

SUBSTANTIVE DUE PROCESS AND REGULATORY TAKINGS: A REAPPRAISAL

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I. INTRODUCTION

Despite the Supreme Court's renewed interest in property rights since the mid-1980s, its property jurisprudence affords litigants only Procrustean hospitality. Federal courts are required both to stretch property rights claims through procedural complexity and to truncate them through suppression of constitutional arguments based upon other than the Takings Clause.

Under "prudential ripeness principles,"¹ which the Court devised for application to regulatory takings claims² and to no others,³ landowners must overcome a complex and difficult set of hurdles in order to obtain federal court review.⁴ Claims often

* Copyright 2000. *Alabama Law Review* and Steven J. Eagle. All rights reserved. Professor of Law, George Mason University. This Article is a revised version of a paper written while I was a Visiting Professor of Law at Vanderbilt University and presented at the United States Court of Federal Claims' Symposium "Winstar, Eastern Enterprises, and Beyond," held on April 29-30, 1999, in Washington, D.C. Thanks to Jim Ely, Dan Mandelker and the participants of a faculty workshop at Vanderbilt Law School for their comments.

1. *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733 (1997).

2. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (establishing "final decision" and "denial of just compensation" requirements for the adjudication of landowners' "as applied" regulatory takings challenges in federal court). *Williamson County* does not apply to a "facial challenge" alleging that the mere promulgation of a statute or regulation constitutes a taking. However, such a challenge requires proof that *all* applications of the rule would result in a taking. See *United States v. Salerno*, 481 U.S. 739, 745 (1987). Thus, "a facial attack on the regulation results in a case which the property owner *can* litigate, but virtually cannot win." MICHAEL M. BERGER, *REGULATORY TAKINGS UNDER THE FIFTH AMENDMENT: A CONSTITUTIONAL PRIMER* 19 (1994) (discussing ripeness issues).

3. See Timothy V. Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1, 2 (1992) (noting "a special ripeness doctrine applicable only to constitutional property rights claims").

4. The literature is extensive. See, e.g., Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37 (1995); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*,

will not be heard at all.⁵ The adjudication of conceptually straightforward regulatory takings claims may take a decade or longer.⁶

While what I dub the "stretching prong" of the Court's property rights jurisprudence is stringent, its "lopping prong" is just as rigorous. Even within the Takings Clause itself, claims based on the Public Use component are severed and discarded,⁷ and claims based on the Just Compensation component are severely pruned.⁸ Non-Takings Clause claims have been struck down remorselessly. The Privileges or Immunities Clause of the Four-

48 VAND. L. REV. 1 (1995); see also BERGER, *supra* note 2, for an excellent summary. Due process claims in takings cases are subject to *Williamson County* ripeness rules, with some variants. See David S. Mendel, Note, *Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments*, 95 MICH. L. REV. 492 (1996).

5. See, e.g., *Testimony on H.R. 1534 Before the Subcomm. on Courts and Intellectual Property of the House Comm. on the Judiciary*, available in 1997 WL 621739 (F.D.C.H.) (statement of Daniel R. Mandelker, asserting that "federal judges have distorted the Supreme Court's ripeness precedents to achieve an undeserved and unwarranted result: they avoid the vast majority of takings cases on their merits"). In October 1999, the Supreme Court declined to review a case directly raising the issue of whether a property owner has a right to federal judicial review. In *Williamson County*, the Court suggested that the owner did but that, pending review in state court, the claim was "premature." 473 U.S. at 185. However, some lower courts have asserted that the application of procedural rules such as *res judicata* and issue preclusion may result in the *Williamson County*-mandated state court review being final. See *Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment*, 178 F.3d 1295 (6th Cir.), *cert. denied*, 120 S. Ct. 172 (1999).

6. See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (upholding temporary takings damages for permit first sought in 1981 and finally denied in 1985); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997) (determining issue of "ripeness" and remanding, where the permit was first sought in 1989); *Eastern Minerals Int'l, Inc. v. United States*, 36 Fed. Cl. 541 (1996); 39 Fed. Cl. 621 (1997) (awarding damages for excessive delay; plaintiffs' 1984 permit application was not denied until 1994); *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851 (Cal. 1997), *cert. denied*, 118 S. Ct. 856 (1998) (reviewing the plaintiff's ten-year effort to obtain a fair rate of return on rental property, determining that the plaintiff had been denied due process, and remanding to the agency that could provide future rent adjustment, taking its earlier deprivation into account).

7. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (declaring the public use requirement "coterminous with the scope of a sovereign's police powers").

8. See *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (noting "that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, [owners] value their property at more than its market value (i.e., it is not 'for sale')").

teenth Amendment⁹ long has been dormant,¹⁰ although recently the Court has bestowed upon it the spark of life.¹¹ The Contract Clause¹² has been mostly moribund.¹³ The Due Process Clause, which played such a prominent role in the protection of property rights, has been downplayed through a revisionist history.¹⁴

Unsurprisingly, outsiders have pronounced the Court's property jurisprudence incoherent,¹⁵ and some of the Justices have been kinder only in form.¹⁶ The Court has not disclaimed that there is a core of substance to individual property rights. To the contrary, it has from time to time celebrated it.¹⁷ But the Court

9. U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . .").

10. *The Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873); see also Kimberly C. Shankman & Roger Pilon, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, 3 TEX. REV. L. & POL. 1 (1998) (spirited argument for resurrection).

11. See *Saenz v. Roe*, 119 S. Ct. 1518, 1525-27 (1999) (holding that lower welfare benefits for recent migrants to a state violates the right to travel—a privilege or immunity of federal citizenship); see also *infra* text accompanying notes 109-10.

12. U.S. CONST. art. I, § 10.

13. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 435 (1934) (upholding Depression-era mortgage foreclosure moratoria by reading the sovereign's emergency powers into contracts "as a postulate of the legal order"). As subsequent cases demonstrate, the Court "has rewritten the contract clause, by inserting the word 'unreasonably' before 'impairing' and by adopting a radically undemanding definition of 'reasonableness.'" *Chicago Bd. of Realtors, Inc. v. Chicago*, 819 F.2d 732, 743 (7th Cir. 1987) (Posner, J., concurring) (citing *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 687-88 (1978)).

14. See discussion *infra* Part III.B.1.

15. See, e.g., John A. