TakeTok: Does a TikTok Ban Violate the Takings Clause?

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ABSTRACT

In 2024, President Biden signed the Protecting Americans from Foreign Adversary Controlled Applications Act (PAFACA), which required TikTok's parent company ByteDance to sell TikTok to a company in a "non-adversarial" country or be banned from the United States. TikTok challenged the regulation, in part, as a violation of the Fifth Amendment's Takings Clause, which would permit the government to ban TikTok so long as it compensates ByteDance. Because PAFACA applies to applications beyond TikTok, it raises a broader question: does the Takings Clase require government compensation for bans on foreign web services? This Comment argues the answer is no.

As a regulatory taking, a ban is subject to the Penn Central *test. However, there is little guidance from the Supreme Court on how* Penn Central *applies to regulations of intangible assets or regulations based on national security concerns. In its absence, a contradictory array of lower court opinions has filled the void.*

This Comment seeks to harmonize those discordant lower court decisions through the example of the TikTok ban. It does so by suggesting that the "reasonable investment-backed expectations" prong of Penn Central *should be conceptualized as prescribing an inquiry into (1) whether the ends sought to be accomplished by the government have historical antecedents, and (2) whether the specific means employed by the government are within the reasonable expectations of the specific regulated entity. Under this view of the* Penn Central *test, the Comment next argues that two nineteenth-century exceptions to the Takings Clause—the contraband exception and national security principle—should be factored into the reasonable investment-backed expectations prong of* Penn Central. *In so doing, the Comment harmonizes discordant lower court rulings, maintains fidelity to existing Supreme Court precedent, and avoids absurd conclusions that invalidate important regulations. Under this view, a TikTok ban would not constitute a taking.*

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I. INTRODUCTION

On April 24, 2024, President Joe Biden signed into law the Protecting Americans from Foreign Adversary Controlled Applications Act.[1] Emphasizing concerns that certain web services, applications, and companies may "present a significant threat to the national security of the United States," the Act identifies TikTok and its China-based parent company, ByteDance, as national security threats by name and requires the companies to rid themselves of any foreign adversarial control or be banned in the United States.[2] In other words, the Act provides ByteDance with a binary choice: sell off ownership in TikTok to a company based in a non-adversarial country, or be banned. The Act refers to that choice as "qualified divestiture."[3]

TikTok sued within weeks and claimed, in part, that qualified divestiture "effects an unlawful taking of private property without just compensation, in violation of the Fifth Amendment's Takings Clause."[4] The Takings Clause prohibits the government from appropriating private property without paying just compensation to the property owner.[5] In effect, TikTok argues that any regulation that takes the form of a qualified divestiture is unconstitutional unless the property owner is compensated.

Qualified divestiture is not a new government regulation. In the antitrust context, the government routinely requires alleged monopolies to be broken up.[6] When the government does so, it presents monopolies with a binary choice: sell or be banned.[7] That choice is effectively identical to the one presented to TikTok.

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[1] Protecting Americans from Foreign Adversary Controlled Applications Act of 2024, Pub. L. No. 118-50, div. H, 138 Stat. 895 (codified with some differences in language at 15 U.S.C. § 9901).

[2] Pub. L. No. 118-50, div. H. § 2(g)(3)(B)(ii).

[3] *Id.* § 2(g)(6).

[4] Petition for Review of Constitutionality of the Protecting Americans from Foreign Adversary Controlled Applications Act at 62, *TikTok Inc., et al v. Garland*, No. 24-01113 (D.C. Cir. May 7, 2024).

[5] U.S. CONST. amend. V.

[6] *See* Robert W. Crandall, *If It Ain't Broke, Don't Break It Up*, BROOKINGS INST. (June 14, 2000), https://www.brookings.edu/articles/if-it-aint-broke-dont-break-it-up/ [https://perma.cc/9VQZ-FBNZ] (providing a brief history of some high-profile antitrust divestiture actions in the twentieth century). For a recent example of an FTC-mandated divestiture, see Press Release, Fed. Trade Comm'n, Statement Regarding Illumina's Decision to Divest Grail (Dec. 18, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/12/statement-regarding-illuminas-decision-divest-grail [https://perma.cc/GTY4-BS2Q], noting that Illumina was required to divest from its wholly owned subsidiary, Grail. *See* Illumina, Inc. v. FTC, 88 F.4th 1036, 1044–55 (5th Cir. 2023) (providing a detailed discussion of the FTC's case against Illumina).

[7] 15 U.S.C. § 45(I) (providing that any company that violates an order from the FTC shall be subject to penalties including "mandatory injunctions" on its operations).

And, just as the regulation of monopolies generally enjoys bipartisan support,[8] so too does a qualified divestment of TikTok. Although President Biden signed the Act into law, the Act essentially codifies a prior Executive Order by President Donald Trump.[9] Moreover, the Act passed the Senate with majorities of both parties in support.[10]

Likewise, there is broad, bipartisan support for extending qualified divestiture beyond TikTok to other applications and services. When President Trump signed the Executive Order banning TikTok, he also signed an Executive Order banning China-based messaging application WeChat.[11] As well, the Act itself authorizes future Presidents to ban additional applications and services other than TikTok deemed to constitute national security threats.[12]

Whether the President and Congress may ban an app or web service deemed to be a national security threat, without compensating the parent company, is a new and important inquiry. That question is not limited only to TikTok and WeChat, nor even only to foreign-owned apps and web services. Using national security as the primary rationale, the United States government has long placed export bans on domestic-produced software[13] and technology.[14] But those bans have been challenged under the Free Speech and Due Process Clauses rather than the Takings Clause,[15] leaving little case law on whether the Takings Clause requires government compensation for bans on or forced sales of property. Compounding the novel legal argument is the novel fact pattern. The emergence of TikTok, WeChat, Alibaba, Temu, and other Chinese communications and commerce companies marks,

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[8] *See, e.g.*, Taylor Orth, *Most Americans Oppose Monopolies and Support Antitrust Laws*, YOUGOV (Nov. 6, 2023, 11:13 AM), https://today.yougov.com/economy/articles/47798-most-americans-oppose-monopolies-and-support-antitrust-laws [https://perma.cc/UD3Y-QJN2].

[9] Exec. Order No. 13,942, 85 Fed. Reg. 48637 (Aug. 6, 2020).

[10] 170 Cong. Rec. S2961, S2991-S2992 (2024).

[11] Exec. Order No. 13,943, 85 Fed. Reg. 48641 (Aug. 6, 2020). Both E.O. 13,942 and E.O. 13,943 were later rescinded by President Biden due to his belief that only the legislative branch could ban TikTok and similar services. *See* Exec. Order No. 14,034, 86 Fed. Reg. 31,423 (Jun. 9, 2021); Cat Zakrzewski & Jeff Stein, *TikTok Faces Uncertain Future After 5-Hour Congressional Thrashing*, WASH. POST (Mar. 23, 2023, 6:40 PM), https://www.washingtonpost.com/technology/2023/03/23/tiktok-ceo-congress-ban/ [https://perma.cc/WUV3-RRPZ].

[12] Protecting Americans from Foreign Adversary Controlled Applications Act, Pub. L. No. 118-50, div. H. § 2(g)(2)–(4).

[13] *See, e.g.*, United States Munitions List, 22 C.F.R. § 121.1 Category XIII (1986) (placing export controls on "cryptographic devices and *software*") (emphasis added).

[14] *See, e.g.*, Implementation of Additional Export Controls: Certain Advanced Computing Items; Supercomputer and Semiconductor End Use; Updates and Corrections, 88 Fed. Reg. 73,458 (Oct. 25, 2023) (to be codified at 15 C.F.R. § 732.2 et seq.) (banning the sale of certain computer chips to China).

[15] *See, e.g.*, Junger v. Daley, 209 F.3d 481 (6th Cir. 2000) (challenging on First Amendment grounds); Karn v. U.S. Dept. of State, 925 F. Supp. 1 (D.D.C. 1996) (challenging on Due Process grounds).

arguably, the first instance of Great Power competition with large, well–known multinational corporations on both sides.[16]

This Comment will explore whether the Takings Clause requires compensation for a forced divestiture or ban of a foreign web service. It will first offer an overview of Supreme Court and lower court decisions that implicate the Takings Clause generally and intangible assets and national security concerns specifically. In so doing, it will focus on two longstanding, but largely forgotten, exceptions to the Supreme Court's takings jurisprudence: the "contraband exception" and the "national security principle." The contraband exception permits the government to regulate contraband without effecting a taking, while the national security principle permits the government to regulate property in service of the national defense without running afoul of the Takings Clause. The Comment will also focus on the *Penn Central*[17] test for regulatory takings, which asks, in part, whether the government regulation upsets the plaintiff's reasonable investment-backed expectation that its property not be regulated.

Meshing these three doctrines together, the Comment argues that courts should refashion and weigh heavily the contraband exception within the reasonable investment-backed expectations prong of the *Penn Central* analysis to determine if the regulation effects a taking. In so doing, courts should ask two inquiries: first, whether the ends sought to be accomplished by the government have historical antecedents, and, second, whether the specific means employed are within the reasonable bound of expectations by the specific business. Next, courts should look to the national security principle in answering that inquiry for a foreign web services ban. National security is a compelling historical rationale for regulations, and national security regulations tend to take similar forms, such as import or export bans.

