Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings

*Andrew W. Schwartz**

"The most important thing we do is not doing."[1]

I.
INTRODUCTION

Ask any American, even the staunchest advocate for the primacy of individual property rights over the interests of the collectivity, and that person will take for granted at least three propositions: first, that democracy is preferable to oligarchy, monarchy, or despotism; second, that the system of government in the United States, from the federal level down to the local level, is a democratic one; and third, that policy-making in a democratic government should reside in a popularly elected legislature. To what extent, however, do the courts promote these democratic ideals in reviewing government regulation of economic activity? Unfortunately, through the expansion of the doctrine of "regulatory takings," the democratic regulation of economic affairs is in some jeopardy.

How did this happen? The explanation lies in the Supreme Court's recent interpretations of the Takings Clause of the Fifth Amendment.[2] Under that Clause, the "taking" of property re-

* Deputy City Attorney, City and County of San Francisco, California. Adjunct Professor of Law, Golden Gate University, San Francisco, California. J.D., UCLA, 1979. B.S., Stanford University, 1976. The views expressed in this article are those of the author and do not necessarily represent the views of the San Francisco City Attorney. The author thanks Tim Lee, Buck Delventhal, Martin Greenman, and Cynthia Jawad for their assistance in preparation of this article. The author also extends a special thank you to Ellen Forman for her invaluable editorial comments and John Echeverria, Douglas Kendall, and Timothy Dowling for contributing key ideas.

1. Supreme Court Associate Justice Louis Brandeis, *quoted in* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 71 (1962).

2. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

quires government compensation.[3] While the Framers of the Constitution intended the Takings Clause to apply only to direct physical appropriation of property,[4] since the Supreme Court's 1922 decision in *Pennsylvania Coal Co. v. Mahon*,[5] the Court has mandated compensation for *regulation* that severely limits use or value of property. The Court's innovation in *Mahon* was equating a regulation that destroys the entire value of property, known as a "total" taking, with direct appropriation.

After *Mahon*, however, the Court did not issue another regulatory takings decision until 1978 in *Penn Central Transp. Co. v. City of New York*.[6] *Penn Central* ultimately proved to be the seed for judicial activism in economic policy-making unseen since the era of *Lochner v. New York*,[7] in which judges struck down health and safety regulations under the Due Process Clause in reliance on a laissez-faire philosophy of government. The expansion of government liability for takings begun in *Penn Central* has produced a disturbing anti-democratic trend in the formulation of economic policy.[8]

In *Penn Central* and other cases, the Supreme Court has moved away from a standard for takings liability that had been the regulatory equivalent of a direct appropriation of property. In particular, the Court has adopted two tests for takings that depart from such equivalency.

First, in *Penn Central*, the Supreme Court established a partial regulatory takings test. A property owner may claim compensation for a partial regulatory taking where the regulation reduces

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3. *See id.*

4. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992); WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 16 (1996).

5. 260 U.S. 393 (1922).

6. 438 U.S. 104 (1978).

7. 198 U.S. 45 (1905).

8. While "land use cases . . . are central to almost all American property rights controversy, and primarily fuel the property rights movement," claimants have invoked the Takings Clause to defeat government regulation of a broad spectrum of real and personal property, involving most commercial activity. Joseph L. Sax, *Takings: Getting Back to Basics*, presented at Conference on Litigating Regulatory Takings Claims, Oct. 10-11, 2002, Boalt Hall (Berkeley), Cal., at 1. For insightful histories of the organized movement to expand governmental liability for takings and, in the process, roll back environmental, health, and safety regulations adopted in the 1960's and 1970's, see DOUGLAS T. KENDALL & CHARLES P. LORD, THE TAKINGS PROJECT: USING FEDERAL COURTS TO ATTACK COMMUNITY AND ENVIRONMENTAL PROTECTIONS (1998); William Greider, *The Right's Grand Ambition: Rolling Back the 20th Century*, THE NATION, May 12, 2003.

but does not eliminate all value of the property, usually leaving substantial value remaining in the property as a whole. The partial takings test under *Penn Central* involves the consideration of three factors: (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with investment-backed expectations; and (3) the character of the government action.[9] Because a partial regulatory taking allows a claimant to receive compensation for regulation that does not produce the equivalent effect of a direct appropriation, the validity of partial takings in the text and original intent of the Takings Clause is questionable.

Second, in 1980 in *Agins v. City of Tiburon*,[10] which in turn relied on *Penn Central*, the Court introduced a means-ends test under the Takings Clause, similar to the test traditionally applied in due process analysis. Under due process analysis, courts examine whether the means of legislation fit the ends, and whether the ends are legitimate. In applying the due process means-ends test, the courts determine whether a regulation is arbitrary or capricious, having no rational basis. But instead of deferring to the judgment of legislatures and administrative permitting agencies as required under the rational basis test, the courts have, in several cases, relied on *Agins* to impose a higher standard of judicial review on regulation under the Takings Clause. As will be seen, the legitimacy of a means-ends test under the Takings Clause, as well as partial takings, is doubtful.

Perhaps in recognition of the weak foundation for partial and means-ends takings in the text and jurisprudential history of the Takings Clause, the United States Supreme Court has consistently construed the partial and means-ends takings standards narrowly. Lower courts, however, have increasingly expanded government liability for takings in reliance on the two tests, resulting in frustration of fundamental democratic processes. By continuing to endorse partial and means-ends takings tests, the Supreme Court has tacitly allowed the judiciary to subvert democratic policy-making.

In two recent decisions of the California and United States Supreme Courts, *San Remo Hotel v. City and County of San Francisco*[11] and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe*

9. *See Penn Cent.*, 438 U.S. at 124.

10. 447 U.S. 255 (1980).

11. 27 Cal. 4th 643 (2002).

Regional Planning Agency,[12] however, this anti-democratic trend in takings jurisprudence appears to have been temporarily arrested. In both cases, the courts upheld economic regulation in reliance on the concept of "reciprocity of advantage." Put simply, reciprocity of advantage assumes that the benefits and burdens of any particular economic regulation are distributed unequally. But because each property owner benefits from certain regulations that are imposed on others, the overall scheme of regulation provides a net benefit for individual property owners. Accordingly, awarding compensation to an individual property owner on the basis of the detriment from an individual regulation would confer a windfall on the property owner.[13]

Relying squarely on reciprocity of advantage, the *San Remo Hotel* and *Tahoe-Sierra* courts recognized that judges should defer to legislative judgments, and that previous expansive readings of the Takings Clause jeopardize representative democracy. By pulling takings jurisprudence back from the brink of judicial activism, these courts have affirmed the primary role of democratically-elected representatives in making economic policy.

This paper argues that if the process of economic regulation is to remain democratic, average reciprocity of advantage must be the guiding principle of substantive tests for regulatory takings. In the rare and extreme types of government regulation known as "categorical," "per se," or "total" takings — regulations that permanently deprive property of all market value or compel physical occupations[14] — compensation may fairly be awarded without frustrating democratic decision-making processes. In all other cases of economic regulation, however, the presumption that the property owner achieves a net benefit from the overall regulatory scheme should be non-rebuttable, requiring rejection

12. 535 U.S. 302 (2002).

13. The reciprocity doctrine is an outgrowth of the modern reality that all property use affects others in an interdependent society.

> A system of reciprocal benefits and burdens underlies the complex ordering of the social and individual spheres. . . . [T]he very notion of private property bespeaks a cornucopia of privileges streaming to the landowner from the public weal. Given these benefits, it is reasonable to view the restrictions placed upon landowners by the state in order to preserve the public well-being as part of their duty as social participants. Because it is the society which supports the existence of private property rights, landowners are actually benefiting themselves by acquiescing to regulations which contribute to the maintenance of that society.

Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 363 (1990).

14. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015-17 (1992).

of the takings claim. The categorical takings doctrine and the Due Process Clause provide adequate protection for property owners from unduly burdensome or arbitrary regulation.

Moreover, because individual reduction in property values from "takings" is necessarily offset by the "givings" of regulation, reciprocity of advantage is the only practical and workable criterion for judicial review of economic regulation. The alternative — accurate accounting of takings and givings — is virtually impossible. Accordingly, where regulation does not effect a categorical taking, the courts should defer to the legislative judgment that regulation effects an average reciprocity of advantage.

II.
PARTIAL AND MEANS-ENDS REGULATORY TAKINGS

A. *Representative Democracy and Majority Rule*

The American political system is a democratic republic. In a democratic republic, the citizens delegate governmental power to a small number of elected representatives. The elected representatives assembled in a legislative body exercise governmental power by enacting laws.[15] State political systems are designed to be equally democratic.[16]

Representative democracy promotes self-governance. To work effectively, a democratic system must allow citizens equal opportunity to control the decision-making agenda.[17] Each citizen

15. *See* ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 18, 159 (2001) [hereinafter DAHL, AMERICAN CONSTITUTION]. A majority vote is generally required to elect representatives and to enact laws. *See* U.S. CONST. art. I, § 7, cl. 2; ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 185 (1989) [hereinafter DAHL, DEMOCRACY]. In a republic, by electing a legislature as their legal representatives, citizens are deemed automatically to have consented to laws adopted by the legislature – even those laws that adversely affect their liberty and economic interests or that take individual property for public use. *See* Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 HASTINGS L.J. 1245, 1264-69 (2002).

16. "The United States shall guarantee to every State in this Union a Republican form of government . . . ." U.S. CONST. art. IV, § 4. *See, e.g.*, CAL. CONST. art. III, § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."); *id.* art. IV, § 1 ("The legislative power of this State is vested in the California legislature which consists of the Senate and the Assembly. . . ."); *id.* art. IV, § 8(b) ("No bill may be passed unless . . . a majority of the membership of each house concurs.").

17. *See* DAHL, DEMOCRACY, *supra* note 15, at 112-13.

must possess the right to express preferences for a decision, meaning that each citizen's vote should receive equal weight.[18]

Inherent in such self-governance is the doctrine of separation of powers between the legislative and judicial branch. "[T]he Constitution does vest each branch with certain 'core' or 'essential' functions that may not be usurped by another branch."[19] The separation of powers doctrine protects decisions of the legislature from "lateral attack by another branch."[20] The legislative branch holds authority to make social and economic policy. As the Supreme Court has consistently recognized in cases involving the powers of the other branches, the Constitution limits the role of the judiciary to restraining the *arbitrary* exercise of legislative and executive authority.[21]

In addition to the separation of powers, majority rule promotes self-determination. "[T]he strong principle of majority rule ensures that the greatest possible number of citizens will live under laws they have chosen for themselves."[22] Majority rule also produces correct decisions more often than authoritarian or other hierarchical decision-making processes, and maximizes utility.[23] James Madison recognized as a virtue of majoritarian decision-making that representatives chosen by a large number of citizens would not become "unduly attached" to individual interests and would be more prone to decide matters in the majority's interest.[24] He later stated that "a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good."[25]

In contrast, in a system dominated by judicial decision-makers focused on the interests of individual litigants, the total welfare of the community suffers. Because the majority consists of indi-

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18. *See id.* at 109.

19. People v. Bunn, 27 Cal. 4th 1, 16 (2002) (citations omitted).

20. *Id.*; *see also* Gorieb v. Fox, 274 U.S. 603, 608 (1927).

21. *E.g.*, Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994).

22. DAHL, DEMOCRACY, *supra* note 15, at 138. In the post-revolutionary war period, the citizens of the fledgling United States had "widespread faith in legislative virtue . . . . [M]ost Americans thought there was little danger that a popularly elected assembly would oppress the citizenry. As the 'voice of the people,' state legislatures 'could be trusted to perceive the common good and define the limits of individual rights.'" Harrington, *supra* note 15, at 1277 (quoting William Michael Treanor, *The Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 695, 701 (1985)).

23. *See* DAHL, DEMOCRACY, *supra* note 15, at 141-43.

24. THE FEDERALIST No. 10, at 82-83 (James Madison) (Clinton Rossiter ed., 1961).

25. THE FEDERALIST No. 51, at 325 (James Madison) (Clinton Rossiter ed., 1961).

viduals, majoritarian decision-making will generally protect a greater quantum of individual rights than judicial decision-making.[26]

B. *Constitutional Limits on Economic Regulation*

1. The Due Process Clause

How does regulation of economic activity fit into this democratic regime? The doctrine of separation of powers between the legislative and judicial branches applies to economic and social regulation.[27] The judiciary's function is to restrain the arbitrary exercise of legislative authority.[28] Faithful to this principle, since the Supreme Court's repudiation of Lochnerian substantive due process in the early part of the twentieth century and until the advent of partial and means-ends takings in *Penn Central* and *Agins*, the Court consistently applied the deferential "rational basis" test to economic regulation under the substantive Due Process Clause of the 14th Amendment.[29] Under this test, the courts presume that the government's decision is supported by the facts.[30] Substantive due process places the burden on the

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26. *See* DAHL, DEMOCRACY, *supra* note 15, at 93-94; *see also* NOVAK, *supra* note 4, at 45. During the period from the Revolutionary War through the late 1800s, it was generally believed that conduct designed to avoid injury to others in the community did not

> limit or detract from individual liberty. By abating a nuisance or imprisoning a criminal, courts were not destroying liberties, they were defending the rights, actually expanding the liberty, of wronged citizens. . . . [T]rue freedom was always a product of reciprocal protection and respect. Liberty and the common good were not antagonistic . . . they were mutually reinforcing.

Id. This holds true in twenty-first century America.

27. *See* Gorieb v. Fox, 274 U.S. 603, 608 (1927).

28. *See* STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 94-95 (1999).

29. U.S. CONST. amend. XIV, § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."). *See, e.g.*, City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 377 (1991) ("[D]etermination of 'the public interest' in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and [Parker v. Brown, 317 U.S. 341 (1943)] was not meant to shift that judgment from elected officials to judges and juries."); United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

30. *See, e.g.*, Berman v. Parker, 348 U.S. 26, 32-33 (1954) (Court does not sit to determine whether particular housing project is or is not desirable); Zahn v. Bd. of Pub. Works, 274 U.S. 325, 328 (1927) (Court will not substitute its judgment for that of legislative body charged with primary duty to determine the question); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (if validity of legislative classification for zoning purposes is fairly debatable, the legislative judgment must be allowed to control). Even cases decided after *Penn Central* and *Agins* acknowledge that legislative judgments in local land use matters are entitled to a presumption of

party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights.[31] Legislation is not "arbitrary" if the wisdom or efficacy of the regulation is "at least debatable."[32] The courts must uphold regulation unless no reason can be conceived to support it.[33]

2. The Takings Clause

The Takings Clause limits legislative power independent of the Due Process Clause. It provides, "nor shall private property be taken for public use, without just compensation."[34] Most jurists agree that the Framers of the Constitution intended the Takings Clause to require compensation only for the government's direct appropriation of property using its power of eminent domain.[35] In *Mahon*, decided in 1922, the Supreme Court held that a public agency is also required to pay compensation for a regulatory tak-

validity. *E.g.*, Dodd v. Hood River County, 136 F.3d 1219, 1230 (9th Cir. 1998) ("The Courts of Appeals were not created to be 'the Grand Mufti of local zoning boards.'"); Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 828 (4th Cir. 1995) ("Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts . . . ."); Raskiewicz v. Town of New Boston, 754 F.2d 38, 44 (1st Cir. 1985) ("[F]ederal courts do not sit as a super zoning board or a zoning board of appeals.").

31. *See* E. Enters. v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring and dissenting) ("Normative considerations about the wisdom of government decisions . . . [are] in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the government's power to act."); *Id.* at 554 (Breyer, J., dissenting) ("[A]t the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good."); Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994) ("[T]he burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights.").

32. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 468-69 (1981).

33. *See* Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-96 (1962).

34. U.S. CONST. amend. V.

35. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 321-22 (2002) ("[The] plain language [of the Takings Clause] requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property."); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992); NOVAK, *supra* note 4, at 16; William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

ing of private property where the regulation "goes too far."[36] How far is "too far" has been a question subject to considerable debate. Most case authority, however, requires a regulation to be extreme before the judicial branch may interfere.[37] Courts generally reject takings claims unless the regulation is so burdensome that it is the functional equivalent of a direct appropriation of property by the government.[38]

In takings jurisprudence, regulations functionally equivalent to direct condemnations are known as "categorical," "per se," or "total" regulatory takings.[39] Categorical takings consist of regulations that either deprive property of all value or compel the property owner to submit to a physical occupation of the property by the public.[40] Once the basic elements of a categorical taking are established, courts do not examine other factors; compensation is required.[41] Because categorical takings: (1) are functionally equivalent to the direct condemnations proscribed by the plain language of the Takings Clause; (2) require extreme government interference with private property; and (3) establish bright line rules for courts, categorical takings neither undercut the separation of powers nor jeopardize democracy.[42]

But the Supreme Court and lower courts have recently adopted partial and means-ends takings, which potentially expand government takings liability beyond categorical takings to virtually every economic regulation. The advent of partial and means-ends takings contradicts the original theory underlying regulatory takings—namely, that the government is liable for a regulatory taking only where the regulation has an impact equivalent to a direct condemnation. Courts are applying the partial and means-ends tests expansively, providing an opportu-

36. 260 U.S. at 415; *see also* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 316 (1987).

37. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985) (stating that "land-use regulation may under extreme circumstances amount to a 'taking' of the affected property").

38. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 199 (1985) (explaining that the Court's task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession").

39. *Lucas*, 505 U.S. at 1015-17.

40. *See id.*

41. *See id.*

42. While there exist compelling arguments against regulatory takings of any sort, an analysis of this issue is beyond the scope of this article. For a discussion of these arguments, see Treanor, *supra* note 35, and J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89 (1995).

nity for activist judges to legislate. Accordingly, these tests are inconsistent with fundamental democratic principles.

C. *Partial and Means-Ends Takings*

Since *Penn Central* in 1978, courts are increasingly engaging in legislating under the guise of requiring compensation for "regulatory takings." Applying partial and means-ends takings tests, courts have crossed the line from merely vetoing regulation that infringes on fundamental rights to making economic policy.

1. Partial Takings

a. Origins of Partial Takings

While *Mahon* held that total regulatory takings require compensation, the Court hinted at the possibility of partial takings by suggesting that a taking "is a question of degree—and therefore cannot be disposed of by general propositions."[43] In 1978, the Supreme Court adopted a partial regulatory takings test in *Penn Central.* A partial taking requires compensation even though the regulation deprives the owner of only a part of the use or value of the total property.

Although the Supreme Court stated in *Penn Central* that the Court "has been unable to develop any 'set formula'" for determining when a regulation "goes too far" and effects a taking, the Court "identified [three] factors that have particular significance:" (1) "[t]he economic impact of the regulation;" (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action."[44]

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43. 260 U.S. at 416.

