

10-24-2016

The *Armstrong* Evolution

Michael Pappas

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/endnotes>

 Part of the [Constitutional Law Commons](#), and the [Legal History Commons](#)

Recommended Citation

76 Md. L. Rev. Endnotes 35 (2016)

This Article from Volume 76 is brought to you for free and open access by DigitalCommons@UM Carey Law. It has been accepted for inclusion in Endnotes by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Essay

THE ARMSTRONG EVOLUTION

MICHAEL PAPPAS*

According to the Supreme Court, the central tenet of modern Fifth Amendment takings jurisprudence is as follows:

*“[T]he Fifth Amendment’s guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”*¹

Taken from *Armstrong v. United States*,² the above quote is termed “the *Armstrong* principle,” and it has appeared in thousands of takings cases. It stresses the ideas of comparative fairness and justice and leads courts to inquire whether individual property owners have been “singled out” to bear outsized burdens.

In a forthcoming work, *Singled Out*, I criticize the role that the *Armstrong* principle plays in the Supreme Court’s takings jurisprudence and beyond.³ As background for that article, this Essay traces how the Supreme Court elevated the *Armstrong* principle, seemingly without reflection, from a rhetorical flourish into an espoused takings dogma. Additionally, this Essay examines the true impact (or lack thereof) of the *Armstrong* principle on case outcomes. Finally, this Essay challenges whether the *Armstrong* principle represents a meaningful approach to evaluating takings claims. The *Armstrong* principle suggests that takings issues should be evaluated via a comparative distributional inquiry that assesses an individual relative to her neighbors. This Essay argues that such a suggestion is misguided, both descriptively and normatively. It posits that that a more accurate and desirable

© 2016 Michael Pappas.

* Associate Professor, University of Maryland Francis King Carey School of Law.

1. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

2. *Id.* at 40.

3. See Michael Pappas, *Singled Out*, 76 MD. L. REV. (forthcoming Nov. 2016) (manuscript at 7).

description of the takings question involves an individualist inquiry that assesses the position of a property owner before and after regulation, regardless of her comparative position relative to her neighbors.

A. *The Evolution of the Armstrong Principle from a Paraphrase into a Test*

The Court has come to endorse the *Armstrong* principle as the central inquiry in takings cases, as well as a stand-alone test for finding a taking. However, it was not originally articulated as such. Rather, Justice Black's oft-quoted passage in *Armstrong*⁴ was merely a paraphrase of the general idea behind the Fifth Amendment. However, subsequent opinions gradually elevated the general idea to a takings test of its own.⁵ This Section tracks how the *Armstrong* test crept into being through imprecision, overstatement, and oversight.

Justice Black first articulated what would become the *Armstrong* principle not as a takings test, but rather as a statement of the general motivation behind the Fifth Amendment's compensation requirement. In ruling that a compensable taking arose when materialmen's liens were transferred to the United States, Justice Black's majority opinion in *Armstrong* reasoned that "[t]he total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking.'"⁶ Thus, the takings test embraced in the opinion was whether the government had destroyed the value of the property. The entirety of the Court's analytical work to determine whether a taking had occurred centered on this question, and it merely involved comparing the property's value before and after the government action.⁷ Then, with the analysis complete, Justice Black's closing sentences offered a sweeping summation, including a general statement encapsulating the broad terms of the "Fifth Amendment's guarantee."⁸ Justice Black concluded the opinion with a rhetorical flourish, stating:

The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the

4. See Barton H. Thompson, Jr., *The Allure of Consequential Fit*, 51 ALA. L. REV. 1261, 1285 (2000) (noting that federal published takings cases have quoted Justice Black's opinion 121 times).

5. This is not the first time such confusion has come from repetition; a similar problem gave rise to *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

6. *Armstrong*, 364 U.S. at 48.

7. See *id.*

8. See *id.* at 49.

public as a whole. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here.⁹

And so the *Armstrong* principle was born.