Applying that test to a foreign web services ban, longstanding deference to the government's national security justifications for regulations suggests that any foreign company, or any domestic company doing business abroad, ought to expect serious regulation amounting to a

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[16] *Compare* Ruth King et al., *From "Red Multinationals" to Capitalist Entrepreneurs*, 29 EUR. J. MKTG. 6 (1995) (noting that, during the Cold War, Soviet multinational corporations were rare, small, and generally serviced their parent companies rather than consumers) *and* RED MULTINATIONALS OR RED HERRINGS? THE ACTIVITIES OF ENTERPRISES FROM SOCIALIST COUNTRIES IN THE WEST (Geoffrey Hamilton ed., 1986) (finding that Soviet multinational corporations were heavily concentrated in Europe and developing economies and that Soviet multinational corporations were highly unlikely to be successful in the long term) *with* ROBERT GILPIN, U.S. POWER AND THE MULTINATIONAL CORPORATION: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT (1975) (arguing, in a foundational text in the field of international political economy, that U.S. multinational corporations were plentiful, powerful, and played a vital role in promoting U.S. foreign policy interests abroad).

[17] 438 U.S. 104 (1978).

total ban on a business. Moreover, the kind of regulation in question—qualified divestiture—amounts to little more than a fancy import ban, which is a commonly used government regulation. Thus, in the case of TikTok, there is no reasonable investment-backed expectation that the U.S. government would not force a qualified divestiture. Finally, the Comment concludes by exploring the absurd consequences that would result from weighing a 100% diminution in value more heavily than a lack of reasonable expectations against regulation.

II. THE HISTORY OF TAKINGS JURISPRUDENCE

The Takings Clause of the Fifth Amendment forbids "private property [to] be taken for public use, without just compensation."[18] The plain text of the Takings Clause places "public use" and "just compensation" requirements on the government's power to "take[]" property, but it does not define any of those terms. History is likewise unclear. The Takings Clause is among the few provisions in the Bill of Rights without discussion by Congress or the states before, during, or immediately after its ratification.[19] As such, the Supreme Court's takings jurisprudence is largely devoid of references to history or text and instead focuses more on the evolution of precedent.[20] In general, the Supreme Court's takings doctrine has evolved in three distinct periods: an early period from 1870[21] through 1921, focused primarily on direct, physical appropriations (the "Physical Appropriations" period); a middle period from 1922 through 1978, focused on regulatory takings (the "Regulatory Takings" period); and a final, modern period from 1978 to today, which focused on fleshing out the regulatory takings doctrine through application of *Penn Central Transportation Co. v. New York City*[22] (the "*Penn Central*" period). This section will examine each of those periods in order.

[18] U.S. CONST. amend. V.

[19] Nicole Stelle Garnett, *'No Taking Without a Touching?' Questions From an Armchair Originalist*, 45 SAN DIEGO L. REV. 761, 766 (2008).

[20] *Id.* at 766–67; *see also* Murr. v. Wisconsin, 582 U.S. 383, 418–19 (2017) (Thomas, J., dissenting) (arguing that the Supreme Court's takings jurisprudence is not "grounded in the original public meaning of the Takings Clause of the Fifth Amendment"). *But see* Horne v. Department of Agriculture, 576 U.S. 350, 358–59 (2015) (grounding discussion of the Takings Clause in the history of the Magna Carta and the limited number of colonial and post-independence state laws regarding takings).

[21] Although the Takings Clause was ratified far before 1870, the Supreme Court took very few cases that implicated the clause. What few cases do exist are irrelevant for this comment.

[22] 438 U.S. 104 (1978).

A. The Supreme Court's Early Takings Jurisprudence: The Physical Appropriations Period

The Supreme Court's first major takings case occurred in 1870 with *Knox v. Lee*,[23] also known as the *Legal Tender Cases*.[24] At issue in *Knox* was whether Congress had the power to create a paper currency, which Knox challenged as a taking because of the way in which it devalued his existing coinage.[25] Although the term would not be coined for many more decades, this was the Court's first regulatory takings case. A regulatory taking occurs when a government regulation impermissibly interferes with an individual's property rights, while a physical taking or direct appropriation occurs when the government literally takes or destroys the individual's property.[26]

The Court rejected Knox's argument, holding categorically that the Takings Clause applies "only to direct appropriations" of property by the government, and not to regulatory takings.[27] The Court principally reasoned that, if government regulations could effect a taking, then "a tariff could not be changed . . . or an embargo enacted, or a war be declared," paralyzing the government.[28] *Knox* thus stands for two important principles: first, the holding of the case, which is that the Takings Clause applies only to direct appropriations of property by the government[29] ("the direct appropriations principle"); and second, the general notion that courts are skittish about interpreting the Takings Clause as constraining the government's power over foreign relations and war ("the national security principle").

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[23] 79 U.S. 457 (1870).

[24] ROBERT MELTZ, CONG. RSCH. SERV., 97–122, TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY (2015).

[25] *Knox*, 79 U.S. at 552–53.

[26] For a brief discussion of the distinction between physical and regulatory takings, *see* Merrick Gables Ass'n, Inc. v. Town of Hempstead, 691 F. Supp.2d 355, 360 (E.D.N.Y. 2010).

[27] *Knox*, 79 U.S. at 551.

[28] *Id.*

[29] The understanding that the Takings Clause applies only to physical takings and not to regulations is very likely the same understanding of the Takings Clause that the Framers held. For a detailed overview of the legal context within which the Takings Clause was adopted, see John F. Hart, *Land Use in the Early Republic and the Original Meaning of the Takings Clause*, 94 N.W. L. REV. 1099, 1099–1147 (2000) (finding generally that land was heavily regulated without compensation during the Early Republic). For an explanation of James Madison's personal views on the Takings Clause's inapplicability to regulations and speculation on the basis for those views, see William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 836–47 (1995).

1. Early evolution of the direct appropriations principle and the creation of the contraband exception

After announcing a narrow interpretation of the direct appropriations principle, the Court immediately reversed course and slowly expanded the reach of the Takings Clause over the ensuing decades. First, in *Pumpelly v. Green Bay & Mississippi Canal Co.*,[30] the Court announced that the Takings Clause could apply to non-direct appropriations, so long as the appropriation was a physical invasion (e.g., a physical destruction of property). Holding that the construction of a dam effected a taking when it flooded the plaintiff's property, rendering the land unusable,[31] the Court implicitly held that the term "direct appropriation"[32] as used in *Knox* did not literally require the government to seize the property; instead, "a serious interruption to the common and necessary use of property may be . . . equivalent to the taking of it."[33] However, during the late nineteenth and early twentieth centuries, this exception was carefully policed. Of the thirty-four major takings cases the Court heard between *Pumpelly* and 1921, the Court found a taking in only five cases, four of which involved flooding from dams.[34]

Second, during this period, the Court also created a "contraband" exception to the Takings Clause.[35] Three cases from the nineteenth century defined the contours of the contraband exception. First, upholding a local ordinance banning the transportation of offal through a residential center, the Court held in *Northwestern Fertilizing Co. v. Village of Hyde Park*[36] that the Taking Clause's limitation on the government's police power[37] does not extend to "nuisances."[38] The Court next expanded on *Fertilizing Co.* in *Mugler v. Kansas*,[39] where a Kansas

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[30] 80 U.S. 166 (1871).

[31] *Id.* at 177–78.

[32] *Knox*, 79 U.S. at 551.

[33] *Pumpelly*, 80 U.S. at 179.

[34] MELTZ, *supra* note 24, at 16–18.

[35] Lior Jacob Strahilevitz, *Hyde Park's Two Turns in the Takings Clause Spotlight*, 50 J. LEGAL STUD. 71, 84 (2021).

[36] 97 U.S. 659 (1878).

[37] Within the context of the Takings Clause, the term 'police power' is vague and ill-defined by the Court's precedents. The two things that observers generally agree on are, first, that regulations are included within the police power, and second, that the Court's modern takings jurisprudence polices (for lack of a better term) the outer boundary of the government's police power. D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 UNIV. MIAMI L. REV. 471, 507–09 (2004). Because it is easier to define what lies outside of the state's police power by applying modern takings doctrines than it is to define what is encompassed within the police power, this Comment will not spend time on the history and evolution of the police power.

[38] *Fertilizing Co.*, 97 U.S. at 667–69. For a history of *Fertilizing Co.*, *see generally* Lior Jacob Strahilevitz, *Hyde Park's Two Turns in the Takings Clause Spotlight*, 50 J. LEGAL STUD. 71 (2021).

[39] 123 U.S. 623 (1887).

regulation banned the production and sale of beer.[40] Mugler argued that this was a taking, but the Court held that a "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community cannot, in any just sense, be deemed a taking."[41] Finally, in *Reinman v. City of Little Rock*,[42] the Court held that a banned business activity need not be a nuisance *per se* to be a prohibitable nuisance under the contraband exception.[43] It is enough that the regulation be for "the health and general welfare of the people" and not "shown to be clearly unreasonable and arbitrary."[44]

Professor Strahilevitz summarized the contraband exception set forth by these three cases as a kind of per se rule: "when the state *properly* renders property contraband or justifiably declares it a nuisance," then the state does not owe compensation to the property owner.[45] This requirement implicitly contains a suggestion that courts look to the purposes behind the regulation; if the purpose is to prevent something injurious to public health or morals, then the regulation is a valid exercise of the state's police power.

2. Early evolution of the national security principle and the creation of a wartime exception

Knox's version of the national security principle seemed to apply only to regulations such as embargos and tariffs. But in the eight war-related cases between 1871 and 1922, the Court was forced to confront physical takings, not just regulations. For physical takings, the Court created a new exception: the wartime exception. The wartime exception permitted the government to physically take property without paying compensation so long as, there was an actual war and a necessity for the taking.