44. 438 U.S. at 124. Courts typically analyze all three factors in a partial takings case, but may choose to emphasize one or more of the factors depending on the individual facts. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 634-35 (2001) (O'Connor, J., concurring) (stressing importance of investment-backed expectations where takings claimant acquired property after challenged statute was in effect); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (explaining that investment-backed expectations factor overwhelmed other factors). *Penn Central* partial takings cases can be organized into three different classes: (1) intensity restrictions, such as the density of housing units permitted per acre; (2) geographical restrictions preventing use of a portion of property, such as the limit on construction in the air space above Grand Central Terminal in *Penn Central*; and (3) temporal restrictions, such as the temporary moratorium on development in the Lake Tahoe Basin in *Tahoe-Sierra. See* John D. Echeverria, *Do Partial Regulatory Takings Exist?*, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 223, 224-26 (Thomas E. Roberts ed., 2002).

b. *Partial Takings Applied: Two Examples*

i. *Florida Rock*

The most extreme partial takings case is *Florida Rock Industries, Inc. v. United States*.[45] In *Florida Rock*, the Army Corps of Engineers denied the property owner permission to mine limestone in ninety-eight acres of wetlands under Section 404 of the Clean Water Act. The Corps found that the mining "would cause irremediable loss of an ecologically valuable wetland parcel and would create undesirable water turbidity."[46] The Federal Circuit found that the property was worth $10,500 per acre before denial of permission to mine, but the value dropped to $4000 per acre after denial of permission. Although the land still had substantial value after imposition of the regulation, the Federal Circuit nevertheless remanded to the Court of Claims to determine whether the government was liable for a partial taking.[47]

Despite repeated statements by the United States Supreme Court that mere diminution of value resulting from government regulation does not amount to a taking of property,[48] the Federal

45. 18 F.3d 1560 (Fed. Cir. 1994). The parties finally settled the case in 2001 for $21 million. *See* Echeverria, *supra* note 44, at 247 n.2.

46. 18 F.3d at 1563.

47. *See id.* at 1567.

48. *See* Concrete Pipe & Prods. of Cal. Inc. v. Const. Laborers Pension Trust, 508 U.S. 602, 645 (1993) ("[M]ere diminution in the value of property, however serious, is insufficient to demonstrate a taking."); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027 (1992) ("It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers . . . ."); Yee v. City of Escondido, 503 U.S. 519, 529-30 (1992) (stating that although traditional zoning regulations, such as a mining bar, transfer wealth from regulated land to neighbors' land, the transfer does not convert the regulation to a taking); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.21 (1987) ("The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received."); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 223, 225 (1986) ("Given the propriety of the governmental power to regulate, it cannot be said that the Takings Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another. . . . [I]nterference with . . . property rights . . . that adjusts the benefits and burdens of economic life to promote the common good . . . does not constitute a taking requiring Government compensation."); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982) ("States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails."); Andrus v. Allard, 444 U.S. 51, 67 (1979) ("It is true that appellees must bear the costs of these regulations. But, within limits, that is a burden borne to secure 'the advantage of living and doing business in a civilized community.'") (quoting *Mahon*, 260 U.S. at 422 (Brandeis, J., dissenting));

Circuit surprisingly concluded that the Supreme Court had not decided this issue.[49] The court suggested that partial takings are compensable because the Takings Clause does not foreclose them.[50] In reliance on the Supreme Court's earlier pronouncements, including *Mahon*[51] and *Penn Central*[52], the *Florida Rock* court proposed a highly subjective test for takings. The court held that there is "no bright line" separating compensable from noncompensable takings: "What is necessary is a classic exercise of judicial balancing of competing values."[53] The court noted that in cases of reciprocity of advantage, "paradigmatically in a zoning case" or cases where the regulation provides "a mutually beneficial environment from which all benefit and in which all can thrive," the balance shifts in favor of the government.[54] But where the benefits are "general[ly] and widely shared through the community and the society, while the costs are focused on a few," the balance favors compensation.[55] This test for takings is essentially "judges will do what is fair." As demonstrated below, insofar as partial takings rest on judges' subjective notions of what is "fair," the test is unprincipled, standardless, and undemocratic.

ii. *Action Apartment Ass'n*

Other courts have followed *Florida Rock* and have applied an expansive partial takings test to require compensation for a taking. For example, in *Action Apartment Ass'n v. Santa Monica Rent Control Bd.*,[56] a local ordinance required landlords to pay 3% annual interest on tenants' security deposits. The landlords claimed that market interest rates had recently fallen below 3%

Kimball Laundry Co. v. United States, 338 U.S. 1, 5 (1949) ("[L]oss [in value] due to an exercise of the police power[ ] is properly treated as part of the burden of common citizenship."); *Mahon*, 260 U.S. at 413 ("Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."). The Supreme Court's narrow construction of partial takings is bolstered by *Tahoe-Sierra*, in which the Court endorsed an expansive reciprocity of advantage doctrine. 535 U.S. 302 (2002).

49. *See* 18 F.3d at 1568.

50. *See id.* at 1568-69.

51. 260 U.S. at 413 (stating that "the question depends upon the particular facts").

52. 438 U.S. at 124 (explaining that takings analysis depends on "essentially ad hoc, factual inquiries").

53. 18 F.3d at 1570.

54. *Id.* at 1570-71.

55. *Id.*

56. 114 Cal. Rptr. 2d 412 (2001).

per year, effecting a *Penn Central* partial taking of the amounts overpaid to tenants.[57]

Under the economic impact *Penn Central* factor, despite acknowledging that the economic impact of the ordinance on a single property would be slight, the court nevertheless concluded that "[a] small taking is still a taking."[58] To demonstrate that the ordinance likely deprived landlords of reasonable investment-backed expectations, the court aggregated all of the landlords' "losses" citywide to reach a large, and misleading, damages figure.[59] The court failed to consider that the value of the difference between the statutory and market rates of interest paid by any single landlord for a brief period was *de minimis* in the context of the value of the landlord's investment in the rental property. That small loss had virtually no chance of depriving the landlord of a fair return on his investment. Moreover, under the "character of the government action" *Penn Central* factor, instead of evaluating the extent to which the ordinance compelled a physical occupation, the court found that the ordinance was "unusual" and not an effective mechanism for protection of renters, refusing to recognize the legislature's rationale for fixing the rate.[60] Accordingly, the court substituted its judgment for that of the elected legislature as to the efficacy of the regulation. *Action Apartment Ass'n* illustrates the extent to which the partial takings doctrine allows courts to usurp legislative power.

c. *Critique of Partial Takings*

According to advocates of expanded regulatory takings, the theoretical underpinning of the *Penn Central* partial takings test is a cryptic, well-worn, and often misunderstood sentence in

57. *See id.* at 418.

58. *Id.* at 426.

59. *See id.* at 425-26.

60. *Id.* The Santa Monica ordinance had at least two conceivable purposes that should satisfy deferential judicial review. First, requiring landlords to pay interest on security deposits reduces the cost of housing for the poor, minorities, students, young families, and seniors. It is beyond dispute that this is a legitimate purpose. Pennell v. City of San Jose, 485 U.S. 1, 12 (1988) (holding that preservation of affordable rental housing is proper public purpose). Second, although the interest on a security deposit is a relatively small amount, a system of paying annual interest on such deposits can generate accounting costs disproportionate to the amount of interest at stake. If the complexity of a fluctuating interest rate is added to the system, the accounting costs are increased. A fixed rate makes it simpler and easier for tenants to determine whether they have been paid the proper amount of interest, reduces landlords' costs to administer a system of interest payments on security deposits, and minimizes litigation over such interest.

Armstrong v. United States:[61] "The Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[62] Relying on *Armstrong's* disproportionate burden language, proponents of expansive regulatory takings have contended that a regulation that transfers any wealth, even if not a total taking, constitutes a partial taking requiring compensation for the entire dollar amount of the "wealth transfer."[63] This extreme formulation of regulatory takings cannot be squared with the Supreme Court's many pronouncements endorsing, at most, a narrow partial takings doctrine. The Court has never held that property owners are entitled to compensation whenever government action imposes a burden on them greater than the burden imposed on anyone else. To the contrary, the Supreme Court repeatedly has held that government action may disproportionately burden an individual property owner without triggering takings liability.[64] As a result, the Court has never found a land use regulation to effect a partial taking.[65]

Despite these numerous and unequivocal statements inconsistent with partial takings, the Supreme Court has continued to assert that partial takings occupy a central place in regulatory takings. In *Yee v. City of Escondido*,[66] the Court described the *Penn Central* partial takings test as "entail[ing] complex factual assessments of the purposes and economic effects of government actions."[67] In *Lucas*, the Court found a total taking, but implied that regulations falling short of a total taking may nonetheless be

61. 364 U.S. 40 (1960). The average reciprocity of advantage theory derives from *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). *See* Part II.A.2., *infra*.

62. 364 U.S. at 49.

63. *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

64. *See* note 46, *supra*; *see also* Part II.A.15, *infra*.

65. The closest the Supreme Court has come to finding a partial taking was a plurality decision in *Eastern Enterprises*, in which four justices found that a statute requiring coal mining companies to fund the health benefit plans of their former employees was a taking, applying the *Penn Central* factors. E. Enters. V. Apfel, 524 U.S. 498, 529-37 (1998). Justice Kennedy, however, concurring in the judgment that the statute was unconstitutional, concluded that it did not effect a taking, but rather that it violated substantive due process. *Id.* at 540 (Kennedy, J., concurring and dissenting).

66. 503 U.S. 519 (1992).

67. *See id.* at 523.

deemed a taking under an ad hoc analysis.[68] In *Palazzolo v. Rhode Island*, the Court denied a *Lucas* categorical taking, but remanded for a determination under *Penn Central*.[69] In her influential concurring opinion in *Palazzolo*, Justice O'Connor indicated that "*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts" for takings, forcefully arguing that the "temptation to adopt . . . per se rules . . . must be resisted."[70] Instead of applying blanket rules, according to Justice O'Connor, courts should "attend to those circumstances which are probative of what fairness requires in a given case."[71] And in *Tahoe-Sierra*, the Court assumed the continuing vitality of partial takings, stating that *Armstrong's* disproportionate burden concept "applies to partial takings as well as total takings."[72] The Court eschewed bright line rules in favor of *Penn Central's* ad hoc analysis: "The answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case."[73] Thus, the Court has adopted partial takings as the preferred test for the vast majority of takings claims.[74]

By declining definitively to limit the scope of the partial takings doctrine, the Supreme Court set the stage for a broader and anti-democratic interpretation of partial takings by the lower courts.[75]

2. Means-Ends Takings

a. Origins of Means-Ends Takings

Proponents of expanded regulatory takings also rely on *Armstrong* as the theoretical foundation for a means-ends test under

68. *See* 505 U.S. at 1015-20 & n.8.

69. *See* 533 U.S. at 630.

70. *Id.* at 634, 636 (O'Connor, J., concurring).

71. *Id.* at 635 (O'Connor, J., concurring).

72. 535 U.S. at 332 n.27.

73. *Id.* at 321. *See also id.* (stating that the Court "[r]esist[ed] the 'temptation to adopt what amount to per se rules in either direction'") (quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)).

74. *See* Gregory M. Stein, *Takings in the 21st Century: Reasonable Investment-Backed Expectations After* Palazzolo *and* Tahoe-Sierra, 69 TENN. L. REV. 891, 928-30 (2002).

75. *See, e.g.*, Machipongo Land & Coal Co. v. Pennsylvania, 799 A.2d 751, 771 (Pa. 2002), *cert. denied*, 537 U.S. 1002 (2002) (remanding challenge to regulation restricting surface coal mining to trial court for consideration of partial taking under *Penn Central* factors).

the Takings Clause. A means-ends test is concerned with the propriety of the objective of government policy — the ends — and the efficacy of the policy to achieve that end — the means. This test owes its existence to confusion as to which branch of government determines economic policy: democratically elected legislatures or courts. Two cases are responsible for this confusion: *Agins v. City of Tiburon*[76] and *Loveladies Harbor, Inc. v. United States*.[77]

i. The *Agins* "Substantially Advance" Test

Agins held that courts are empowered to find that a regulation requires compensation under the Takings Clause if the regulation fails to "substantially advance legitimate state interests."[78] This "substantially advance" test conflicts with the plain language of the Takings Clause, which requires the payment of compensation for "taking" of private property for public use. It is difficult to discern how the failure of a regulation to fulfill a valid public purpose could "take" property. Before *Agins*, the Takings Clause had never been understood as a substantive limit on governmental power.[79] Moreover, the "substantially advance" test lacks any basis in takings jurisprudence. Nevertheless, courts have used this test to justify interfering with legislative policymaking under a variety of circumstances, none of them appropriate. As shown below, the test subverts democracy.

The *Agins* "substantially advance" test is in fact a reincarnation of the defunct substantive due process doctrine of the era of

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76. 447 U.S. 255 (1980).

77. 28 F.3d 1171 (Fed. Cir. 1994).

78. 447 U.S. at 260.

79. *See* Harrington, *supra* note 15, at 1248-49. The Framers of the Constitution did not intend the Takings Clause

> to impose a substantive limit on congressional expropriations. Rather, they intended to distinguish a certain type of taking which required compensation (expropriations) from those which did not (taxes and forfeitures). In essence, the drafters merely intended to ensure that compensation was given when a citizen was called upon to contribute more than his fair share to support the government. . . . [I]f read properly, the expropriation clause of the Fifth Amendment is nothing more than a compensation clause.

Id. *See also* E. Enters. v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring and dissenting) ("[T]he Takings Clause . . . has not been understood to be a substantive or absolute limit on the government's power to act."); *id.* at 554 (Breyer, J., dissenting) ("[A]t the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good.").

Lochner.[80] One commentator has described substantive due process as "a peculiarly Social Darwinist-inspired version of laissez-faire."[81] Since the New Deal and the demise of substantive due process, the Supreme Court has consistently applied the lowest level of scrutiny to determine whether economic regulation conceivably advances a legitimate government interest.[82] Courts reviewing such economic regulations under the Due Process Clause have applied the deferential "rational basis" test.[83]

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80. *See* Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936) (invalidating minimum wage law); Carter v. Carter Coal Co., 298 U.S. 238, 283-84 (1936) (invalidating requirement that coal mining companies adhere to maximum labor hour contracts negotiated by miners and producers organization); United States v. Butler, 297 U.S. 1, 73 (1936) (invalidating regulation of farm prices); ALA Schechter Poultry Corp. v. United States, 295 U.S. 495, 548 (1935) (striking down regulation of competition among poultry dealers under Commerce Clause); Stewart Dry Goods Co. v. Lewis, 294 U.S. 550 (1935) (striking down tax classifications); Tyson & Bro.-United Theatre Ticket Offices v. Banton, 273 U.S. 418 (1927) (invalidating state law regulating theater ticket sales); Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating state law prohibiting anti-union activity contracts); Allgeyer v. Louisiana, 165 U.S. 578, 589-91 (1897) (striking down Louisiana law precluding recovery of insurance proceeds for damage to property located in Louisiana from an insurance company not registered to do business in that state).

81. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 273 (1995).

82. *See* City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 377 (1991); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) (stating that legislative acts adjusting burdens and benefits of economic life are presumed constitutional and that the burden is on one complaining of constitutional violation to establish that the regulation is arbitrary and irrational); Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) ("[W]e refuse to sit as a 'superlegislature to weigh the wisdom of legislation' . . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours."); Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 490 (1955) (upholding statute restricting fitting or duplication of eyeglasses by opticians because "[t]he legislature might conclude" that the law had a variety of legitimate purposes); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) (explicitly overturning *Coppage*, 236 U.S. 1); United States v. Carolene Products Co., 304 U.S. 144, 152-54 & n.4 (1938) ("[W]here the legislative judgment is drawn in question, [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed, affords support for [the legislation]."); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 397 (1937) (upholding minimum wage law for women against a substantive due process challenge); Nebbia v. New York, 291 U.S. 502, 537 (1934) ("[A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.").

83. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); *see also* Pennell v. City of San Jose, 485 U.S. 1 (1988) (upholding ordinance controlling rents); *Agins*, 447 U.S. at 261-62 (upholding zoning to prevent ill effects of urbanization); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 129-30 (1978) (upholding landmark preservation law as valid exercise of police power); Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (giving great weight to the judgment of the legislature); notes 27-31, *supra*.

But in a section of the *Penn Central* opinion unrelated to the discussion of partial takings, the Supreme Court declared that a government restriction on the use of private property could constitute a taking if the regulation is "not reasonably necessary to the effectuation of a substantial public purpose."[84] In support of the novel proposition that the Takings Clause is concerned with the relationship between the means and ends of regulation, the *Penn Central* Court cited only two cases: *Nectow v. City of Cambridge*[85] and *Moore v. City of East Cleveland*[86]–both substantive due process cases applying the rational basis test. Two years later, in *Agins*, the Court canonized this means-ends test for a taking, once again relying exclusively on a substantive due process case: "The application of a general zoning law to particular property effects a taking if the ordinance *does not substantially advance legitimate state interests* . . . ."[87]

During the seven-year period between *Agins* and the Supreme Court's 1987 decision in *Nollan v. California Coastal Commission*,[88] no court had occasion to apply the proposition that a regulation that fails a means-ends test could constitute a taking. Indeed, it was unclear whether the *Agins* "substantially advance" test differed in any respect from the rational basis test under the Due Process Clause. In *Nollan*, however, the Supreme Court produced a dramatic innovation on the means-ends test. *Nollan* completed the grafting of substantive due process analysis onto the Takings Clause begun in *Penn Central* by sharpening the teeth of the requirement that a regulation substantially advance legitimate state interests.

In *Nollan*, the Supreme Court invented "heightened scrutiny" under the Takings Clause. Under heightened scrutiny, to justify a transfer of a possessory interest in land as a condition of development, known as an "exaction," a governmental entity bears the burden of showing that the exaction "substantially advances legitimate state interests" under *Agins*.[89] This clause, in the context of exactions, means that a condition must "serve[ ] the same governmental purpose as [a] development ban."[90] In addition to

84. 438 U.S. at 127.
85. 277 U.S. 183 (1928).
86. 431 U.S. 494 (1977).
87. *Agins*, 447 U.S. at 260 (emphasis added).
88. 483 U.S. 825 (1987).
89. *See id.* at 834-37.
90. *Id.* at 837.

elevating the standard of review, the heightened scrutiny test also shifts to the government the burden of justifying the exaction.[91]

Seven years later, *Dolan v. City of Tigard*[92] answered "a question left open" by *Nollan*.[93] The *Dolan* Court quantified the *degree* of the nexus required by *Nollan* between the impact of a development project and a condition: the nexus test requires "rough proportionality."[94] Accordingly, heightened scrutiny imposes the burden on the government to "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[95] Heightened scrutiny emanates from the Court's concern that, in cases of unique, discretionary, adjudicatory exactions imposed on individual applications, the danger exists that the public agency might improperly leverage its police power by requiring an individual property owner to bear more than its share of responsibility for the burdens caused by the development.[96]

Advocates of expanding regulatory takings assert that *Nollan* suggests yet a third standard of judicial review somewhere between deferential review and heightened scrutiny. The *Nollan* Court stated: "We have required that the regulation 'substantially advance' the 'legitimate state interest' sought to be achieved, *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), not that 'the State "*could rationally have decided*" that the measure adopted might achieve the State's objective.'"[97] In *San Remo Hotel v. City and County of San Francisco*,[98] dissenting justices of the Cal-

91. *See id.* at 836; *see also* Dolan v. City of Tigard, 512 U.S. 374, 391 n.8. (1994).
92. 512 U.S. 374 (1994).
93. *Id.* at 377.
94. *Id.* at 391.
95. *Id.*
96. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987); *see also Dolan*, 512 U.S. at 385. The Court has also found that heightened scrutiny is appropriate for administratively imposed exactions of real property interests because such regulations resemble physical takings. *See Nollan*, 483 U.S. at 831, 841; *see also Dolan*, 512 U.S. at 385 ("The sort of land use regulations discussed in [*Euclid* and *Agins*] . . . differ in [that] the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city."). In *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999), the Supreme Court unanimously confirmed that heightened scrutiny is limited to exactions of physical interests in land: "[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions — land-use decisions conditioning approval of development on the dedication of property to public use." *Id.* at 702.
97. 483 U.S. at 834 n.3.
98. 27 Cal. 4th 643 (2002).

ifornia Supreme Court relied on this passage from *Nollan* to propose an intermediate standard of review.[99] The majority in *San Remo Hotel* rejected the argument, however. No court has yet endorsed this third approach.

ii. The *Loveladies Harbor* Character Test

The "character of the governmental action," one of the three factors of the *Penn Central* partial takings test, has also been interpreted to import a means-ends test to the Takings Clause, independent of the *Agins* "substantially advance" test. In *Penn Central*, the Supreme Court stated that the "character" of the challenged regulation means the degree to which the regulation approaches a physical invasion: "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[100] This definition stems from the principle that regulations compelling private property owners to submit to physical invasions implicate the right to exclude others and have traditionally received greater judicial scrutiny than laws that regulate property use.[101]

Without any basis in prior decisions, some courts have transformed the character factor into a completely different inquiry: balancing the importance of the public purpose of the regulation against the private purpose to be served by the owner's proposed use.[102] Ignoring *Penn Central's* specific definition of the character of the governmental action, the Federal Circuit in *Loveladies Harbor* concluded that the character factor "required that a reviewing court consider the purpose and importance of the public interest reflected in the regulatory imposition."[103] The court

99. *See* 27 Cal. 4th at 686 (Baxter, J., concurring and dissenting).