Since then, Justice Black's language has been widely embraced in subsequent Supreme Court opinions. While many have cited the language consistent with its initial use as a broad description of the Fifth Amendment guarantee,¹⁰ a series of cases has also morphed the meaning of the *Armstrong* language, aggrandizing it from a general Fifth Amendment summary to a stand-alone measure of whether a taking has occurred.¹¹

The rise of the *Armstrong* principle as a test began in 1978 with then-Justice Rehnquist's dissent in *Penn Central Transportation Co. v. City of New York*.¹² In arguing that the regulation preventing Penn Central from developing a skyscraper above Grand Central Station amounted to a taking, Justice Rehnquist not only referenced the *Armstrong* principle as the general concept behind the Fifth Amendment,¹³ but also added *Armstrong*'s comparative fairness language into his takings analysis.¹⁴ The dissent stressed that the facts of the case, where the regulated property owner bore a multimillion-dollar burden but received no offsetting benefit, offended the fairness purpose behind the Fifth Amendment.¹⁵ As Justice Rehnquist put it:

If the cost of preserving Grand Central Terminal were spread evenly across the entire population of the city of New York, the

9. *Id.*

10. Notably, Justice Brennan's canonical *Penn Central* majority opinion echoed the *Armstrong* principle for its general Fifth Amendment summation. *Penn Cent. Transp. Co. v. New York City (Penn Central)*, 438 U.S. 104, 123–24 (1978). Additionally, this general principle was repeated in a number of takings and exaction cases since. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001); *Eastern Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (finding general purpose and to some degree incorporated the *Penn Central* analysis in terms of character of government action); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992); *Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988); *id.* at 19 (Scalia, J., concurring in part and dissenting in part); *First English Evangelical Lutheran Church of Glendale v. City of Los Angeles*, 482 U.S. 304, 318–19 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 512–13 (1987) (Rehnquist, C.J., dissenting); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (providing a general conceptual reference).

11. See, e.g., William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 877 (1995).

12. 438 U.S. at 138. It is no coincidence that the rise of this test was part of the Rehnquist Court, which is known for its property-rights project. Notably, Justice Stevens joined this dissent, but would later apply the *Armstrong* principle in *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 320–21 (2002).

13. In addition to quoting *Armstrong*, Justice Rehnquist also relied on a similar general statement about the Fifth Amendment from *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 337 (1893). *Penn Central*, 438 U.S. at 146 n.9 (Rehnquist, J., dissenting).

14. *Penn Central*, 438 U.S. at 140.

15. *Id.* at 147–50.

burden per person would be in cents per year—a minor cost appellees would surely concede for the benefit accrued. Instead, however, appellees would impose the entire cost of several million dollars per year on Penn Central. But it is precisely this sort of *discrimination* that the Fifth Amendment prohibits.¹⁶

Justice Rehnquist's analysis, which repeatedly emphasized the magnitude of the multimillion dollar burden, relied on individualist considerations.¹⁷ However, by stressing not just the size of the burden but also the fact that it was borne unevenly, his dissent coupled comparative concepts with the individualist conclusion that the multimillion dollar burden itself was simply too large a diminution in value to impose without compensation. Moreover, Justice Rehnquist's dissent injected distributional concerns by stating that the Fifth Amendment protects against "discrimination" (as opposed to uncompensated destruction of value, as identified in *Armstrong*).¹⁸ Thus, Justice Rehnquist laid the foundation for a takings test based totally on comparative fairness.

Then-Justice Rehnquist continued his advancement of the comparative takings inquiry in a 1980 opinion, where he wrote for a unanimous court.¹⁹ In *PruneYard Shopping Center v. Robins*,²⁰ the Court held that no taking arose when a California provision required a shopping center to allow speech and petitioning on its premises. When introducing the takings doctrine, the opinion cast the *Armstrong* principle as the overall test for determining whether a taking has occurred and described it as the overarching inquiry into which the *Penn Central* factors fit. The opinion states:

[T]he determination whether a state law unlawfully infringes a landowner's property in violation of the Taking[s] Clause requires an examination of whether the restriction on private property "forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." This examination entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.²¹

16. *Id.* at 148–49 (emphasis added).

17. In fact, some might argue that the analysis centered on this individualist analysis and that the reasoning was not truly distributivist at all. Justice Rehnquist was apparently motivated by the diminution of value created by the multimillion dollar burden (the same concern that is the first *Penn Central* factor and that motivated the analysis in *Armstrong*). See *id.* at 147–50.

18. *Id.* at 149.

19. Justice Blackmun joined except for one sentence. See *PruneYard Shopping Ctr. v. Robins (Prune Yard)*, 447 U.S. 74, 88–89 (1980).

20. *Id.* at 74.

