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NOTE

Ultra Vires Takings

Matthew D. Zinn

INTRODUCTION

When does legislative or administrative regulatory action "go[ ] too far" and effectively amount to an appropriation of private property for which the Fifth Amendment requires just compensation?\(^1\) This question has turned out to be one of the thorniest in American constitutional law.\(^2\) The Supreme Court has identified several circumstances in which one can expect to find a regulatory taking,\(^3\) but its numerous pronouncements on the subject give no clear rule to distinguish compensable takings from noncompensable interference with property rights.

Notwithstanding its volume, the commentary on the Takings Clause by and large addresses only proper governmental action that rises to the level of a taking. Commentators have bypassed the question of what the Clause demands of regulatory restrictions that suffer from other legal flaws, such as being without statutory authority or being arbitrary and capricious. This Note suggests there are compelling reasons that one such flaw — the action’s being unauthorized, or ultra vires\(^4\) — should be fatal to takings claims di-

1. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). The Takings Clause of the Fifth Amendment states, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.


3. The Court has identified three circumstances in which a court may find a regulatory taking: (1) physical occupation of property, see, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982); (2) deprivation of all "economically beneficial or productive use" of property, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992); and (3) satisfaction of a multi-factor, "essentially ad-hoc, factual inquir[y]" concerning the "character" of the governmental action, its economic impact on the property owner, and its interference with "distinct investment-backed expectations," Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

4. Traditionally associated with the law of corporations, see, e.g., Ashbury Ry. Carriage & Iron Co. v. Riche, 7 L.R.-E. & I. App. 653 (Eng. 1875), the term "ultra vires" is here used to describe those agency actions that lack statutory basis. See BLACK'S LAW DICTIONARY 1522 (6th ed. 1990).
rected against state governments. Whether these particular takings must be compensated remains to be determined conclusively.

This issue may be presented in several procedural postures. A property owner might bring both a takings claim and an administrative law claim complaining that the regulation is ultra vires. The court might then enjoin the regulatory action on the latter basis,5 converting what would have been a permanent taking into a temporary taking.6 The issue also arises when a court has enjoined the regulation in a previous action and a property owner later seeks just compensation for the duration of the enjoined action.7 In any event, because courts enjoin unauthorized actions, such flawed regulations can, at most, amount to temporary takings.8

Consider the following example.9 A state agency requires that a property owner obtain a permit to develop her property. The agency denies the owner the permit, leaving the owner with no economic use of the property. The owner sues the agency, claiming that the agency lacked statutory authority to demand that the owner obtain the permit in the first instance and also that the denial effected a taking of the property. After severing the claims for trial, the court decides that the agency altogether lacked authority to reg-

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8. Temporary regulatory takings have been compensable since the Supreme Court's decision in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987). Temporary physical expropriation of property has a much longer history of compensability. See United States v. Pee wee Coal Co., 341 U.S. 114, 119-21 (1951) (Reed, J., concurring) (collecting cases). This Note generally contemplates only regulatory takings, although many of the principles discussed will apply as readily to physical expropriation.

9. This example is based generally on the facts of Landgate, 953 P.2d at 1188.
ulate the property, and it mandates that the agency not stand in the way of the development. In so doing, the court transforms the plaintiff's permanent takings claim into a temporary takings claim because the owner may now proceed with her intended use of the property. Must the court now award just compensation for the economic loss suffered while the regulation was in effect?

Courts have not conclusively decided whether state and local governments must pay just compensation under the Takings Clause for agency actions that are invalidated by a court as ultra vires. These cases might be adequately addressed under the normal tests for regulatory takings; that is, ultra vires takings might be compensable like any other action that meets the courts' definition of "taking." Indeed, several courts have approved such claims against state agencies with little or no attention given to the fact that the action was ultra vires. To the contrary, however, the courts that most frequently exercise jurisdiction over claims brought against the federal government — the Court of Federal Claims and its predecessors, the Federal Circuit Court of Appeals, and the U.S. Supreme Court — have almost unanimously held that unauthorized federal agency actions cannot give rise to takings liability.

10. The Takings Clause was made applicable to the states through the Fourteenth Amendment's Due Process Clause. See Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897).

11. See Corr, 904 F.2d at 587 (allowing consideration of a takings claim where the relevant ordinance had been invalidated as unauthorized); Fountain v. Metropolitan Atlanta Rapid Transit Auth., 678 F.2d 1038, 1043-44 (11th Cir. 1982) (holding that "[i]f official authorities act on behalf of the state so as to take private property for public use without just compensation, even if they are acting outside of the scope of their official powers, they have violated the fifth and fourteenth amendments"); Landgate, Inc. v. California Coastal Comnn., 52 Cal. App. 4th 784, 791, 795 (1997) (finding taking despite invalidation of challenged action in prior proceeding), revd. on other grounds, 953 F.2d 1188 (1998); Steinbergh, 604 N.E.2d at 1272-73 (performing takings analysis where challenged action had been invalidated in prior case; rejecting takings claim on other grounds).

12. The Tucker Act gives the Court of Federal Claims jurisdiction over claims "founded ... upon the Constitution" brought against the federal government. 28 U.S.C. § 1491(a)(1). The district courts also hear takings claims brought against the federal government, but their concurrent jurisdiction is limited to claims of $10,000 or less. See 28 U.S.C. § 1346(a)(2) (1994).


15. The Court has not spoken directly to the issue of takings claims against state agencies for ultra vires actions, although this Note argues that the principles elaborated by the Court apply as readily to state claims as to federal claims. See infra Part I.

16. Supreme Court. See, e.g., Regional Rail Reorganization Act Cases, 419 U.S. 102, 127 n.16 (1974); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 330 (1922);
handful of courts have similarly rejected ultra vires takings claims leveled at state agencies expressly because the implementing agency lacked authority. Both the federal and state cases rejecting ultra vires takings claims are notable for their myriad rationales and for their often perfunctory discussion of those rationales.

Reading the literature on the Takings Clause, one might think that once an action has been characterized as a taking — for instance, because it deprived a property owner of all economically beneficial use of her property — the court’s liability inquiry is finished and all that remains to be decided is the amount of compensation due. On the contrary, that a “taking” has occurred is only one of the Clause’s demands. For instance, the taking must have been of “private property,” and the parties might dispute whether the interest taken was in fact within the plaintiff’s “bundle.” Similarly, the action must be that of the government and it must serve a “public use.” In short, under the plain language of the Takings


17. See Department of Transp. v. Weisenfeld, 617 So. 2d 1071, 1078 (Fla. Dist. Ct. App. 1993) (Harris, J., concurring) (interpreting expansively the language of a previous state case); Elkins-Swyers Office Equip. Co. v. Moniteau County, 209 S.W.2d 127, 131 (Mo. 1948) (holding that lack of authority destroys agency relationship); Ontario Knitting Co. v. New York, 98 N.E. 909, 913 (N.Y. 1912) (holding that unauthorized action of state engineer was “void” and rejecting takings claim); Firemen’s Ins. Co. v. Board of Regents, 909 S.W.2d 540, 543 (Tex. App. 1995) (holding ultra vires actions tortious and therefore noncompensable under the Takings Clause); Reel Enters. v. City of La Crosse, 431 N.W.2d 743, 749 (Wis. Ct. App. 1988) (arguing that ultra vires takings are by definition unripe); see also 29A C.J.S. Eminent Domain § 72, at 210 & n.57 (1992).

18. Compare, e.g., Hoe, 218 U.S. at 335-36 (holding that ultra vires actions destroy the agency relationship between the government and responsible officers) with Firemen’s Ins. Co., 909 S.W.2d at 543 (holding that ultra vires actions are torts, not takings) and Adams, 20 Cl. Ct. at 137 (holding that ultra vires actions violate the public use requirement).


20. See, e.g., Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992) (discussing the “logically antecedent inquiry into the nature of the owner’s estate [to determine whether] the proscribed use interests were . . . part of his title to begin with”).
Clause, to call an action a “taking” says nothing about whether it is a compensable taking.21

This Note relies on the latter two requirements to argue that courts hearing claims against state administrative agencies should follow the federal rule and refrain from holding those agencies liable under the Takings Clause for unauthorized actions.22 Part I maintains that ultra vires takings violate the state action requirement of the Takings Clause, as the law of agency indicates that ultra vires actions are not the actions of the sovereign. Part II argues that the “public use” requirement of the Takings Clause limits payment of just compensation in inverse condemnation cases23 to those circumstances in which the legislature has found that the taking will serve a public purpose. Because unauthorized agency actions by definition do not advance public uses, Part II concludes that such actions do not demand just compensation under the Clause. Finally, Part III contends that the intuition of fairness underlying the Takings Clause does not counsel against the arguments made in the first two Parts. Part III concludes that due process, tort, or legislative remedies might be available to an aggrieved property owner, but just compensation under the Takings Clause is not. This Note concludes that the Takings Clause is intended to compensate property owners only for “otherwise proper”24 government actions that take private property, and ultra vires actions are not such “proper” actions.

21. Nor does the fact that ultra vires takings are necessarily temporary takings make them necessarily compensable takings. The Court in First English Evangelical Lutheran Church v. County of Los Angeles required that governments pay just compensation for temporary takings where they would be liable for just compensation if the taking were permanent; the duration of the interference with property rights is irrelevant to its compensability under the Takings Clause. See 482 U.S. 304, 318 (1987) (citing San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting)). Ultra vires takings are noncompensable because they lack state action and fail to advance public uses, and the fact that they are also necessarily temporary changes nothing. Indeed, the First English Court emphasized that it dealt with “otherwise proper interference amounting to a taking.” 482 U.S. at 315. Where an action lacks a public purpose or state action, it is not “otherwise proper” and not compensable under the Clause, regardless of whether it is permanent or temporary.

22. Of course, such a rule may discourage a plaintiff from including in her complaint a claim that the action is unauthorized. Courts might nonetheless require that a plaintiff plead validity of the agency action as an element of her claim for just compensation. In any event, defendant agencies may raise invalidity as an affirmative defense to the claim. Cf. Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 899 (Fed. Cir. 1986). Agencies will want to use such a defense judiciously, however, as it will mean injunction of the regulation.

23. “Inverse condemnation” refers to claims brought by property owners to obtain just compensation for property that the government took without first instituting formal eminent domain proceedings. See Kirby Forest Indus., Inc. v. United States, 467 U.S. 1, 5 & n.6 (1984); Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980).

24. First English, 482 U.S. at 315.
I. STATE ACTION AND AGENCY PRINCIPLES

A takings claimant must demonstrate that her injury is the result of government action if the government is to be held accountable therefor. This Part argues that where a government agency lacks statutory authority for its action, the action cannot be attributed to the government and thus the government cannot be liable; the agency does not act as an agent at all. Section I.A maintains that the principle of authority well established in the law of agency indicates that ultra vires agency actions cannot be compensable under the Takings Clause and that the doctrine of apparent authority cannot save these claims. That section demonstrates that several Supreme Court cases have applied this rationale to reject ultra vires takings claims leveled at federal agencies. Section I.B argues that because the position of the responsible government agency in the federal system is irrelevant to the agency principles used in the Supreme Court cases, those cases and principles should be applied to reject ultra vires takings claims directed at state regulatory actions as well as their federal siblings.

A. Authority and State Action

Like most of the Constitution’s provisions, the Takings Clause requires that a plaintiff allege governmental action to state a claim,25 though the Clause’s use of the passive voice obscures the actors to whom the Clause is directed: “nor shall private property be taken for public use, without just compensation.”26 As an “incident of sovereignty,” the taking power must be exercised by the sovereign or its delegate.27 Where the sovereign is not responsible for a taking, the taking cannot be compensable under the Constitution’s Takings Clause.

Section I.A.1 argues that, under the common law of agency, an agency’s lack of authority means that the sovereign cannot be held


27. The reporters contain some cases in which a private entity has been a mediate actor in effecting a taking, generally by outright condemnation. In those cases, however, the taking power was delegated to the private party by a public entity. See, e.g., United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896); Baldwin v. Appalachian Power Co., 556 F.2d 241, 242 (4th Cir. 1977); Thatcher v. Tennessee Gas Transmission Co., 180 F.2d 644, 647 (5th Cir. 1950).
liable for the agency's actions. The section maintains that the Supreme Court has rejected takings liability for federal agencies on this basis. Section I.A.2 contends that the doctrine of apparent authority is consistent with this outcome.