Two cases illustrate this point. First, in *Jaragua Iron Co. v. United States*,[46] the Court held that military destruction of private property to prevent the spread of yellow fever in Cuba during the Spanish-American War was not a taking requiring compensation because it was a necessary act during wartime.[47] By contrast, in *Portsmouth Harbor Land*

[40] *Id.* at 273.
[41] *Id.* at 301.
[42] 237 U.S. 171 (1915).
[43] *Id.* at 175.
[44] *Id.* at 177.
[45] Strahilevitz, *supra* note 35, at 86 (emphasis added).
[46] 212 U.S. 297 (1909).
[47] *Id.* at 301–02, 305–06.

& Hotel Co. v. United States,[48] where the military tested weapons by firing them over property in Maine, the Court held there likely was a taking (though it remanded for further factfinding) because it occurred during peacetime.[49]

In all, three takeaways emerge from the Court's early Takings Clause jurisprudence. First, the Court expanded the meaning of the Takings Clause to include physical damage of property. Second, the Court created a contraband exception. Third, the Court created a wartime exception, immunizing the government from compensation for takings where necessary during war.

B. The Regulatory Takings Period: The Creation of Regulatory Takings and a Change in the Court's Wartime Takings Doctrine

1. The creation of regulatory takings

As *Pumpelly* and its progeny make clear, the Court was willing to look beyond direct appropriations of property when determining if a taking occurred, but essentially only for dam flooding.[50] As such, the category of regulatory takings did not exist. But that strict adherence to the direct appropriations principle evaporated in 1922, when the Court unambiguously held in *Pennsylvania Coal Co. v. Mahon*[51] that "if a regulation goes too far it will be recognized as a taking."[52] Without saying as much, the Court overruled *Knox*'s direct appropriations principle. Consequently, there are now two types of judicially recognized takings: physical takings and regulatory takings.

After the creation of regulatory takings, both lower courts and the Supreme Court struggled in differentiating regulatory takings from permissible government regulations.[53] The judiciary's troubles with *Mahon* are largely irrelevant for purposes of this Comment, except for what cases from that time implied for the wartime exception.

[48] 260 U.S. 327 (1922). Note that *Portsmouth* was decided in 1922, once the Court was willing to entertain regulatory takings claims more seriously. Nevertheless, it is discussed here because it of its relevance to the evolution of the wartime exception.

[49] *Id.* at 328–30.

[50] *See* MELTZ, *supra* note 24.

[51] 260 U.S. 393 (1922).

[52] *Id.* at 415.

[53] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978) ("The question of what constitutes a [regulatory] 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty.").

2. Post-*Mahon* wartime cases

Although *Mahon* expanded the reach of the Takings Clause to include regulations, the Court nevertheless strengthened the national security principle that regulations done in the name of national security were not takings. For instance, when the government—without physically possessing or invading any property—forced domestic gold mines to shut down and direct resources to copper mining to ameliorate a copper shortage during World War II, the Court found there to be no taking.[54] The Court further noted that "[i]n the context of war, we have been reluctant to find that . . . *regulation[s]*" constitute a taking because war "demands the strict regulation of nearly all resources."[55]

At the same time, several other cases relating to physical takings fleshed out the wartime exception. The Court made three distinct moves. First, it implicitly limited the wartime exception's applicability only to physical takings, while regulatory takings were to be governed by the national security principle. Second, it maintained the original requirements that, for the wartime exception to apply, the alleged taking had to occur during wartime and with necessity. Third, to operationalize necessity, the Court began using the imminence of danger as its line. As a proxy for the imminence of danger, the Court often looked to the presence of an active warzone.

Three examples illustrate these principles. When the government physically took unfinished ships and materials from a domestic shipbuilder to aid the military during World War I, the Court found there to be a compensable taking.[56] Likewise, when the government took over a domestic electrical plant during World War I, the court again found a compensable taking.[57] Finally, during World War II, when the government took "immediate possession . . . of any and all mines producing coal in which a strike or stoppage had occurred or [was] threatened," the Court again found there to be a compensable taking.[58] In all three cases, the government physically took property, but there was no imminence of danger since none of the cases occurred in an active warzone.

However, when the imminence of danger was high, the Court remained resistant to finding violations of the Takings Clause. For example, in a suit to recover compensation under the Takings Clause for the destruction of privately held oil reserves in the Philippines during

[54] United States v. Central Eureka Mining Co., 357 U.S. 155, 158–60, 165–69 (1958).

[55] *Id.* at 168 (emphasis added).

[56] Brooks-Scanlon Corp. v. United States, 265 U.S. 106, 119–21 (1924).

[57] International Paper Co. v. United States, 282 U.S. 399, 407–08 (1931).

[58] United States v. Pewee Coal Co., 341 U.S. 114, 115–17 (1951).

World War II, the Court held that there was no taking.[59] The destruction of property occurred during Japan's initial invasion of the Philippines—then a U.S. colony—when U.S. forces were overrun.[60] To prevent oil from falling into the hands of the Japanese military, the U.S. destroyed large swaths of privately-owned oil reserves while retreating.[61] The Court chiefly relied upon the principle that "in times of imminent peril," the Fifth Amendment did not require compensation for takings.[62] Thus, necessity was the main rationale for the Court's holding.

C. *Penn Central*'s Three Doctrines: The *Penn Central* Period

After unsuccessfully grappling with what precisely constitutes a regulatory taking, the Supreme Court attempted to clarify its regulatory takings jurisprudence by announcing three doctrinal changes in *Penn Central Transportation Co. v. City of New York.*[63] First, the Court held that at least three factors should bear on regulatory takings inquiries: (1) "[t]he economic impact of the regulation on the claimant;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations" of the claimant; and (3) "the character of the governmental action."[64] The Court cautioned that these factors should be considered as part of an "essentially ad hoc, factual inquir[y]."[65] Second, *Penn Central* also instructed courts to conduct an analysis of "the parcel as a whole."[66] Third, *Penn Central* endorsed a means-end analysis of whether the challenged policy "substantially further[ed an] important public polic[y]."[67] These three doctrines have evolved in different ways over time.

1. The evolution of the three *Penn Central* factors

a. Regulatory takings immediately after Penn Central

In a trio of cases decided shortly after *Penn Central*—*Andrus v. Allard*,[68] *Kaiser Aetna v. United States*,[69] and *Agins v. City of Tiburon*[70]—

[59] United States v. Caltex, 344 U.S. 149, 150–53 (1952).
[60] *Id.* at 150–51.
[61] *Id.*
[62] *Id.* at 154.
[63] 438 U.S. 104 (1978).
[64] *Id.* at 124.
[65] *Id.*
[66] *Id.* at 130–31.
[67] *Id.* at 127.
[68] 444 U.S. 51 (1979).
[69] 444 U.S. 164 (1979).
[70] 447 U.S. 255 (1980).

"the Court did not treat *Penn Central* as having set forth any kind of controlling analysis."[71]

b. The Loretto *and* Ruckelshaus *revolution*

Breaking from the post-*Penn Central* trio, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[72] the Court identified the three *Penn Central* factors as a "standard[]" to apply in regulatory takings cases.[73] *Loretto* also further affirmed the Court's commitment to uphold "substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest."[74]

Despite these statements, the Court held that just one *Penn Central* factor—the character of governmental action—weighed so heavily in favor of finding a taking in instances of a permanent physical occupation that *any* "permanent physical occupation authorized by government is a taking *without regard to the public interests that it may serve*."[75] Similarly, in *Ruckelshaus v. Monsanto*,[76] the Court "again focused on [only] a single factor as determinative,"[77] this time focusing solely on Monsanto's investment-backed expectations.[78]

Loretto and *Ruckelshaus* are critical in the evolution of the *Penn Central* framework for four reasons. First, both cases provided insight into what two of the three *Penn Central* factors entailed. *Loretto* focused on the third *Penn Central* factor—the character of governmental action—and held that a "permanent physical occupation" of property is a part of the "character of the governmental action."[79] However, the Court did not decide whether that factor entailed a "single-variable distinction between invasions and land use regulations . . . or . . . a more open-ended category, encompassing a variety of potentially relevant variables, for which the distinction between invasion and regulation was simply one particularly relevant variable."[80]

By contrast, *Ruckelshaus* focused on the claimant's investment-backed interests, the second *Penn Central* factor. *Ruckelshaus* held that "a 'reasonable investment-backed expectation' must be more than a

[71] Gary Lawson et al., *'Oh Lord, Please Don't Let Me Be Misunderstood!': Rediscovering the* Mathews v. Eldridge *and* Penn Central *Frameworks*, 81 NOTRE DAME L. REV. 1, 32 (2005).

[72] 458 U.S. 419 (1982).

[73] *Id.* at 426.

[74] *Id.*

[75] *Id.* (emphasis added).

[76] 467 U.S. 986 (1984).

[77] Lawson, *supra* note 71, at 33.

[78] *Ruckelshaus*, 467 U.S. at 1005–13.

[79] *Loretto*, 458 U.S. at 434.

[80] Thomas W. Merrill, *The Character of the Governmental Action*, 36 VT. L. REV 649, 652 (2012).

'unilateral expectation or an abstract need'" on the part of the plaintiff.[81] Instead, *Ruckelshaus* identified three scenarios where the strength of an investment-backed interest varies. In the first scenario, if the plaintiff is aware of a government regulation and it voluntarily submits to that regulation, then there is no investment-backed interest.[82] The second scenario occurs when the plaintiff operates in "an industry that long has been the focus of great public concern and significant government regulation."[83] In that case, the possibility that the government would regulate the plaintiff—even if no regulations existed before the challenged regulation—is so great that there is "no basis for a reasonable investment-backed expectation" that there would be no regulation.[84] In the third scenario, when a regulation provides for certain property rights but the government ignores that regulation, the plaintiff has a distinct investment-backed expectation that the property right will be honored.[85]

Second, in both cases, the Court moved closer to using a three-factor *Penn Central* test as a standard or test rather than just an incomplete list of factors to consider. Third, *Loretto* marked the first instance of the Court opting for a per se rule over employing the *Penn Central* framework. In dissent, Justice Blackmun (joined by Justice Brennan, the author of *Penn Central*) argued that a "straightforward application" of the *Penn Central* framework would necessitate a finding of no taking, and the Court's per se rule is merely an escape device to permit the Court to avoid employing the test.[86] The Supreme Court's increasing use of per se rules will become a stronger theme later in the Comment.