21. *Id.* at 82–83 (citation omitted) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960) and citing *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

Thus, it presents the takings question as an examination of comparative fairness in which the individualistic *Penn Central* factors are points of inquiry. However, in determining that the provision at issue in the case was not a taking, the opinion employed no true comparative analysis. Rather, it reasoned that requiring *PruneYard* to allow speech, subject to time, place, and manner restrictions, did not “unreasonably impair the value or use of their property as a shopping center.”²² Thus, the takings decision was actually grounded in the individualist question of how much the regulation reduced property values and expectations rather than any true comparative question. Nonetheless, the language and conception of the comparative takings test continued to gain traction.

Following *PruneYard*, the Court briefly mentioned the comparative takings test as a supplement to the individualist *Penn Central* factors in *Connolly v. Pension Benefit Guaranty Corp.*²³ and *Bowen v. Gilliard*,²⁴ but the next major announcement of the comparative *Armstrong* standard as a stand-alone takings measure came from Justice Scalia’s majority opinion in *Nollan v. California Coastal Commission*.²⁵ In a footnote of dicta, Justice Scalia recognized the *Armstrong* principle as a separate test for takings.²⁶ Reflecting the comparative principle that being singled out for a burden is sufficient to show a taking, without examination of the magnitude of that burden, the footnote read:

If the Nollans were being singled out to bear the burden of California’s attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State’s action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” But that is not the basis of the Nollans’ challenge here.²⁷

Though of limited precedential value, the unchallenged, gratuitous footnote²⁸ offers another indication of the Court’s growing acceptance of a comparative takings test.²⁹

22. *Id.* at 83.

23. 475 U.S. 211, 227 (1986).

24. 483 U.S. 587, 606–08 (1987).

25. 483 U.S. 825 (1987).

26. *Id.* at 835 n.4.

27. *Id.* (citation omitted) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, (1960) and citing *Sandiego Gas & Elec. Co., v. City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978)).

28. There is no indication of other members of the majority not joining the footnote or of the dissent taking issue with it.

29. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 632–33 (2000) (O’Connor, J., concurring).

Justice Stevens next incorporated a comparative test in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Authority*,³⁰ where the Court considered whether a moratorium on development constituted a per se taking.³¹ Justice Stevens's majority opinion endorsed the *Armstrong* principle as a stand-alone measure of takings liability, with a section of the opinion going so far as to premise its reasoning on "why the *Armstrong* principle requires rejection" of the petitioners' arguments.³² Ultimately, the Court refused to recognize the petitioners' proposed per se rule based on both prior case law and a policy-driven argument inquiring into "whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases."³³ Rejecting the per se rule, Justice Stevens's opinion further relied on comparative concerns, noting that "with a temporary ban on development there is a lesser risk that individual landowners will be 'singled out' to bear a special burden that should be shared by the public as a whole. At least with a moratorium there is a clear 'reciprocity of advantage.'"³⁴ Thus, the opinion considered comparative fairness as a guiding principle counseling against adoption of a per se takings rule and as a metric for finding the likelihood of takings concerns.

Finally, Justice O'Connor's opinion for the unanimous Court in *Lingle v. Chevron U.S.A., Inc.*³⁵ recognized the comparative takings test in the context of a holding expressly aimed at delineating which concepts were and were not appropriate for the takings inquiry. In *Lingle*, the Court sought to clarify whether the "substantially advance[s] legitimate state interests" inquiry, which had been used in a series of prior takings cases, was actually a proper test for determining whether a regulation constituted a regulatory taking of property.³⁶ The Court held that it was not, concluding that the "substantially advances" formula was a due process inquiry rather than a takings concern. In explicating the scope of proper takings inquiries, the Court noted the importance of the individualist takings question, stating, "each of these [takings] tests focuses directly upon the *severity* of the burden that government imposes upon private property rights."³⁷ However, the opinion also endorsed distributional concerns, identifying the *Armstrong* principle as the

30. 535 U.S. 302 (2002).

31. *Id.* at 306.

32. *Id.* at 321.

33. *Id.* at 334.

34. *Id.* at 341 (first quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 835 (1987); and then quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

35. 544 U.S. 528 (2005). The opinion was unanimous, though Justice Kennedy added a concurrence as well. *Id.* at 548.