1. Authority

The principle of authority applied in the common law of principal-agent relations indicates that ultra vires actions do not satisfy the state action requirement. In general, principals cannot be subject to vicarious liability for the acts of their agents where those agents have acted without authority. Applying this principle to public officers, when government officials — public agents — have acted without statutory authority, their acts cannot be considered to be acts of the government — the public principal. While the responsible officers may be seen as acting in their individual capacities, they cannot be seen as acting as agents of the state. As a result, the state action component necessary to a takings claim is lacking and the government need not provide compensation to affected property owners. On this basis, albeit without invoking agency law by name, the Supreme Court has rejected ultra vires takings claims directed at federal agency actions. The lower federal courts have also applied the Court's doctrine in many cases to reject just compensation liability. To be sure, the Court's rejections of ultra vires takings claims have been more frequent than its perfunctory discussions of the agency rationale therefor.


29. See, e.g., Regional Rail Reorganization Act Cases, 419 U.S. 102, 127 n.16 (1974) (dictum) (stating that "the Government action must be authorized" to give rise to a taking); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 330 (1922); United States v. North Am. Transp. & Trading Co., 253 U.S. 330, 333 (1920) ("In order that the Government shall be liable it must appear that the officer who has physically taken possession of the property was duly authorized so to do, either directly by Congress or by the official upon whom Congress conferred the power."); Hughes v. United States, 230 U.S. 24, 35 (1913); Hooe v. United States, 218 U.S. 322, 335-36 (1910); United States v. Lynah, 188 U.S. 435, 479 (1903) (Brown, J., concurring) ("[I]f property were seized or taken by officers of the government without authority of law, ... there could be no recovery ... "), overruled in part on other grounds by United States v. Chicago, Milwaukee, St Paul & Pac. R.R., 312 U.S. 592, 598 (1941); see also Barton H. Thompson, Jr., Judicial Takings, 76 Va. L. Rev. 1449, 1515-16 & n.252 (1990) (noting that the Supreme Court cases address the question whether "the government [is] liable for the actions of an agent acting outside her authority [and] raise the issue of whether the fifth amendment extends to actions, not by the government, but by individuals incidentally employed by the government" (emphasis added)).

The Court stated the agency-based rule most clearly in *Hooe v. United States*, where the plaintiff landowner sought just compensation for the Civil Service Commission's occupation of more office space in plaintiff's building than was provided for in the Commission's lease. The Court rejected the takings claim, holding that:

If an officer of the United States assumes, by virtue alone of his office, and without the authority of Congress, to take such matters under his control, *he will not, in any legal or constitutional sense, represent the United States*, and what he does or omits to do, without the authority of the Congress, cannot create a claim against the Government "founded upon the Constitution." It would be a claim having its origin in a violation of the Constitution. The [Takings Clause] is directed against the Government, and not against individual or public officers proceeding without the authority of legislative enactment. The taking of private property by an officer of the United States for public use, without being authorized, expressly or by necessary implication, to do so by some act of Congress, *is not the act of the Government.*

By announcing that when an agency acts ultra vires the agency does not "in any legal or constitutional sense, represent the United States" or that the action is not "the act of the United States" or that "neither the government nor any other principal is bound by the unauthorized acts of its agents," the Court has fairly implicated the law of agency.

A line of analogous cases confirms that the Court was looking to the law of agency in its ultra vires takings cases. In its sovereign immunity cases the Court has examined in greater detail government liability for ultra vires action, expressly applying agency law to distinguish "officer suits" from those directed at the government: unlike suits directly against the government, officer suits are not

32. See 218 U.S. at 326-27.
33. 218 U.S. at 335-36 (latter two emphases added). The meaning and import of the Court's distinguishing an ultra vires takings claim as "a claim having its origin in a violation of the Constitution" from one "founded upon the Constitution" is obscure. It may mean that while compensation is unavailable, injunctive relief may be available as a remedy for a "violation" of the Takings Clause. See infra note 138 and accompanying text.
34. *Hooe*, 218 U.S. at 335.
35. Hughes v. United States, 230 U.S. 24, 35 (1913). Three years after *Hooe*, the Court in *Hughes* considered a compensation claim for flood damage to plaintiff's property resulting from the government's construction of a new levee and the dynamiting of an old levee. See 230 U.S. at 25, 34. In rejecting the claim, the Court found that the unauthorized act "cannot be held to be the act of the United States, and therefore affords no ground in any event for holding that the United States had taken the property for public use." 230 U.S. at 35 (emphasis added).
barred by sovereign immunity.37 In *Larson v. Domestic & Foreign Commerce Corp.*,38 the Court applied agency principles to find that the plaintiff's claim for injunctive relief was barred by sovereign immunity: "We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign... if they would be regarded as the actions of a private principal *under the normal rules of agency.*"39 The negative implication of *Larson* is that where agency actions *do* conflict with "the terms of... valid statutory authority" — or presumably where they lack statutory authority40 — then they are not "the actions of the sovereign" and the sovereign cannot be held liable therefor.41

Several jurists have looked to *Larson* to identify those agency actions that are ultra vires and therefore noncompensable. In *Del-Rio Drilling Programs Inc. v. United States*,42 the Federal Circuit applied the Supreme Court's ultra vires takings cases and expressly relied on *Larson's* agency-based understanding of unauthorized action in defining those actions that cannot be compensable because they cannot be considered acts of the sovereign.43 Then-Judge Scalia drew a similar connection between *Larson* and the *Hooe* line of cases in his dissent to an en banc reversal in *Ramirez de Arellano v. Weinberger*44: "[T]he question whether a government officer was..."

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37. "Officer suits" are directed at public officers individually but provide relief "run[ning] against the government," as in situations where an official is named as the defendant in a suit for injunctive relief but the government is thereby effectively enjoined as well. See John F. Duffy, Comment, *Sovereign Immunity, the Officer Suit Fiction, and Entitlement Benefits*, 56 U. Chi. L. Rev. 295, 295 (1989). Officer suits are distinguishable from suits brought against officers in their personal capacity, where the relief sought does not impinge on the government, see id. at 295 n.4, as where a plaintiff sues under 42 U.S.C. § 1983 seeking damages from individual officers for deprivations of constitutional rights, see infra section III.B.1.

38. 337 U.S. 682 (1949).

39. 337 U.S. at 695 (emphasis added).

40. The meaning of "conflict with" has been muddied since *Larson*. Although the *Larson* court clearly meant to distinguish "wrongful" actions — such as tortious actions — from those that "conflict with the terms of [an officer's] valid statutory authority," the latter category apparently was narrowed in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), so as to exclude actions that are prohibited by state law. See David P. Currie, *Sovereign Immunity and Suits Against Government Officers*, 1984 Sup. Ct. Rev. 149, 166-67. *Pennhurst* does not alter *Larson* with respect to actions for which the agency altogether lacked authority, but in practice this fine distinction may be difficult to make.

41. *Larson*, 337 U.S. at 695; cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum... In these circumstances, and in these only, may he be said... to personify the federal sovereignty.").


43. See 1998 WL 321272, at *5-6 (citing *Larson*, 337 U.S. at 695 and *Hooe* v. United States, 218 U.S. 332, 335 (1910)).

acting sufficiently within his authorized powers to permit a [just compensation] remedy is precisely the same as the question whether he was acting sufficiently within his authorized powers to preclude injunctive relief against him . . . .”

These cases confirm that both the ultra vires takings cases and the cases discussing the ultra vires exception to sovereign immunity are both based on orthodox agency principles.

In response to the argument that agency principles prohibit payment of just compensation for ultra vires actions, one might point to the several cases in which the Court has held that an official clothed with governmental authority may be considered to have violated a plaintiff's rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment even if she lacked authority to act. The reason for this inconsistency with the Court's ultra vires takings cases is admittedly obscure.

Professor Tribe poses one possible explanation based on the Takings Clause's unique attributes. He suggests that: “[T]here are some constitutional prohibitions that the acts of individual government officials cannot in isolation violate. These prohibitions concern themselves with more systematic government activity and thus, in their light, individual acts simply cannot rise to the level of a constitutional violation.” Although he does not cite the Supreme Court's ultra vires takings cases, he finds that the Takings Clause is one of the "clearest instances of norms ordinarily addressed to legal systems as a whole rather than to individual government actors," and thus that the ultra vires action that satisfied the state action requirement of substantive due process in Home Telephone & Telegraph might not satisfy that of the Takings Clause. Although Tribe provides no further explanation for this view of the Clause, it may be based on the Clause's nature as a condition on legitimate governmental action and not a protection against illegitimate governmental action:

45. Ramirez de Arellano, 745 F.2d at 1554 (en banc) (Scalia, J., dissenting) (emphasis added). Judge Scalia also reiterated the Supreme Court's use of agency principles in its ultra vires takings cases. See 745 F.2d at 1551 (arguing that if a taking is authorized it is “thereby an act of the United States” and compensable); 745 F.2d at 1556 (arguing that compensability depends on “whether that action was sufficiently authorized by law to justify attributing it to the United States”).

46. See Home Tel. & Tel. v. City of Los Angeles, 227 U.S. 278 (1913); Ex parte Young, 209 U.S. 123, 159-61 (1908); Ex parte Virginia, 100 U.S. 339, 346-47 (1879); see also Lugar v. Edmondson Oil Co., 457 U.S. 922, 929 (1982) (characterizing Ex parte Virginia as standing for the rule that “the actions of a state officer who exceeds the limits of his authority constitute state action for purposes of the Fourteenth Amendment”); PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1225 n.1 (3d ed. 1988) (suggesting a conflict between Home Telegraph & Telephone and the ultra vires takings cases).

47. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-4, at 1704 (2d ed. 1988).

48. Id. at 1705 n.15.
[The Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power . . . . [It] is designed not to limit governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.\(^{49}\)

That is, due process or equal protection may reach the actions of rogue officials because those provisions are intended to remedy wrongful actions by governmental officials, whether authorized or not. As the Court in *First English* suggested, however, the Takings Clause does not speak to such wrongful actions.

Whatever the explanation for the rule applied under the Equal Protection and Due Process Clauses, the Supreme Court has re-stated the agency rule for the Takings Clause numerous times since *Ex parte Young*, *Ex parte Virginia*, and *Home Telephone & Telegraph*.\(^{50}\) As a result, the agency rule still controls the question of regulatory ultra vires takings.

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The law of agency applied in federal ultra vires takings cases and sovereign immunity cases provides that actions without authority are not the actions of the state. The Takings Clause provides no compensation remedy for claims that are not predicated on state action.

2. *Apparent Authority*

If agency law is to be the basis of a defense to a takings claim, then perhaps the government should still be held liable where there was apparent authority for the action.\(^{51}\) The doctrine of apparent

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\(^{50}\) *See* cases cited *supra* note 29; *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 & n.19 (1984); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952); 343 U.S. 631-32 (Douglas, J., concurring).

\(^{51}\) *See generally Restatement (Second) of Agency*, *supra* note 28, § 8. At least one court has found apparent authority adequate to give rise to a compensable taking. *See Silberman v. United States*, 71 F. Supp. 895, 896 (D. Mass. 1947) (finding “apparent authority” and “ostensible authority” to take plaintiffs’ property adequate to bind the government to payment of compensation). *But see* Elkins-Swyers Office Equip. Co. v. Moniteau County, 209 S.W.2d 127, 130-31 (Mo. 1948) (expressly rejecting application of apparent authority to support ultra vires takings claim). The *Silberman* court hinted, however, that the taking’s having occurred during time of war and having been done by a military officer was significant. *See* 71 F. Supp. at 896.

Liability might also be predicated on the nebulous principle of “inherent agency power.” This theory is apparently a creature of the *Restatement* itself, *see Restatement (Second) of Agency*, *supra* note 28, § 8A, which admits that it is a catch-all category established ex post to describe cases that do not appear to fit into the other categories of authority. *See Restatement (Second) of Agency*, *supra* note 28, § 161 cmt. a. As argued *infra* in the context of apparent authority, however, because the terms of a government agent’s authority are publicly available, this “doctrine” should not apply.
authority holds that where a principal had made manifestations of an agent’s authority to a third party, and the manifestations resulted in harm to that party, the principal’s liability should be determined as if she had actually authorized the agent.\textsuperscript{52} Because agency officers responsible for an ultra vires taking possessed the trappings of authority when they “took” the property, they might be said to have possessed apparent authority for the taking. To the contrary, two arguments counsel against applying apparent authority to hold the government liable for an ultra vires taking.