Fourth, *Ruckelshaus* was the first Takings Clause case to reach the Supreme Court that dealt with purely intangible property (in *Ruckelshaus*, it was proprietary data created by Monsanto later submitted to the EPA).[87] Critically, the Court held that "intangible property rights protected by state law are deserving of the protection of the Taking[s] Clause."[88] As such, intangible property is seemingly always protected by the Takings Clause, so long as it is protected by state law.

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[81] *Ruckelshaus*, 467 U.S. at 1005 (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 499 U.S. 155, 161 (1980)).

[82] *Id.* at 1007.

[83] *Id.* at 1008.

[84] *Id.* at 1009.

[85] *Id.* at 1009–10.

[86] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 446 (1982) (Blackmun, J., dissenting).

[87] *Ruckelshaus*, 467 U.S. at 990–96.

[88] *Id.* at 1003.

c. *The final* Penn Central *cases*

Bowen v. Gilliard[89] and *Keystone Bituminous Coal Ass'n v. DeBenedictis*[90] were the final cases in which the Supreme Court applied the *Penn Central* factors. As a result, although the Court has analyzed the Takings Clause after 1987, it has provided little instruction on how to analyze the Takings Clause under *Penn Central* for over thirty-five years.

2. The death of means-ends analysis and the proliferation of per se regulatory takings

After *Keystone Bituminous*, the Court changed regulatory takings jurisprudence more rapidly and forcefully than before. First, the Court excised means-ends analysis as a standalone doctrine. Two years after *Penn Central*, *Agins* held that the means-end analysis requires an inquiry into whether the challenged regulation "substantially advance[s] legitimate state interests."[91] But, by 2005, the Court in *Lingle v. Chevron*[92] explicitly overruled *Agins* and severed means-ends analysis from takings jurisprudence as a "freestanding takings test" because it "prescribes an inquiry in the nature of a due process, not a takings, test, and [therefore] has no proper place in our takings jurisprudence."[93]

Second, the Court increasingly singled out specific instances in which a government regulation is per se a taking and thus not subject to the *Penn Central* test. The first per se test came from *Lucas v. South Carolina Coastal Council*,[94] where the Court held that a regulation that deprives a real property owner of all economically viable use of his or her land is a per se taking.[95] *Lucas* also noted in dicta that, for purposes of the economic impact *Penn Central* factor, a land owner who suffers a 95% diminution of value may nevertheless not have suffered a taking due to the ways in which other factors could balance it out.[96]

The second per se test came from *Cedar Point Nursery v. Hassid*,[97] where the court differentiated between regulations that impose use restrictions and regulations that physically appropriate property ("physical invasions"). *Cedar Point* concerned a 1975 California regulation that

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[89] 483 U.S. 587 (1987).
[90] 480 U.S. 470 (1987).
[91] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).
[92] 544 U.S. 528 (2005).
[93] *Id.* at 540.
[94] 505 U.S. 1003 (1992).
[95] *Id.* at 1003.
[96] *Id.* at 1019, n.8.
[97] 594 U.S. 139 (2021).

required farm owners to permit union organizers onto their properties intermittently and temporarily.[98] The Court held that this was a taking, reasoning that whenever a government regulation causes the government to physically acquire private property rights, it has per se committed a taking.[99] The government needs not acquire the entire bundle of property rights that comes with a property (e.g., the right to exclude, the right to possess, and so on); acquisition of only a single stick in the bundle (e.g., the right to exclude) is enough.[100] Moreover, even temporary acquisition of a single stick is sufficient to constitute a per se physical taking.[101] By contrast, whenever a government regulation imposes a use restriction on property, courts should apply the *Penn Central* test.[102] In both cases, the Court took a more protective approach to property rights by discarding *Penn Central* and applying a new per se rule.

3. The evolution of the parcel as a whole requirement

Penn Central commands courts to calculate the diminution in value, but this raises one large problem. To do so, courts necessarily must compare the current value of the property (the numerator) and divide it by the pre-regulation value of the property (the denominator).[103] But plaintiffs could misrepresent the denominator in order to claim a 100% or near-100% diminution of value. The parcel-as-a-whole requirement was created to police this issue (the "denominator problem"), and it instructs courts to look to the parcel as a whole when calculating the denominator.[104]

In contrast to other aspects of the *Penn Central* framework, the Court has strengthened and reaffirmed the parcel-as-a-whole requirement over the years. In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[105] the Court considered whether a

[98] *Id.* at 2069–70.

[99] *Id.* at 2071.

[100] *Id.* at 2072–73.

[101] *Id.* at 2074–75.

[102] *Id.* at 2071–72.

[103] Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663, 679 (1996).

[104] *See, e.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 479 (1987) ("[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, [and] one of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction'") (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967)); *Concrete Pipe & Prods. of Cal., Inc. v. Const. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 644 (1993) ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question.").

[105] 535 U.S. 302 (2002).

regulation that temporarily deprived all economically valuable use of certain parcels of land was a per se taking under *Lucas*.[106] The Court held that *Lucas* did not apply, reasoning that viewing the parcel as a whole requires not only viewing the physical parcel as a whole, but also *time* as a whole.[107] Thus, a regulation that prohibited any use of a parcel for only thirty-two months did not deprive all economically valuable use of the parcel, because the regulation was guaranteed to end at some point.[108]

In *Murr v. Wisconsin*,[109] the Court confronted whether two adjacent parcels under common ownership should be considered as a whole parcel or viewed independently. Although Justice Roberts argued in dissent that "[s]tate law defines the boundaries of . . . property at issue in regulatory takings cases,"[110] the majority reasoned that, just as the plaintiffs may not alter the denominator, the state likewise may not "limit the parcel in an artificial manner to the portion of the property targeted by the challenged regulation."[111] Instead, courts should "endeavor [to] determine whether *reasonable expectations* about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts," with reasonable expectations defined as "objective" and "derive[d] from the backgrounds customs and the whole of our legal tradition."[112]

Both *Tahoe-Sierra* and *Murr* show that the Court has taken an expansive view of what is contained in the parcel. This view generally results in the Court not finding a taking even where government regulation results in a 100% diminution of value within the formalistic physical and temporal boundaries of a parcel.

4. The dissolution of the real versus personal property distinction

Although never explicitly stated until the 1990s,[113] there has always implicitly been a distinction between real property (real estate) and personal property (everything else) within the Court's takings

[106] *Id.* at 310–12.

[107] *Id.* at 331–32.

[108] *Id.*

[109] 582 U.S. 383 (2017).

[110] *Id.* at 407 (Roberts, C.J., dissenting).

[111] *Id.* at 396.

[112] *Id.* at 397.

[113] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027–28 (1992) (holding that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless . . . [but] [i]n the case of land," a regulation depriving the owner of all economically viable use is "inconsistent with the . . . Takings Clause").

jurisprudence. Thus, in theory, the cases that dealt with regulations of real property do not apply to regulations of personal property. For example, in *Lucas*, the Court clearly articulated that a regulation resulting in a total deprivation of value in land would be a per se taking requiring compensation, but a regulation resulting in a total deprivation of value in personal property would instead be subject to the *Penn Central* test, not Lucas's per se rule.[114]

This dichotomy began to unravel in *Horne v. Department of Agriculture*.[115] While the Court reaffirmed the distinction between real and personal property within the context of *regulatory* takings, it nevertheless held that there is no such distinction in the realm of *physical* takings.[116] But the Court's language seemed to go even further than its holding, with Justice Roberts writing for the majority that the "Takings Clause . . . protects 'private property' without any distinction between different types."[117] Although the Court has not had occasion to address whether the distinction still holds with respect to regulatory takings, Justice Breyer suggested in his concurrence that the distinction between real and personal property is on its last legs, even if the notion still remains good law.[118]

5. The creation and evolution of exactions

A separate but related section of the Supreme Court's takings jurisprudence are its cases that deal with so-called "exactions." Exactions have traditionally been understood as "land-use decisions conditioning approval of development on the dedication of property to public use."[119] There are four requirements to be an exaction under this traditional definition: (1) the government must be making a *land-use* decision on whether a property owner may use her land in a certain manner; [120] (2) the government's land-use approval must be contingent upon the property owner giving up some right in *real property* (e.g., giving up some access rights through the creation of an easement for the public);[121] (3) the government's requested exaction must itself be a taking (e.g., the government taking someone's land for an easement would be a

[114] *Id.*

[115] 576 U.S. 350 (2015).

[116] *Id.* at 361.

[117] *Id.* at 358.

[118] *Id.* at 375–76 (Breyer, J., concurring in part and dissenting in part).

[119] City of Monterey v. Del Monte Dunes at Monterey Ltd., 526 U.S. 687, 702 (1999).

[120] *See* Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287, 288, 296–297 (2013).