100. *Penn Cent.*, 438 U.S. at 124.

101. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426-27 (1982).

102. *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 634 (2001) (O'Connor, J., concurring); Yee v. City of Escondido, 503 U.S. 519, 523 (1992) (stating that regulatory takings cases "necessarily entail[ ] complex factual assessments of the purposes and economic effects of government actions").

103. 28 F.3d at 1176. *Loveladies* involved a Clean Water Act restriction on filling of wetlands. The Court found a taking and awarded $2,658,000 in damages. The Court of Claims found a taking based on the *Penn Central* factors. With respect to the character factor, the Court of Claims held that "plaintiffs have shown that their private interest in developing and utilizing their property outweighs the public value in preserving these wetlands." Loveladies Harbor, Inc. v. United States, 15 Cl. Ct.

cited *Ruckelshaus v. Monsanto Co.*[104] and *Nollan*[105] for this proposition.[106] While neither Supreme Court case supports applying *Penn Central's* character factor as a means-ends test, or even cites *Penn Central*, other courts have relied on *Loveladies Harbor* for this analysis,[107] and no case repudiates this holding. The result is an expansion of the opportunities for judicial policy-making. Like the "substantially advance" test, this interpretation of the character factor "would convert the Takings Clause into a free-wheeling tool for judicial reweighing of essentially legislative judgments."[108]

b. Means-Ends Takings Applied: Three Examples

Several courts have exploited the uncertainty of the "substantially advance" doctrine to assume essentially legislative powers. The cases addressing the application of the "substantially advance" test to generally applicable legislative regulation occupy the full spectrum from highly deferential review to heightened scrutiny.[109]

381, 399 (1988). In the interim between the Court of Claims' judgment and the Federal Circuit Court's decision, the United States Supreme Court decided *Lucas*. The Federal Circuit Court based its decision on *Lucas*, finding a total taking, rather than on *Penn Central's* partial takings analysis. Accordingly, the Federal Circuit's discussion of the character factor is arguably dictum.

104. 467 U.S. 986, 1014 (1984) (failing to mention *Penn Central* while discussing whether regulation is a taking for public, as opposed to private, use, and concluding that "[s]o long as the taking has a conceivable public character, 'the means by which it will be attained is . . . for Congress to determine'" (citing Berman v. Parker, 348 U.S. 26, 33 (1954))).

105. 483 U.S. at 837 (failing to mention *Penn Central* while discussing governmental purpose under the "substantially advance legitimate state interests" test of *Agins*).

106. 28 F.3d at 1176.

107. *E.g.*, Rose Acre Farms, Inc. v. United States, 53 Fed. Cl. 504, 518 (Fed. Cl. 2002).

108. Echeverria, *supra* note 44, at 232.

109. *Compare* S. County Sand & Gravel Co., Inc. v. Town of S. Kingstown, 160 F.3d 834, 836 (1st Cir. 1998) (equating substantive due process and takings means-ends tests, but recognizing that takings test may be more demanding in certain situations); Garneau v. City of Seattle, 147 F.3d 802, 818-20 (9th Cir. 1998) (Williams, J., concurring) ("[T]akings principles cannot logically apply" to a claim that government action "is inherently wrongful and unfair."); Tx. Mfr. Hous. Ass'n v. Nederland, 101 F.3d 1095, 1105 (5th Cir. 1996) (rejecting application of *Nollan* to legislation regulating location of manufactured homes); New Port Largo, Inc. v. Monroe County, 95 F.3d 1084, 1088 (11th Cir. 1996) (stating that heightened scrutiny not applicable to zoning regulation that does not compel a physical invasion); Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1995) (refusing to apply heightened scrutiny to hunting license scheme because the regulation was not a "physical taking or its equivalent"); Santa Monica Beach, Ltd. v. Superior Court, 968

The numerous decisions applying the "substantially advance" and character means-ends tests to conduct non-deferential review of economic regulation testify to the severity of the threat that the means-ends takings test poses to democracy.[110] Several cases stand out as particularly egregious examples of means-ends takings review usurping legislative prerogatives.

i. *Chevron*

Chevron USA, Inc. v. Cayetano[111] illustrates the abuse of democracy possible where judges are permitted to apply an exacting means-ends test in reviewing economic legislation. In

P.2d 993, 1001-02 (Cal. 1999) (applying deferential standard to land use regulations that are "generally applicable through legislative action"); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687 (Colo. 2001) (finding that courts should apply deferential review to legislative sewage treatment impact fee); Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck, 721 N.E.2d 971, 974-75 (N.Y. 1999) (refusing to apply heightened scrutiny to downzoning); Rogers Mach. Co. v. Washington County, 45 P.3d 966 (Or. Ct. App. 2002), *cert. denied,* 123 S. Ct. 1482 (2003) (applying rational basis test to legislative development fee); Brunelle v. Town of S. Kingston, 700 A.2d 1075, 1083 n.5 (R.I. 1997) ("[A] discussion of the arbitrariness or capriciousness of a particular state action is properly examined under the light of the Fourteenth Amendment due process clause and not the Fifth Amendment takings clause."); Mission Springs, Inc. v. City of Spokane, 954 P.2d 250, 258 (Wash. 1998) (using the Due Process Clause, rather than the Takings Clause, to determine whether a state action is arbitrary or capricious); Chevron v. Cayetano, 224 F.3d 1030 (9th Cir. 2000) (applying heightened scrutiny to rent control, finding that the ordinance would not achieve its stated purpose); Richardson v. City & County of Honolulu, 124 F.3d 1150, 1165-66 (9th Cir. 1997) (applying heightened scrutiny to rent control, finding that the ordinance would not achieve its stated purpose); Action Apartment Ass'n v. Santa Monica Rent Control Bd., 114 Cal. Rptr. 2d 412, 424-25 (Cal. Ct. App. 2001) (refusing to apply presumption of validity to legislative rent control regulation that required landlords to pay 3% annual interest on tenants' security deposits); Cwynar v. City & County of San Francisco, 90 Cal. App. 4th 637, 661 (2001) (applying heightened scrutiny to voter-approved ballot initiative restricting owner move-in evictions of tenants); N. Ill. Home Builders Ass'n v. County of DuPage, 649 N.E.2d 384, 389 (Ill. 1995) (applying heightened scrutiny to legislative development impact fee); Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401, 407-08 (Neb. 1994) (affirming taking based on finding that refusal of permit to operate gas station lacked legitimate purpose); Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 482 (N.Y. 1994) (applying heightened scrutiny to rent control legislation); Seawall Assoc. v. City of New York, 542 N.E.2d 1059, 1068-71 (N.Y. 1989) (invalidating ordinance restricting conversion of single-room occupancy hotels); Shemo v. City of Mayfield Heights, 765 N.E.2d 345, 351 (Ohio 2002), *cert. denied*, 123 S. Ct. 1484 (2003) (applying non-deferential review to takings challenge to agency's refusal to upzone property from residential to commercial); *and* Trimen Dev. Co. v. King County, 877 P.2d 187, 194 (Wash. 1994) (applying heightened scrutiny to legislative development impact fee).

110. *See* note 109, *supra.*

111. 224 F.3d 1030 (9th Cir. 2000), *remanded to* 198 F. Supp. 2d 1182 (D. Haw. 2002).

Chevron, the Ninth Circuit discarded any notion of deference to the decisions of a legislative body as to the efficacy of the regulation.

In response to escalating retail gasoline prices, in 1997 the State of Hawaii adopted Act 257 ("Act"). The Act limits rents that oil companies may charge their independent retail dealers for leasing gas stations (land and buildings) to 15% of the dealer's gross profit from gasoline sales.[112] The objective of the law is to prevent oil companies from driving independent dealers out of business and controlling the market for retail gasoline through their company-owned and -operated stations. This consolidation of market power, according to the Hawaii Legislature, would result in higher, noncompetitive retail gas prices.

The Act allows a dealer to transfer its leasehold interest in the station to another dealer. According to Chevron, the Act creates the possibility that the dealer assuming the lease would pay a premium to the assigning dealer for the opportunity to lease the station at a below-market rent.[113] Because the premium would be equal to the cost savings from reduced rent, according to Chevron, the legislation would not "work," i.e., would not be effective to reduce prices to consumers. Moreover, in reaction to reduced income from rental of gas stations, Chevron argued that it would increase the price of wholesale gasoline to its independent dealers, again defeating the objective of reducing retail prices.

Relying on *Agins* and *Nollan*, Chevron challenged the Act as a regulatory taking on the ground, among others, that the Act does not "substantially advance a legitimate state interest."[114] Applying heightened scrutiny to the Act, the district court entered summary judgment for Chevron on its takings claim. The district court found that the Act would not "substantially advance" the objective of reducing retail gasoline prices.[115]

Ignoring *Del Monte Dunes*,[116] the Ninth Circuit concluded that the district court correctly applied heightened scrutiny to inquire into the efficacy of the Act.[117] The two-judge majority found,

112. *See id.* at 1032-33.

113. *See id.* at 1033.

114. *Id.*

115. *Id.*

116. In *Del Monte Dunes*, the Supreme Court appeared to limit the application of heightened scrutiny to physical exactions. *See* 526 U.S. at 702.

117. *See* 224 F.3d at 1037.

however, that whether the Act substantially advanced a legitimate state interest raised triable issues of fact. The majority remanded the case to the district court for an evidentiary hearing as to whether the Act would actually accomplish its stated purpose. The Ninth Circuit's description of the issues to be "tried" in the district court illustrates the extent to which the court assumed legislative powers:

> The conflicting affidavits establish that genuine issues of fact remain as to whether Act 257 will result in lower gasoline prices. Whether, and to what extent, Chevron will raise its wholesale price of fuel to compensate for lost rent, and whether, and to what extent, incumbent dealers will capture the value of the capped rent in the form of a premium upon transfer of the leasehold, remain as unanswered questions.[118]

The majority ordered the district court to hold an evidentiary proceeding essentially aimed at predicting whether the Act would serve its intended purpose of reducing retail gasoline prices. If the trial court were to conclude that the Act would not produce this result, it must find that the Act effects a "taking."[119]

In dissent, Judge William Fletcher sounded the alarm that the majority was plunging the courts into Lochnerian economic policy-making: "Ever since its retreat from economic substantive due process at the end of the 1930's, the Supreme Court has essentially left it to the other branches of government to decide, in their political wisdom, whether to adopt rent and price controls."[120]

On remand, the district court conducted a "factfinding process," based on a preponderance of the evidence, to second-guess a determination already made by the Hawaii Legislature in adopting the Act: whether the Act *would* result in a reduction in retail gasoline prices to consumers.[121] To predict the economic effects of the Act, the court heard testimony from economists representing each side.[122] After hearing the evidence and observing the "demeanor" of the witnesses, the district court agreed with the theories of Chevron's economist — that the legislation would not work — and ruled the Act a taking.[123]

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118. *Id.* at 1038.
119. *Id.* at 1038-39.
120. *Id.* at 1048 (Fletcher, J., concurring and dissenting).
121. Chevron USA, Inc. v. Cayetano, 198 F. Supp. 2d 1182, 1183, 1190 (D. Haw. 2002).
122. *See id.* at 1184.
123. *Id.* at 1193.

ii. *Philip Morris*

An *en banc* panel of the First Circuit also assumed for itself the role of legislator in *Philip Morris v. Reilly*.[124] Philip Morris brought a takings challenge to a Massachusetts statute requiring tobacco companies to disclose to the State the ingredients of their cigarettes and other tobacco products. The State intended to provide the lists to the public to "reduce risks to public health," while the tobacco company argued that the law appropriated its trade secrets.[125]

By a vote of 2-1, with three separate opinions, the panel held that the regulation effected a taking.[126] Judge Juan Torruella, purporting to apply the "character of the government action" factor of *Penn Central*, determined that the court's role was to "balance the effects of the Disclosure Act against Massachusetts' interests."[127] Judge Torruella concluded that the statute would destroy the value of Phillip Morris' trade secrets.[128] He then proceeded to analyze the efficacy of the Act as would a legislator:

> If I was convinced that this regulation was tailored to promote health and was the best strategy to do so, I might reconsider our analysis. . . . [T]he cases . . . show that the means should bear some reasonable relationship to the ends. . . . I simply am not convinced that the Disclosure Act . . . really helps to promote public health. The Disclosure Act allows for full disclosure of the ingredient lists when doing so "could" further public health. This places an extremely low burden on Massachusetts. . . . [T]he state . . . should be required to show more than a *possible* beneficial effect.[129]

Ignoring the limits to heightened scrutiny imposed by the Supreme Court in *Nollan*, *Dolan*, and *Del Monte Dunes*, Judge Torruella found that heightened scrutiny applied to the Massachusetts law. He equated the law's requirement that tobacco firms disclose their ingredients or be barred from selling in the state to the conditions in *Nollan* and *Dolan* that the developer dedicate property to the public as a condition of building.[130] In equating the two regulations, Judge Torruella ignored the crucial distinction between legislative and adjudicatory regulations

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124. 312 F.3d 24 (1st Cir. 2002).

125. *Id.* at 26.

126. *See id.* at 47. The unusually small three-judge panel resulted after many judges on the First Circuit recused themselves.

127. *Id.* at 41.

128. *See id.* at 42-43.

129. *Id.* at 44.

130. *See id.* at 47.

and between physical dedications of land and mere restrictions on business activities.

Even the dissenting judge in *Phillip Morris* agreed that it is proper for the courts to balance the interests of the tobacco companies in their trade secrets against the state's interest in the public health, deciding that the Massachusetts law did not require the state to disclose the entire list of ingredients of their products, but rather only the harmful ingredients.[131]

Judge Torruella's opinion illustrates the danger the means-ends takings test poses to democracy. It is a fundamental prerogative of the legislature to "tailor" laws and to adopt "strategies" to achieve public policy goals. There is no authority allowing courts to engage in "strategic" decision-making. Under the doctrine of separation of powers, courts must uphold legislative regulations, even if the court would not have defined the problem in the same way as the legislature or would have developed a different strategy for addressing the problem. In placing the burden on the government to prove that a law will be efficacious, the court in *Phillip Morris* was legislating. It ignored the Legislature's judgment that use of tobacco products is a leading cause of preventable death in the United States, and consumer awareness of the ingredients of tobacco products could have the potential to reduce deaths and other health problems associated with them. Under the rational basis test, the state need make no greater showing for the law to pass constitutional muster.

iii. *Rose Acre Farms*

Rose Acre Farms, Inc. v. United States[132] presents another example of use of the Takings Clause to thwart democratic policymaking. In *Rose Acre Farms*, an egg farm with a history of producing eggs tainted with salmonella claimed that regulations adopted by the United States Department of Agriculture (USDA) restricting the sale of eggs by chicken farms suspected of selling salmonella-infested eggs effected a taking of its healthy eggs and hens. On appeal from a district court action between the same parties, the Seventh Circuit had previously concluded

131. *See id.* at 53 (Lipez, J., dissenting).

132. 53 Fed. Cl. 504 (Fed. Cl. 2002). On March 20, 2003, the Court of Claims reissued its 2002 opinion in identical form, adding an award of $2.4 million in fees and expenses to the earlier damage award of $6.1 million plus interest. *See* Rose Acre Farms, Inc. v. United States, 55 Fed. Cl. 643 (2003).

that the regulations "were neither arbitrary nor capricious."[133] Rose Acre Farms then filed a takings action in the Court of Claims.

Following a trial, the court found that the regulations effected a taking of the plaintiff's healthy eggs and hens and awarded damages in excess of $6 million plus interest. During the trial, the court heard testimony as to the efficacy and fairness of the regulations from officers of Rose Acre Farms, employees of the USDA, and expert scientific witnesses from each side. Applying the three *Penn Central* factors to the regulations, the court concluded that the "character of the government action" factor entitled the court to "consider the purpose and importance of the public interest reflected in the regulatory imposition"[134] and whether the regulation forced Rose Acre Farms "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[135]

Showing no apparent deference to the USDA regulations or to the Seventh Circuit's decision that the regulations were not arbitrary, the court based its ruling on its conclusion that the USDA "overreacted" to salmonella outbreaks and that its regulations were "misguided" and "irresponsible."[136] Thus, under the authority of *Armstrong*, the court applied a heightened form of judicial review of the wisdom and efficacy of quasi-legislative health and safety regulations. The court converted what was essentially a political policy decision for a legislature into a judicial decision involving essentially *de novo* review based on the court's subjective views as to the effectiveness and equity of the regulations. In the process, the court applied a heightened standard of review and shifted the burden to the government to show that the regulation was valid, all simply by invoking the Takings Clause instead of the Due Process Clause.

iv. *Critique of Means-Ends Takings Test*

Underlying the debate as to whether "substantially advance legitimate state interests" calls for deferential, intermediate, or heightened review is the inescapable fact that there is no foundation in the Constitution or takings jurisprudence for *any* means-

133. Rose Acre Farms, Inc. v. Madigan, 956 F.2d 670, 672-74 (7th Cir. 1992).

134. 53 Fed. Cl. at 518 (quoting Loveladies Harbor v. United States, 28 F.3d 1171, 1176 (Fed. Cir. 1994).