First, the government cannot be liable, because an ultra vires agency action cannot have been apparently authorized. Apparent authority is a concern only where the terms of an agent’s \textit{actual} authority were concealed from the injured party. This generally occurs in either of two situations. In the first, a principal overtly grants authority to an agent but privately modifies the agent’s authority. Acting based on the principal’s overt grant of authority, a third party is harmed by the agent. That the principal had privately modified the agent’s authority such that the act was not \textit{in fact} authorized is deemed irrelevant; the agent possessed apparent authority.\textsuperscript{53} In the second, the principal has placed the agent in a position to which certain duties and authorities traditionally attach, though \textit{in fact} the principal has limited the agent’s authority or failed to authorize the agent to do something that a person in the agent’s position would normally be authorized to do.\textsuperscript{54}

Neither situation obtains, however, where government agents are concerned. The simple reason is that the \textit{actual} terms of the agent’s authority are a matter of public record, available to all; governments do not establish or alter the authority of their agents in secret. In short, apparent and actual authority are identical for public officers. Apparent authority is thus irrelevant to the actions of public officers, a point on which numerous federal and state courts have agreed.\textsuperscript{55} Applied to the present topic, this principle

\textsuperscript{52} See \textit{Restatement (Second) of Agency}, supra note 28, § 8; \textit{Reuschlein \& Gregory}, supra note 28, § 23; \textit{Sell}, supra note 28, § 35.

\textsuperscript{53} See, e.g., \textit{Restatement (Second) of Agency}, supra note 28, § 8 cmt. a, illus. 1-3.

\textsuperscript{54} Under an apparent authority theory, “[l]iability is based upon the fact that the agent’s position facilitates the consummation of the fraud, in that from the point of view of the third person the transaction seems regular on its face and the agent appears to be acting in the ordinary course of the business confided to him.” American Socy. of Mechanical Engrs., Inc. v. Hydrolevel Corp., 456 U.S. 556, 566 (1982) (quoting \textit{Restatement (Second) of Agency}, supra note 28, § 261 cmt. a). This is sometimes referred to as “power of position.” See, e.g., Bucher \& Willis Consulting Engrs., Planners \& Architects v. Smith, 643 P.2d 1156, 1159 (Kan. Ct. App. 1982).

\textsuperscript{55} See, e.g., Margalli-Olvera v. I.N.S., 43 F.3d 345, 353 (8th Cir. 1994); Schaefer v. Anne Arundel County, 17 F.3d 711, 714 (4th Cir. 1994); Thomas v. I.N.S., 35 F.3d 1332, 1338 (9th Cir. 1994); Healey v. Town of New Durham Zoning Bd. of Adjustment, 665 A.2d 360, 367 (N.H. 1995); Baker v. Deschutes County, 498 P.2d 803, 805 (Or. Ct. App. 1972); Moore v.
means that a government agency cannot have possessed apparent authority for an ultra vires taking.\(^{56}\) That a reviewing court held that the relevant statutes and regulations do not give the agency the authority to act as it did means that the plaintiff property owner cannot claim that the state made any manifestation of the agency's authority.\(^{57}\)

Second, even assuming that apparent authority were applicable to a takings scenario, a state could not be held liable for an ultra vires taking because the state's putative \textit{manifestation} of authority did not cause the harm to the property owner; the property owner has not relied on the manifestation.\(^{58}\) Apparent authority is generally justified under two theories: the objective theory of contract, or estoppel.\(^{59}\) Both theories demand that the manifestation of authority caused the harm to the plaintiff. On the first theory, the principal is held to be bound by his objective manifestation of authority to contract where the plaintiff has made what she thought to be a contract \textit{in reliance on that manifestation}.\(^{60}\) The second theory applies in tort, where a third party has detrimentally relied in some way on the principal's manifestation of the agent's authority.\(^{61}\) In the ultra vires takings case, however, the property owner has not relied or otherwise been harmed by the \textit{manifestation} of authority. The property owner's belief that the regulatory agency possessed

\footnotesize{Attorney General, 820 S.W.2d 874, 878 (Tex. App. 1991); see also Jeffrey F. Ghent, Annotation, \textit{Doctrine of Apparent Authority As Applied To Agent of Municipality}, 77 A.L.R. 3o 925, § 2 (1977).}

\(^{56}\) Because of the public availability of the terms of agencies' authority, the mere fact that the public officers responsible for an ultra vires taking were clothed with the appearance of state authority is irrelevant. The third party's belief of the agent's authority must be reasonable, see \textit{Restatement (Second) of Agency, supra} note 28, § 8, cmt. c, which it is not where the terms of actual authority are available.

\(^{57}\) Courts nonetheless may be sympathetic to property owners in this position, given the vagaries of statutory interpretation. In many cases, ultra vires takings will occur because the agency itself misread the governing statute. \textit{See, e.g., Landgate, Inc. v. California Coastal Commn.}, 953 P.2d 1188 (Cal. 1998). If the agency cannot properly interpret the statutes it administers, property owners can hardly be expected to understand the extent of an agency's authority. Such equitable concerns, however, have not dissuaded courts from almost unanimously refusing to apply the doctrine of apparent authority to public officers. \textit{See supra} note 55 and accompanying text. Those courts' holdings are supported by the longstanding rule that ignorance of the law is no defense. \textit{See Hawkins v. United States}, 96 U.S. 689, 691 (1877) ("Individuals ... must take notice of the extent of the authority conferred by law upon a person acting in an official capacity, and the rule applies, in such a case, that ignorance of the law furnishes no excuse for any mistake or wrongful act."). On the longstanding rule generally, see JEROME HALL, \textit{GENERAL PRINCIPLES OF CRIMINAL LAW} 383 (2d ed. 1960) ("To permit an individual to plead successfully that he had a different opinion or interpretation of the law would contradict the ... postulates of a legal order.").

\(^{58}\) \textit{See Restatement (Second) of Agency, supra} note 28, § 8 cmt. d (stating that "reliance ... is required when the claim is based upon apparent authority").

\(^{59}\) \textit{See id.; Reuschlein & Gregory, supra} note 28, § 23(A), (B).

\(^{60}\) \textit{See Restatement (Second) of Agency, supra} note 28, § 8 cmt. d.

\(^{61}\) \textit{See id.; see also id.} § 265(2) (asserting that principals are "not liable in tort for conduct of [an] agent merely because it is within his apparent authority").
authority to regulate is irrelevant to the agency's unilateral taking of the plaintiff's property; the taking would have harmed the property owner with or without the manifestation of authority.

* * *

The principle of authority from the law of agency demands that public officials have authority if the sovereign is to be vicariously liable for their actions. The Supreme Court has held as much in rejecting federal ultra vires takings claims. The doctrine of apparent authority does not change this outcome because it is inapplicable to government agents and the appearance of authority is not the cause of the property owner's harm.

B. Application to State Claims

Although the Supreme Court cases establishing the agency rule have involved only claims leveled at federal agencies, courts should also apply the rule to takings claims aimed at state agencies. The Supreme Court cases indicate that ultra vires agency actions are not the actions of the sovereign, and they thus lack the state action component required by the Takings Clause. That each of the cited cases involved a claim against a federal, rather than state, agency must be irrelevant; the level of government responsible for the taking is a distinction without a difference. In no case was the Court's basis for its decision peculiar to federal sovereignty; rather the Court decided each on the basic agency-law principle of authority, which itself is equally applicable to the federal and state governments.

Indeed, in its sovereign immunity cases, the Court has treated state and federal governments similarly in applying agency principles. In considering the extent of the Eleventh Amendment's protection of states from suit in the federal courts, the Supreme Court has relied on principles developed in its cases involving the sovereign immunity of the federal government. For instance, in

62. In fact, apparently no Supreme Court case has involved an ultra vires takings claim directed at a state agency.
63. At least one state court has applied the agency theory in rejecting a state ultra vires claim. See Elkins-Swyers Office Equip. Co. v. Moniteau County, 209 S.W.2d 127, 130-31 (Mo. 1948) (citing Hooe v. United States, 218 U.S. 322 (1910)).
64. See cases cited supra note 29.
65. The federal ultra vires takings cases are not, strictly speaking, binding precedent for state claims cases. Because the Court's rationale is equally applicable to both, however, courts should apply the federal cases to state claims, if for no other reason than that the Supreme Court is likely to do so itself once such a claim reaches its docket.
66. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").
Pennhurst State School & Hospital v. Halderman, an Eleventh Amendment case, the Court discussed the ultra vires exception elaborated in Larson, a federal sovereign immunity case. Because the Court has applied the holding in Larson to a state immunity case, it is hardly a stretch to apply the underlying principles of the federal ultra vires takings cases to state ultra vires takings claims as well.

Finally, the common law of agency is as applicable to state agencies as it is to federal agencies and private parties. Agency law is applicable to both federal and state governments for the same reason it is applicable to both private and public principals: the fundamental relationship of principal and agent is used in both public and private settings to reduce the costs of collective action in a complex world. The law of agency — and authority specifically — sets out the ground rules for the principal-agent relationship and in so doing establishes the conditions in which an agent’s actions may impose liability on the agent’s principal. Where such principal-agent relationships exist, the common law of agency governs the allocation of liability among the principal, the agent, and the injured party, absent some statutory or constitutional abrogation of that doctrine. No provision of the federal Constitution expressly or impliedly alters the law of agency relations of the several states. As a result, unless the constitution or statutes of a particular state do so, the common law of agency should control, and courts should turn away takings claims aimed at state officers’ ultra vires actions.

* * *

The Supreme Court has held that the ultra vires actions of federal agencies cannot be considered acts of the sovereign and thus

69. See Reuschlein & Gregory, supra note 28, § 1, at 3 (“The division of labor, the ready means of transportation and the growth of cooperative enterprises largely in the form of corporations, both public and private, dictate the need for agents.”); see also id. (“Officers and employees of the nation, states and municipalities are agents.”).
70. See Reuschlein & Gregory, supra note 28, §§ 1, 3.
71. This should plainly suggest what this Note implies throughout: that state law can in some circumstances, define a government’s liability under the federal Takings Clause. This is not a novel idea. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992) (indicating that courts should apply state law to define “property” as used in the Takings Clause) (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)); cf. Richard A. Epstein, A Common Lawyer Looks at Constitutional Interpretation, 72 B.U. L. Rev. 699, 703-04 (1992) (suggesting that common law principles can and should guide constitutional interpretation); Samuel C. Kaplan, “Grab Bag of Principles” or Principled Grab Bag?: The Constitutionalization of Common Law, 49 S.C. L. Rev. 463 (1998) (discussing three areas in which the Supreme Court has relied on common law principles in elaborating constitutional doctrine).
cannot impose liability on the sovereign under the Takings Clause. By the Court's reasoning, where a state or federal agency official has acted without authority, a state government cannot be accountable on a takings theory absent some relevant, state-specific modification of the law of agency.