36. *Id.* at 531–32 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

37. *Id.* at 539 (emphasis added).

justification for the takings doctrine³⁸ and stating that along with individualist inquiries into the *magnitude* of a burden on private property, an alternative takings inquiry also asks “how any regulatory burden is *distributed* among property owners.”³⁹ The Court identified this distributive question as coequal with the individualist one, declaring that takings inquiries should examine “the *actual burden* imposed on property rights, *or* how that burden is *allocated*.”⁴⁰ Moreover, in criticizing the claimant’s failure to articulate a cognizable takings claim, the Court stated that “[i]n short, Chevron has not clearly argued—let alone established—that it has been singled out to bear any particularly severe regulatory burden,” implying that “singling out” is the crux of a colorable takings claim.⁴¹ That the unanimous Court articulated the centrality of a comparative test in the course of a decision premised on bringing clarity and precision to the takings inquiry is telling; *Lingle* evidences no accidental allusion to comparative questions but rather articulates comparative fairness as an independent takings test. As such, it represents the final step in the metamorphosis of the *Armstrong* principle from a general statement of Fifth Amendment concepts to a stand-alone takings inquiry.

Over the course of these cases between *Armstrong* and *Lingle*, the Court incrementally adopted a comparative takings test without ever truly examining the logic or implication of such an approach. However, such a test is misguided both theoretically and practically. While the *Armstrong* principle makes sense as a statement about the Fifth Amendment’s overall grounding in the idea of fairness, it cannot withstand conceptual scrutiny as a test for whether a taking has occurred. In *City of Monterey v. Del Monte Dunes at Monterey, LLC*,⁴² the Court actually acknowledged a similar conceptual problem with applying the *Armstrong* principle too directly as a takings test. *Del Monte Dunes*, however, was in the context of distinguishing between takings and exactions inquiries, and the Court has not had another opportunity to recognize the parallel problem with the comparative takings test. In *Del Monte Dunes*, Justice Kennedy’s majority opinion clarified that the proportionality test employed in exactions cases is distinct from the determination for whether a regulatory taking of property has occurred.⁴³ In explaining the difference, the Court briefly addressed *Armstrong*, noting that:

Although in a general sense concerns for proportionality animate the Takings Clause, see *Armstrong v. United States*, 365 U.S. 40, 49 (1960) (“The Fifth Amendment’s guarantee . . . was designed

38. *Id.* at 537.

39. *Id.* at 542 (emphasis added).

40. *Id.* at 543 (emphasis added).

41. *Id.* at 544.

42. 526 U.S. 687 (1999).

43. *Id.* at 702–03.

to bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”), we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions⁴⁴

Moreover, Justice Kennedy reasoned, “[the proportionality test] was not designed to address, and is not readily applicable to, the much different questions arising where, as here, [the case presents a regulatory taking issue]. We believe, accordingly, that the rough-proportionality test of *Dolan* is *inapposite* to a case such as this one.”⁴⁵

The distinction Justice Kennedy’s opinion draws between the proportionality and takings inquiries is similar to the distinction between the comparative fairness inquiry and the takings inquiry. Though a general concern for comparative fairness underscores the Takings Clause, the comparative question is inapposite regarding whether a property expectation has been taken. The question of fairness is fundamentally different from the question of whether a regulation has gone too far because comparative fairness is not a relevant touchstone for measuring changes in property expectations.

Just because *Armstrong* articulates an overarching Fifth Amendment principle does not make it a meaningful or appropriate takings inquiry. The Fifth Amendment guarantees fairness by mandating that when property is taken compensation is to be paid; this is the fairness concept to which *Armstrong* adheres. However, this promise of fairness via compensation does nothing to inform the threshold question of whether property has, in fact, been taken. Whether a property has been taken is a question about the change in property expectations from before the regulation to after the regulation, and this is a question that the *Armstrong* principle is not suited to answer.

B. Non-Application and Misinformation from the Armstrong Test

Among the strongest evidence that the *Armstrong* principle is unworkable as a takings test is that, despite the Court’s continued repetition of it, it has never done any work as a takings test. A survey of takings cases in the Supreme Court, lower federal courts, and state courts, indicates that despite the Court’s announced allegiance to a comparative measure of takings embodied by the *Armstrong* principle, the Court does not actually resolve takings cases on these grounds. While the Court dutifully repeats the comparative takings inquiry, it actually applies individualist measures, and thus the Court’s invocation of the *Armstrong* test vastly overstates the amount that the *Armstrong* principle influences decisions, if it influences them at all. As a

44. *Id.* at 702.

45. *Id.* at 703 (emphasis added).

result, the Court misinforms property owners and regulators that take the comparative language at its word and view it as a measure of takings coequal with the individualist takings standards.⁴⁶

Of the many takings cases that repeat the *Armstrong* standard,⁴⁷ few if any actually turn on this comparative inquiry.⁴⁸ While it is difficult to prove the negative proposition that courts announce the *Armstrong* principle as a standalone takings test but then do not actually use that test to influence the result, the review of the Supreme Court cases discussed above supports that conclusion. Though the opinions in *PruneYard*, *Nolan*, and *Lingle* go out of their way to incorporate the *Armstrong* principle as more than just a general statement about the Fifth Amendment, the comparative analysis does not appear to be the primary grounds, if any grounds, for the decision in any of these cases.⁴⁹ The Court's opinion in *Tahoe-Sierra* comes the closest to actually using the *Armstrong* principle, but even there it is supplemental to other case law analysis.

Moreover, an analysis of all citations to the *Armstrong* principle in lower federal courts and state courts indicates the same result: that the *Armstrong* principle is oft-cited but never the ultimate grounds for resolving a case. These cases citing *Armstrong* tend to fall into one of four categories. First, some cases simply cite and repeat the *Armstrong* principle, usually as a general tenet of takings law.⁵⁰ Second, some cases cite the *Armstrong* principle as a component of one of the factors in the *Penn Central* balancing test or cite *Armstrong* as an addition after applying an individualist takings measure.⁵¹ Third, some cases cite *Armstrong* in reliance on its narrow holding to support the assertion that liens or comparable types of property amount to property interests for the purposes of the takings clause.⁵² Finally, a fourth

46. See Pappas, *supra* note 3, at Part III.A.4.

47. See *supra* Part A; see also Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 21 (2008).

48. See Davidson *supra* note 47, at 44.

49. Cf. Nadav Shoked, Response, *Property's Perspective (or of Whom to be Jealous)*, 161 U. PA. L. REV. ONLINE 118 (2013), <https://www.pennlawreview.com/online/161-U-Pa-L-Rev-Online-118.pdf> (arguing that the cases on which Strahilevitz relies for relativism actually resolve on absolutist grounds).

50. A full citation to the hundreds of cases that fall in this category is on file with the author. A representative sample of cases includes: *Cape Ann Citizens Ass'n v. City of Gloucester*, No. 96-2327, 1997 WL 459079, at *4 (1st Cir. Aug. 13, 1997); *Valles v. Pima County*, 776 F. Supp. 2d 995, 1003 (D. Ariz. 2011); *Town of Gurley v. M & N Materials, Inc.*, 143 So. 3d 1, 20 (Ala. 2012).

51. A full citation to the hundreds of cases that fall in this category is on file with the author. A representative sample of cases includes: *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 42 (1st Cir. 2002); *Golden Gate Hotel Ass'n v. City & Cty. of San Francisco*, 864 F. Supp. 917, 925 (N.D. Cal. 1993); *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 641-42 (Minn. 2007).

52. A full citation to the many cases that fall in this category is on file with the author. A representative sample of cases includes: *1256 Hertel Ave. Assocs., LLC v. Calloway*, 761 F.3d 252, 263 (2d Cir. 2014); *City of Oakland v. Oakland Raiders*, 646 P.2d 835, 839 (Cal. 1982).

set of cases cites *Armstrong* for the general propositions that the destruction or seizure of valuable property can amount to a taking but that not every government action affecting property is necessarily a taking.⁵³ There are also cases that fall outside of these categories,⁵⁴ but, again, none applies *Armstrong* as the primary (or even major) source of reasoning or decision in a case. Of all these cases, none of them offers a robust or even meaningful application of the *Armstrong* principle as a test for whether a taking has occurred.

C. Administrability

Finally, a comparative measure of takings creates administrability problems by introducing an undefined set of possible comparators to the takings inquiry. Individualist measures for takings may involve muddled, ad hoc factual inquiries, but at least the comparators are defined and identifiable: a court can consider the situation of the property holder pre-regulation and post-regulation. A comparative measure lacks this definition of relevant comparators; asking if an individual is singled out or bears an excessive burden begs further questions. Against whom and how many others should the court compare? For example, does a regulation single out a property owner if it affects only one, only ten, only one hundred, or only one thousand? Does there need to be a count of all parties affected by a regulation before meaningfully determining whether some are singled out? Moreover, the comparative inquiry also forces a question of how abstractly to define the burden—too narrowly and a singling out is almost certain; too broadly and the more distributed the burden appears.⁵⁵ A comparative takings inquiry is “inherently indeterminate,”⁵⁶ introducing additional subjectivity to an already ad hoc doctrine. Moreover, this indeterminacy helps explain why the comparative language is so often coupled with an actually individualist analysis under the *Penn Central* factors; those at least give some criteria to evaluate. As Justice O’Connor put it, in a marvelous example of understatement, “[t]he

53. A full citation to the many cases that fall in this category is on file with the author. A representative sample of cases includes: *In re Metmor Financial, Inc.*, 819 F.2d 446, 450–51 (4th Cir. 1987); *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 542 (D.C. 2011).

54. A full citation to the many cases that fall in this category is on file with the author. A representative sample of cases includes: *United States v. Am. Elec. Power Serv. Corp.*, 258 F. Supp. 2d 804 (S.D. Ohio 2003) (considering how *Armstrong* might influence a Fourteenth Amendment Equal Protection analysis); *Abney v. Alameida*, 334 F. Supp. 2d 1221, 1230 (S.D. Cal. 2004) (holding that the plaintiff was rightfully meant to bear a public burden but that the *Armstrong* test was moot because the case was governed by the Due Process Clause); *Alto Eldorado Partners v. City of Santa Fe*, 664 F. Supp. 2d 1213, 1218–20 (D.N.M. 2009) (addressing a claim by the plaintiffs that *Armstrong*’s relativist language reduces the requirement of ripeness for Takings Claims and finding that the test only applies to ensuring compensation for unfair government takings).

55. *See, e.g.*, Shoked, *supra* note 49, at 124.

56. Davidson, *supra* note 47, at 37–38.

concepts of ‘fairness and justice’ that underlie the Takings Clause, of course, are less than fully determinate.”⁵⁷ This Essay suggests that the concepts are so much less than fully determinate that they make for a takings test that is both unworkable and illogical.

Moreover, there are serious questions involving the institutional competence of courts as arbiters of such a fairness test. As Buzz Thompson has noted, “[g]iven the absence of any fairness criterion inherent in the takings protections themselves, a fairness rationale also raises the question of why the courts are a more appropriate institution than Congress to determine the fairest means of allocating the cost of particular public goods or services.”⁵⁸

A comparative approach frustrates the takings analysis and also works against the predictability that the Court has attempted to introduce to the takings inquiry through the adoption of bright-line, per se takings standards. A distributivist measure of takings is simply a more complex inquiry than an individualist measure, and as a result it is harder to administer.

D. Conclusion

While Justice Black’s famous statement of the *Armstrong* principle might serve as a general articulation of the compensation requirement underlying the Fifth Amendment,⁵⁹ it cannot serve as a meaningful test to determine whether property has been taken. The Fifth Amendment embraces a general concept of fairness by requiring that compensation be paid when property is taken, and this compensation indeed plays a role in “bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁶⁰ It accomplishes this by dispersing burdens among taxpayers. But, the Fifth Amendment’s concern with fairness arises only *after* the requisite finding that a taking has occurred.

However, the inquiry as to whether a taking has, in fact, occurred should incorporate no comparative fairness question. It should merely ask whether regulation has gone too far in reducing property expectations. To identify a taking, a court needs to ask first whether a property interest exists and, if so, whether a regulation has gone too far from a recognized baseline of expectations to amount to a taking. This inquiry does not require comparing one property owner to another because the Fifth Amendment does not call for compensation whenever property is treated relatively differently. Rather, it calls for compensation when property is taken, and the question of a taking

57. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring).

58. Thompson, *supra* note 4, at 1287; *see also id.* at 1296.

59. That is, it may inform why compensation is paid.

60. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

revolves around a reduction of the number of sticks in the bundle, not a comparison to other bundles. Thus, while the concept of fairness and justice explains the need to compensate, it does not provide a measure for whether a taking has occurred.

The *Armstrong* principle is simply not suited for identifying takings. But, then again, the *Armstrong* language was never meant to do so. Takings cases have canonized Justice Black's words as an article of faith, but this faith has been a blind one. Through rote and imprecision, the Court has mythologized a turn of phrase into a fundamental principle of the takings inquiry. By tracing the *Armstrong* evolution, this Essay seeks to demystify the *Armstrong* principle and clarify its place in the takings jurisprudence.