135. *Id.* (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

136. *Id.* at 518-19.

ends test under the Takings Clause.[137] The "substantially advance" test is based exclusively on substantive due process precedent. In recognition of the shaky foundation of the means-ends test for takings, most courts have been reluctant to elevate the standard of review of economic regulation from due process rational basis merely because the means-ends test is applied under a different amendment to the Constitution. Moreover, the vast majority of courts have limited *Nollan/Dolan* heightened review to physical exactions, where the right to exclude others is implicated. Indeed, *Nollan*, *Dolan*, and *Del Monte Dunes* directly support this distinction.[138]

The chances that the Supreme Court may some day repudiate the "substantially advance" standard as an independent takings test increased considerably with the Supreme Court's decision in *Eastern Enterprises v. Apfel*.[139] *Eastern Enterprises* involved the constitutionality of the Coal Industry Retiree Health Benefit Act. The Act required coal-mining companies to pay health benefits to their former employees. A four-justice plurality held that the Act worked a taking because it imposed an extreme, retroactive financial burden on the claimant.[140]

Significantly, a majority of the justices in *Eastern Enterprises* rejected the notion that the "substantially advance" prong of *Agins* enunciated a freestanding takings test outside the *Nollan/Dolan* context of compelled dedications of land. Five justices indicated that the deferential due process test, rather than a takings analysis, should be applied to a law requiring the payment of money.[141] As Justice Kennedy stated, the wisdom of governmental action that does not require the dedication of possessory interests in real property is more appropriately analyzed under "general due process principles rather than under the Takings Clause."[142]

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137. *See* John D. Echeverria, *Does a Regulation that Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L. 853, 866-76 (1999); S. Keith Garner, *"Novel" Constitutional Claims: Rent Control, Means-Ends Tests, and the Takings Clause*, 88 CAL. L. REV. 1547, 1561-64 (2000).

138. *See* note 96, *supra*.

139. 524 U.S. 498 (1998).

140. *See id.* at 529-37.

141. *See id.* at 545-56 (Kennedy, J., concurring and dissenting), 554-58 (Breyer, J., dissenting).

142. *Id.* at 545 (Kennedy, J., concurring and dissenting); *see also* Echeverria, *supra* note 137, at 866-76; Garner, *supra* note 137, at 1561-64.

Following *Eastern Enterprises*, several courts have acknowledged the five-justice majority supporting elimination of a means-ends test under the Takings Clause. In *Simi Investment Co. v. Harris County*,[143] an en banc panel of the Fifth Circuit recognized that in *Eastern Enterprises*, five justices concluded that claims of "illegitimate and arbitrary governmental abuse" must be brought under the Due Process Clause, rather than the Takings Clause.[144] In *Bamber v. United States*,[145] the court noted that the *Agins* means-ends test "has not had a fruitful life" and is limited to regulations that "create public access to privately held real property."[146]

In its most recent regulatory takings decision, *Brown v. Legal Foundation of Washington*,[147] the United States Supreme Court again indirectly called into question the existence of a means-ends test under the Takings Clause. In *Brown*, the Court denied a takings challenge to the State of Washington's use of an Interest on Lawyer Trust Accounts (IOLTA) program to fund legal services for the poor. The Court assumed that a "taking must be for a 'public use,'" which the Court equated with the "legitimacy" of the government's action.[148] If the legitimacy of a government action is a precondition for a regulatory taking, then the alleged illegitimacy of the action cannot constitute a valid basis for a takings claim.[149]

The Supreme Court also addressed the scope of the "substantially advance" test in *Del Monte Dunes*. The Court there observed that it had thus far applied heightened scrutiny only in

143. 256 F.3d 323 (5th Cir. 2001).

144. *Id.* at 323 & n.3.

145. 45 Fed. Cl. 162 (Fed. Cl. 1999).

146. *Id.* at 165-66 (citing *Eastern Enters.*, 524 U.S. at 554 (Breyer, J., dissenting). In addition, the Federal Circuit Courts have recognized that the five-justice agreement in *Eastern Enterprises* that the Takings Clause should not be applied to an obligation to pay money is binding on the lower courts. *See* Kitt v. United States, 277 F.3d 1330, 1336-37 (Fed. Cir. 2002), *modified on other grounds*, 288 F.3d 1355 (Fed. Cir. 2002) (holding that a regulatory action that requires the payment of money is not a taking); Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1339 (Fed. Cir. 2001), *cert denied*, 535 U.S. 1096 (2002) ("[F]ive justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings. We agree with the prevailing view that we are obligated to follow the views of that majority."). By implication, the five-justice majority opinion that the Takings Clause is not properly concerned with the means and ends of regulation is also binding.

147. 538 U.S. 216 (2003).

148. *Id.* at 1417.

149. *See* John D. Echeverria, *Regulatory Takings After Brown*, 33 ENVTL. L. REP. 10626, 10-11 (2003).

"the special context of exactions."[150] The Court held that heightened scrutiny was not intended to apply to denials of individual development applications.[151] The Court allowed the jury to determine whether the city's conduct "substantially advance[d] legitimate public interests" under the Takings Clause only because the city did not object to a jury instruction allowing that question to be put to the jury.[152] However, the Court reserved the question of whether means-ends review under the Takings Clause imposes a different standard of review than due process for generally applicable land use regulation.[153] The *Del Monte Dunes* Court also distinguished between issues of fact in individual cases and issues of a "city's general land-use ordinances or policies." In the former case, the Court held, juries may resolve the question applying a nondeferential standard; in the latter case, the Court stated that the inquiry "might well fall within the province of the judge" applying a more deferential standard.[154]

Significantly, in *Del Monte Dunes* five justices, including Scalia and O'Connor, expressly refused to take a position as to whether a means-ends test constitutes a proper inquiry under the Takings Clause at all.[155] Thus, along with Justices Kennedy and Stevens who rejected a means-ends test in *Eastern Enterprises*, a total of seven justices of the Supreme Court have at least questioned the legitimacy of the "substantially advance" test.

The Supreme Court has provided other indirect signals that the scope of the "substantially advance" test is narrow. In *Parking Ass'n of Georgia, Inc. v. City of Atlanta*,[156] the Supreme Court of Georgia ruled that regulations requiring landscaping and curbs for development did not trigger heightened scrutiny because the regulations were legislative. The Supreme Court denied certiorari.[157] But in a rare opinion dissenting from the denial of certiorari, joined by Justice O'Connor, Justice Thomas wrote: "It is hardly surprising that some courts have applied *Dolan*'s rough proportionality test even when considering a legisla-

150. 526 U.S. at 702.

151. *See id.* at 702-03; *see also id.* at 723 (Scalia, J., concurring), 733 (Souter, J., dissenting).

152. *See id.* at 721-22.

153. *See id.* at 722.

154. *Id.* at 721-22.

155. *See id.* at 732 n.2 (Scalia, J., concurring); *id.* at 753 n.12 (Souter, J., dissenting).

156. 450 S.E.2d 200 (Ga. 1994).

157. 515 U.S. 1116 (1995).

tive enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking."[158] That only one justice joined in this dissent would indicate that a solid majority of the Court does not consider heightened scrutiny appropriate for legislative regulation.

Since *Eastern Enterprises* and *Del Monte Dunes*, however, the Supreme Court has declined the opportunity to grant review in cases raising the issue of the existence or scope of a means-ends test under the Takings Clause.[159] While clearly suggesting that deferential review is appropriate for legislative regulations, *Eastern Enterprises* and *Del Monte Dunes* nevertheless have left this question open. Meanwhile, the "substantially advance" test has engendered significant confusion in the lower courts as to whether the test imposes a different standard from the Due Process Clause, and if it does, whether heightened scrutiny applies to all government regulation of economic affairs, or only to exactions imposed on a case-by-case basis,[160] or to some other classification of regulation. Other than the handful of decisions finding that the five-justice majority in *Eastern Enterprises* is binding, the lower courts have been reluctant to reject the "substantially advance" test outright. The Supreme Court has implied that courts should apply a deferential means-ends test to

158. *Id.* The dissenting opinion, in which Justice O'Connor joined, apparently did not consider the Court's rationale for the adjudicatory-legislative distinction expressed in *Nollan* and *Dolan*—namely, that the danger of the government's unfairly leveraging its police power is far greater in cases of individual property owners seeking approval of a single development than in instances of regulation applying across the board to an entire class of similarly situated property owners. *See Nollan*, 483 U.S. at 837 n.5 (applying heightened scrutiny to the "leveraging" of government power to strike land use bargains in individual cases); *Dolan*, 512 U.S. at 385 (courts do not apply heightened scrutiny to regulations that "involve[ ] essentially legislative determinations classifying entire areas of the city"); *id.* at 391 n.8 ("[I]n evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitary regulation of property rights. Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city."); Ehrlich v. City of Culver City, 12 Cal.4th 854, 867-69 (1996), *cert. denied*, 519 U.S. 929 ("Justice Scalia's opinion in *Nollan* . . . makes clear [that] such a discretionary context presents an inherent and heightened risk that local government will manipulate the police power."); Krupp v. Breckenridge Sanitation Dist., 19 P.3d at 695-96 (holding that *Nollan/Dolan* heightened review limited to adjudicative decisions affecting single property owner).

159. *E.g.*, Chevron USA, Inc. v. Cayetano, 224 F.3d 1030 (9th Cir. 2000).

160. *See* note 158, *supra*; *see also* Del Monte Dunes, 526 U.S. at 702 (Takings Clause "was designed 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"), *citing* Armstrong v. United States, 364 U.S. 40, 49 (1960).

most generally applicable, legislatively imposed regulations because the risk that the police power will be used to exact unconstitutional conditions is not present.[161] The Court implicitly reasoned that classes of property owners have greater power than individual owners to influence land use policy in the legislative process and thus require less protection from government overreaching.[162]

D. *The Partial and Means-Ends Takings Tests and Judicial Activism in Economic Policy-Making*

The Federal Circuit in *Florida Rock*, the Ninth Circuit in *Chevron*, the First Circuit in *Philip Morris*, the Court of Claims in *Rose Acre Farms*, and the California Court of Appeal in *Action Apartment Ass'n* demonstrate how far afield courts have strayed from fundamental tenets of democracy. In *Chevron*, for example, predicting the impact of price controls in a complex business such as the motor fuel industry is a quintessentially legislative policy function. By extending no deference to the Hawaii Legislature on a question of economics, the court usurped the Legislature's role. The courts have no greater right to legislate this policy than they have in dictating zoning decisions, safety requirements for autos, or the proper procedure for pasteurizing milk. Indeed, no one would seriously contend that the Bush Administration's tax cuts are subject to heightened judicial review under the Takings Clause on the ground that the tax cuts will not be effective in stimulating the nation's economy.

The partial and means-ends takings tests constitute an invitation to the judiciary to expand judicial power to second-guess the decisions of legislatures far beyond any limits imposed by the Constitution. Because the tests are essentially standardless, judges have become legislators, substituting their judgment as to wise and effective land use and economic policy for the decisions of elected representatives. This arrogation of power constitutes a frontal assault on representative democracy and the separation of powers.

161. *Id.*
162. *See id.*

1. Partial and Means-Ends Takings Invite Judicial Activism and Usurpation of Legislative Power

a. Judges as Quasi-Guardians

As a general rule, judges are not direct representatives of the electorate. All Article III federal judges are appointed by the President and serve for life, assuming good behavior.[163] The nineteen-member Senate Judiciary Committee, where all nominees for federal judgeships are vetted, has, with a handful of visible exceptions, historically rubber-stamped the President's choices. On rare occasions, the Committee rejects candidates alleged to have taken extreme positions on controversial issues. On even rarer occasions, Senators have attempted to block the appointment of federal judges on the Senate floor.[164] In general, however, the electorate has no direct control over the appointment of federal judges and no control over them after they have been confirmed.

Most state court appellate judges are initially appointed by the governor or legislature of the state and must stand for a retention election without a direct opponent.[165] Although thirty-one states elect judges for their initial term, including seventeen by partisan elections,[166] with notable exceptions these elections historically have not turned on specific political issues or the philosophical orientation of the candidates.[167] The recent trend, however, appears to be toward politicizing judicial elections, where business

163. *See* U.S. CONST. art. III, § 1 ("The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour . . . .").

164. At this writing, Democrats in the Senate were filibustering two presidential nominees to the federal Courts of Appeals, Miguel Estrada and Priscilla Owen. At the time of the filibuster, the Senate had approved 123 of the President's nominees to the federal courts and rejected only three: Mr. Estrada, Judge Owen, and Judge Thomas Pickering. *See Hearing on Judicial Nominations and Filibusters Before the Senate Judiciary Comm., Subcomm. on the Constitution, Civil Rights and Property Rights*, 108th Cong. (2003). In April 2003, the President renominated Judge Pickering. *See id.* Since the Senate filibuster of the appointment of Abe Fortas to the Supreme Court in 1960's the Senate has filibustered only five judicial nominees. *See id.*

165. *See* ENVIRONMENTAL POLICY PROJECT, CHANGING THE RULES BY CHANGING THE PLAYERS: THE ENVIRONMENTAL ISSUE IN STATE JUDICIAL ELECTIONS 2-3 (2000), *available at* http://www.law.georgetown.edu/gelpi/sjelect/judicial_elections.pdf.

166. *See id.*

167. *See id.* at 1. The 1986 election in California is one of these exceptions, in which the voters refused to retain Chief Justice Rose Bird and two Associate Justices of the California Supreme Court in response to a high profile campaign attacking their decisions reversing the death penalty.

and other special interest groups provide campaign financing and other assistance to candidates who they perceive will decide cases in their favor.[168] Despite this alarming trend, judges, and particularly federal judges, remain far more insulated from the voters than legislators. Because judges are appointed and immune from voter control either permanently or for extended periods, they do not directly represent the electorate. Accordingly, judicial policy-making compromises the democratic ideal of one person, one vote.

The alternative to democracy most closely analogous to a system in which a largely unelected judiciary predominates on questions of public policy is a guardianship.[169] In a guardianship, ordinary people are considered unqualified to govern themselves. Instead, "rulership [is] entrusted to a minority of persons who are specially qualified to govern by reason of their superior knowledge and virtue."[170]

For a variety of reasons, guardianship is an inferior form of government to democracy. Guardianships obviously cannot claim to be egalitarian. Guardians have no greater moral capacity than the guarded.[171] Nor do guardians typically possess superior technical knowledge or the "correct understanding of the most efficient means for achieving widely . . . accepted ends like human happiness or well-being"[172] or "the general good."[173]

By opening the door to partial and means-ends takings, however, the Supreme Court has engendered a judicial quasi-guardianship in economic regulation. But the Court has yet to acknowledge this profound shift in the policy-making apparatus. For example, in her concurring opinion in *Palazzolo*, Justice O'Connor stated: "*Penn Central* does not supply mathematically

168. *See id.* at 1, 4. *See* Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (striking down state's canon of judicial conduct prohibiting judicial candidates from announcing their views in disputed legal and political issues because it violated the First Amendment).

169. *See* DAHL, DEMOCRACY, *supra* note 15, at 52.

170. The idea of guardianship is "[m]ost beautifully and enduringly presented by Plato in The Republic." *Id.* Throughout history, guardianship, or "hierarchy," has been "democracy's most formidable rival." *Id.* Marxism-Leninism is a contemporary example of guardianship. *See id.* at 54.

171. *See id.* at 66-67.

172. *Id.* at 67.

173. *Id.* at 71. The shortcomings of guardianship are aptly illustrated by the former Soviet Union, the People's Republic of China, North Korea, and the military regimes of Argentina, Brazil, and Chile. *See id.* at 63. "An imperfect democracy is a misfortune for its people, but an imperfect authoritarian regime is an abomination." *Id.* at 78.

precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required."[174] But does *Penn Central* really provide such "guideposts"? Once accepted, partial takings has no principled stopping point.[175] Because judges bring ideology and personal bias to their decisions, one judge's idea of fairness is not necessarily the same as another's. Partial takings inevitably devolves into luck of the draw as to the politics of the judge or judges hearing the case. This is hardly a desirable alternative to a legislative decision-making process.[176]

To avoid establishing a quasi-guardianship, the judiciary's role in constitutional review should be limited to protecting fundamental rights integral to the democratic process. Self-governance through representative legislatures is clearly a fundamental, "inalienable" right crucial to democracy.[177] Expansion of judicial power beyond protecting the right to self-governance and other rights essential to realizing democratic ideals puts democracy at risk. "Once the rights and other interests necessary to the democratic process have been effectively secured, then the more the quasi-guardians extend their authority to substantive policy questions, the more they reduce the scope of the democratic process."[178]

The role of the courts in reviewing legislation to protect fundamental liberties necessary for the proper functioning of democracy is well established.[179] In his concurring opinion in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*,[180] Justice Scalia noted that the Due Process Clause protects only "certain 'fundamental liberty interests' from deprivation by the government."[181] Justice Scalia gave "[f]reedom from delay in receiving a building permit" as an example of an economic interest that "is not among these 'fundamental liberty interests.'"[182]

174. 533 U.S. at 634 (O'Connor, J., concurring).

175. *See* Echeverria, *supra* note 44, at 226.

176. *See id.* at 245 ("The problem is that fairness resists being cast into a simple, impersonal, easily stated formula."); *see also* DUXBURY, *supra* note 81, at 272-76, 473-74; NOVAK, *supra* note 4, at 248 ("When . . . public things . . . and the people's welfare . . . become mere functions of individual interests, economic formulas, and political expediency, we have only laws of men, not government.").

177. *Id.* at 191.

178. *Id.*

179. *Id.*

180. 123 S. Ct. 1389 (2003).

181. *Id.* at 1397 (Scalia, J., concurring).

182. *Id.*

When courts venture outside the realm of protecting fundamental rights, however, into economic policy-making, the courts frustrate democratic ideals.[183]

The only property rights arguably fundamental in the Constitution are the rights to be free from direct takings of property without compensation or due process.[184] Lesser property rights are not as essential to liberty and the democratic process as the constitutional rights of freedom of speech and freedom from unreasonable searches and seizures.[185] As demonstrated above, the right to compensation for takings was intended to apply only to direct expropriation by the government. Regulatory actions that are the functional equivalent of direct expropriations — categorical takings — are arguably equally fundamental.[186] Judicial extension of this protection to partial takings and means-ends takings, however, is plainly anti-democratic, sharply conflicting with self-governance.[187] Compensation for property regulation short of a total taking is not integral to the democratic process.[188]

b. Judges Are Protectors of the Politically Less Powerful

Advocates of expansive regulatory takings subscribe to the myth that property owners suffer from government regulation imposed by a landless majority seeking to transfer wealth through regulation. To the contrary, decisions about economic and social policy are inherently political, and property owners are rarely politically impotent. Property owners are often organized, well funded, and arguably have as much or more influence on legislatures than other groups. In fact, the majority of prop-

183. *See* DAHL, AMERICAN CONSTITUTION, *supra* note 15, at 153-54.

184. *See* U.S. CONST. amend. V; *id.* amend. XIV.

185. *See* DAHL, AMERICAN CONSTITUTION, *supra* note 15, at 153.

186. *See* notes 33-36, *supra.*

187. Dahl demonstrates that fundamental rights enjoy no lesser protection in democracies with weak or no judicial review of legislation. *See* DAHL, DEMOCRACY, *supra* note 15, at 189.