II. THE PUBLIC USE REQUIREMENT

The Takings Clause provides that "private property [shall not] be taken for public use, without just compensation."72 The public use requirement appears to be the descendant of similar language in the writings of early civil law commentators on the sovereign power of eminent domain, that consistently emphasized that the taking power should be exercised only for public benefit.73 Echoing these early scholars, several courts have noted the public use requirement's importance: "[I]t is just as important that the proposed use of the property be limited to what the court decides to be a 'really public' use as it is that the property owner be given just compensation."74

Notwithstanding the public use requirement's deep roots and apparent importance, it makes only sporadic appearances in inverse condemnation cases — perhaps because litigants have adopted the widespread view among legal commentators that contemporary takings doctrine has essentially excised the requirement from the Takings Clause.75 Whatever the reason for the provision's apparent


73. See 2 Jean-Jacques Burlamaqui, The Principles of Natural and Politic Law part III, ch. V, § XXVI (Thomas Nugent trans., 3d ed. 1784) (1748); 2 Cornelius van Bynkershoek, Quaestionum Juris Publici Libri Duo bk. II, ch. XV, at 221 (Tenney Frank trans., Clarendon Press 1930) (1737) ("[N]ecessity or public utility is requisite for the exercise of eminent domain."); 2 Hugo Grotius, De Jure Belli et Pacis bk. II, ch. XIV, § VII (Francis W. Kelsey et al. trans., Clarendon Press 1925) (1625) ("[T]hrough the agency of the king even a right gained by subjects can be taken from them . . . [b]ut in order that this may be done by the power of eminent domain the first requisite is public advantage . . . ."); 2 Samuel Pufendorf, De Jure Naturae et Gentium Libri Octo bk. VIII, ch. V, § 7, at 1285 (C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688) ("[W]hen something belonging to one or a few citizens is required for the necessary uses of the commonwealth, the supreme sovereignty will be able to seize that thing for the necessities of the state . . . "). For a discussion of these commentators' influence on the Framers, see Joseph L. Sax, Takings and the Police Power, 74 Yale L.J. 36, 54 & n.100 (1964); William B. Stoebuck, A General Theory of Eminent Domain, 47 Wash. L. Rev. 553, 595 (1972).

74. Hogue v. Port of Seattle, 341 P.2d 171, 193 (Wash. 1959); see also Customer Co. v. City of Sacramento, 895 P.2d 900, 921 (Cal. 1995) (Kennard, J., concurring) ("The 'use' requirement as a central part of the constitutional text. To ignore it is to turn the just-compensation clause into a facially open-ended right to compensation for any government action that affects the value or use of private property.").

75. Many have argued that the Supreme Court's interpretation of the public use requirement as coextensive with states' police powers, see infra sections II.A and II.C, has effectively rendered the public use requirement useless. See generally, e.g., Roger Clegg, Reclaiming the Text of the Takings Clause, 46 S.C. L. Rev. 531 (1995); Thomas W. Merrill, The Economics of Public Use, 72 Cornell L. Rev. 61 (1986); Rubenfeld, supra note 2; Note, The Public Use
desuetude, this Note argues that the public use requirement is dispositive of ultra vires takings claims. Section II.A maintains that the constitutional separation of powers indicates that definition of "public use" is a legislative function and argues that the Supreme Court has held likewise. Section II.A contends that, as a result, an agency action without legislative approval cannot advance a public use. Section II.B argues that the language of the Takings Clause straightforwardly demands that a taking be for a public use if just compensation is to be awarded. Section II.C argues that the public use argument made in this Part is consistent with the Supreme Court's so-called "police power takings" test. Because ultra vires actions by definition cannot advance public uses, and because the Takings Clause requires a public use before demanding just compensation, Part II concludes that ultra vires actions need not be compensated under the Takings Clause.76

A. Defining a "Public Use"

When considering a takings claim, a court must determine, explicitly or implicitly, which branch of government is the proper interpreter of the constitutional requirement of public use.77 The court could make its own decision about what constitutes a public use and compare the challenged action to that standard, or the court might accord deference to the decision of the legislature, or even the agency itself, finding that one or the other is empowered and competent to decide the question. If an agency may properly make such a decision, the court might find a public use even where the agency has acted without statutory authority. If, however, the legislature must have a hand in defining public use, an agency's action cannot advance a public use by definition if the action lacked statutory authorization. Section II.A.1 argues that the legislature, as the most "public" branch of government, is the proper exponent

Limitation on Eminent Domain: An Advance Requiem, 58 YALE L.J. 599 (1949). This Note maintains that the public use requirement is not useless and argues for an interpretation of the requirement that is consistent with the Supreme Court case law but which state-government litigants may profitably use to defend against claims for just compensation.


77. Professor Bickel described the Framers as having established a rough "allocation of competences" in the three constitutional branches of government. See ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 103-04 (1962). In Marbury v. Madison, the Court seemed to adopt a similar view, justifying judicial review on the Court's special ability to interpret law. See 5 U.S. (1 Cranch.) 137, 177 (1803). This section argues that the text of the Takings Clause suggests that the courts are not the branch of government "competent" to discern public from nonpublic uses.
of public purposes.\textsuperscript{78} Section II.A.2 contends that agencies cannot decide \textit{sua sponte} which actions advance public purposes because they generally lack both the inherent constitutional power to make such determinations and the indicia of representativeness possessed by the legislature, and thus they cannot make such determinations except where authority is delegated by the legislature. Finally, section II.A.3 argues that courts should not make their own judgments in the course of takings litigation of whether a particular agency action \textit{in fact} advanced a public purpose. Section II.A concludes that because the legislature properly determines which "uses" are "public," either expressly or by implication in the course of legislating, an ultra vires agency action cannot advance a public use.

1. \textit{The Legislature}

The most "public" of the branches of government, the legislature, must decide which government actions will advance public uses,\textsuperscript{79} as the text of the public use requirement suggests. The "public philosophy"\textsuperscript{80} underlying our constitutional order suggests that determinations of the "public interest" are by definition the result of representative rather than analytical processes: contention for and representatives' deliberation over policy outcomes is the closest thing we have to a guarantee that those outcomes will serve public purposes.\textsuperscript{81} In other words, "public purposes" demand political decision and are not susceptible to ex ante, objective determination; no calculation or application of technical expertise will identify that which is in the public interest.\textsuperscript{82}

\footnotesize{\textsuperscript{78} The Supreme Court has used "public use" and "public purpose" interchangeably, see Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 244 (1984); Berman v. Parker, 348 U.S. 26, 32 (1954), and the terms are therefore used synonymously in this Note.}

\footnotesize{\textsuperscript{79} See United States v. 2,606.84 Acres of Land, 309 F. Supp. 887, 902 (N.D. Tex. 1969); see also Merrill, supra note 75, at 68 (noting that ascribing this role to the legislative branch is not surprising in a "society committed to majority rule").}

\footnotesize{\textsuperscript{80} Professor Sandel has defined "public philosophy" as a "vision \ldots embodied in our legal and political practices." Michael J. Sandel, The Order of the Coif Annual Lecture: The Constitution of the Procedural Republic, 66 FORDHAM L. Rev. 1, 2 (1997); see also Walter Lippmann, The Public Philosophy 101 (1955).}

\footnotesize{\textsuperscript{81} This is true of both of the primary strains of American "public philosophy": classical liberalism and civic republicanism. See Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain 7-18 (1984) (noting classical liberal influences on the Framers); William Michael Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 COLUM. L. Rev. 782, 818 (1995) (discussing the civic republican thread of the founding philosophy). At a high level of generality, classical liberalism rejects the notion of a public interest apart from an aggregation of individual private interests, a function served — however imperfectly — in the economic sphere by markets and in government by legislatures. See Epstein, supra, at 13. Civic republican philosophy relies on the process of legislative deliberation to identify the public interest. See Cass R. Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. Rev. 1689, 1691 (1984).}

\footnotesize{\textsuperscript{82} See Stephen G. Breyer & Richard B. Stewart, Administrative Law and Regulatory Policy 140 (3d ed. 1992); James M. Buchanan & Gordon Tullock, The
The Supreme Court has recognized this fact and has repeatedly held that the legislature is the proper branch of government to decide which actions comprehend public uses. The Court's primary discussion of its position came in Berman v. Parker, which involved the condemnation of the plaintiffs' District of Columbia property under an urban redevelopment statute. In upholding application of the statute to the plaintiffs' property, the Court held:

The definition [of public use] is essentially the product of legislative determinations addressed to the purposes of government . . . . Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature . . . is the main guardian of the public needs to be served by social legislation . . . .

Because this deference to legislative pronouncements is rooted in basic separation of powers concerns, the Court has also held that such deference cannot be limited to Congress but also must be accorded to state legislatures.

As a result, the legislature must expressly or by implication acknowledge that the action to be taken by an agency will advance a public use. Such an implication may be found in the legislature's

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83. See, e.g., National R.R. Passenger Corp. v. Boston & Me. Corp., 503 U.S. 407, 422-24 (1992); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987); Midkiff, 467 U.S. at 241-43; Berman 348 U.S. at 32; Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893). These cases specifically compare the competences of the legislature and judiciary in determining what constitutes a public use, but their language is sufficiently broad to suggest that the legislature is the best of all three branches of government. See, e.g., infra quote accompanying note 90.

In its public use cases, the Court has echoed a number of early constitutional commentators. See Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 532 (1868) ("[If the public interest can be in any way promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance . . . ."); 2 James Kent, Commentaries on American Law 276 (1827) ("It undoubtedly must rest in the wisdom of the legislature to determine when public uses require the assumption of private property . . . ."); Theodore Sedgwick, A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law 514 (1857) ("[T]he legislature is the sole judge as to the fact whether the public welfare demands the sacrifice of the private right."); id. at 512.

85. See 348 U.S. at 31.
86. 348 U.S. at 32.
87. See, e.g., Midkiff, 467 U.S. at 244 ("Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power.").
88. See Midkiff, 467 U.S. at 244; Berman, 348 U.S. at 32.
89. Property owners need not worry that such a rule would allow a legislature to immunize its agencies from takings liability by simply stating in the statute that the resultant action would not advance a public purpose. A statute that expressly admitted that it would advance no public purpose would violate the Due Process Clause. See discussion infra section II.C.
authorization of a program to be implemented by an agency — the legislature's adoption of a piece of legislation constitutes an implicit judgment that the resultant program will advance a public purpose.90 Where an action taken by an agency lacks statutory authority, the legislature has not implicitly or expressly identified that action as advancing a public use, and therefore courts must hold that the action does not advance a public use.91 Although a court may review and occasionally reject a legislature's implicit or explicit definition of public use,92 a court cannot approve an executive action that altogether lacks the necessary legislative imprimatur.

2. Administrative Agencies

Several independent reasons dictate that courts should not give administrative agencies the authority to define public uses unilaterally. The structure of the Constitution indicates that the executive branch, and thus administrative agencies,93 possess no inherent power to identify public purposes. Although administrative agencies are frequently trusted with broad discretion in the management of public policy,94 that trust is granted only where the executive is acting under inherent power95 or is administering a statute enacted

90. This reflects the view that the legislature's representative character demands that its enactments be assumed, where reasonably possible, to bespeak public purposes. Cf. Berman, 348 U.S. at 32 ("When the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

91. Without legislative authorization, no type of administrative action can be said to advance a public purpose. Even if the agency had acted ultra vires so as to provide the public with the "use" of a piece of property in some literal way, for instance by creating a public park or right of way, the action could not be said to have advanced a public use. The Court has consistently rejected such a literal understanding of the public use requirement. See, e.g., Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984); Rindge Co. v. Los Angeles, 262 U.S. 700, 707 (1920), cited in Midkiff, 467 U.S. at 244; see also Stoebuck, supra note 73, at 590 (noting that the Supreme Court has "made clear that 'public use' cannot be argued in any literal sense").

92. See infra section II.A.3.

93. The federal Constitution makes little reference to administrative agencies. See, e.g., U.S. Const. art. II, § 2, ¶ 1 (mentioning "executive Departments"). The Supreme Court nonetheless has since recognized agencies' role as repositories of the president's executive responsibilities under Article II. See, e.g., Myers v. United States, 272 U.S. 52, 132 (1926) (referring to agency officials as "exercising not their own [will] but [the president's] discretion").

94. See, e.g., Yakus v. United States, 321 U.S. 414, 423-27 (1944) (upholding as constitutional a statute delegating authority to an agency to fix "fair and equitable" prices); J.W. Hampton & Co. v. United States, 276 U.S. 394, 409 (1928) (requiring only an "intelligible principle" to guide agencies to sustain a delegation as constitutional).

95. In the federal context, such powers are enumerated in Article II. See U.S. Const. art. II.
by the legislature.96 Under Article II of the federal Constitution,97 the executive has only limited powers beyond "tak[ing] care that the laws be faithfully executed,"98 none of which can be interpreted reasonably to include unilateral determinations of the public purposes of its actions. Where a state constitution does not give general lawmaking power to the executive, administrative agencies simply lack the constitutional power to decide the question of public use where they have not been given authority to act by the legislature.99 Professor Stoebuck has made the same point with regard to eminent domain: "[I]f no legislative body . . . has authorized a road from point A to point B, land for such a road may not be condemned. In such cases as these, then, it seems inevitable, even truistic, to say there is a public-purpose limitation on the exercise of the eminent power."100

Because agencies have no power to determine on their own which actions advance public purposes, the legislature must either specify which actions will advance public uses or impliedly delegate that determination to the agency. Where the legislature has not spoken and thus the agency lacks statutory authority for its action, that action cannot be said to advance a public use.

Agencies also lack the indicia of representativeness that legislatures possess, and therefore lack the "public" character demanded by the text of the Takings Clause. Although governors and presidents are elected, one can question their ability to bend effectively

96. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.").

97. Although the structure of the applicable state constitution is the proper inquiry, most of the states' constitutions mirror the federal in basic structure. See Willi P. Adams, The First American Constitutions: Republican Ideology and the Making of the State Constitutions in the Revolutionary Era 4 (Rita Kimber & Robert Kimber trans., U.N.C. Press 1980) (1973); Robert B. Dishman, National Municipal League, State Constitutions: The Shape of the Document 5-6 (1960). Of course, were a state constitution to provide otherwise, this argument would be inapplicable. Again, the use of state law to define the boundaries of constitutional strictures is well-established. See supra note 75.

98. U.S. Const. art. II, § 3. The executive powers are enumerated in Article II, §§ 2-3.

99. Cf. Youngstown Sheet & Tube Co., 343 U.S. at 588 (finding that although the President lacked power to issue order seizing steel mills, "[t]he power of Congress to adopt such public policies . . . is beyond question").

To what extent the legislature may delegate the determination to an agency — expressly or implicitly — is not at issue here. This Note does not argue that agencies cannot make such determinations where the legislature has expressly delegated that decision to the agency or a statute provides ambiguity or silence from which a court can reasonably infer that the legislature intended to delegate the decision to the agency. Cf. Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984); Bell Atl. Tel. Cos. v. F.C.C., 24 F.3d 1441, 1446 (D.C. Cir. 1994). This Note considers only cases in which a court has found that the agency altogether lacks authority for its action and has thus invalidated it.

100. Stoebuck, supra note 73, at 588-89.
their subordinates’ actions to the will of the electorate. The lack of a broad electoral constituency is compounded by agencies’ tendency to be, at worst, “captured” and, at best, strongly influenced, by narrow constituencies or dominated by their internal institutional dynamics or their employees’ ideologies. Although one could hardly suggest that legislatures are uninfluenced by narrow interests, legislatures in the American system have been designed to reduce the dominant influence of any one such “faction,” and have proven more successful than agencies in avoiding capture by a single interest by encouraging the participation of myriad, countervailing groups. Notwithstanding that legislatures plainly fail to


This may be the result of various influences: (1) agencies’ dependence on constituents for resources and cooperation, see Francis E. Rourke, Bureaucracy, Politics, and Public Policy 11-24 (1969); Wilson, supra note 101, at 79-80; Stewart, supra note 82, at 1686; (2) the professional norms agencies share with their constituencies, see Suzanne Weaver, Antitrust Division of the Department of Justice, in The Politics of Regulation 123, 150 (James Q. Wilson ed., 1980); (3) employment of former agency personnel — and the prospect of their future employment — by regulated entities, see Paul J. Quirk, Food and Drug Administration, in id., at 191, 212-13; Wilson, Politics of Regulation, supra note 102, at 159-60; or (4) simply frequent contact between agency personnel and representatives of the regulated community, see Quirk, supra, at 211.

103. See Edwards, supra note 101, at 127-33 (discussing problems associated with agencies’ use of standard operating procedures); Wilson, supra note 101, at 101-09 (discussing the effects of agency “culture”).

104. See Wilson, supra note 101, at 86-88 (discussing the effects of agency officials’ “beliefs”); Steven Kelman, Occupational Safety and Health Administration, in The Politics of Regulation, supra note 102, at 236, 250 (noting the important influence of agency officials’ “values” and “ideology” on agency outputs). Of course legislators are also guided by their ideologies, but those ideologies are an element considered by voters in electing them. See Bernard R. Berelson et al., Voting 309 (1954) (discussing voters’ tendency to vote for a candidate because of the candidate’s adherence to a party ideology).


achieve the pluralist ideal, in a contest with administrative agencies, the legislature is better able to incorporate the will of the public in identifying uses of private property that serve it. An agency's decisionmaking process — marshaling expertise to decide technical questions — is inadequate to determine which uses are "public." Given that courts consistently defer to agencies' decisions in their areas of expertise, one should not be surprised that they would defer to the legislature in its area of competence: determination of the public will and weal.

3. The Judiciary

The legislature's uniquely "public" character also means that courts should not allocate to themselves the power to define public uses. Although a plaintiff might ask the court to decide independently whether an ultra vires action in fact comprehends a public purpose based on the particular situation before the court, courts should deny themselves the privilege of so defining public use because public purposes are not simply a matter of fact. To be sure, since Marbury v. Madison, the courts have generally occupied the seat of final arbiter of the Constitution's meaning, and there is some precedent to support such a role in giving content to the public use requirement. That approach, however, chafes against

108. Many have criticized pluralist theorists' conclusion that societal interests can be adequately represented through interest group competition for influence in the legislative process. See, e.g., Charles E. Lindblom, Politics and Markets 141 (1977) (finding skewed representation of interests in institutional political processes); Mancur Olson, The Logic of Collective Action 1–2, 125–31 (1971) (discussing impediments to formation of political pressure groups); Kay Lehman Schlozman & John T. Tierney, Organized Interests and American Democracy 66 (1986) (finding, based on empirical research, that "the Washington pressure community is not inclusive"). The argument made here, however, is not that interest groups represent perfectly the gamut of societal interests, but rather that any single interest will have more difficulty capturing the legislative process than its administrative counterpart.


110. See sources cited supra note 82 and accompanying text.


112. 5 U.S. (1 Cranch) 137 (1803).

113. See, e.g., Cooper v. Aaron, 358 U.S. 1, 18 (1958); Marbury, 5 U.S. (1 Cranch) at 177.

114. See Cincinnati v. Vester, 281 U.S. 439, 446 (1930) ("It is well established that in considering the . . . expropriation of private property, the question what is a public use is a judicial one."); Hairston v. Danville & Western Ry., 208 U.S. 598, 606 (1908). But see United States ex rel. Tenn. Valley Auth. v. Welch, 327 U.S. 546, 552 (1946) (limiting Vester to cases involving "the power to condemn 'excess' property"); see also cases cited supra note 83.
both the contemporary understanding of the relative roles of the judiciary and legislature and the particular competence of the courts.

The Supreme Court in this century has been particularly careful about substituting its own views of wise policy for those of legislatures. For a court to decide what does and does not constitute a public purpose without according substantial deference to the legislature's pronouncements or silence would fly in the face of the Court's contemporary approach to economic and social regulation under the Equal Protection and Due Process Clauses. The now well-established policy of judicial deference to legislative judgment reflects the view that the courts are not properly situated to substitute their views for those of the legislature where broad judgments of the public interest are at stake.

Interpretation of the public use requirement also strains the traditional area of judicial competence frequently cited as a justification for judicial review. Unlike interpretation of law, ascertaining public purposes demands representative decisionmaking. As a result, although a court can review a legislature's judgment of public purpose for its basic rationality, it cannot effectively determine such purposes without the legislature's guidance. Given the near impossibility of identifying objectively the "public interest," the judiciary — the least representative branch — is perhaps the least competent branch to determine independently which uses of private property benefit the public. A court simply does not pos-

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116. See, e.g., Ferguson, 372 U.S. at 731 (due process); Williamson v. Lee Optical Co., 348 U.S. 483, 487-89 (1955) (equal protection); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937) (due process); see also Tribe, supra note 47, § 8-7 (discussing the death of economic substantive due process); id. § 16-2 (discussing rational basis review under the Equal Protection Clause). The Takings Clause evinces no reason to show less deference to legislative judgment in its application than in applying the Equal Protection and Due Process Clauses.

117. See supra notes 80-82 and accompanying text.

118. Courts may reject a legislative determination of public use only where "it is shown to involve an impossibility," that is, where the "use [is] palpably without reasonable foundation." Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240-41 (1984) (quoting, respectively, Old Dominion Co. v. United States, 269 U.S. 55, 66 (1925) and United States v. Gettysburg Elec. Ry. Co., 160 U.S. 668, 680 (1896)). This deferential standard of review approximates that applied to regulatory legislation under substantive due process. See Midkiff, 467 U.S. at 242-43; Berman v. Parker, 348 U.S. 26, 32 (1954); Merrill, supra note 75, at 63; Stoebuck, supra note 73, at 590. For a discussion of the similarity between the due process and public use standards, see infra section II.C.

119. That is, although the judiciary may veto a legislature's implicit or express finding of public purpose where utterly lacking in reasonable foundation, it may not identify which actions have such purposes where the legislature has not spoken to the question; a court may point to actions that lack public purposes but cannot identify actions that advance public purposes.
sess the representative procedural machinery necessary for making such decisions.

The Supreme Court has affirmed this view and resoundingly held in cases such as Berman v. Parker and Hawaii Housing Authority v. Midkiff that the judiciary is ill-suited to making determinations of public use. The Court in those cases referred to prudential concerns about the propriety and ability of the judiciary to make the broad determinations of public policy that the public use requirement demands. The Court has repeatedly and plainly stated that the legislature, not the judiciary, is the proper expositor of public use.

* * *

Given that the legislature is the body properly vested with authority to determine which actions will further a public use, it follows that agency actions without statutory bases cannot advance public uses. In general, regardless of the appearance of public purpose to an outside observer such as a court, that observer simply cannot say that an action will advance a public use where the legislature has not authorized the action and thus has not considered or addressed the question. In sum, ultra vires actions by definition cannot serve public uses.

B. The Function of the Public Use Requirement

In eminent domain, the public use requirement stands as a gatekeeper, limiting the situations in which government may constitutionally condemn property and disallowing the taking of private property for private, as opposed to public, uses. But how should the public use language function in inverse condemnation cases, where the property owner brings suit to recover just compensation for an ongoing or already completed action that the state denies constitutes a compensable taking? This section argues that even where a court deciding an inverse condemnation suit has found that agency action has “taken” property, if the taking does not advance a public use, just compensation need not be paid. As a result, ultra vires takings, which lack public purposes, cannot be compensable.

120. See Midkiff, 467 U.S. 299; Berman, 348 U.S. 26; see also other sources cited supra note 83.

121. See Midkiff, 467 U.S. at 244 ("Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power."); Berman, 348 U.S. at 33.

122. See, e.g., Midkiff, 467 U.S. at 241, 245; Hairston v. Danville & Western Ry., 208 U.S. 598, 605 (1908); see also Lawrence Berger, Public Use, Substantive Due Process and Takings — An Integration, 74 Neb. L. Rev. 843, 846 (1995); Merrill, supra note 75, at 61; Rubenfeld, supra note 2, at 1079; Stoebuck, supra note 73, at 595.
The text of the Takings Clause makes clear that just compensation is not available where the action fails to advance a public use: "[N]or shall private property be taken for public use, without just compensation." Each element of the Clause's text prior to the comma imposes a prerequisite to the requirement of compensation, following the comma: "private property" must have been "taken" and the taking must have been "for a public use." Indeed, in the seminal case of regulatory takings, Pennsylvania Coal Co. v. Mahon,124 Justice Holmes acknowledged the role of public use as a threshold requirement: "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation."125 To apply the just compensation requirement to actions lacking a public purpose would effectively redact the public use requirement from the Clause or would replace the phrase "for public use" with "for public or private use."126 This would fundamentally distort the meaning of the Takings Clause.

Accordingly, several courts have expressly rejected claims for just compensation under the Takings Clause where the challenged action failed to advance a public use.127 Courts have considered the role of the public use requirement most frequently in cases of government officials' accidental or negligent damaging of private property in the course of normal public duties.128 Several of these courts have held that the government actor's negligence eliminates the element of public use required by state and federal takings clauses thereby precluding compensation.129 Commentators on the Clause

124. 260 U.S. 393 (1922).
126. Cf. COLO. CONST. art. II, § 15 ("Private property shall not be taken . . . for public or private use, without just compensation.").
129. See, e.g., Lucien, 61 F.3d at 574-76 ("A complication is that almost certainly [plaintiff's] personal property was not taken for a public use.") (emphasis omitted); Angelle, 34 So.
and its state constitutional counterparts have agreed that the public use requirement limits the situations in which just compensation must be paid.\[130\]

Nevertheless, one might counter that allowing compensation for non-public use takings would not redact the public use requirement if it is read not as a threshold requirement of compensation, but instead as a basis for additional, injunctive relief. This argument might proceed as follows. The Supreme Court has repeatedly held that under normal circumstances the Takings Clause does not provide injunctive relief.\[131\] That is, a takings claimant cannot opt for injunction of the offending regulation in lieu of compensation. Where the challenged action lacks a public use, on the other hand, the action might not be allowed to stand: it is not “otherwise proper” as required by First English.\[132\] Thus, the argument continues, a property owner may seek both just compensation for a regulation alleged to be a taking and a court order enjoining the

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2d at 323-24 (finding no taking where “destruction or damage occurs not for a public purpose but by reason of the negligence of the state officers or agents”); Gearin, 223 P. at 933 (finding “no intention upon the part of the county to subject the property or any part thereof to a public use” where plaintiff's property was damaged by flooding accidentally caused by defendant agency).

130. See Jan G. Laitos, The Public Use Paradox and the Takings Clause, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 9, 11 (1993); Merrill, supra note 75, at 61 n.2; Rubenfeld, supra note 2, at 1120 (arguing that the public use requirement identifies “a specific category of constitutional takings — the category for which compensation would be required”); Arvo Van Alstyne, Statutory Modification of Inverse Condemnation: The Scope of Legislative Power, 19 STAN. L. REV. 727, 782 n.293 (1967) (“[T]he theory of inverse condemnation does not apply ... in a case where no public-use element is present.”) (discussing California constitutional provision). But see Tribe, supra note 47, § 9-2, at 590-91 (arguing that the compensation requirement itself has come to be the only assurance of public purpose provided by the Clause).


In Eastern Enterprises v. Apfel, the Court enjoined the application of the Coal Act, 26 U.S.C. § 9701 (1994 and Supp. II 1996), as unconstitutionally retroactive. See 118 S. Ct. 2151-53. In her plurality opinion, Justice O'Connor relied on the Takings Clause to enjoin application of the statute, apparently in contradiction of the cases cited supra. See 118 S. Ct. at 2153. In concurrence, Justice Kennedy found that the statute should be invalidated under the Due Process Clause, and he therefore dissented from the plurality's decision to apply the Takings Clause. See 118 S. Ct. at 2154 (Kennedy, J., concurring in the judgment and dissenting in part). The four dissenting Justices, Justices Breyer, Ginsburg, Souter, and Stevens, opposed invalidation altogether. See 118 S. Ct. at 2160-68. Although a bare majority rejected the Act's constitutionality, the proposition that the Act should be invalidated based on the Takings Clause did not receive support from a majority of the Court.

132. 482 U.S. at 315.
regulation because it does not advance a public use.\textsuperscript{133} Once the plaintiff establishes that the action lacks a public use, the reviewing court might, on the authority of the public use requirement, enjoin further enforcement of the regulation. Then, the public use requirement having been applied, the court could proceed to provide just compensation for the period the restriction was in effect.\textsuperscript{134} In short, this argument concludes that public use is not a "threshold" or "gatekeeper" requirement for just compensation, but rather a basis for additional, injunctive relief.\textsuperscript{135}

Neither courts nor commentators have conclusively determined whether the lack of a public purpose allows injunctive relief.\textsuperscript{136} Some have suggested that the absence of a public purpose simply makes the Takings Clause altogether inapplicable, and therefore no relief of any kind can be predicated on the Takings Clause where the challenged action lacked a public purpose.\textsuperscript{137} Others have suggested that the public use requirement demands that a reviewing court enjoin enforcement of a regulation lacking a public purpose, as it would when faced with a formal exercise of eminent domain.\textsuperscript{138}

In any event, neither theory requires that the government pay just compensation for actions that lack public purposes. Under the first theory, the Takings Clause has no effect whatsoever and thus the just compensation requirement is not implicated.\textsuperscript{139} The action

\textsuperscript{133} Such injunctive relief would be redundant in ultra vires takings cases specifically because a court will enjoin enforcement of an ultra vires regulation on administrative law grounds. \textit{See supra} note 5. For other actions that lack public uses, however, this argument would give injured property owners an injunctive remedy they would otherwise lack due to the general rule against enjoining takings.

\textsuperscript{134} This sounds distinctly like the situation in \textit{First English}. \textit{See} 482 U.S. 304. The difference, of course, is that the Court in \textit{First English} was not faced with a regulation that lacked a public use. \textit{See supra} note 21.

\textsuperscript{135} An alternative way of thinking about this view is that the terms "public use" and "just compensation" each create particular remedies: the former allows a claim for injunctive relief while the latter allows a claim for monetary relief.

\textsuperscript{136} \textit{See Coniston Corp. v. Village of Hoffman Estates}, 844 F.2d 461, 464 (7th Cir. 1988) (noting the lack of a conclusive answer to the question).


\textsuperscript{138} \textit{See Ruckelshaus v. Monsanto Co.}, 467 U.S. 986, 1016 (1984) (dictum); F.E. Trotter, \textit{Inc. v. Watkins}, 869 F.2d 1312, 1316 (9th Cir. 1989); \textit{Coniston Corp.}, 844 F.2d at 464; \textit{cf. 2A Julius L. Sackman, Nichols on Eminent Domain § 7.01[4]} (rev. 3d ed., 1998). Injunction for an absence of public use would not be prohibited under the normal rule against injunctive relief under the Takings Clause, discussed \textit{supra} note 131. \textit{First English} only rejects injunction of takings that are "otherwise proper," 482 U.S. at 315, which an action without a public purpose is arguably not.

\textsuperscript{139} The effect of this view would be analogous to that of a finding that the property in question was not in fact "taken" or that the plaintiff's taken interest was not "private property"; in those cases the plaintiff simply could not look to the Takings Clause for relief.
might be invalidated as violating due process, but the Takings Clause will provide neither just compensation nor injunctive relief.

The second theory also does not demand that the state pay just compensation, although the reason is more complex. The public use requirement must serve a function in both of the plaintiff's claims, for injunctive relief and for just compensation. While the plaintiff might cite the public use requirement as authority for enjoining the regulation, she cannot then claim that the action did advance a public use to support her claim for just compensation for the duration of the regulation's effect. Consider the following illustration. An agency has regulated plaintiff's property so as to eliminate all economically beneficial use thereof. Plaintiff brings suit seeking injunction of the regulation and just compensation. Because an injunction is not normally available in inverse condemnation, the plaintiff alleges that the defendant's action lacked a public use and therefore should be enjoined. In a second count, plaintiff seeks just compensation for the taking of her property. If the court finds that the taking did indeed lack a public purpose, it might enjoin the regulation, converting a permanent taking into a temporary taking. The real question arises when the court considers the second count: Should the court provide just compensation for the now-temporary taking? If yes, the court would be awarding compensation for "private property . . . taken [without] a public use, without just compensation." This is plainly at odds with the text of the Takings Clause. While plaintiffs generally may plead inconsistently — that a taking without public use or a taking with public use had occurred — such inconsistent pleading could not give the plaintiff both requested remedies. In sum, the public use requirement may provide an injunctive remedy, but only as an alternative to just compensation.

Ultra vires actions do not advance public uses. The Takings Clause demands that an action serve a public use if that action is to give rise to a claim for just compensation. Therefore, ultra vires actions cannot give rise to claims for just compensation.

C. Police Power Takings

The Supreme Court's "police power takings" test, one prong of the regulatory takings test presented in Agins v. City of

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142. See Laitos, supra note 130, at 13 (apparently coining the term "police power taking").
Tiburon\textsuperscript{143} and reiterated in \textit{Lucas v. South Carolina Coastal Council},\textsuperscript{144} does not defeat the argument that the public use requirement prevents payment of just compensation for ultra vires actions. In \textit{Agins}, the Court stated that a regulation "effects a taking if [it] does not \textit{substantially advance legitimate state interests}."\textsuperscript{145} Some have suggested that this "test" squarely contradicts the Court's public use cases.\textsuperscript{146} Several compelling arguments suggest, however, that the police power test does not demand compensation for takings that lack public purposes, such as ultra vires takings.

The \textit{Agins} test ostensibly indicates that a regulatory action that is beyond the scope of the state's police power\textsuperscript{147} — that is, one that "does not substantially advance legitimate state interests"\textsuperscript{148} — constitutes a taking. At the same time, however, the Supreme Court has held that the public use requirement of the Takings Clause is "coterminous with the scope of a sovereign's police powers."\textsuperscript{149} Thus where a state has acted outside its police power by failing to advance a legitimate state interest, its act cannot be said to advance a public use under the Takings Clause. Because of the near inverse relation of the \textit{Agins} police power takings test to the

\begin{itemize}
  \item \textsuperscript{143} 447 U.S. 255, 260-62 (1980).
  \item \textsuperscript{144} 505 U.S. 1003, 1016 (1992).
  \item \textsuperscript{145} 447 U.S. at 260 (emphasis added).
  \item \textsuperscript{146} See generally Respondents' Answer to League for Coastal Protection, Planning and Conservation League, Etc. Amicus Brief at 6-7, Landgate, Inc. v. California Coastal Commn., 953 P.2d 1188 (Cal. 1998) (No. S059847) (on file with author); Laitos, \textit{supra} note 130.
  \item \textsuperscript{147} The "police power" is seemingly incapable of precise definition. At root it encompasses the state's plenary power to regulate private conduct: "Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it." Berman v. Parker, 348 U.S. 26, 32 (1954). "To be a valid exercise of the police power in the first instance a government regulation must be rationally related to a \textit{legitimate state interest}." Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408, 429 n.11 (1989) (citing Williamson v. Lee Optical, Inc., 348 U.S. 483, 491 (1955)) (emphasis added). What falls within the police power is an open question that courts address on a case-by-case basis. See Stone v. Mississippi, 101 U.S. 814, 818 (1880).
  \item \textsuperscript{148} Lucas, 505 U.S. at 1016 (quoting \textit{Agins}, 447 U.S. at 260).
  \item \textsuperscript{149} Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984); see also Berman, 348 U.S. at 32.
\end{itemize}
Court’s understanding of a violation of the public use requirement, the Court appears to have established contradictory requirements: an action that fails to advance a public use under *Berman* and *Midkiff* also must be compensated as a taking under *Agin*.

If this is correct, then this Note’s contention that ultra vires actions lack public purposes would reinforce, not contradict, their compensability under the Takings Clause.

Consider the following illustration of the apparent similarity of the public use requirement and the police power test. A coastal-zone regulatory agency adopts a regulation that requires a property owner to allow agency personnel to recreate on a portion of the owner’s private dry-sand beach. A court might find, without engendering much controversy, that such a regulation “fails to substantially advance legitimate state interests,” and it therefore might hold that the regulation has effectively taken an easement in the plaintiff’s property. The police power test would seem to allow the court to award compensation for the value of that easement. But the court might also readily hold that the regulation took property for the private use of agency personnel, as opposed to public use. On this basis, the court might enjoin enforcement of the regulation as lacking a public use, but the court could not award just compensation.

Characterized as a taking under the police power test, the action apparently demands compensation, but characterized as a violation of the public use requirement, the action demands, at most, an injunction. In other words, these two tests seem to create a “public use paradox.” Nonetheless, there is reason to believe that the rumors of such a paradox have been greatly exaggerated.

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150. See Laitos, *supra* note 130, at 14; Ross A. Macfarlane, Comment, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis*, 57 WASH. L. REV. 715, 730 (1982); *cf.* Epstein, *supra* note 81, at 110 (arguing that “[t]he Supreme Court has obliterated a key structural distinction” between the public use requirement and the police power test).

151. See *supra* note 138 and accompanying text.

152. See *supra* section II.B.

First, the statements in both *Lucas* and *Agins* were dicta and thus are not binding precedent. Indeed, both cases’ discussions of the test are paradigmatic instances of the unreliability of dicta. The *Agins* case neither cited a prior takings case for its proposition nor discussed the reasoning behind its statement. The *Lucas* Court’s discussion, while more lengthy, creates new confusion. In *Lucas*, the Court ostensibly identifies two situations that constitute takings per se: actions that amount to physical invasions of property and actions that deprive property owners of all economically beneficial use of their properties. The Court, however, later identifies the police power test as identifying a third situation in which a regulation cannot be sustained without payment of compensation. In so doing, the Court converts what was long considered to be a defense to a taking — a finding that the regulation prevented one landowner’s “harming” another or the public generally into support for the police power test as an independent

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154. In neither case was the police power takings test essential, or in *Lucas* even useful, to the holding. Although *Agins* elaborated a two-prong takings test, the Court found that the defendant locality had a slew of defenses, one of which was that the challenged action substantially advanced a legitimate state interest. See *Agins* v. City of Tiburon, 447 U.S. 255, 260-63 (1980). *Lucas* provided a general discussion of takings principles, including the putative *Agins* test. The Court decided the matter, however, on the basis of *Agins*’s second prong, elimination of economically viable use. See *Lucas* v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992).

As this Note goes to press, the Supreme Court is considering a case in which the *Agins* theory was presented. See Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996), cert. granted, 118 S. Ct. 1359 (1998). The position of the four dissenting Justices and Justice Kennedy’s partial dissent in *Eastern Enterprises* v. *Apfel*, suggests that a majority of the Court might reject the *Agins* test when next faced with it. See 118 S. Ct. 2131, 2157 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (“[Agins] is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the Government’s power to act.”); 118 S. Ct. at 2161 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.) (arguing that the Takings Clause is concerned with “providing compensation for legitimate government action”) (emphasis omitted).

155. See, e.g., Humphrey’s Exr. v. United States, 295 U.S. 602, 626-27 (1935); Carroll v. Lessee of Carroll, 57 U.S. (16 How.) 275, 287 (1850); Benjamin Cardozo, The Nature of the Judicial Process 29 (1921) (“[I]t is a good deal of mystery to me how judges ... should put their faith in dicta.”).

156. Dicta are generally thought to be unreliable for having had the benefit neither of full argument by the parties nor of full consideration by the court. In a classic statement, Chief Justice Marshall identified this as the reason for courts’ refusal to accord precedential effect to dicta: “The question actually before the Court is investigated with care, and considered in its full extent.” Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399 (1821).


158. See *Agins*, 447 U.S. at 260.

159. See *Lucas*, 505 U.S. at 1015.

160. See *Lucas*, 505 U.S. at 1026.

161. The Court’s numerous “noxious use” cases held that a takings claim would not lie where the challenged regulation prohibited a noxious or harmful use of property. See *Lucas*, 505 U.S. at 1026 n.13 (collecting cases).
basis of takings liability. The Court provides no discussion of what would advance such a legitimate state interest, as it was not called to do so by the case before it. This confusion is precisely the problem raised by courts' ruminations on legal issues outside the ratio decidendi of the case. For this reason, courts should be wary of applying the police power test to award just compensation.

Moreover, the Court's application of the police power test does not support payment of just compensation: the Court has never applied the test to make such an award. Instead, the Court has applied the test in Dolan v. City of Tigard and Nollan v. California Coastal Commission only to enjoin conditions imposed on land development permits that lacked the necessary means-ends connection to a legitimate state interest. As a result, neither case can be authority for payment of just compensation. If anything, these cases indicate that the Agins test identifies one situation in which regulatory action is not "otherwise proper" — and thus is deserving of an injunction — unlike the situation in which compensation must be paid. Such a view in fact puts the Agins test in the same role as that often attributed to the public use requirement, invalidation of offending regulations, not a "paradoxical" or conflicting role.

Finally, the risk of creating a "public use paradox" mandates that courts not read Agins and its progeny expansively. The Court's well-established public use cases should not be trumped by a broad application of dicta that have never been applied to award just compensation. Rather than force a conflict between the police power takings test and the public use doctrine — and add new confusion to an already muddled takings jurisprudence — courts should apply the textual requirement of public use and the Court's clearly-established public use precedents as argued supra in sections II.A and II.B.

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162. See Lucas, 505 U.S. at 1026. This notwithstanding the Court's use of language that suggests that substantial advancement of a legitimate state interest constitutes a defense to a takings challenge: "land use regulation does not effect a taking if it substantially advance[s] legitimate state interests." Lucas, 505 U.S. at 1024 (quoting Nollan v. California Coastal Commn., 483 U.S. 825, 834 (1987)) (internal quotation marks omitted; alteration in original; emphasis added).

163. Cf. Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 390 (1988) ("[N]o court has ever found that a taking has occurred solely because a legitimate state interest was not substantially advanced.").


166. See cases cited supra note 131 (discussing the general rule against enjoining actions that amount to takings).

167. See supra note 138 and accompanying text.
Lacking legislative benediction, ultra vires actions by definition do not advance public uses, which are creatures of legislative will. The police power takings test notwithstanding, courts have properly applied the public use requirement in its gatekeeping role to reject claims for just compensation leveled at administrative actions that do not serve a public purpose. These premises lead to the conclusion that where a plaintiff demands just compensation for an ultra vires taking, the public use requirement must bar her claim.

III. Fairness & Alternative Legal Theories

This Note takes the intuitively perverse position that state governments are protected from compensating property owners under the Takings Clause because their agencies acted without authority. But the ultra vires character of the action should not encourage us to provide a remedy under the Takings Clause where the terms of the Clause would not otherwise demand one. Despite our intuition to the contrary, the Takings Clause does not serve a punitive function; rather, it is designed to compensate claimants where governmental entities have taken their property to serve the public.\(^{168}\)

Little can be gained by shoehorning into the Takings Clause a remedy for every injury to private property rights perpetrated by a government official. That the challenged action lacked statutory authorization provides no additional reason to do so.\(^{169}\) This Part contends that the unauthorized aspect of ultra vires actions should not cause us to be willfully blind to the Clause’s textual requirements. Section III.A argues that notions of “fairness” should not keep courts from applying the requirements of the Takings Clause as identified in Parts I and II. This section argues that although fairness is frequently cited as a basis of takings law, that notion is fundamentally reciprocal and thus is not implicated by ultra vires takings. Section III.B contends that due process, tort, or legislative remedies are more appropriate avenues by which property owners may seek remuneration.

168. See First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314-15 (citations omitted) ("[The Fifth Amendment] does not prohibit the taking of private property, but instead places a condition on the exercise of that power . . . . [I]t is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.").

169. See Dalton v. Spector, 511 U.S. 462, 472 (1994) ("Our cases do not support the proposition that every action by [an] executive official[ ] in excess of his statutory authority is ipso facto in violation of the Constitution."); Screws v. United States, 325 U.S. 91, 108 (1945) ("Violation of local law does not necessarily mean that federal rights have been invaded.").
A. Fairness

At its root, the Takings Clause's guarantee of just compensation embodies an intuition of fairness.\(^{170}\) The Supreme Court expressed that intuition in *Armstrong v. United States*\(^{171}\) and has affirmed its expression in numerous subsequent cases.\(^{172}\) In the Court's view, fairness demands that private property owners be compensated where they have been forced to bear public burdens beyond their pro rata share: "[The Takings Clause] bar[s] 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."\(^{173}\) To give effect to the *Armstrong* formulation, and to satisfy the aggrieved owner's — and our — intuitions of fairness, perhaps courts should read the Takings Clause with an eye for equity and grant property owners just compensation for ultra vires takings.\(^{174}\) Several arguments, however, counsel against applying *Armstrong* and the intuition it reflects to grant relief under the Takings Clause in ultra vires cases.

First, predictability and interpretive economy demand that the public use and state action requirements of the Takings Clause not be trumped by our intuition of fairness. The Takings Clause has presented one of the most prolonged and Byzantine problems of constitutional jurisprudence. For whatever reason, takings doctrine is notoriously convoluted and devoid of straightforward rules of application.\(^{175}\) As a result, property owners — and arguably govern-

\(^{170}\) On the intuition of fairness generally, see JAMES Q. WIlSON, THE MORAL SENSE 55-78 (1993).

\(^{171}\) 364 U.S. 40, 49 (1960).


\(^{173}\) *Armstrong*, 364 U.S. at 49 (emphasis added). On fairness as the basis for just compensation generally, see Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967).

\(^{174}\) Indeed, a court might be justified in looking to equity for its decision, as the just compensation obligation has long been thought to rest on principles of equity. See, e.g., 2 ByNkERSHOEK, supra note 73, at 221 (citing 2 GROTIUS, supra note 73, bk. II, ch. XIV, § VII); 2 KENT, supra note 83, at 275-76; 2 PUFENDORF, supra note 73, at 1285-86.

\(^{175}\) For an example of the Court's nebulous takings tests, see Penn Central Transportation Co. v. City of New York, 438 U.S. 104, 124 (1978) (articulating a multi-factor, "essentially ad hoc, factual inquir[y]" to identify compensable takings). See also supra text accompanying notes 159-63 (describing the confusion created by the Court's opinion in *Lucas v. South Carolina Coastal Council*). This confusion is reflected in the epithets that commentators have attached to takings law; indeed, that confusion seems to be the one aspect of takings law about which most commentators can agree. See, e.g., ACKERMAN, supra note 2, at 8 ("chaos"); Rose, supra note 2, at 561 ("muddle"); Sax, supra note 73, at 37 ("a welter of confusing and apparently incompatible results"). But see Erstens, supra note 81, at 85 ("What constitutes a taking of private property is a question that admits to a rigid logical answer, so it is always possible to judge which judicial decisions are clearly right or clearly wrong.").
mental agencies themselves — cannot clearly understand the extent of their respective rights and responsibilities under the Clause.176

To use a principle of "fairness" to trump the requirements of public use and state action is to exacerbate the existing convolutions of takings jurisprudence. While Armstrong established an arguably nebulous fairness principle to guide interpretation of the Takings Clause,177 that principle is fairly discernible in the Clause itself.178 To apply that principle where the express requirement of public use and the implicit requirement of state action are not met converts a broad but supportable principle into an uncabined and insupportable remedy at variance with the Clause and further muddies the water of takings law.

Second, the Supreme Court's pronouncement in Armstrong is based on circumstances not present in the case of an ultra vires taking. Armstrong, by its terms, demands compensation where government forces property owners to bear more than their fair share of "public burdens."179 Actions that cannot be considered acts of the state or that violate the public use requirement do not impose public burdens and thus are not compensable even under the language of Armstrong.180 If the action lacks a public purpose, a "public burden" is absent a fortiori. Similarly, if the state action requirement is not met, the "burden" imposed may be that of the responsible officers in their individual capacities, but it is not that of the public principal.

The principles underlying Armstrong confirm this view. Although the intuition that demands "compensation" is exceptionally strong in ultra vires cases, the intuition of fairness offended by ultra vires takings is not that expressed in Armstrong. The intuition

176. See Eastern Enters. v. Apfel, 118 S. Ct. 2131, 2155 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (noting the importance of interpreting the Takings Clause so as to "provide[ ] some necessary predictability for governmental entities"). See also generally Susan Rose-Ackerman, Against Ad Hocery: A Comment on Michelman, 88 Colum. L. Rev. 1697 (1988) (describing takings law's unsettling effect on private expectations).

177. On the difficulties of basing takings judgments on the fairness criterion, see Michelman, supra note 173, at 1248-53.

178. The Armstrong principle in effect reflects the idea of an "average reciprocity of advantage" noted by Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), which suggests that on the whole, government action implicitly compensates property owners for their contributions to the public weal, but that where property owners are called upon to contribute more than they receive, compensation should be paid. See also Epstein, supra note 81, at 197 (citing Mahon and Armstrong); Michelman, supra note 173, at 1225. That is, Armstrong is a gloss on the meaning of "just compensation": it requires payment of compensation where property owners have not or will not be justly compensated from the public benefits produced by government's "use" of their properties.

179. See Armstrong, 364 U.S. at 49 (emphasis added).

180. Cf. Eastern Enters., 118 S. Ct. at 2161-62 (Breyer, J., dissenting) (quoting Armstrong's "fairness and justice" language to support statement that the Takings Clause "requires compensation when the government takes . . . property for a public purpose").
underlying *Armstrong* is that of "fairness as reciprocity," the sense that "[y]ou should give benefits to those who give you benefits. . . . [It is a] generalized moral norm . . . which defines certain actions and obligations . . . toward others on the basis of their past behavior." *Armstrong* supports payment of just compensation — a benefit — where the property owner's property has contributed to the public good — a benefit — and the owner has not been adequately compensated by receiving her share of that public benefit. This reciprocal view of fairness vis-à-vis the public is not implicated where the public cannot be considered a party to the takings transaction, as where the agency official does not represent the state, or where the purpose of the action is not to benefit the public.

Ultra vires takings are intuitively offensive, but for reasons other than the reason that proper but uncompensated takings are intuitively offensive. To stretch the Takings Clause to apply to such situations does damage to the integrity of the constitutional text and to established judicial interpretations of that text and creates further uncertainty for property owners and regulators. The intuitive — and justified — reaction to unauthorized agency action should not lead us to stretch the Takings Clause beyond its reasonable meaning.

**B. Potential Alternative Remedies**

Although the Takings Clause does not provide a just compensation remedy for ultra vires actions, aggrieved property owners may look to other avenues for monetary relief. Although a complete assessment of alternative remedies is beyond the scope of this Note, due process and tort law seem to be appropriate places to look for such monetary relief. In the event that current law does not provide an adequate remedy, property owners may call upon their legislatures for relief.

1. **Due Process and Section 1983**

The Due Process Clause has traditionally been considered a bulwark against arbitrary governmental action. 42 U.S.C. § 1983 provides a due process action for damages against the officers responsible for a deprivation of property and against municipalities

181. Wilson, supra note 171, at 65-69 (discussing "fairness as reciprocity" generally); see also supra note 178.


that employ them. Unlike a claim for just compensation, because section 1983 requires only that the officer have acted under color of authority, an agency action’s lack of authority would not defeat the claim. The Due Process Clause remains, in conjunction with section 1983, a potential legal theory for aggrieved property owners who are not satisfied with simple invalidation of the challenged ultra vires action.

The Supreme Court has held, however, that only executive action that “shocks the conscience” will violate substantive due process. The Court has clarified that an agency will be considered to have acted to “shock the conscience” only where an agency has acted intentionally to harass and harm property owners. To be sure, many instances of ultra vires takings will be unintentional, the results of simple errors of statutory interpretation, and thus non-compensable under the Due Process Clause. On the other hand, in the most egregious cases, where officials have used the regulatory process intentionally and maliciously to delay and harass property owners, courts may award damages for section 1983 due process claims.

Alternatively, because of the similarity of the standards of public use and due process, a court might construe an ultra vires action’s lack of a public use to “dump the case into the due process clause.” On this view, the public use requirement serves as a remedy for ultra vires actions in some circumstances. See Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 803 (Fed. Cir. 1993); Baltimore & O.R. Co. v. Van Ness, 2 F. Cas. 574, 576 (C.C.D.C. 1835) (No. 830); Marks v. United States, 34 Fed. Cl. 387, 410 (1995); Catellus Dev. Corp. v. United States, 31 Fed. Cl. 399, 408 n.9 (1994).

Relief under § 1983 might also be predicated on a theory that the agency action violates the Takings Clause because it lacks a public use. That is, a taking without public use may itself be a “deprivation of [a] right[, privilege[, or immunit[y].” 42 U.S.C. § 1983; cf. supra section II.B (discussing the function of the public use requirement and the possibility that it gives rise to a claim for injunctive relief).

Several lower federal courts have suggested in dicta that due process may offer a remedy for ultra vires actions in some circumstances. See Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 803 (Fed. Cir. 1993); Baltimore & O.R. Co. v. Van Ness, 2 F. Cas. 574, 576 (C.C.D.C. 1835) (No. 830); Marks v. United States, 34 Fed. Cl. 387, 410 (1995); Catellus Dev. Corp. v. United States, 31 Fed. Cl. 399, 408 n.9 (1994).


See Lewis, 118 S. Ct. at 1718 (holding that “liability for negligently inflicted harm is categorically below the threshold of constitutional due process”).


See supra section II.C.

See Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988). Although Lewis suggests that a substantive due process claim will lie only for executive ac-
boundary line between actions remediable by just compensation under the Takings Clause and those that amount to "deprivations" that the Due Process Clause is intended to address. Justice Brennan took this position in his influential dissent in San Diego Gas & Electric Co. v. City of San Diego:191

[Where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare . . . there may be no "public use." Although the government entity may not be forced to pay just compensation under the Fifth Amendment, the landowner may nevertheless [allege] a Fourteenth Amendment due process violation.192

That is, the facts that cause an agency action to violate the public use requirement may also be adequate to give rise to a substantive due process claim. Other jurists and commentators have also hypothesized that such a connection between the public use requirement and due process exists193 although the position has not been adopted by a majority of the Supreme Court.

2. Tort Law

While the reciprocal-fairness concern normally present in takings cases is absent in ultra vires cases, the "rogue" character of the
ultra vires act certainly arouses moral indignation. Our intuition that an unauthorized taking, of all regulatory actions, especially requires remuneration arguably stems from the sense that the property owner has been "wronged" by the unlawful action. This sense of the "wrongfulness" of the ultra vires act, however, places that act within the ambit of tort law. Remedy for "wrongs" and "blameworthy" or "culpable" action lies in tort.\footnote{194} In fact, several courts have held that the Takings Clause does not provide relief for ultra vires actions, because they are not compensable takings, but torts.\footnote{195} Tort law's traditional recognition of negligently inflicted harm may make it an available remedy for actions that lack the intentional, conscience-shocking element requisite for relief under due process.

States' tort liability generally is limited by the doctrine of sovereign immunity, but some state courts have nonetheless held that state instrumentalities are \textit{not} immune from tort liability for ultra vires acts.\footnote{196} These cases involve interpretation of state statutes providing exceptions to the common law doctrine of sovereign immunity,\footnote{197} and thus immunity in any given state would depend on the terms of its waiver-of-immunity statute. Similarly, some courts have held that officials themselves may lose their qualified immunity from suit where they have acted ultra vires.\footnote{198} As a result, in at least some states sovereign immunity would apparently not preclude a state agency's tort liability for ultra vires actions.

\footnote{194. Tort law is almost universally defined as legal prevention or remediation of "wrongs." \textit{See, e.g.}, Van Camp v. McAfoos, 156 N.W.2d 878, 882 (Iowa 1968) ("Generally speaking, a tort is a wrong, and a tortious act is a wrongful act."); Churchill v. Howe, 152 N.W. 989, 991 (Mich. 1915); McElroy v. Gaffney, 529 A.2d 889, 891 (N.H. 1987); \textsc{black's Law Dictionary}, \textit{supra} note 4, at 1489 (defining "tort" as "[a] private or civil wrong or injury" and "tortious" as "[w]rongful"); \textsc{W. Page Keeton et al., Fossen and Keeton on the Law of Torts} \textit{§ 1}, at 2 (5th ed. 1984) (defining tort as "a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages"). \textsc{But see Richard A. Epstein, A Theory of Strict Liability, 2 J. Legal Stud. 151 (1973) (arguing for a causation-, rather than culpability-, based standard of tort liability).}

\footnote{195. \textit{See} \textsc{Mc'Avo y v. Smithsonian Inst.}, 757 F. Supp. 60, 70 (D.D.C. 1991); \textsc{American Commerce Natl. Bank v. United States}, 38 Fed. Cl. 271, 272-73 (1997); \textsc{Adams v. United States}, 20 Cl. Ct. 132, 137 (1990); \textsc{Firemen's Ins. Co. v. Board of Regents}, 909 S.W.2d 540, 543 (Tex. App. 1995). \textsc{But see Epstein, supra} note 81, at 35-36 (suggesting that governmental interference with private property is a taking if it would be tortious where performed by a private entity).

\footnote{196. \textit{See, e.g.}, \textsc{Herzig v. Horrigan}, 644 A.2d 360, 362 (Conn. App. Ct. 1994); \textsc{Tolbert v. Crisp County Power Commm.}, 338 S.E.2d 295, 296 (Ga. Ct. App. 1985); \textsc{Coleman v. Kootsillas}, 575 N.W.2d 527, 529 (Mich. 1998). States' immunity from suit in federal court under the Eleventh Amendment would of course remain intact. \textsc{See U.S. Const. amend. XI.}


\footnote{198. \textit{See, e.g.}, \textsc{In re Allen}, 106 F.3d 582, 593 (4th Cir. 1997); \textsc{Bowling v. Brown}, 469 A.2d 896, 903 (Md. Ct. Spec. App. 1984); \textsc{Bego v. Gordon}, 407 N.W.2d 801, 808-09 (S.D. 1987); \textsc{Camacho v. Samaniego}, 954 S.W.2d 811, 822 (Tex. App. 1997).}}
3. Legislative Remedies

If neither tort nor due process claims will lie under current law, state legislatures remain available to hear property owners' grievances and to provide remedies. State legislatures have in recent years shown new solicitude for property owners' claims under the Takings Clause and have enacted statutes to provide compensation to property owners where state or local regulation reduces the value of property but does not rise to the level of a constitutional taking as defined by the courts. For example, Texas's Private Real Property Rights Preservation Act requires state agencies to prepare "takings impact assessments" to determine the effects of proposed government actions on private property and requires agencies and localities to pay compensation to property owners whose real property values are diminished by twenty-five percent or more. The Texas statute and those of its kind in other states at least suggest that some state legislatures may be open to legislation providing compensation for otherwise noncompensable ultra vires takings. Property owners might also lobby their state legislatures to change their states' tort claims statutes to waive sovereign immunity for ultra vires actions or to enact private bills to provide relief for individual property owners.

In general, one might expect legislatures to be favorably disposed to a property owner's complaint of an ultra vires taking, as the agency has violated legislative will in acting ultra vires. This is especially true in the cases that we should be most worried about, where evidence indicates that an agency has intentionally acted to harass a property owner. In such cases, in addition to the legislative remedies already mentioned, the legislature may rely on its usual mechanisms for sanctioning rogue agencies.


203. Cf. generally JOSEPH P. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION (1964) (discussing the federal legislature's tools for controlling executive agencies, including investigation, control of appropriations, and the legislative veto). These sanctions admittedly would not provide the property owner any compensation, but would deter similar agency behavior in the future.
Both concerns of interpretive economy and the intuition of fairness expressed in the Takings Clause and in judicial interpretations of the Clause in the end point away from the Takings Clause’s just compensation remedy for ultra vires actions. Tort law, the constitutional requirement of due process, or new legislation may present more appropriate alternatives. To be sure, plaintiffs face roadblocks under any of those approaches, but establishing a just compensation remedy under the Takings Clause is not worth the damage done to the language and purposes of the Clause.

CONCLUSION

Two independent arguments, rooted in the text of the Takings Clause, support rejecting claims for just compensation leveled at state ultra vires actions. The Takings Clause’s state action requirement, in league with principles from the law of agency, suggests that ultra vires actions cannot be compensable under the Takings Clause; where government agents act without authority, their acts are their own and not those of the state. The Supreme Court has applied such a theory to claims brought against the federal government. Because the Court’s theory is equally applicable to state governments, the Supreme Court cases and the agency principles they reflect should be read to preclude just compensation for ultra vires takings claims at the state level as well.

The public use requirement of the Takings Clause demands that all compensable actions serve a public purpose. Such a purpose must be identified in the first instance by the legislature or by an agency to whom the job has been delegated expressly or by implication. Where a regulatory action lacks legislative authorization, the legislature cannot be said to have approved the action’s purpose as public. As a result, the public use requirement prohibits payment of just compensation for unauthorized actions.

Many may complain that the rule elaborated in this Note is unfair and point out that fairness has long been a lodestar of takings law. In fact, courts have relied on fairness to identify which actions can be said to rise to the level of a “taking” and assumed requirements of the Takings Clause are met. Where those requirements are not met, however, unfairness of the result should not dissuade courts from refusing relief under the Takings Clause. Claimants might instead look to other potential bases for relief, such as the Due Process Clause, the common law of tort, or even new legislation. Relief from those sources is admittedly uncertain, but that should not lead courts to reject an “otherwise proper” interpretation of the Takings Clause.