[121] *Id.* at 295, 297–299; *see also* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 611–612 (2013) (describing that many understood the pre-*Koontz* status quo to require a private dedication of real property for a government action to be an exaction).

compensable taking);[122] and (4) the property owner's concession of a property right must be necessary for the property owner to obtain some permit or benefit from the government.[123]

If the four requirements are met and thus an exaction occurred, the exaction is not *per se* impermissible. Rather, exactions are subject to the requirements in *Nollan v. Cal. Coastal Comm'n*[124] and *Dolan v. City of Tigard*.[125] Under *Nollan*, there must be an "essential nexus" between the requirement imposed by the government upon the property owner, and the goal advanced by the government's general position against permitting the development.[126] In other words, the *Nollan* inquiry is "whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether."[127] Under *Dolan*, there must be "rough proportionality" between the exaction imposed upon the property owner and the harm the government believed would materialize if the development were approved.[128]

Of the four traditional requirements, the requirement that the property owner be asked to give up a right in the regulated property has changed due to *Koontz v. St. Johns River Water Management Dist.*[129] There, the Court held that, where the government makes a land development permit contingent upon payment of money, an exaction may have occurred.[130] In other words, the requested exaction by the government—in Koontz's case, payment of money—no longer has to be a request to relinquish some property right in the regulated property.

The requirement that exactions analysis applies only to real property is likewise on shaky grounds. Since *Horne* dissolved the barrier between real and personal property for purposes of physical invasions, it is likely that, if the government conditions use of personal property on the government's right to invade that personal property, it can be subject to exactions analysis. What is less clear is whether the sweeping language in *Horne* means that the distinction between real and

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[122] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831–834 (1987) (holding that courts must first determine if government action effects a taking before then inquiring whether "requiring . . . [the taking] as a condition for issuing a land-use permit alters the outcome; *see also Koontz*, 570 U.S. at 612 ("A predicate for any unconstitutional conditions [(exactions)] claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing.").

[123] Fennell & Peñalver, *supra* note 120, at 294–295.

[124] 483 U.S. 825 (1987).

[125] 512 U.S. 374 (1994).

[126] *Nollan*, 483 U.S. at 837.

[127] Lingle v. Chevron, 544 U.S. 528, 547 (2005).

[128] *Dolan*, 512 U.S. at 391.

[129] 570 U.S. 595 (2013).

[130] *Id.* at 614.

personal property also no longer applies for regulatory takings analysis. If the distinction no longer exists, then exactions analysis can apply to regulations of personal property just as it applies to regulations of land. If the distinction still exists, then exactions analysis cannot apply to regulations of personal property.

6. The post-*Penn Central* changes to the contraband and national security principle

Since *Penn Central*, there have been no further Supreme Court cases addressing the application of the Takings Clause to wartime or even within the national security context. However, there has been one major case addressing the contraband exception. In *Bennis v. Michigan*,[131] Michigan declared vehicles utilized for prostitution a nuisance and physically appropriated a car used for prostitution without compensation to the owner.[132] The Court upheld the state's actions under the Takings Clause.[133] However, the Court primarily engaged in Fourteenth Amendment Due Process analysis regarding the fairness of depriving an innocent owner of the car, spending only one paragraph on the takings question.[134] Nevertheless, quite circularly, the Court held that since the labeling of the car as a nuisance was not improper under the Fourteenth Amendment's Due Process Clause, it was *properly* identified as a nuisance under the Takings Clause, and there was therefore no taking.[135]

As well, *Lingle* was arguably also a case about the contraband exception. In prohibiting a means-ends test, the Court described the means-ends inquiry as "asking, in essence, whether a regulation of private property is *effective* in achieving some *legitimate* public purpose."[136] *Lingle*'s description *of Penn Central*'s means-ends test is quite similar to *Mugler* and *Reinman*'s formulations of the contraband exception. *Mugler* held that a "prohibition . . . upon the use of property for purposes that are declared, by *valid legislation*, to be injurious to the . . . community cannot . . . be deemed a taking,"[137] while *Reinman* commanded that courts should examine whether the regulation is "*unreasonable*."[138] Moreover, in some contraband cases, the Court seemed to ask whether the legislation was effective as part of its inquiry into

[131] 516 U.S. 442 (1996).
[132] *Id.* at 443–45.
[133] *Id.* at 452.
[134] *Id.*
[135] *Id.*
[136] Lingle v. Chevron, 544 U.S. 528, 529 (2005) (emphasis added).
[137] Mugler v. Kansas, 123 U.S. 623, 301 (1887) (emphasis added).
[138] Reinman v. City of Little Rock, 237 U.S. 171, 175 (1915).

whether something was properly made contraband. For example, in *Fertilizing Co.*, the Court noted that nuisance, in the form of putrid smells, was of "flagrant character" and that "the factory could not be [physically] removed," and thus the regulation was an effective means of regulation.[139]

The resemblance between *Lingle*'s proscribed inquiry and the contraband exception is striking. If the means-ends test and contraband exception truly are essentially the same inquiry, then *Lingle* seems to have proscribed the contraband exception. That said, the Court did not state that it was explicitly overruling—let alone even cite to—*Fertilizing Co.*, *Mugler*, and *Reinman*, so the current status of the contraband exception is ambiguous at worst.

7. Where the regulatory takings doctrine stands now

The status of *Penn Central*'s three major doctrines defies simple categorization. While the means-end analysis seems comfortably dead, the parcel as a whole requirement has been strengthened to include not only the physical parcel, but also time and the plaintiff's objectively reasonable expectations. Meanwhile, the contours of *Penn Central*'s three-factor test are exceedingly fuzzy as applied to physical invasions. There are now two exceptions to the *Penn Central* test that allow courts to perform an end–run around the test in favor of finding a per se taking: the "all economically beneficial use" exception and the "physical invasion" exception. Moreover, there are also exactions, whose prior limited applicability only to real property may have been undermined by *Horne*.

If the regulation in question has not effected a physical invasion, however, the Court has instructed lower courts to apply the *Penn Central* factors. But the Court has not tackled, head-on, a case necessitating the application of the *Penn Central* factors in decades. As such, the doctrine behind each of the three factors has remained static for some time. The first *Penn Central* factor (economic impact) appears to only ask to what extent the plaintiff has suffered a diminution of value.[140] The second factor (investment-backed expectations) seems to inquire whether the plaintiff had notice or reason to believe that the government would regulate its property in the challenged manner.[141] The third factor (character of government action) is "the most mysterious [factor] of all" and lacks any rigid analytical framework.[142] It is unclear whether the

[139] Northwestern Fertilizing Co. v. Village of Hyde Park, 97 U.S. 659, 667–70 (1878).

[140] John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 178 (2005).

[141] *Id.* at 183–84.

[142] Merrill, *supra* note 80, at 651.

third factor has been subsumed by *Cedar Point*'s per se rule against physical appropriations of property.[143]

Lingering in the background of the Court's modern takings jurisprudence are the contraband exception and national security principle, which appear—in their strongest forms—to be per se rules finding no taking in certain situations. It is no surprise, then, that the Supreme Court's jurisprudence on regulatory takings has been characterized by legal scholars as "perplexing"[144] and judges as "a mess."[145] Modern regulatory takings jurisprudence now resembles a garish patchwork quilt of overlapping and contradicting precedents. Yet for all the ink spilled on Takings Clause jurisprudence, *Penn Central* still remains the primary supporting beam "in the architecture of the regulatory takings doctrine."[146]

D. The Property, Public Use, and Just Compensation Requirements

Although this Comment has focused mostly on what constitutes a taking, the Takings Clause also contains requirements that the taking be of "private property," that it be done for "public use," and that "just compensation" be paid to the property owner.

This Comment assumes that a foreign web services ban would interfere with recognized property interests. For instance, TikTok and WeChat likely have advertising contracts, intellectual property, and proprietary data. Because whether contracts, IP, and data are property is likely dependent on state law,[147] and thus highly fact-specific, this Comment avoids engaging in speculation about this question.

The Public Use requirement presents a low bar and is therefore also not of much concern. The Supreme Court decided in *Kelo v. City of New London, Conn.*[148] that a physical appropriation of land satisfied the Public Use requirement because the government rationally concluded that its action served a "public purpose," though the government may never simply take property from one individual and transfer it to another if use by the public is not the rationale.[149] Although TikTok, for example, may wish to argue that the government is taking its property to give to an American company like Facebook, the facts of *Kelo* rob this argument of any force. In *Kelo*, New London used eminent domain to

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[143] *See, e.g.*, Lee Anne Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. CONST. L. & PUB. POL'Y 1, 8, 32–33 (2022).

[144] Lawson, *supra* note 71, at 2.

[145] Nekrilov v. City of Jersey City, 45 F.4th 662, 681 (3d Cir. 2022) (Bibas, J., concurring).

[146] Merrill, *supra* note 80, at 649.

[147] Ruckelshaus v. Monsanto, 467 U.S. 986, 1003–04 (1984).

[148] 545 U.S. 469 (2005).

[149] *Id.* at 477, 480–82.

take land owned by Kelo and give it to Pfizer, a large corporation.[150] A forced divestment follows a similar pattern and is clearly grounded in a national security concern, so the public use requirement is certainly met.

The Just Compensation requirement is also doctrinally simple, though complex to calculate. The Just Compensation requirement mandates "a full and perfect equivalent [payment] for the property taken"[151] based on "the market value of the property at the time of the taking,"[152] and intangible assets like the going concern value of a business[153] are factored into that calculation. In all, nothing in these requirements is of as much importance as whether qualified divestiture is a taking.

E. How Lower Courts Have Applied Regulatory Takings Doctrine to Analogous Cases and National Security Justifications

Since the creation of regulatory takings, the Supreme Court has heard only one case in which intangible assets were the primary piece of property allegedly taken and has heard none where national security concerns were the purported rationale for the regulation.[154] As a result, the Court has developed its takings doctrine(s) around physical property (and, in particular, real property). However, lower courts have dealt with many cases where the property in question is an intangible asset.

1. Analogous cases

The government routinely bans products that are currently on sale and usable by consumers, but manufacturers rarely challenge these bans as violations of the Takings Clause. That said, what few challenges have been raised have generally been struck down. *Holliday Amusement Co. of Charleston, Inc. v. South Carolina*[155] is representative of how courts have dispatched such challenges. In *Holliday Amusement*, the Fourth Circuit upheld a South Carolina regulation banning video poker gambling machines. Gambling machines were legal in South

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[150] *Id.* at 473–75.

[151] Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893).

[152] Olson v. United States, 292 U.S. 246, 255 (1934).

[153] Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) (holding that the laundromat that owned real estate physically appropriated by the government could recover intangible property in the form of the going concern value of the business).

[154] In fact, in the one instance in which the Supreme Court was squarely presented with the question of whether a government regulation was a taking in the national security context, it declined to address the issue because the question was "not ripe for review." Dames & Moore v. Regan, 453 U.S. 654, 689 (1981).

[155] 493 F.3d 404 (4th Cir. 2007).

Carolina for decades before being outlawed in 1999, prompting a rash of lawsuits.[156] In rejecting the plaintiff's Fifth Amendment challenge to the regulation, the Fourth Circuit reasoned that any "owner of any form of personal property must anticipate the possibility that new regulation might significantly affect the value of his business," and that such an expectation is especially true in the gambling industry, which has historically been "heavily regulated and highly contentious."[157]

The Fourth Circuit applied similar logic in *Maryland Shall Issue, Inc. v. Hogan*,[158] where the court reasoned that Maryland regulations on rapid-fire triggers were not a taking because there are "few types of personal property that are more heavily regulated than" guns and similar devices.[159] In both cases, the Fourth Circuit seemed to combine the contraband exception and *Penn Central*'s reasonable investment-backed expectation prong.

Contrary to the Fourth Circuit, the First Circuit found a taking in *Philip Morris, Inc. v. Reilly*.[160] There, Massachusetts required tobacco companies to disclose to the state government what ingredients were used in cigarettes, which the government could then disclose to the public writ large.[161] Tobacco companies challenged the law as a taking of trade secrets.[162] In an en banc opinion, the First Circuit, despite acknowledging that tobacco products are "[u]nquestionably . . . subject to heavy regulation by federal and state governments," nevertheless held that tobacco companies have a "reasonable investment-backed expectation that their ingredient lists will remain secret."[163] In other words, despite the historically significant regulations that the tobacco industry was subject to, the specifically challenged regulation was not within the reasonable bounds of a tobacco company's expectations.

2. National security cases

There are similarly few cases that address whether regulations enacted for national security purposes constitute a taking. The leading case is *Chang v. United States*,[164] where the Federal Circuit held that, given Congress' broad authority over international commerce, there cannot be a reasonable investment-backed interest in doing business in

[156] *Id.* at 406.
[157] *Id.* at 411.
[158] 963 F.3d 356 (4th Cir. 2020), *cert. denied* 141 S. Ct. 2595 (2021).
[159] *Id.* at 366–67.
[160] 312 F.3d 24 (1st Cir. 2002) (en banc).
[161] *Id.* at 28–29.
[162] *Id.* at 26.
[163] *Id.* at 25, 41.
[164] 859 F.2d 893 (Fed Cir. 1988).

a foreign country when there is public knowledge of deteriorating relations between that foreign country and the United States. In *Chang*, petroleum engineers alleged a taking of their contracts with a Libyan oil company due to an executive order under the IEEPA.[165] The Federal Circuit focused on two aspects of the case while rejecting the plaintiffs' claims. First, the court reasoned that, because the Constitution grants Congress the power to regulate commerce with foreign nations, "the possibility of changing world circumstances and a corresponding response by the United States government can never be completely discounted."[166] Second, the *Chang* court considered that "the overwhelming public knowledge of strained and deteriorating relations between [Libya and the United States] at the time when plaintiffs entered their contracts" indicated "the foreseeability of the risk" of regulation.[167]

Similarly, in *Allied-General Nuclear Services v. United States*,[168] the Federal Circuit rejected taking claims when the national security issue involved government regulation of nuclear fission. There, the Nixon Administration "induce[d]" Allied-General to build a nuclear power plant in the early 1970s, only for the Carter and Reagan administrations to shut it down before completion—but after over $200 million in private funds were spent—due to concerns about nuclear proliferation.[169] The Federal Circuit applied the contraband exception (which it called the "nuisance exception") as a freestanding per se rule that "no one has a legally protected right to use property in a manner that is injurious to the safety of the general public," so long as the state's regulation is "reasonable."[170] Combined, the Federal Circuit's reasoning in *Chang* and *Allied-General* is in many respects similar to the Fourth Circuit's reasoning in *Holliday Amusement* and *Maryland Shall Issue*, just applied to the national security context.

In all, lower courts have generally given wide latitude to the government to regulate in the name of national security without running afoul of the Takings Clause. Likewise, the contraband exception is still alive in some form and used to absolve the government of liability when it regulates private property. However, the line where regulation of contraband goes too far as to effect a taking remains unclear.

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165 *Id.* at 895–98.

166 *Id.* at 897.

167 *Id.*

168 839 F.2d 1572 (Fed Cir. 1988).

169 *Id.* at 1572–74.

170 *Id.* at 1576.

III. WHY COURTS SHOULD REJECT THE ARGUMENT THAT A FOREIGN WEB SERVICES BAN IS A TAKING

With so much precedent surrounding the Takings Clause, TikTok (or another similarly situated foreign web service) has three main footholds to make its argument that qualified divestiture effects a taking: first, that it is an impermissible exaction; second, that it is a per se taking under *Lucas*; and third, that it is a taking under the traditional *Penn Central* balancing test. All three arguments fail.

The first two arguments fail by virtue of *Horne*. Because *Horne* did not erase the distinction between real and personal property for regulatory takings, both exactions analysis and *Lucas*'s per se rule do not apply, since both remain confined only to real property.

The argument that qualified divestiture is a taking under *Penn Central* balancing is closer, but it should also fail. Specifically, the long-dormant contraband and wartime exceptions—consistent with *Lingle*—should not be read not as freestanding exceptions to the Takings Clause, but instead as considerations under the reasonable investment-backed expectations prong of *Penn Central*. Lower courts have essentially been reading the wartime and contraband exceptions into the *Penn Central* framework *sub silento* for decades, but have failed to clearly demarcate the boundaries of both exceptions.

Courts should ask two questions when incorporating the wartime and contraband exceptions into *Penn Central*: (1) whether the ends sought to be accomplished by the government have historical antecedents, and (2) whether the specific means employed by the government are within the reasonable expectations of the specific regulated entity. These questions are not pulled from thin air; rather, they are based on what results lower courts have arrived at in the decades since *Penn Central* was decided. Verbalizing this inquiry harmonizes discordant cases like *Holliday Amusement* and *Philip Morris* and adds predictability to an otherwise messy and unpredictable area of law.

Under this clearer inquiry, qualified divestiture of a foreign web service is not a taking because the ends have historical antecedents in the form of import bans, and the specific means employed are within the reasonable expectations of the regulated entity due to the judiciary's longstanding deference to the executive and legislature when setting national security priorities.

A. Exactions Analysis and *Lucas*'s Per Se Rule Do Not Apply to a Foreign Web Services Ban

Although the Supreme Court seems to be moving towards a world where there is no longer a distinction between real and personal

property, it has not yet done so. As a matter of law, the dichotomy between real and personal property still exists when analyzing regulatory takings. Indeed, despite some sweeping language in *Horne* that might suggest that the Court has abandoned this distinction, a significant portion of the opinion endorses and "the 'longstanding distinction' between [direct] government acquisitions of property and regulations."[171] It stands to reason, then, that if the Supreme Court continues to recognize the distinction between direct appropriations and regulatory takings, the dissolution of the distinction between real and personal property in the context of direct appropriations does not extend to regulatory takings. If the Supreme Court wanted to overrule such a fundamental aspect of its takings jurisprudence, it would say so explicitly.

If the Supreme Court ever reconsiders the question of whether the distinction between real and personal property should continue to exist for regulatory takings, it should continue to maintain the dichotomy. If the distinction between real and personal property no longer exists, then several old cases will come into conflict with one another. For example, *Lucas* held that the deprivation of all economically viable use of real property constitutes a per se taking, but *Andrus v. Allard* held that a deprivation of all economically viable use of personal property was not a taking.[172] These cases cannot coexist but for the distinction between real and personal property.

As well, real and personal property demand different regulations because of three key differences. First, real property is fixed in place, while personal property may be easily transportable. Second, personal property may cause harm merely through its existence (e.g., radioactive waste), while real property does not. Finally, real property is tangible, while personal property can be intangible.

Practically, these differences mean that the panoply of regulations the government may impose on personal property is far more extensive than the restrictions it may impose on real property. For instance, the government may ban personal property (e.g., a certain drug or website) altogether, while it obviously cannot ban the existence of land. The differences also mean that the rationale behind the government's regulation of real property may be different than its rationale for regulating personal property. Where a regulation of personal property may be justified to avoid life-threatening harm, a regulation of real property may be justified to avoid the minor harm of an unsightly building.

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[171] Horne v. Department of Agriculture, 576 U.S. 350, 361 (2015) (citing Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 323 (2002)).

[172] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027–1030 (contrasting the holdings in *Allard* and *Lucas*).

A one-size-fits-all approach to adjudicating highly varied regulations of distinct types of property based on different harms would be inadvisable, as *Allard* and *Lucas* show. When land is deprived of all economically viable use, there is nothing more the owner can do with it. The owner cannot donate it to a museum or transport it to a place where it does have economic use. But an owner of eagle feathers, owing to the transportable characteristic of personal property, may donate them to a museum, display them at a residence, or take them to another country where the owner may be able to sell them (depending on U.S. laws). Picking the *Lucas* per se rule to govern personal property would result in the government being unable to ban the sale of endangered species without providing compensation. On the other hand, applying *Penn Central* to a regulation that destroys all economic value in real property may, as *Lucas* notes, permit "the equivalent of a physical appropriation" without compensation.[173] The current regime, where regulations of personal and real property are subject to different rules, is more appropriately tailored to the circumstances surrounding such regulations.

B. The Contraband Exception and National Security Principle Are Still Good Law, But Should be Read into the Reasonable Investment-Backed Expectations Prong of *Penn Central*

Without exactions or *Lucas*, qualified divestiture may only be challenged under traditional *Penn Central* analysis. This makes the status of the contraband exception and national security principle of paramount importance. If both are still alive as independent doctrines, they may override any argument that TikTok can make; conversely, if both have been so limited as to be worthless, then TikTok can safely ignore them.

1. The contraband exception is still good law but should operate as part of *Penn Central* rather than as an independent exception to the Takings Clause

The strongest argument against the continued existence of the contraband exception is that *Lingle* functionally overruled the contraband exception. This argument is not without force. But even assuming that it is correct does not change the outcome for TikTok.

Lingle dealt with a regulation on *real* property, not *personal* property. As such, its holding is not applicable to a foreign web services ban. The following chart is the simplest illustration of this point:

[173] *Id.* at 1017.

If *Lingle* Overruled the Contraband Exception, Has *Lingle* Overruled the Contraband Exception For . . .		
	Personal property?	Real property?
Physical appropriations of . . .	No, *Bennis*.	No, *Bennis*. Since *Horne* held that the distinction between real and personal property does not exist for physical appropriations, *Bennis* applies.
Regulations of . . .	No case on point. The closest case is *Allard*, which held that a near-100% diminution in value of eagle feathers was not a taking, citing in part to the contraband exception of *Mugler*.[174]	Yes, *Lingle*.

Moreover, it is not at all clear that *Lingle* even overruled the contraband exception for regulatory takings of real property. If *Lingle* rejected the contraband exception at all, it did so "as a freestanding takings test" that is "wholly independent of *Penn Central*."[175] It would be entirely consistent with *Lingle* to consider the contraband exception not as an exception, but as a part of the *Penn Central* inquiry.

Normatively, the contraband exception should be considered as part of *Penn Central* rather than as an independent exception. As originally formulated, the contraband exception's command that "when the state *properly* renders property contraband or justifiably declares it a nuisance," then the state does not owe compensation to the property owner[176] is largely circular. It is unclear what is required for something to be *properly* identified as contraband, and no Supreme Court or lower court case fleshes this out. Permitting such a nebulous exception to

[174] Andrus v. Allard, 444 U.S. 51, 67 (1979).

[175] Lingle v. Chevron, 544 U.S. 528, 540 (2005).

[176] Strahilevitz, *supra* note 35, at 86 (emphasis added).

potentially invalidate the meaning of the Fifth Amendment, perhaps based on a judge's own personal views on what property is desirable in society, would be troubling.

That said, without any kind of contraband exception, it would be difficult to justify excepting many kinds of regulations from the Takings Clause. With no pre- and post-ratification history[177] and an ambiguous text, nothing in the Takings Clause suggests that drugs, endangered species, and other nuisances *can* be regulated. But, of course, the government must be able to regulate property "in order to prevent, or at least to reduce . . . disorder[] and dangers."[178]

The proper way to balance these competing interests is to place the contraband exception within *Penn Central*. Doing so cabins the dangers of a freewheeling judge by making the determination of something as contraband only a consideration rather than an all-or-nothing exception while still permitting the regulation of many dangerous pieces of property. As well, the contraband exception fits neatly within the reasonable investment-backed expectations prong of *Penn Central*, since whether an expectation of no regulation is reasonable depends in part on whether the property regulated is contraband. Finding the contraband exception a new home is therefore both simple and desirable.

2. The wartime exception is not applicable, but the national security principle should be a part of the *Penn Central* analysis

In its strongest form, the wartime exception requires there to be actual conflict and necessity. At the time of publication, the United States is not in a declared war, and immediate necessity likewise does not exist in the absence of an active warzone. The wartime exception may also be inapplicable because it seems to apply only to physical takings. However, even if the freestanding wartime exception is not applicable, the national security principle may be factorable into a *Penn Central* analysis.

First, unlike the wartime exception, the national security principle does and should not have a wartime requirement, which makes it a good fit for a test—like *Penn Central*—that is generally applicable across various scenarios. From the beginning, *Knox*'s national security principle broadly applied to tariffs and embargoes, quintessential examples of regulations that are imposed even outside of wars. In more recent cases, such as *Central Eureka Mining Company*,[179] the Supreme Court has held that when regulations are used during wartime, necessity in the

[177] Garnett, *supra* note 19, at 766.

[178] Village of Euclid, Ohio v. Amber Realty Co., 272 U.S. 365, 393 (1926).

[179] 357 U.S. 155 (1958).

narrowest is not required. Instead, so long as the government can point to a serious need, it has a high probability of winning.

That said, the Court has not been clear on this point. But normatively, the national security principle should not have a wartime requirement, as modern trends make determining when the country is at war—and with whom—difficult for a judge. For instance, while a judge may wish to see if the government has formally declared war, the United States has not formally declared war on a country since World War II[180] despite placing troops on the ground in Korea, Vietnam, Afghanistan, and Iraq.[181] Moreover, conflicts between countries have increasingly turned non-violent, with a focus on economic and cyber-warfare.[182] Without traditional markers of conflict, it will not always be clear when the United States is at war with other powers.

Second, like the contraband exception, the national security principle fits neatly into *Penn Central*, since, if the United States and another country are sufficiently antagonistic, then there can surely be no reasonable expectation that commerce flows freely between the two nations.[183] It also fits well as part of *Penn Central* because it provides the government with great flexibility to regulate property for vital national security purposes while also not permitting the government free rein to regulate property so long as it can pretextually justify its regulation on security grounds.

C. There is No Reasonable Investment-Backed Expectation Against Regulation

Moving the contraband exception and national security principle into the *Penn Central* framework is easy, but operationalizing them is much tougher. Doing so first requires fleshing out what a reasonable investment-backed expectation is.

Ruckelshaus provides three illustrations of when a private individual may have a reasonable investment-backed expectation,[184] but they center on two inquiries: (1) whether the private party or government has explicitly consented to regulation or promised not to regulate, and (2) whether, as a matter of history, the regulated business is in a heavily

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[180] U.S. Senate, *About Declarations of War by Congress*, https://www.senate.gov/about/powers-procedures/declarations-of-war.htm [https://perma.cc/A7LZ-9K7C].

[181] BARBARA SALAZAR TORREON & CARLY A. MILLER, CONG. RSCH. SERV., RS21405, U.S. PERIODS OF WAR AND DATES OF RECENT CONFLICTS (2024).

[182] Forward Defense, Scowcroft Ctr. for Strategy and Sec., *Today's Wars are Fought in the 'Gray Zone.' Here's Everything You Need to Know About It*, ATL. COUNCIL (Feb. 23, 2022) https://www.atlanticcouncil.org/blogs/new-atlanticist/todays-wars-are-fought-in-the-gray-zone-heres-everything-you-need-to-know-about-it/ [https://perma.cc/VA8Q-HYSH].

[183] *See, e.g.*, Chang v. United States, 859 F.2d 893 (Fed Cir. 1988).

[184] Ruckelshaus v. Monsanto, 467 U.S. 986, 1005–1010 (1984).

regulated industry. It is the latter inquiry that a foreign web services ban is principally concerned with.

The Supreme Court has not explained how to properly conduct an inquiry into whether a business is in a heavily regulated industry. However, from surveying lower court decisions, two distinct lines of analysis emerge: first, whether the *ends* the government seeks to achieve have historical antecedents, and second, whether the *specific means* selected are within the reasonable expectations of the *specific business* regulated. Although this two-pronged inquiry has never been articulated, it is essentially a slightly modified contraband exception. Instead of asking, as the Court did in *Fertilizing Co.*,[185] whether the means are effective at targeting a valid end, this version of the contraband exception asks if the means and ends have historic grounding.

The two-pronged inquiry also harmonizes cases like *Holliday Amusement* and *Philip Morris*. In *Holliday Amusement*, the Fourth Circuit found that the gambling and related alcohol industries had been regulated for decades, providing evidence that the state had sought the same ends in the past—namely, the regulation of public welfare and public health.[186] Additionally, citing to Supreme Court cases, it found evidence that the specific regulation employed—a total ban—had been used in the past to address the sale of eagle feathers and gambling.[187] Conversely, in *Philip Morris*, although the First Circuit acknowledged that there was a long history of the government pursuing the end of public health regulation, the specific regulation in question—publicizing trade secrets—was something the Supreme Court had previously declared invalid.[188] Thus, the business had a reasonable expectation against having its trade secrets divulged.[189]

Some foreign web services may want to make industry-specific arguments that the services had a reasonable, investment-backed expectation against regulation. The strongest version of this argument is that web services, being a relatively young industry, and having historically received protection from the First Amendment, reasonably relied on the historic lack of regulation when choosing to do business in the United States. But that argument is incomplete.

First, the *end* sought to be achieved by a foreign web services ban—protecting national security—has long been recognized as legitimate and given deference by courts thanks to the national security principle

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[185] Northwestern Fertilizing Co. v. Village of Hyde Park, 97 U.S. 659, 667–70 (1878).

[186] Holliday Amusement Co. of Charleston, Inc. v. South Carolina, 493 F.3d 404, 409–11 (4th Cir. 2007).

[187] *Id.*

[188] Philip Morris, Inc. v. Reilly, 312 F.3d 24, 36–41 (1st Cir. 2002).

[189] *Id.*

and wartime exception.[190] In particular, *regulations* in the name of national security have generally been found not to be takings.[191] The general rule is that there is no taking when the government regulates in the name of national security, and there are no Court cases to the contrary.

Courts should be very careful about this conclusion, however. It cannot be the case that the government can regulate all property to any degree it desires in the name of national security. But the proper way to police this issue is not to ignore the government's national security concerns, but to require a factual showing that the government is not invoking national security to accomplish a goal it otherwise could not. Instead, the government should have to name with particularity the national security concerns it is addressing and explain how the challenged regulation addresses those concerns.

Second, the *specific means* employed (a ban) are within the reasonable expectations of the *specific businesses* regulated. Congress has the power "to regulate Commerce with foreign Nations,"[192] and it has made judicious use of that power in the form of import controls and bans. Import controls have been challenged as violations of the Takings Clause, and those challenges have uniformly failed.[193]

That is for good reason. To take an extreme example, the U.S. government places an import ban on child pornography,[194] but Libya has no laws prohibiting child pornography.[195] Invalidating import controls in general would lead to the absurd conclusion that the government cannot prevent someone who visits Libya from returning to the United States with child pornography. As the Court has long acknowledged, this cannot be what the Takings Clause means: "whoever supposed that, because of [the Takings Clause] . . . an embargo [could not] be enacted."[196] A ban on foreign companies operating within the United States due to the national security risks they may pose is functionally similar to an import ban, just on intangible rather than tangible

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[190] *See supra* Parts II.A, II.A.2, & II.B.2.

[191] *See supra* Part II.B.2.

[192] U.S. CONST. art. I, § 8, cl. 3.

[193] *See, e.g.*, Mitchell Arms, Inc. v. United States, Fed. Cir., 7 F.3d 212 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1106 (1994); B-West Imports, Inc. v. United States, 880 F. Supp. 853 (Ct. Int'l Trade 1995).

[194] United States Customs and Border Protection, *Prohibited and Restricted Items* (Dec. 26, 2023) https://www.cbp.gov/travel/us-citizens/know-before-you-go/prohibited-and-restricted-items [https://perma.cc/N86D-2XST].

[195] U.S. DEP'T OF STATE, 2022 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: LIBYA https://www.state.gov/reports/2022-country-reports-on-human-rights-practices/libya [https://perma.cc/25TX-WFT3].

[196] Knox v. Lee, 79 U.S. 457, 551 (1870).

property. Thus, the specific means employed should have been well within a business's reasonable expectations.

Finally, industry-specific arguments should generally fail. When dealing with potential regulatory takings of companies operating in nascent industries, such as social media and instant messaging, courts should be wary about demanding nearly perfect historically analogous regulations.[197] There is likely to be a lack of regulation due to the young age of the industry, and historical analogies (e.g., to newspapers) are likely to be imperfect due to the technological advances (e.g., algorithms and the Internet) that have enabled the regulated businesses to become popular in the first place. At bottom, courts should not rely so heavily on history such that they do not permit history to happen.

D. There is Likely a Total Diminution in Value

The reasonable investment-backed expectation of the claimant is only one prong of *Penn Central*. A court must next consider the extent to which a foreign web services ban diminishes value.

TikTok has, and will continue to, argue that a foreign web services ban constitutes a 100% diminution in value.[198] Implicit in that argument is the contention that, when looking to the denominator, a court should look only to a foreign web service's property within the United States. This argument is correct by virtue of *Murr*[199] and, as a result, a foreign web services ban would likely constitute a 100% diminution in value.

Murr requires looking to the "reasonable expectations"[200] of the property owner. Suppose that a landowner has parcels in Montana and Idaho, and Montana passes a law regulating land. The landowner would naturally not anticipate that the Idaho parcel would be affected. Likewise, if the United States banned TikTok, there is no reason for

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[197] *See* United States v. Rahimi, 144 S. Ct. 1889, 1903 (2024) (admonishing the Fifth Circuit for searching for a "historical twin" rather than a "historical analogue" when adjudicating a Second Amendment case).

[198] Brief of Petitioners at 3, 24, 68-70, *TikTok Inc., et al v. Garland*, No. 24-01113 (D.C. Cir. June 20, 2024). TikTok argues that because the Chinese government will not allow ByteDance to sell TikTok, forced divestiture effects a 100% diminution of value. By contrast, the government argues that a forced divestiture does not result in a 100% diminution of value in the case of TikTok, because TikTok will always have the option to sell its assets for market value. Public Redacted Brief for Respondent at 84, *TikTok Inc., et al v. Garland*, No. 24-01113 (D.C. Cir. July 26, 2024). These arguments raise an interesting question regarding when a government regulation *actually* deprives property of all economically beneficial use. Although ripe for analysis, this Comment will decline to answer such a question and will instead assume, for purposes of argument, that there is a 100% diminution of value.

[199] Murr v. Wisconsin, 582 U.S. 383 (2017).

[200] *Id.* at 397.

TikTok to expect the United States's powers to extend extraterritorially. Thus, the parcel as a whole should be the United States. [201]

Furthermore, including data stored anywhere in the calculation of the economic impact of the regulation would prompt significant disagreement over what the diminution in value is. It would incentivize the company whose service has been banned to underreport the value of its assets outside the United States and overreport the value of its assets within the United States. There would need to be a factual finding regarding the true value of assets both within *and* outside the United States, which could be functionally unknowable depending on the company's form and location. All told, a foreign web services ban should, as a matter of precedent and logic, amount to a total diminution of value.

E. When *Penn Central* Factors Are in Equipoise, Expectations Should Win over Diminution of Value

The extreme lack of reasonable investment-backed expectations should, at least, bring the *Penn Central* factors into equipoise,[202] if not tip the scales in favor of a finding of no taking. If a court finds itself in equipoise, it should default to the reasonable investment-backed expectations rather than the diminution of value. To default to the 100% diminution in value would effectively make the diminution of value factor dispositive. However, the diminution in value should *never* be dispositive, as doing so would both invite absurd conclusions and be contrary to Supreme Court and lower court precedent.

Once more looking to the extreme example of child pornography, the first federal ban on child pornography was enacted in 1978,[203] while,

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[201] There is an additional legal reason why courts should look only to the *United States*. *Russian Volunteer Fleet*, 282 U.S. 481, 491–92 (1931), permits a non-American to claim a taking of property within the United States, and *Turney v. United States*, 115 F. Supp. 457, 464 (Ct. Cl. 1953), permits American companies to claim a taking by the U.S. government of overseas property. But foreign citizens generally do not have a right to the protection of the Fifth Amendment, including the Takings Clause, when the alleged violation occurred outside the United States. *See* Johnson v. Eisentrager, 339 U.S. 763 (1950) (holding that German nationals, held in confinement by the United States in Germany during World War II and alleging a right to a writ of habeas corpus under the Fifth Amendment, did not receive Fifth Amendment protections); Ashkir v. United States, 46 Fed. Cl. 438 (2000) (holding that a Somali citizen did not receive protection from the Takings Clause when he claimed the U.S. government destroyed his property in Somalia in violation of the clause). As a foreign corporation, ByteDance should therefore be unable to claim a taking of its overseas property.

[202] This Comment ignores the 'character of the government action' prong of *Penn Central*. It is entirely undefined, but what definition exists suggests that it should not play a role in this analysis, since there is nothing particularly unique about the form of the government's regulation.

[203] Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 95-225, 92 Stat. 7.

beforehand, only one[204] or six[205] (depending on the measurement used) states enacted bans on child pornography. In the remaining states, the federal ban effected a 100% diminution in value of all child pornography. To hold that, no matter how weak the investment-backed expectations are, such a ban would amount to a taking would have made banning child pornography unconstitutional without just compensation. That compensation may well have been prohibitively high, given that the industry was estimated to be worth millions of dollars with hundreds of child pornographic magazines in public circulation at the time of the ban.[206]

Although, thankfully, child pornography is now illegal and its ban is unlikely to be challenged, the government is likely to continue adding endangered animals, dangerous drugs, and deadly weapons to its list of illegal property. It would be quite "freakish"[207] to hold that the government must compensate cartels and drug dealers when it bans a new designer drug or that the government must compensate poachers when an endangered species is regulated.

Additionally, holding that the diminution in value is dispositive would be inconsistent with cases like *Allard*, *Maryland Shall Issue*, *Holliday Amusement*, and *Allied-General*. All four cases involved 100% or near-100% diminutions in value, but courts nevertheless found no taking because of exceptionally weak investment-backed expectations. In all, *Penn Central*, properly understood, commands a finding that a foreign web services ban is not a taking.

IV. CONCLUSION

When faced with a potential foreign web services ban, courts should place great emphasis on the lack of any reasonable investment-backed expectations that foreign web services be exempt from bans. That lack of reasonable expectations comes primarily from recontextualizing the contraband exception as a part of the *Penn Central* framework and considering the judiciary's long deference to government regulations in the name of national security. This conclusion comports with the Supreme Court's repeated pronouncements that the federal government must have the latitude to impose tariffs, embargoes, and other regulations in the name of national security without compensating the targets of those regulations. It also makes sense of the many lower court opinions that continue to reference the contraband exception while arriving at

[204] Jennifer M. Payton, Note, *Child Pornography Legislation*, 17 J. FAM. L. 505, 519–20 (1978).

[205] S. Rep. No. 95-438, at 10 (1977).

[206] *Id.* at 5.

[207] Gundy v. United States, 588 U.S. 128, 149 (2019) (Alito, J., concurring in the judgment).

different outcomes. Ultimately, applying this analysis to ByteDance's claims, a TikTok ban would not be a taking.