188. *See* City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 441-42 (2002) ("[W]e must acknowledge that the Los Angeles City Council is in a better position than the Judiciary to gather and evaluate data on local problems. . . . [O]ur cases require only that municipalities rely upon evidence that is 'reasonably believed to be relevant' to the secondary effects that they seek to address."); *see also id.* at 444 (Kennedy, J., concurring) ("Municipal governments know that high concentrations of adult businesses can damage the value and the integrity of a neighborhood. . . . A city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.'") (quoting Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 71 (1976)).

erty owners in the United States are homeowners.[189] As beneficiaries of the reciprocal benefits of land use regulation, homeowners rarely challenge government regulation as a taking. Indeed, the three groups of property owners most likely to challenge government land use regulation are developers, farmers and other agricultural users, and companies engaged in the extractive industries, such as mining, timber, and energy.[190] No one would seriously contend that these groups are without considerable political might.[191] These groups have persuaded legislatures to adopt a multitude of laws at the federal, state, and local level from which they derive enormous economic benefits.[192] These government-effected wealth transfers should be considered in assessing the impact of economic regulation on the same parties.

Many property owners are "repeat players" in the political marketplace.[193] They consistently engage in political activity, influencing decision-makers through lobbying and monetary contributions. They enter into political compromises in the give and take of the legislative process.[194] If an individual property owner

189. *See* Treanor, *supra* note 35, at 863.

190. *See* Greider, *supra* note 8, at 17. The volume of regulatory takings cases in the Supreme Court initiated by real estate developers and mining companies illustrates the point. *See, e.g.*, City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687 (1999); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1014 (1992); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

191. For example, political action committees (PACs) for agribusiness, construction, energy and natural resources, chemical and related manufacturing, and transportation industries contributed $63,610,794 to candidates for federal office in 2001-2002.

By contrast, contributions to federal candidates for the same election year by environmental PACs was $780,832. Center for Responsive Politics, *Industry Totals*, *at* http://www.opensecrets.org/pacs/alphalist.asp (last visted Oct. 16, 2003). *See also, e.g.*, Mike Soraghan, *Campbell Seeks More Drilling on Indian Land*, DENVER POST, Apr. 29, 2003; Natural Resources Defense Counsel, *Rewriting the Rules, Year-End Report 2002*, *at* http://www.nrdc.org/legislation/rollbacks/execsum.asp (Jan. 2003); Natural Resources Defense Counsel, *The Bush Record,* "White House Transportation Plan Steamrolls Environmental Protections," *at* http://www.nrdc.org/bushrecord/other_more.asp#1333 (May 14, 2003); Natural Resources Defense Counsel, *The Bush Record,* "Justice Department Lax on Chemical Security," *at* http://www.nrdc.org/bushrecord/other_more.asp#1063 (Oct. 10, 2002).

192. *See* HOLMES & SUNSTEIN, *supra* note 28, 60-76.

193. Treanor, *supra* note 35, at 885.

194. Decision makers in a political process commonly receive reciprocal benefits by making "adjustments that are mutually advantageous." CHARLES E. LINDBLOM,

loses in the legislative process or bargains away rights in that process as part of a compromise in exchange for other benefits, but then may petition the courts for monetary compensation for the loss, the owner could receive a windfall.[195]

For example, in the battle over rental housing in San Francisco, tenants have persuaded the City's legislature to adopt rent control ordinances and amendments that enhance tenant rights at the expense of landlords.[196] But landlords hold considerable political power at the State level, and have obtained important statutory concessions from the California Legislature that supersede or limit local tenant protections.[197] Accordingly, because landlords are not politically disadvantaged in California, the Takings Clause does not insulate them from local rent control. The California and federal courts have properly rejected regulatory takings challenges to rent control in California.[198]

By constitutionalizing virtually all economic regulation, partial and means-ends takings threaten to concentrate political power in groups engaging in activities that the Constitution has not afforded any special protection. The purpose of the Takings Clause was to protect against government's physical appropriation of property in case of eminent domain.[199] There is no evidence that the Clause was originally intended to apply to governmental regulation of the use of property.[200] The original understanding of the Clause was that it "defers to majoritarian decision making in most instances but defends those most likely to be the victims of process failure."[201] At the time of ratification of the Constitution and Bill of Rights in 1792, James Madison, the principal author and proponent of the Takings Clause, feared that landowners, who would soon become a minority, and slaveowners, would be vulnerable to majoritarian decision-making

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THE INTELLIGENCE OF DEMOCRACY: DECISION MAKING THROUGH MUTUAL ADJUSTMENT 74-75 (1965).

195. *See* Treanor, *supra* note 35, at 885.

196. SAN FRANCISCO ADMIN. CODE Ch. 37.

197. *See, e.g.*, Ellis Act, CAL. GOV'T CODE § 7060 (West 2003) (barring local governments from hindering landlords' eviction of tenants in order to withdraw completely from the rental housing business); Costa-Hawkins Rental Housing Act, CAL. CIV. CODE § 1954.50 (West 2003) (precluding local governments from controlling rents in apartment units that become vacant).

198. *See* Pennell v. City of San Jose, 485 U.S. 1, 12 (1988); Birkenfeld v. City of Berkeley, 17 Cal. 3d 129 (1976).

199. *See* Treanor, *supra* note 35, at 782, 837.

200. *See Lucas*, 505 U.S. at 1028 n. 15; Treanor, *supra* note 35, at 798-810.

201. Treanor, *supra* note 35, at 872.

that would effect a total taking of their property.[202] The understanding of the Framers, therefore, was that the democratic process would dictate whether compensation should be paid for regulatory restrictions on property.

Although inconsistent with the original understanding of the Takings Clause, the law has devolved to the point where property owners may now seek compensation for regulatory takings.[203] Indeed, the theory underlying *Nollan/Dolan* heightened scrutiny is the failure of the democratic process to protect an individual property owner.[204] The expansion of the types of government action subject to the Takings Clause should not, however, change the underlying purpose of the Clause: to protect groups vulnerable to political process failure.[205] The groups targeted by the Clause are without power to "protect themselves through the political process, [by] engaging in logrolling to ensure that they do not receive an unfair share of the public's burden."[206] As shown, takings claimants are usually businesses whose claim to vulnerability to political process failure rings hollow. Accordingly, partial and means-ends takings are not necessary to correct an imbalance in political power.

The substantive due process chapter in American law is the clearest example of the judiciary's failure in governing as quasi-guardians. Substantive due process was discredited in the early twentieth century because it violated the separation of powers, hindered government efforts to address the problems of an increasingly urban society, and was anti-democratic. For the same reasons, partial and means-ends takings should be discarded.

2. Partial and Means-Ends Takings Lead to Unpredictable Outcomes

Admittedly, democracy is messy and does not result in the greatest economic efficiency. The doctrine of partial takings, it has been argued, is tidy and efficiently allocates resources because the majority of voters will tax themselves to pay compensa-

202. *See id.* at 850-51.

203. *See Mahon*, 260 U.S. at 415.

204. *See Nollan*, 483 U.S. at 837 & n.5; Ehrlich v. City of Culver City, 12 Cal. 4th 854, 876 (1996) ("Where the regulatory land-use power of local government is deployed against individual property owners . . . the *Nollan* test helps to . . . assur[e] that the monopoly power over development permits is not illegitimately exploited . . . .").

205. *See* Treanor, *supra* note 35, at 871.

206. *Id.*

tion to private property owners for regulations that appear to give voters greater personal utility than the amount of the tax.[207] Although democracy is indeed untidy, partial and means-ends takings are more so because they are standardless and uncertain.

The partial and means-ends takings tests are highly subjective. Despite the court's forecast in *Florida Rock* that "[o]ver time . . . enough cases will be decided with sufficient care and clarity that the line [between partial takings and noncompensable regulation] will more clearly emerge,"[208] in the nine years since the Federal Circuit offered this prediction, partial and means-ends takings have not become more coherent, and are perhaps less so.[209] Because the law of property rights cannot always be reduced to rules that courts can apply with consistency,[210] evaluating the *Penn Central* factors or compliance with the "substantially advance" test is bound to depend on the ideology of the judges or, in some cases, juries making the determination. The amorphous phrases used by various courts to justify their takings decisions are susceptible to vastly different interpretations. Accordingly, no one can predict the outcome of a partial or means-ends takings case. The result is uneven justice and the danger that takings cases will confer windfalls on individual property owners.[211] This unpredictability limits the government's power to regulate land and does not maximize the total welfare of society.[212]

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207. *See, e.g.*, William A. Fischel, *Public Goods and Property Rights: Of Coase, Tiebout, and Just Compensation,* 13-14 (2000), *at* http://www.dartmouth.edu/~wfischel/Papers/00-19.pdf.

208. 18 F.3d at 1571.

209. *See* Treanor, *supra* note 35, at 887 ("[V]irtually every one of the legion of commentators to discuss takings law has observed [that] takings law today is incoherent. It lacks a unifying principle . . . .").

210. *See* LINDBLOM, *supra* note 194, at 192-204 (discussing the benefits of consistent decision making).

211. For example, in *Del Monte Dunes*, the jury awarded the developer more than $1.45 million in damages plus attorneys' fees for the agency's denial of the proposed development, even though the developer purchased the property for $3.7 million and sold it four years later, after denial of its project, for $4.5 million. *See* Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422, 1432 (9th Cir. 1996).

212. Even the conservative economist Thomas Sowell has recognized the dangers of judicial activism in economic policy-making, stating that

> [b]elievers in judicial restraint face a major dilemma because such restraint applies both to following the laws as written and respecting legal precedents. Both these things make the law predictable – without which it is not really law but just a set of arbitrary edicts, and courts are just places from which lightning can strike anyone without warning at any time.

Uncertainty in partial and means-ends takings cases will also lead to waste of resources by property owners who pursue litigation in the hope of landing in the courtroom of a sympathetic judge.[213] If courts are to be the final arbiter of economic policy, the enactment of economic policy by a legislature will mark only the beginning of the decision-making process. The validity of any policy could remain unsettled for years as challenges to the legislation wind their way through the courts. Removing certainty about the validity of economic regulation will discourage investment in economic ventures, reducing property values across the board.

To provide reasonable predictability, takings tests must be simple and draw bright lines. A planning regime that allows legislatures to make economic policy would provide the level of predictability necessary for both fairness and efficiency.

3. Legislatures Are Better Equipped to Make Economic Policy than Courts

Simply put, legislatures are superior to courts in making policy because "two heads are better than one." That policy is made by legislative bodies consisting of "a multiplicity of decision makers . . . marked by great variety of attitudes and interests, so that no line of adverse consequence fails to come to the attention of some decision maker" is a "great strength" of the American policymaking system.[214] Legislative bodies are capable of "strategic" decisions; single decision-makers make "serial" decisions, generally leading to inferior results.[215] "[T]hrough multiplicity, decision makers mop up the adverse consequences of each other's inevitably imperfect decisions . . . ."[216] Multiple decision-makers will "compellingly call to others' attention aspects of the problem they cannot themselves analyze."[217] To underscore this point, suppose that international trade policy is made without input from farmers. But domestic farm policy, heavily influenced by farmers, may have adverse effects on international trade policy

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Thomas Sowell, *Judgeships: Part II*, THE WASHINGTON TIMES, Nov. 21, 2002.

213. The unpredictability of takings litigation increases the cost and time required to determine whether a particular regulation effects a taking. *See* F. Patrick Hubbard, *"Takings Reform" and the Process of State Legislative Change in the Context of a "National Movement,"* 50 S.C. L. REV. 93, 107 (1998).

214. LINDBLOM, *supra* note 194, at 151.

215. *Id.*

216. *Id.*

217. *Id.*

towards which the domestic farming community may "be inadequately sensitive."[218] In such situations, the inclusiveness of legislative bodies generally results in superior decisions.

In contrast to decision-making bodies consisting of many members, courts are composed of a single judge or a small group of judges. Their decisions on matters of policy are likely to be disjointed and incremental.[219] For example, in *Action Apartment Ass'n*,[220] the court concluded that Santa Monica's requirement that landlords pay 3% interest on residential tenants' security deposits effected both a partial and means-ends taking.[221] But the ordinance regarding interest on tenant security deposits was only one small part of a comprehensive rent control scheme hammered out by legislative compromise. In exchange for the interest on tenant security deposits, the parties would normally give and take other benefits and burdens to reach a final policy. Instead, a three-judge court allowed landlords to secure compensation for a single component of a larger legislative program, and so disrupted the delicate political process that produced a comprehensive policy. This type of decision-making is at odds with self-governance.

Legislatures are particularly superior to courts in formulating land use policy. The Supreme Court long ago acknowledged that "[s]tate legislatures and city councils, who deal with [land use issues] from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation" required to respond to "increase[s] and concentration of population in urban communities."[222] The "conclusions" of legislatures "should not be disturbed by the courts, unless clearly arbitrary and unreasonable."[223]

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218. *Id.*

219. *See id.* at 143.

220. 114 Cal. Rptr. 2d 412 (2001).

221. *See id.* at 423-28.

222. Gorieb v. Fox, 274 U.S. 603, 608 (1927).

223. *Id.*; *see also* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments."); City of Columbia v. Omni Outdoor Adver., 499 U.S. 365, 377 (1991); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962) (stating that "debatable questions as to reasonableness are not for the courts but for the legislature"); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) ("[W]e do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. . . . [S]tate legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare.").

Environmental conditions are in constant flux, and knowledge of the harmful effects of human behavior on the environment is evolving rapidly. Government must have the freedom and flexibility to adapt land use regulations to changing environmental conditions and evolving scientific understanding of the planet's biological, geological, atmospheric, and marine systems.[224] The Supreme Court applauded this flexibility, finding that local land use regulatory agencies have a "high degree of discretion" to reduce the adverse impact of regulation on the community.[225] But were such deliberations turned over to courts, judges would have no capacity to respond to these changing conditions.

Legislative regulation can also "address cumulative impacts of a range of actions,"[226] whereas courts, as forums for dispute resolution between individual aggrieved parties and agencies, are limited to the random and "occasional . . . impacts of individual actions."[227] Finally, legislatures are better positioned to balance public and private interests by forging compromises and trade-offs that are the very fabric of democratic policy-making.[228]

224. In *Gen. Motors v. Tracy*, 519 U.S. 278, 307-09 (1997), the Supreme Court rejected a challenge to legislation exempting natural gas distribution companies from taxation, stating that it was "institutionally unsuited to gather the facts upon which economic predictions can be made, and professionally untrained to make them. . . . [The Court is] consequently ill qualified to develop Commerce Clause doctrine dependent on . . . predictive judgments."). *See also id.* at 315 (Stevens, J., dissenting) ("[S]peculation about the 'real-world economic effects' of a decision like this one is beyond our institutional competence.").

225. Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 738 (1997).

226. Timothy Searchinger, *Some Key Questions Raised by the Recent Focus in Takings Cases on 'Reduction in Value,'* paper presented at Georgetown University CLE Conference on Regulatory Takings, San Francisco, California, September 1998 at 12.

227. *Id.* "Judges do not have the proper training to [efficiently allocate resources] and they necessarily operate with inadequate and biased sources of information." HOLMES & SUNSTEIN, *supra* note 26, at 94-95. "Unlike a legislature, a court is riveted at any one time to a particular case. Because they cannot survey a broad spectrum of conflicting social needs and then decide how much to allocate to each, judges are institutionally obstructed from considering the potentially serious distributive consequences of their decisions." *Id.* at 95; *see also id.* at 123 (stating that protection of "rights" demands "selective investments of scarce collective resources"); *id.* at 125 (explaining that isolation of a policy issue in court is likely to produce "confusion and arbitrariness").

228. *See Nollan*, 483 U.S. at 847 (Brennan, J., dissenting).

4. Partial and Means-Ends Takings Chill Land Use Planning and Health and Safety Protections

If the courts continue to expand the application and scope of partial and means-ends takings, it is likely that strong land use planning, which the Supreme Court effusively praised in *Tahoe-Sierra*,[229] would descend into chaos. The prospect of defending every economic regulation in court under open-ended partial and means-ends tests would inevitably have a chilling effect on the entire land use planning process. A partial and means-ends takings system of compensation administered by the courts would also cause a massive diversion of government resources to litigation and away from sound health, safety, and environmental planning.

Confronted with the risk of paying compensation for regulation, governments may simply withdraw from land use planning and other forms of economic regulation. The resulting vacuum could be devastating for communities attempting to remedy sprawl, pollution, transportation gridlock, aging infrastructure, and lack of affordable housing and open space. Governments would be less apt to experiment with new initiatives to respond to changing conditions. More social and economic problems would go unaddressed. All communities would become more haphazard, congested, and unsafe. What may promote the short-term economic interest of a few property owners would cause immeasurable injury to a public that relies on local government to create well-planned and safe communities. Ultimately, the quality of life for all would suffer.

III.

A NEW REGIME IN REGULATORY TAKINGS: REPLACEMENT OF PARTIAL AND MEANS-ENDS TAKINGS WITH A CONCLUSIVE PRESUMPTION OF VALIDITY UNDER RECIPROCITY OF ADVANTAGE

The courts should abandon the partial and means-ends takings tests of economic policy in favor of a system that is consistent with democratic decision-making. By adopting bright-line rules, limiting compensation to cases where property owners suffer severe injury from regulation, and broadly applying reciprocity of

229. 535 U.S. 302, 337-42; *see also Dolan*, 512 U.S. at 396 ("Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization . . . .").

advantage, the courts could preserve democracy in economic policy-making. While *Armstrong* teaches that economic policy should be "fair" and should not impose a disproportionate burden on an individual property owner, *Armstrong* provides only the theoretical framework for takings. The question as to what is "fair" should be guided by the determination of democratically elected legislatures that regulation confers an average reciprocity of advantage.

"[A] well-regulated society secured by a state policepower [is] an essential part of the American governmental tradition."[230] The concept of average reciprocity of advantage, while not explicit in most takings decisions, in fact underlies the historic exercise of the police power to regulate land. From the immediate post-Revolutionary War period until the advent of substantive due process in the late nineteenth century, reciprocity of advantage emerged as one of the central organizing principles of the American political system. The prevailing view of the individual in society during this period held that humans are "fundamentally . . . *social* being[s]" who associate because each individual derives reciprocal benefits.[231] This philosophy of mutual exchange resulted in pervasive government regulation for "public safety," "public economy," "the policing of public space," and the "guarantee [of] public health."[232]

"Nineteenth-century America was a public society . . . . Its governance was predicated on the elemental assumption that public interest was superior to private interest. Government and society were not created to protect preexisting private rights, but to further the welfare of the whole people and community."[233] Decision-making in large part took the form of local self-government.

Society employed a flexible system of common law without rigid constitutional limits on the police power.[234] Property own-

230. NOVAK, *supra* note 4, at 14.

231. *See id.* at 30.

232. *Id.* at 1-2. The reality of a well-regulated state during the period immediately before the ratification of the Constitution until approximately 1887 contrasts with the present widely-held myth that this period was instead marked by "statelessness" and "liberal individualism." *Id.* at 3-6. Modern adherents to liberalism tend to engage in "mythic historiography to produce a gross overemphasis on individual rights, constitutional limitations, and the invisible hand; and a terminal neglect of the positive activities and public responsibilities of American government over time." *Id.* at 7.

233. *Id.* at 9.

234. *See id.* at 10, 40, 81, 233.

ers enjoyed protection from injurious land use practices through rigorous application of the common law of nuisance.[235] "Rights and duties were guaranteed actively and relatively in an ongoing calculation of the reciprocal rights and duties of others and the good of the whole in a constantly changing society."[236]

Regulatory takings has moved away from this model of government. Embracing reciprocity of advantage would help restore this ethic.

A. *The Historical Development of Reciprocity of Advantage*

Since the demise of substantive due process, the Supreme Court has displayed only intermittent reliance on average reciprocity of advantage in reviewing government economic regulation. Indeed, no Supreme Court takings decision between 1987 and 2002 relied directly on the doctrine. Reciprocity of advantage has seen a strong resurgence, however, in the Supreme Court's recent *Tahoe-Sierra* decision, and in the California Supreme Court's opinion in *San Remo Hotel.* Such a trend toward deferential judicial review of economic regulation, if indeed a trend, would improve the chances that economic decision-making will become more democratic.

The following discussion of fifteen cases traces the development of reciprocity of advantage from the earliest United States Supreme Court cases through *San Remo Hotel.* This evidence of historical reliance on reciprocity of advantage provides ample support for substituting judicial deference to economic legislation for partial and means-ends takings.

1. Early Reciprocity of Advantage Cases

The first mention of the phrase "average reciprocity of advantage" in American jurisprudence is found in a case that preceded *Mahon* by one month, *Jackman v. Rosenbaum Co.*[237] In *Jackman*, the Supreme Court upheld a state statute allowing construction of two-party walls on property lines against a due

235. *See id.* at 62; *see also id.* at 81 ("In case after case, judges comfortably defended a far-reaching state power to enact fire regulations and control private property rights for the public safety."). "The nuisance exception to the Holmesian takings analysis is based, in large part, on reciprocity theory. The individual owner is burdened by the restriction on possible uses and yet is benefited by like restrictions burdening his or her neighbors." Coletta, *supra* note 13, at 356.

236. NOVAK, *supra* note 4, at 36.

237. 260 U.S. 22, 30 (1922).

process challenge. The Court found that the exercise of the police power "to impose burdens upon property or to cut down its value in various ways without compensation . . . has been held warranted in some cases by what we may call the average reciprocity of advantage, although the advantages may not be equal in the particular case."[238] The *Jackman* Court in turn relied on *Wurts v. Hoagland*[239] and *Fallbrook Irrig. Dist. v. Bradley*.[240]

In *Wurts*, state law permitted assessment of property for the cost of draining adjoining lots. Wurts challenged the law as violating due process because the assessment was "beyond the benefits conferred upon him."[241] The Court disagreed, finding that adjoining lot owners "all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all . . . ."[242] The Court upheld the power of the state "to make an improvement common to all concerned, at the common expense of all."[243]

Similarly, in *Fallbrook*,[244] the Court upheld a statutory assessment of property for irrigation benefiting the entire community. The Court ruled that the rights of individual owners must yield to what the legislature declares "to be for the public benefit."[245]

Several cases decided before *Mahon* also indirectly shaped the reciprocity of advantage doctrine. For example, in *Mugler v. Kansas*,[246] the Court dismissed a constitutional challenge to a Kansas law prohibiting the manufacture and sale of intoxicating liquor. The Court held that under the American system of democracy, the power to regulate in a manner "appropriate or needful for the protection of the public morals, the public health, or the public safety . . . is lodged with the legislative branch of the government" rather than the courts.[247]

238. *Id.* at 30.
239. 114 U.S. 606 (1885).
240. 164 U.S. 112 (1896).
241. 114 U.S. at 611.
242. *Id.* at 614.
243. *Id.* at 612.
244. 164 U.S. 112.
245. *Id.* at 163.
246. 123 U.S. 623 (1887).
247. *Id.* at 660-61.

2. *Mahon*

Mahon contains the first reference to average reciprocity of advantage in a takings case. Without citation, Justice Holmes observed that "an average reciprocity of advantage . . . has been recognized as a justification for various laws."[248] Adopting a narrow view of the reciprocity doctrine, the Court concluded that Pennsylvania's Kohler Act, which prevented coal mining that posed a danger of surface subsidence, failed to confer a sufficient advantage on the holder of the subsurface mining rights to avoid the necessity of compensation.[249] The Court distinguished *Plymouth Coal Co. v. Pennsylvania*,[250] where the Court upheld a regulation requiring underground coal mining operations to leave pillars of coal along the boundary of adjoining property to protect the safety of coal miners. According to Justice Holmes, the distinction between the Kohler Act and the law in *Plymouth* lay in the absence of any benefit to the owners of the mining rights. In *Plymouth*, by contrast, the regulation benefited the coal mining operation by protecting the safety of its employees. Hence, the law achieved a reciprocal advantage.

In his dissent in *Mahon*, Justice Brandeis adopted a more expansive view of reciprocity of advantage than the majority. Indicating that he would have upheld the Kohler Act, Justice Brandeis concluded that reciprocity of advantage should be construed to uphold regulation that generally confers "the advantage of living and doing business in a civilized community."[251]

3. *Euclid*

Although in *Village of Euclid v. Ambler Realty Co.*[252] the Court recognized that some land uses "of an innocent character" may be swept up in zoning classifications, it held that a regulation is not unconstitutional unless it is arbitrary and bears no relation to the health and safety of the community.[253] While not expressly invoking average reciprocity of advantage, the Court found that the complexities of modern urban life brought on by "great increase and concentration of population" require a "degree of elasticity" of land use regulations that was not previously

248. 260 U.S. at 415.
249. *See id.* at 416.
250. 232 U.S. 531 (1914).
251. 260 U.S. at 422 (Brandeis, J., dissenting).
252. 272 U.S. 365 (1926).
253. *See id.* at 389, 391.

necessary.[254] "[W]hile the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation."[255]

As an outgrowth of this recognition of the crucial role of the police power in securing the general health and safety, the Supreme Court adopted the rational basis test for land use regulations: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[256] The *Euclid* Court applied this standard in the context of due process, rather than takings. But the standards for judicial review of zoning regulations and other economic regulation under due process embody the concept of separation of powers and democratic decision-making. These concepts should apply with equal force and in like manner to analysis of regulations under the Takings Clause.

4. *Miller*

Takings cases decided after *Mahon* helped to develop democratic themes in the context of property regulation. For example, in *Miller v. Schoene*,[257] the Supreme Court affirmed a state entomologist's decision to destroy the plaintiff's red cedar trees to avoid spreading rust disease to nearby apple orchards.[258] The Court relied squarely on democratic principles to determine that "the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public."[259]

5. *Penn Central*

No Supreme Court takings case decided after *Mahon* used the term "reciprocity of advantage" until *Penn Central*. Citing *Armstrong's* "disproportionate burden" language for the theory of takings,[260] *Penn Central* established several tests for takings liability, including the three-pronged inquiry involving economic

254. *Id.* at 386.
255. *Id.* at 386-87.
256. *Id.* at 388.
257. 276 U.S. 272 (1928).
258. *See id.* at 277.
259. *Id.* at 279.
260. 438 U.S. at 123-24.

impact, investment-backed expectations, and the character of the regulation, in addition to suggesting a means-ends test.[261] Although the majority opinion in *Penn Central* did not specifically mention "reciprocity of advantage," it relied on several analogous formulations in support of judicial deference to legislative judgments. *Penn Central* cited *Mahon* for the proposition that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law . . . ."[262] Dismissing the terminal owner's argument that New York City's Landmarks Law effected a taking because it imposes a disproportionate burden on the owners of historic buildings, the Court observed that "[l]egislation designed to promote the general welfare commonly burdens some more than others."[263] The Court then explained that the owner had not been "solely burdened and unbenefited," invoking the reciprocity of advantage doctrine: "[T]he New York City law applies to vast numbers of structures in the city in addition to the Terminal. . . . [T]he preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole . . . ."[264]

Associate Justice Rehnquist argued in dissent that the New York City law did not create an average reciprocity of advantage because it was not a zoning regulation.[265] Rather than treating *Armstrong* as stating that fairness should be the objective of such tests, Justice Rehnquist confused the *Armstrong* disproportionate burden principle with a takings test, and laid the groundwork for takings claimants to request courts to make legislative policy judgments.[266] Justice Rehnquist acknowledged the reciprocity of advantage test, but found its scope to be limited: "Here . . . a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other 'landmarks' in New York City."[267] The dissent concluded that the Landmarks Law violated *Armstrong's* disproportionate burden test, suggesting that

261. *Id.* at 124-125.

262. *Id.* at 124 (quoting *Mahon*, 260 U.S. at 413).

263. *Id.* at 133.

264. *Id.* at 134 (footnote omitted).

265. *See id.* at 139 & n.2 (Rehnquist, J., dissenting).

266. *See id.* at 140 (Rehnquist, J., dissenting).

267. *Id.* at 147 (Rehnquist, J., dissenting) (footnote omitted).

the cost of historic preservation in New York City should be spread "evenly across the entire population of the city."[268]

6. *Andrus*

The Court found that an act of Congress prohibiting commercial trafficking in migratory bird parts did not effect a taking in *Andrus v. Allard*.[269] Regulation is not a taking where it "curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase."[270] Adopting Justice Brandeis' broad view of reciprocity of advantage, the Court found, "[I]t is true that appellees must bear the costs of these regulations . . . [b]ut, within limits, that is a burden borne to secure 'the advantage of living and doing business in a civilized community.'"[271]

7. *Agins*

In *Agins v. City of Tiburon*,[272] the Court ruled that a zoning ordinance limiting development of a five-acre parcel to five single-family homes was not a taking. The Court essentially relied on reciprocity of advantage to find that the ordinance generated reciprocal benefits. The Court held that the ordinance benefited the property owner and the public by "assuring careful and orderly development of residential property with provision for open-space areas."[273] The Court noted that other properties were similarly regulated and would "share . . . the benefits and the burdens" of the zoning ordinance.[274] In assessing the economic impact of the regulation on the property, the Court ruled that the benefits of the regulation "must be considered along with any diminution in market value" of the property.[275]

8. *Hodel*

In *Hodel v. Irving*,[276] a federal statute required escheat to an Indian tribe of fractional interests in Indian lands transferred by

268. *Id.* at 148.
269. 444 U.S. 51 (1979).
270. *Id.* at 65.
271. *Id.* at 67, quoting *Mahon*, 260 U.S. at 422 (Brandeis, J., dissenting).
272. 447 U.S. 255 (1980).
273. *Id.* at 262.
274. *Id.*
275. *Id.*
276. 481 U.S. 704 (1987).

descent or devise that were too small to allow efficient use of the land.[277] The tribe would consolidate the fractional interests into larger plots to create better economies of scale.[278] Although recognizing that "the Government has considerable latitude in regulating property rights in ways that may adversely affect the owners,"[279] the Court found that the statute in question deprived the heirs of 100% of their property interest.[280] The Court held that the extreme impact of the statute on the economic value of the property in question was not outweighed by the reciprocity of advantage to the heirs and the tribe from maintaining any escheatable interests in the tribe, or consolidating Indian lands in the tribe.[281] The Court found that this reciprocity weighed only "weakly in favor of the statute."[282] The Court's failure to conclude that reciprocity of advantage justified the statute is explained by the regulation's extraordinary interference with property rights, tantamount to a total taking.

9. *Nollan*

Reciprocity of advantage also did not vindicate the regulation in *Nollan v. California Coastal Commission*.[283] In *Nollan*, the California Coastal Commission conditioned its approval of Nollan's permit to expand his beach house on Nollan's dedication of a public easement to the public to pass along Nollan's private beach to and from public beaches on either side of Nollan's property. The Commission defended the condition on the ground that the enlarged house would make it more difficult for the public to see the beach. The Commission asserted that the ability to see the beach constituted a form of access. The larger house would prevent the public from realizing that there were two public beaches beside Nollan's house. The Court found that the condition failed to "substantially advance" legitimate state interests because there was no connection between the expansion of Nollan's house and the public's need to walk from one public beach to the other.[284]

277. *See id.* at 709.
278. *See id.*
279. *Id.* at 713.
280. *See id.* at 717.
281. *See id.* at 715.
282. *Id.*
283. 483 U.S. 825 (1987).
284. *Id.* at 838-39.

The four dissenting justices would have upheld the condition based on reciprocity of advantage, among other grounds. In his dissent, Justice Brennan explicitly relied on reciprocity of advantage, finding that the economic advantage to Nollan from receiving permission to expand his house far exceeded any minor economic detriment from the public access easement.[285] In addition, Justice Brennan observed, the Coastal Commission's program to improve public access to the beach by requiring other property owners to dedicate public access easements directly benefited Nollan, who enjoyed enhanced access to the beach beyond his own property.[286]

Justice Blackmun likewise advocated a less rigid approach to reciprocity than the majority, based on a more realistic and less myth-bound view of the problems of modern land use regulation:

> The land-use problems this country faces require creative solutions. These are not advanced by an "eye for an eye" mentality. The close nexus between benefits and burdens that the Court now imposes on permit conditions creates an anomaly in the ordinary requirement that a State's exercise of its police power need be no more than rationally based.[287]

The easement the Coastal Commission sought to exact from Nollan, Justice Blackmun argued, was a reasonable mitigation of the impact of the Nollans' development on the loss of "the public's visual access to the ocean," and the "public's sense that it may have physical access to the beach."[288] According to Justice Blackmun, no more precise fit is required to secure a reciprocity of advantage.

Finally, foreshadowing his majority opinion in *Tahoe-Sierra* fifteen years later, Justice Stevens cautioned that the majority's new rule requiring a strict accounting of the burdens and benefits of regulation would "have a chilling effect" on "public officials charged with . . . protect[ing] the environment and the public welfare . . . ."[289]

10. *Keystone*

Perhaps the Supreme Court's clearest and best-developed expression of reciprocity of advantage is found in *Keystone Bitumi-*

285. *See id.* at 856 (Brennan, J., dissenting).
286. *See id.*
287. *Id.* at 865 (Blackmun, J., dissenting).
288. *Id.*
289. *Id.* at 866-67 (Stevens, J., dissenting).

nous Coal Ass'n v. DeBenedictis.[290] In that case, Pennsylvania's Subsidence Act required coal mining companies to leave 50% of subsurface coal in place to provide surface support for certain types of buildings. The Court found that the Act protected the safety and value of surface land, and enhanced drainage and public water supplies.[291] But in addition to identifying these concrete benefits from the Act, the Court adopted a far more expansive view of the reciprocity doctrine than the *Mahon* Court: "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."[292] In a footnote to this passage, the Court explained the practical considerations historically underlying reciprocity of advantage:

> The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received. Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.[293]

The *Keystone* Court's emphatic endorsement of a broad average reciprocity of advantage doctrine appeared to foretell a narrow reading of the Takings Clause. Future cases proved otherwise, however, as the Supreme Court virtually abandoned *Keystone's* broad application of the doctrine until *Tahoe-Sierra* in 2002.

11. *Pennell*

In *Pennell v. City of San Jose*,[294] a six-justice majority of the Court, surprisingly led by Chief Justice Rehnquist, denied a facial takings challenge to a rent control ordinance that allowed reduction of rent increases in cases of tenant hardship. In his concurring and dissenting opinion, joined by Justice O'Connor, Justice Scalia began his analysis of the merits of the takings challenge by quoting *Armstrong's* "disproportionate burden" language to establish a context for his remarks.[295] Justice Scalia then engaged

290. 480 U.S. 470 (1987).
291. *See id.* at 485-86.
292. *Id.* at 491-92 (footnote omitted).
293. *Id.* at 491 n.21.
294. 485 U.S. 1 (1988).
295. *See id.* at 19.

in an extended discussion of the distinction between "[t]raditional land-use regulation" and the limitation on rents for hardship in the San Jose ordinance. In the former case, the regulated property owner is "the source of the social problem" and the regulation presumably confers a reciprocity of advantage; in the latter case, however, the landlord does not create the hardship.[296] According to Justice Scalia's dissent, the cost of subsidizing tenants facing hardship should not be placed on landlords, but rather spread across society as a whole in the form of taxation.[297]

12. *Lucas*

In *Lucas v. South Carolina Coastal Council*,[298] the Court employed the concept of average reciprocity of advantage to explain categorical takings. Where regulation leaves the property owner with no value, effecting a "total taking," the Court reasoned that it is improbable that the regulation confers an "average reciprocity of advantage."[299] Interestingly, the Court did not exclude the possibility that even a regulation effecting a categorical taking could confer an average reciprocity of advantage where a "background principle" of state law, such as common law nuisance, would constitute a defense to a takings claim.[300]

13. *Dolan*

Like *Nollan*, *Dolan v. City of Tigard*[301] was a case of a physical exaction of land, which triggers special scrutiny. In this case, Dolan sought to enlarge her hardware store, located adjacent to Fanno Creek. She argued that in requiring her to deed portions of her property to the city for a bike path and flood control as a condition of approval, "the city has identified 'no special benefits' conferred on her, and has not identified any 'special quantifiable burdens' created by her new store that would justify the particular dedications required . . . ."[302] The Court concluded that the conditions worked a taking, finding that the city failed to show a reasonable relationship between the expansion of the

296. *Id.* at 20.
297. *See id.* at 21.
298. 505 U.S. 1003 (1992).
299. *Id.* at 1017-18 (quoting *Mahon*, 260 U.S. at 415).
300. *Id.* at 1031-32.
301. 512 U.S. 374, 385 (1994).
302. *Id.* at 386.

hardware store and the amount of land exacted to preserve the floodplain.[303] The Court further concluded that although "[n]o precise mathematical calculation is required, . . . the city must make some effort to quantify its findings . . . beyond the conclusory statement that [the bike path] could offset some of the traffic demand generated."[304] The Court required an "individualized determination" that the impacts of the project are related to both the "nature and extent" of the exaction.[305]

Despite the Court's concession that the expansion of the store would create additional demand for bike transportation and flood control,[306] the majority was unwilling to concede to the city the discretion to impose conditions of a particular amount. Nor did the Court provide any guidance as to how the demand for bike paths and flood control generated by the expansion of the hardware store could be quantified. Accordingly, the Court took a narrow approach to reciprocity of advantage.

The dissent, authored by Justice Stevens, easily found a reciprocity of advantage to warrant the conditions, rejecting the need for an "individualized determination."[307] In assessing the relationship between the benefits and burdens of regulation, the dissent insisted on examining the parcel as a whole, which it characterized as "the entire economic transaction."[308] The burden of the loss of a small portion of property for public use, the dissent argued, was insignificant compared to the "benefit to be derived from the permit to enlarge the store and the parking lot."[309] The proper test, in the view of Justice Stevens, would be to require the city to determine whether a nexus is reasonably evident and to require any greater showing of the degree of the relationship only where the condition is "grossly disproportionate" to the adverse effects of the development.[310] The dissent found reciprocal benefits to Dolan that "may well go beyond any advantage she gets from expanding her business" because the city's drainage plan would widen and strengthen the slopes of

303. *See id.* at 394-95.
304. *Id.* at 395-96.
305. *Id.* at 391.
306. *See id.* at 387-88.
307. *Id.* at 398 (Stevens, J., dissenting).
308. *Id.* at 400.
309. *Id.* at 403.
310. *Id.*

Fanno Creek, increasing the Creek's carrying capacity during flooding.[311]

The dissent was particularly dismissive of the majority's insistence that the city calculate the number of bike trips that would replace car trips, stating, "Predictions on such matters are nothing more than estimates."[312] The dissent argued that a reciprocity of advantage, which it referred to as "offsetting benefits," was obvious, regardless of the number of cars trips avoided. "If the Court proposes to have the federal judiciary micro-manage state decisions of this kind, it is indeed extending its welcome mat to a new class of litigants."[313] Justice Stevens cautioned that, by placing considerable burdens on regulators, the majority was venturing dangerously close to Lochnerian substantive due process.[314]

14. *San Remo Hotel*

In the eight years following Dolan, no major regulatory takings opinion mentioned reciprocity of advantage. The reciprocity doctrine resurfaced in *San Remo Hotel v. City and County of San Francisco*.[315] In *San Remo Hotel*, the California Supreme Court held that heightened scrutiny does not apply to legislative fees on which more than 100 California public entities rely to fund infrastructure and services made necessary by development. The ordinance at issue required that hotels converting residential hotel units to permanent tourist use pay a mitigation fee to replace a portion of the lost housing.[316] The San Remo Hotel argued that the ordinance was subject to heightened scrutiny and that it failed to pass that test. The hotel further claimed that a development impact fee that is not imposed on every parcel of property in the jurisdiction unfairly singles out a class of property owners, compelling them to bear a disproportionate burden of a public program.[317] The California Supreme Court upheld San Francisco's fee and, in the process, laid out a blueprint for valid impact fees. The court ruled that courts must defer to legislatively imposed fees where: (1) the method of imposing the fee gives no discretion to the public agency in the imposition or calculation of

311. *Id.* at 400.
312. *Id.* at 404.
313. *Id.* at 405.
314. *See id.* at 406-07, 410.
315. 27 Cal. 4th 643 (2002).
316. *See id.*
317. *See id.* at 668-69.

the fee; and (2) the ordinance is generally applicable to a class "logically subject to its strictures."[318]

In response to the property owner's argument, based on *Armstrong*, that it was entitled to compensation in any instance where the burden of the government regulation, expressed in dollars of lost market value, exceeds the benefit in dollars of market value gained from the regulation, the Court held that the advantage from regulation need not be direct to survive challenge. Rather, it held that the benefit could be as abstract and indirect as "'the advantage of living and doing business in a civilized community.'"[319]

> [T]he necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.[320]

The *San Remo Hotel* court found that San Francisco's ordinance "ensur[ed] affordable and available housing for those San Franciscans who would otherwise be without it, carr[ying] benefits for all the City's property owners, including those operating tourist hotels."[321] Implicit in the court's findings is the assumption that the availability of affordable housing for households of diverse incomes and backgrounds preserves the character of San Francisco as a socially and culturally diverse city. These qualities attract tourists and indirectly benefit tourist hotels. Thus, the *San Remo Hotel* court broadly construed reciprocity of advantage.

15. *Tahoe-Sierra*

One month after *San Remo Hotel*, reciprocity of advantage resurfaced in the United States Supreme Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.[322] At issue was the legendary clarity of Lake Tahoe, which was disappearing at a rate of several feet per year as a direct result of

318. *Id.*
319. *Id.* at 675 (quoting *Mahon*, 260 U.S. at 422 (Brandeis, J., dissenting)).
320. *Id.* at 675-76.
321. *Id.* at 676.
322. 535 U.S. 302 (2002).

overdevelopment in the Lake Tahoe Basin watershed. Housing and commercial construction had been altering the drainage patterns in the Basin for decades, causing nutrients that historically had been absorbed in the soil to instead wash into the Lake. The infusion of nutrients caused the formation of algae and hence the clouding of the Lake.[323]

In this case, an association of 2000 property owners challenged a thirty-two-month development moratorium imposed by the Tahoe Regional Planning Agency (TRPA). The moratorium was necessary to stem further destruction of the Lake's water quality while TRPA studied permanent land use controls.[324] In their takings challenge to the moratorium, the owners staked out an aggressive position: any moratorium preventing development of vacant land for any length of time effects a categorical taking.

A six-three majority of the Court upheld the moratorium. In rejecting the claim that any regulatory delay in development of vacant land effects a per se or total taking under *Lucas*, the Court extended the "parcel as a whole" rule to preclude a takings claim relying on temporal severance. The Court denied the property owners' attempt to carve out a thirty-two-month interest in the property from the remainder of the property's useful life.[325]

The Court also considered whether *Armstrong's* "fairness and justice" language "justifies creating a new rule for these circumstances."[326] The *Armstrong* standard preventing individual property owners from bearing a disproportionate burden of a public program did not, the Court held, require the adoption of "the extreme categorical rule that any deprivation of all economic use, no matter how brief, constitutes a compensable taking . . . ."[327] Nor did it require compensation for "normal delays in obtaining building permits"[328] or temporary restrictions on use "that have long been considered permissible exercises of the police power."[329] Plainly referring to the separation of powers, the

323. *See id.* at 307-08.

324. *See id.* at 311-12.

325. *See id.* at 331-32.

326. *Id.* at 332.

327. *Id.* at 334.

328. *Id.* at 335 (citing First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987)).

329. *Id.*

Court stated, "Such an important change in the law should be the product of legislative rulemaking rather than adjudication."[330]

Then, in unprecedented praise of land use planning through democratic decision-making, the Court stated that "the consensus in the planning community" was that moratoria constituted "an essential tool of successful development."[331] The Court lauded planning moratoria as a means of avoiding hasty decision-making. By using moratoria, "'the planning and implementation process may be permitted to run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of view.'"[332] The Court went on to decry hasty decision-making as "fostering inefficient and ill-conceived growth," noting that the legislatures of California and Nevada had approved the moratorium.[333]

Finally, endorsing legislative decision-making as the antidote to takings, the Court found that the moratoria allowed TRPA to benefit from the input of "interested parties," including the petitioners, during its public hearings and deliberations on the regional plan.[334]

> [W]ith 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 whole. At least with a moratorium there is a clear "reciprocity of advantage," because it protects the interests of all affected landowners against immediate construction that might be inconsistent with the provisions of the plan that is ultimately adopted. . . . In fact, there is reason to believe property values often will continue to increase despite a moratorium. . . . Such an increase makes sense in this context because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state.[335]

In a final nod to the need for democratic land use regulatory decisions, the Court eschewed judge-made rules about the proper length of moratoria: "Formulating a general rule of this kind is a suitable task for state legislatures."[336] Significantly, the Court found that the reciprocity of advantage was "clear," with-

330. *Id.*
331. *Id.* at 337-38.
332. *Id.* at 338 n.33.
333. *Id.* at 339.
334. *Id.* at 340 & n.35.
335. *Id.* at 341.
336. *Id.* at 342.

out imposing a burden on TRPA to show the enhancement of value owing to the moratorium, or even to present *any* empirical, quantitative evidence. *Tahoe-Sierra* suggests that courts should presume that a regulation effects an average reciprocity of advantage in most circumstances where legislative regulation is applied to a class of property owners and the regulation does not effect a categorical taking.

B. *The Scope of Reciprocity of Advantage*

These cases addressing reciprocity of advantage establish an unmistakable pattern. In each case where the Supreme Court rejected a partial or means-ends takings claim, it found that the claimant benefited from a reciprocity of advantage (*Penn Central*, *Andrus*, *Agins*, *Keystone*, *Pennell*, *Tahoe-Sierra*). In contrast, where the Court found a categorical taking, it held that reciprocity was lacking (*Armstrong*, *Lucas*, *Hodel*, *Nollan*, *Dolan*). The Court presumed in the categorical takings cases that no reciprocal benefits could offset the extreme and disproportionate burden on the property owner.

While the Supreme Court's explicit reliance on reciprocity of advantage has been spotty, *Tahoe-Sierra* indicates that the Court may be poised to place wider reliance on reciprocity of advantage in takings cases. The crucial question for the future is whether the Court will expand the scope of reciprocity of advantage to curtail or eliminate partial and means-ends takings. In *Tahoe-Sierra*, the Court found that the reciprocity of advantage was "clear." The Court had no difficulty finding a direct and close relationship between property values in the Tahoe Basin and the clarity of Lake Tahoe. But would the Court also perceive a sufficiently close correlation between a prohibition on filling wetlands and property values, as in *Palazzolo*?

Where the Court does apply the reciprocity doctrine, the degree of closeness that the Supreme Court requires between the benefits and the burdens of regulation may depend on the degree to which the Court perceives that the decision-making process that produced the regulation was fair. In *Nollan* and *Dolan*, the Court expressed concern for a politically powerless individual property owner at the mercy of administrative government agencies.[337] In contrast, in *San Remo Hotel*, the California Supreme Court noted that "generally applicable legislation is subject to

337. *See Nollan*, 483 U.S. at 841; *Dolan*, 512 U.S. at 385.

the ordinary restraints of the democratic political process."[338] Similarly, the *Tahoe-Sierra* Court ruled that a generally applicable legislative standard was fair and did not raise the same risk of imposing regulation on a single property owner.[339] The Lake Tahoe moratorium had been exposed to public review in the political process.[340] Thus, the broader the class of property regulated and the greater the political power of the property owners, the more the Court should be willing to defer to legislative judgments on the basis of reciprocity of advantage.

This analysis is complicated, however, by the *Tahoe-Sierra* Court's rejection of categorical tests in favor of ad hoc adjudications and its dictum that partial and means-ends takings are still viable.[341] Envisioning a rigorous application of reciprocity of advantage is difficult when partial and means-ends takings remain permissible bases for takings liability.

The Supreme Court's most recent takings case, *Brown v. Washington Legal Foundation*,[342] involved a categorical taking,[343] and accordingly provides little guidance as to the Court's intentions regarding reciprocity of advantage. The Supreme Court's next partial or means-ends takings case may present more clues as to the fate of the reciprocity doctrine.

C. *Reciprocity of Advantage Should Guide Regulatory Takings Tests*

The renewed emphasis on reciprocity of advantage in *Tahoe-Sierra* and *San Remo Hotel* suggests two reasons for the principle that regulatory takings should be confined to categorical takings, and that partial and means-ends takings should be eliminated as takings tests. First, regulation of property which falls short of a categorical taking does not implicate fundamental rights. The text and original intent of the Takings Clause support only total takings and physical takings equivalent to direct condemnations. The doctrine of separation of powers requires that in all other cases of police power regulation, courts should extend broad latitude to legislatures to determine if regulation confers an average reciprocity of advantage. Second, if reciprocity of advantage is to

338. *San Remo Hotel*, 27 Cal. 4th at 671.
339. *See Tahoe-Sierra*, 535 U.S. at 341.
340. *See id.* at 340.
341. *See id.* at 332 n.27.
342. 123 S. Ct. 1406 (2003).
343. *See id.* at 1418-19.

occupy a central position in regulatory takings, the partial and means-ends takings tests would be rendered unworkable.

1. Reciprocity of Advantage Is the Only Theoretical Framework for Takings Consistent with Democratic Decision-Making

In *San Remo Hotel*, the California Supreme Court rejected the notion that courts decide economic policy, declaring that "generally applicable legislation is subject to the ordinary restraints of the democratic political process."[344] The court emphasized that the Constitution:

> does not enact Mr. Herbert Spencer's Social Statics, . . . just as surely [as it] does not enact the late Robert Nozick's 'Minimal State.' . . . [N]othing in the law of takings would justify an appointed judiciary in imposing [its] personal theory of political economy on the people of a democratic state.[345]

Responding to the property owner's argument that it should be compensated under the Takings Clause whenever government regulation reduces property values in an amount greater than the monetary benefits of the regulation, the *San Remo Hotel* court ruled that property owners nonetheless benefit from an average reciprocity of advantage.

Adherence to the democratic principles of self-governance and one-person-one-vote requires judicial deference to the economic policy decisions of elected legislatures.[346] Under the doctrine of separation of powers, legislatures are vested with responsibility to balance the burdens and benefits in an "interlocking system" of economic regulation.[347] Judicial deference to the policy decisions of legislatures necessarily requires a conclusive presumption that economic regulations other than categorical takings achieve an average reciprocity of advantage. Any other system would be standardless and devolve into judicial legislating, transforming an ostensibly democratic system into a quasi-guardianship.[348]

Absent an understanding that individual property owners will receive reciprocal benefits from regulation of their property, eco-

344. *San Remo Hotel*, 27 Cal. 4th at 671.

345. *Id.* at 677 (quoting Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

346. *See* Part I., *supra.*

347. *See San Remo Hotel*, 27 Cal. 4th at 675-76.

348. *See* Part I.D.1., *supra.*

nomic policy-making will be subject to the pitfalls of judicial activism under the partial and means-ends tests, including usurpation of power granted to a co-equal branch of government, uncertainty, lack of legislative tools, and chilling of the initiative necessary to respond to changing economic, social, and environmental conditions.[349] Under the reciprocity of advantage doctrine, therefore, judicial review of economic regulation under the Takings Clause should be limited to those regulations that impose extreme economic burdens on property or compel permanent physical occupations — the only rights arguably protected by the text and original intent of the Takings Clause.

2. Reciprocity of Advantage Is the Only Practical Framework for Takings

Proponents of expanding partial and means-ends regulatory takings argue that all government regulation that reduces the market value of property from its value before the regulation was imposed effects a partial and means-ends taking. They contend that the difference between the before and after values constitutes the measure of compensation. This before and after approach to takings is flawed not only because it fails to account for the reciprocal benefits of the regulation at issue and other government givings, but also because neither takings nor givings can be accurately measured. Takings should accordingly be limited to those narrow cases where the claimant proves a categorical taking and the complete absence of reciprocity, not just from the regulation in question, but from the whole system of applicable economic regulations, of which the particular regulation is merely a part.

a. The Difficulty of Calculating Takings

A presumption that regulation confers an average reciprocity of advantage avoids the considerable practical difficulties of evaluating the economic impact of regulation on property. The practical difficulties of measuring "takings" resulting from land use regulation are particularly acute.

The difference in the before and after value of property is the generally accepted measure of liability and damages for partial takings, as well as the measure of damages for means-ends takings. But "considerable uncertainty surrounds" the before and

349. *See* Part I.D., *supra*.

after valuation of property.[350] Before and after appraisals "require counterfactual judgments about the use to which the affected property would have been put in the absence of regulatory action."[351] Valuation of the property in the "before" condition when the challenged regulation is also applicable to other properties "requires speculation about how much a piece of property would be worth in a market that does not exist."[352] To determine the value of the property without the regulation requires an appraiser to compare the property to similar property in a different location not subject to the regulation in question. But finding comparable property not subject to the same regulation is often impossible.

The circumstances of *Palazzolo* illustrate the paradox of accurately appraising the "before" condition. Palazzolo claimed that restrictions on filling the wetland portion of his property constituted a regulatory taking, entitling him to compensation for the lost "value" of the wetland portion of the property.[353] To determine the lost "value" of Palazzolo's property, an appraiser would be required to make a market comparison. To compare Palazzolo's property with similar properties, the appraiser would have to determine the probable sale price of other properties in the vicinity of Palazzolo's on the Rhode Island Coast, assuming that these parcels were free from any restrictions on filling. It is anyone's guess as to the value of Palazzolo's wetlands and upland property if houses, shopping malls, parking lots, beach clubs, and office buildings surrounded it instead of undisturbed wetlands. No property comparable to the subject property – that is, comparable except for the challenged regulation – exists.

As another example, the traditional market comparison approach to valuation of real estate would be useless in determining the cost or benefit to landowners resulting from the building moratorium at issue in *Tahoe-Sierra*. In that case, the moratorium on building was intended to preserve the clarity of Lake Tahoe. The only way to determine the impact of the clarity of the lake on land value would be to compare the sale price of a parcel of land adjacent to a cloudy lake with the sale price of a

350. C. Ford Runge, *The Congressional Budget Office's Regulatory Takings and Proposals for Change: One-Sided and Uninformed*, 7 ENVTL. L. & PRAC. 5, 7 (1999).

351. *Id.* at 7.

352. *Searchinger*, *supra* note 225, at 4; *see also* Echeverria, *supra* note 44, at 222-23 (showing difficulty of establishing benchmark for "before" condition of property for assessing partial takings damages).

353. 533 U.S. at 615-16.

comparable parcel adjacent to a clear lake, controlling for all other factors. Because the degree of clarity of the lake is uniform throughout the Tahoe Basin, the transactions necessary to appraise the value of the moratorium do not exist.

Other appraisals of before and after values would be equally problematic. To determine reasonable investment-backed expectations, the appraiser must account for carrying costs, maintenance and improvements, and inflation for the period between the purchase and the taking. This determination would require several subjective and arbitrary judgments.[354] Adjusting the purchase price of the property for inflation and then comparing the adjusted price with the market value of the property subject to the regulation may indicate that the owner has made a reasonable return on his investment, negating a taking.[355] Because the inflation adjustment is highly subjective, however, the question of takings liability would likewise be unreliable, inconsistent, and impractical to resolve.[356] Investment-backed expectations "are not observable and are extremely subject to misrepresentation."[357]

Moreover, the value of land can change over time, creating uncertainty as to permanent loss or gain.[358] For example, a landowner receiving compensation for a regulatory burden on the property that assumes the regulation to be permanent would receive a windfall if the regulation were modified or withdrawn.

Even putting aside the difficulty of quantifying the burden imposed on individual properties in a partial regulatory takings regime, the extreme version of partial and means-ends takings advocated by the property rights movement, in which every property owner would be entitled to compensation for any regulatory diminution in value or any regulation that a court believes unwise or ineffective, poses enormous practical barriers. Each of the millions of individual parcels of privately owned property in the United States is subject to a myriad of regulations. If even a small fraction of those property owners sought compensation in the courts for regulatory takings, the judicial system would eventually be overwhelmed.

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354. *See* Echeverria, *supra* note 44, at 222-24.
355. *See id.* at 224.
356. *See* Runge, *supra* note 350, at 12.
357. *Id.*
358. *See id.* at 6.

Implementing an extreme partial and means-ends takings system proposed by several courts, such as the *Chevron* and *Florida Rock* courts, would also overtax other resources. The appraisal of property before and after government regulation is complex. In cases of vacant or underdeveloped land, the appraiser must determine the highest and best use of the property.[359] This determination requires investigation and sophisticated judgments as to the physical, financial, and political feasibility of particular development.[360] The judgment of highest and best use often requires a prediction as to the outcome of a politically charged entitlement process.[361] These judgments can be made only by the most experienced appraisers, such as those holding the Member of Appraisal Institute (MAI) designation.[362] Further, for the appraisal of property with development potential, an appraiser may require the assistance of civil engineers to design and estimate the cost of infrastructure, extraordinary foundation costs, or hazardous waste remediation.[363] An appraiser may also require the advice of a planner or architect experienced in the local politics of land use regulation to determine the development potential of the property.[364] Massive resources would be tied up in litigation to determine compensation for regulation. In spite of the Supreme Court's declaration in *Tahoe-Sierra* that land use planning is vitally important for the welfare of society,[365] the continuing vitality of partial and means-ends takings would have the effect of diverting these resources from land use planning to litigation.

Added to these uncertainties is the complexity of assessing the impact of a "single regulatory restriction" on different parcels of land.[366] Because each parcel of real property is unique in location, size, topography, shape, and orientation, a separate appraisal would have to be conducted for each parcel affected.[367]

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359. *See* APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE 50 (11th ed. 1996).

360. *See id.* at 303-06.

361. *See id.* at 304.

362. *See id.* at 253-56.

363. *See id.* at 274.

364. *See id.*

365. *See Tahoe-Sierra*, 535 U.S. at 337-38, 339 (stating that the "consensus in the planning community" supports moratoria and that planning is an important tool to curb "inefficient and ill-conceived growth").

366. Runge, *supra* note 350, at 11.

367. *See* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 738-39 (1997) (stating that each parcel of land is "singular").

Each individual property owner would necessarily have a separate claim to compensation requiring a separate proceeding.

The above discussion emphasizes the problems of expanded takings for land use regulation. If all economic regulation were susceptible to challenge under the partial and means-ends takings tests, the potential litigation would be multiplied. Society simply cannot afford a system where property owners can litigate to recover compensation for open-ended partial or means-ends takings. Besides the fact that just compensation awards would bankrupt government, the litigation costs alone of such a system would be prohibitive. Moreover, the public would presumably pay the property owner's attorneys' fees as well as its own.[368] For many properties, the overall cost of adjudicating a partial or means-ends takings claim would eclipse the total compensation awarded.

Finally, the justice resulting from a partial takings system is bound to be unsatisfactory. An appraisal is an opinion of value, rather than a scientific measuring process.[369] "[B]iased . . . appraisals [are] difficult to avoid."[370] Under the jury system for determination of regulatory takings damages in most states, two similarly situated property owners could easily obtain different results from a takings suit. The courts, appraisers, other experts, and counsel in each case would determine the costs to society of government land use regulation, instead of an orderly, comprehensive planning process.

In contrast, where reciprocity of advantage is assumed for all economic regulation except categorical takings, the practical difficulties of assessing takings fall away. The case for reciprocity as the only practical theory for evaluating the "fairness" of economic regulation is even stronger when "givings" are added to the analysis.

b. The Difficulty of Accounting for Givings

Implicit in the theory of average reciprocity of advantage — and ignored in partial and means-ends takings — is the concept that reductions in property values from regulatory "takings" are more than offset by increases in values from regulatory and other

368. *E.g.*, CAL. CIV. PROC. CODE § 1036 (West 2003) (requiring government to pay attorneys, appraisers, engineers, and other expert fees, and litigation costs to successful inverse condemnation plaintiff).

369. *See* APPRAISAL INSTITUTE, *supra* note 359, at 12.

370. Runge, *supra* note 350, at 7.

government "givings"[371] In any analysis of the impact of regulation on property values to determine whether compensation is due, it is fair and logical to balance all government givings with takings. "[S]ome citizens . . . commonly benefit from larger 'givings' than other citizens. In concept, it is no more unfair to leave unequal adverse effects of government regulation unremedied than it is to leave unequal givings unrecouped."[372] Focusing on takings to the exclusion of givings "might have the perverse effect of creating a special entitlement to compensation for groups already among the largest beneficiaries of public givings."[373] Government agencies routinely upzone agricultural or industrial property for more profitable residential or commercial development and use public funds to provide infrastructure to facilitate development. Indeed, the positive impact of government planning on property values is well documented.[374] Government sub-

371. *See id.* at 5. Theodore Roosevelt used his State of the Union Speech in 1906 as an occasion to express the potentially broad scope of the givings doctrine: "The man of great wealth owes a peculiar obligation to the State, because he derives special advantages from the mere existence of government." THEODORE ROOSEVELT, *Sixth Annual Message to the Senate and House of Representatives, the White House (December 3, 1906), in* 2 THE STATE OF THE UNION MESSAGES OF THE PRESIDENTS 1790-1966, Vol. II, at 2194, 2213 (Fred L. Israel ed., 1967). Professor Joseph Sax echoed these sentiments:

> I have often pondered the paradox that the strongest property rights movement in the world should have developed in the United States, the most vigorous defender of private property, and the private property system, of any place in the world. One would be hard pressed indeed to find any place where one's bank account, securities holdings, contracts, and transactions, are more vigilantly protected, where security of possession in land and chattels is more jealously insured, and is so little subject to the whims of government or to some notion of public rights.

Sax, supra note 8, at 1. *See generally* HOLMES & SUNSTEIN, *supra* note 28.

372. Runge, *supra* note 350, at 10. The illogic and unfairness of failing to consider both givings and takings as noncompensable events is poignantly illustrated by the example of global warming. Under the takings theory, assuming that the United States Government's policies contribute to global warming, every person whose property value will be diminished or destroyed by global warming would deserve compensation from the federal government for a taking. *See* Molly Ivins, *Warming and Doing Nothing*, S.F. CHRONICLE, June 5, 2002, at A25. Likewise, government policies that reduce greenhouse gases or preserve carbon-absorbing forests would constitute givings that should be offset against global warming takings. The monetary value of these respective burdens and benefits would be impossible of determination.

373. Runge, *supra* note 350, at 10-11.

374. *See, e.g.*, JAMES E. DUNCAN ET AL., THE SEARCH FOR EFFICIENT URBAN GROWTH PATTERNS (1989) (finding that costs of housing in planned communities are lower than in unplanned conditions); DUPAGE COUNTY DEV. DEPT., IMPACTS OF DEVELOPMENT ON DUPAGE COUNTY PROPERTY TAXES (1991) (stating that residential property taxes increased to subsidize infrastructure for commercial development); JAMES E. FRANK, THE COSTS OF ALTERNATIVE DEVELOPMENT PATTERNS: A

sidies to tobacco and corn growers are further prime examples of government givings.[375] Were the beneficiaries of these programs to receive compensation for other government regulation restricting the use of their property, they would receive a windfall at public expense.[376]

Government provides three types of givings: (1) regulations that "protect services and amenities that directly benefit property owners, including owners who are themselves subject to the regulations;" (2) regulations that produce "scarcity effects," limiting the owners' use of property, but in the process increasing the value of the property due to the "uses owners retain;" and (3) "private subsidies" and "public investments" in infrastructure and services.[377] An example of the first type of giving is the moratorium in *Tahoe-Sierra*, where the Supreme Court suggested that the limits on development resulting from the temporary building ban and the long term plan enhanced the clarity of Lake Tahoe, resulting in an increase in property values for those subject to the moratorium. An example of the second type of giving is a limit on logging a portion of forest owned by a logging company to protect native habitat. The resulting scarcity of timber

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REVIEW OF THE LITERATURE (1989) (explaining that capital costs for housing are substantially reduced in planned high-density communities, rather than in unplanned, inefficient, low-density sprawl); TRANSPORTATION RESEARCH BOARD, NATIONAL RESEARCH COUNCIL, THE COSTS OF SPRAWL – REVISITED 46-58 (1998) (summarizing studies concluding that urban sprawl increases need for public subsidy of infrastructure, causes adverse public fiscal impacts, and increases land costs); Eben V. Fodor, *The Real Cost of Growth in Oregon*, POPULATION AND ENV'T, Mar. 1997, at 373, 375 (stating that public subsidy of infrastructure keeps housing prices artificially low).

375. *See* Runge, *supra* note 350, at 15.

376. *See* Mark W. Cordes, *The Public/Private Balance in Land Use Regulation*, 1998 L. REV. M.S.U.-D.C.L. 681, 688-91 (1998). Indeed, tax-funded government creates property rights – the very same rights that takings claimants allege to have been taken:

> A liberal legal system does not merely protect and defend property. It defines and thus creates property. Without legislation and adjudication there can be no property rights in the way Americans understand that term. Government lays down the rules of ownership specifying who owns what and how particular individuals acquire specific ownership rights. It identifies, for instance, the maintenance and repair obligations of landlords and how jointly owned property is to be sold. . . . Property rights exist because possession and use are created and regulated by law.

HOLMES & SUNSTEIN, *supra* note 28, at 60.

377. Runge, *supra* note 350, at 5-6. Palazzolo's property is an excellent example of the enhancement of value from scarcity effects. Palazzolo's upland would be worth considerably more if it were adjacent to Winnapaug Pond, a wetland that was, like most of Palazzolo's property, protected from development. *See Palazzolo*, 533 U.S. at 613.

could generate higher values for unrestricted timber owned by the company. The third type of giving includes the full range of government services, from the construction of roads to the provision of police, fire, and public health services.

While givings are substantial and should be recognized in evaluating whether a regulation effects a taking, the measurement of givings is even more problematic than the measurement of takings.[378] It is difficult to assess how regulation "affects both the supply and amenity value of land."[379] "[I]n some places highways increase land values, in other places they decrease them. Separating the impacts, however, is analytically difficult."[380] Moreover, regulation can provide improvements to health, safety, and other social benefits that are not reflected in land values.[381] As another example, the traditional market comparison approach to valuation of real estate would be useless to determine the effect of police and fire protection on value, because virtually all land benefits from such services.[382] Thus, transactions that could be compared to determine the enhanced value from these services – one with the services and one without – do not exist.

To add yet another layer of complexity to an already complicated calculation, to fully account for the givings that contribute to the value of property, the takings/givings equation would have to consider historic givings to the property, and potential givings in the future measured by an appropriate standard, such as givings that are likely to occur.[383] For example, the construction of Hoover Dam by the federal Bureau of Reclamation at taxpayers' expense in the 1930s led to the explosion of agriculture in western Arizona and California's Imperial Valley. Formerly arid, unproductive, privately owned land now had access to a reliable supply of irrigation water, suddenly and dramatically increasing

378. "Property rights are costly to enforce. To identify the precise monetary sum devoted to the protection of property rights, of course, raises difficult issues of accounting." HOLMES & SUNSTEIN, *supra* note 28, at 61.

379. Runge, *supra* note 350, at 9.

380. *Id.* at 14.

381. *See id.*

382. Private property benefits from myriad government services funded by taxes: police and fire protection, record keeping, road and bridge building, sewage treatment, a court system to defend property rights, a national defense, and various laws creating predictability and hence a favorable business climate. *See* HOLMES & SUNSTEIN, *supra* note 28, at 62-64.

383. *See* City of Los Angeles v. Decker, 558 P.2d 545, 549 (1977) (opinion of fair market value can be based on future development that is "reasonably probable").

the land's value.[384] If the landowners that benefited from Hoover Dam were to claim that an endangered species regulation in 2003 effected a taking of their land, the massive givings from the Dam should be taken into account. Without the Bureau of Reclamation's continuing contribution of water to their property, their land would have little value to lose.[385]

Givings can assume an even broader scope if a court considers indirect benefits to property in the takings calculus. Echoing *Tahoe-Sierra's* finding that takings should consider long-term value, the future value of all natural resources – minerals, timber, rain forest, air, water, and soil – should be considered in land use decisions.[386] Income, and resulting value, should be defined as the maximum resources society can consume over a period of time and still be as well off.[387] Growth should be defined not as the total of monetary transactions, but rather the net social and economic gain of human activity.[388] Accordingly, government regulation that devalues land and other natural resources in the short term, but that preserves natural capital for later owners, could achieve givings equal to or greater than any takings. Moreover, the role of government regulation is not necessarily limited to maximizing the economic benefit of every sector of society. Governments promote non-economic goals, such as public health and aesthetic values. These services should also be considered in assessing the givings provided by government regulation.

As an example of the potential breadth of the reciprocity doctrine, it is virtually undisputed that overfishing in United States' waters off both the Atlantic and Pacific coasts will lead to a catastrophic depletion of fisheries unless government takes sweeping, sustained action to limit fishing.[389] Regulation limiting fishing,

384. *See* MARC REISNER, CADILLAC DESERT 131-44, 478 (1993).

385. Of course many taxpayers also benefit from the availability of less expensive agricultural products as a result of the federal funding of Hoover Dam. California and Arizona consumers in close proximity to the products grown with Colorado River water derive more benefit than consumers in New York or Hawaii. And those who consume more fresh fruit and vegetables grown in California and Arizona may benefit more than those whose diet consists primarily of red meat shipped from ranches in the Midwest. But the dollar value of the individual benefits of this government-funded program are entirely speculative.

386. *See* GRETCHEN C. DAILY & KATHERINE ELLISON, THE NEW ECONOMY OF NATURE 10-11 (2002); PAUL HAWKEN ET AL., NATURAL CAPITALISM 19-20 (1999).

387. *See* HAWKEN ET AL., *supra* note 386, at 158.

388. *See id.* at 60-61.

389. *See* Conti v. United States, 48 Fed. Cl. 532, 534-35 (2001); John Heilprin, *Study Stresses Growing Crisis Over Health of Oceans, Coasts*, S.F. CHRONICLE, Sept. 23, 2002, at A5; CNN, *Study Warns Pollution, Overfishing Threaten Once Rich*

however, may damage the livelihood of those presently employed in the fishing industry. Government must adopt regulations that will minimize the disruption of the industry, and at the same time insure the viability of fisheries for present and future generations. The courts are not the proper forum for developing a policy to achieve this balance. In a takings lawsuit brought by fisherman challenging fishing limits, it would be difficult for a court to quantify the burden on the claimants, and likewise difficult to quantify the benefit of fishing regulations to the preservation of fisheries and other oceanic life systems.[390] The cost-benefit analysis simply breaks down. While the legislature must obtain as much evidence as possible before imposing regulations, its decision will ultimately depend on a reciprocity of advantage that will span not only populations, but entire generations. Of course, those with a stake in the decision of the legislature will have an opportunity to influence the policy in the legislative forum.

Not surprisingly, government regulation is necessary to create the correct incentives to preserve natural capital because markets are generally too shortsighted and do not effectively recognize either the full or long term natural capital costs of transactions.[391] Partial and means-ends takings rely on the fiction that land use decisions affect only economic interests, and only in the short term. Politics, however, cannot be divorced from economic policy. An elected legislature, applying reciprocity of advantage, is the proper forum for balancing the interests of different constituencies on questions of economics.

Property rights advocates have argued that taxes pay for all government givings, and thus regulatory takings should ignore

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Stocks Under the Sea, *at* http://www.cnn.com/2000/NATURE/11/13/missing.fish/ (Nov. 13, 2000); Greenpeace, *Global Overfishing: Overview of the Campaign*, *at* http://archive.greenpeace.org/oceans/globaloverfishing/ (last visited Nov. 3, 2003); Sierra Club, *Population and Overfishing Factsheet*, *at* http://www.sierraclub.org/population/reports/fishing.asp (last visited Nov. 3, 2003); World Wildlife Federation, *Creating a Sea Change for Fisheries*, *at* http://www.panda.org/resources/publications/water/fisheries_99/seachange.html (last visited Nov. 3, 2003).

390. *See Conti*, 48 Fed. Cl. at 539 (rejecting fisherman's takings challenge to fishing restrictions on ground that fisherman had no property right in continued use of gear, vessel, or permit).

391. *See* HAWKEN ET AL., *supra* note 386, at 260-64, 318. "Markets were never meant to achieve community or integrity, beauty or justice, sustainability or sacredness – and, by themselves, they don't. To fulfill the wider purpose of being human, civilizations have invented politics, ethics, and religion. Only they can reveal worthy goals for the tools of the economic process." *Id.* at 262.

givings. To the contrary, calculating the value of all government givings received by an individual property owner would be an impossible task. Moreover, taxes are used to fund a multitude of government programs, many of which do not benefit the person taxed. Some taxpayers receive services and goods from the government of a total value exceeding their personal tax payments, and some receive less. Indigents, farmers, and defense contractors are examples. By some estimates, government subsidies to agricultural land users in the United States have increased the value of all agricultural land by 15-20%.[392] Taxes are the most common source of wealth transfers to achieve social aims. It is not a valid objection to a tax that the value of the goods and services received by the taxpayer is less than the amount of the tax.[393] Democratically elected legislatures determine equity in taxation.[394] Equity in economic and social regulation should be conducted through the same route.

c. Summary: Partial and Means-Ends Takings Are Unworkable

The foregoing discussion demonstrates that the costs and benefits of regulation – the takings and givings – cannot be objectively and accurately quantified.[395] Using cost-benefit analysis to set environmental standards is deeply flawed and does not lead to more efficient or fair decisions, primarily because the benefits of environmental regulation have not been quantified and are incapable of being quantified. Cost-benefit analysis as the basis of environmental regulation sacrifices the health and safety of future generations for present ones, imposes greater burdens on the poor, and fails to accurately quantify benefits and burdens.[396] Accordingly, a different decision-making structure is necessary—namely, a process that recognizes that these decisions are quintessentially political and involve compromise, but is founded on the premise that an average reciprocity of advantage will be

392. *See Searchinger*, *supra* note 226, at 9 n.4 (*citing* Robbin Shoemaker et al., *Commodity Payments and Farmland Values*, AGRICULTURAL OUTLOOK, June 1995, at 15-16).

393. *See* Regan v. Taxation with Representation of Wash., 461 U.S. 540, 547 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.").

394. *See id.*

395. *See* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection*, 150 U. PA. L. REV. 1553 (2002).

396. *See id.*

achieved.[397] The corollary principle is that courts should defer to legislative decisions, only interfering in cases of manifest injustice.

The need to measure givings only compounds the difficulty of measuring takings. Although the case for netting out givings and takings to achieve an average reciprocity of advantage is compelling, calculating them is well nigh impossible. The givings in the equation would include all government regulation and services directly and indirectly affecting the property in question.

Even if the net effect of an individual regulation could be calculated, however, and were found to be disadvantageous to the property owner after all takings and givings are netted out, compensation should nonetheless be denied, except in the case of categorical takings. Economic regulation, like taxes, should be permitted to effect wealth transfers without compensation.

Application of an average reciprocity of advantage theory to takings compels two conclusions: not only must givings be balanced with takings, but it would be folly to expect a court to determine the impact of a discrete enactment on the net advantage or disadvantage to an individual property from all applicable takings and givings related to the property. In *Tahoe-Sierra*, the Court did not require that the takings and givings of the moratorium be reduced to mathematical calculations, recognizing that any such analysis would be too complex and subjective. Instead, the Court relied on the well-recognized effect of sound land use regulation to rule that the givings effected by the moratorium were sufficient to offset any taking. The Court's ruling supports the conclusion that the only workable and fair approach to land use regulation is to permit the democratic decision-making process to make policy.

IV.
CONCLUSION

Confining takings to categorical rules is necessary. The only workable system of land use regulation is to limit compensation to those categorical, bright line cases of complete economic

397. The amount society should spend on social programs such as "equal access to justice . . . is a question for political and moral evaluation, and it cannot be settled by accounting alone." HOLMES & SUNSTEIN, *supra* note 26, at 28. For an interesting discussion of the psychology of reciprocity of advantage, see Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law* (2002), *at* http://papers.ssrn.com/abstract=361400.

wipeout or a physical occupation. The Supreme Court's efforts to find a middle ground have resulted in confusion, inconsistent decisions, and most problematically, undemocratic decision-making. Issues of fairness can be adequately addressed under other constitutional provisions, such as the Due Process Clause.

Partial and means-ends takings are inherently anti-democratic because: (1) they allow land use policy-making by largely unelected judges, without any democratic counterweight to their individual biases; (2) judges do not have the expertise, time, or resources necessary to conduct a thorough analysis of land use problems for informed decision-making; (3) the parties to the judicial proceeding have narrow interests, while the decision of the court often affects the general public interest; and (4) interested parties have limited opportunity to express their views in a partial takings judicial proceeding.

Democracy is not tidy nor does it produce perfect equity, but it is the best political regime available. A system that presumes that economic regulation made by elected legislatures achieves reciprocity of advantage is superior to a system where courts, acting as quasi-guardians, apply partial and means-ends takings tests to make economic policy.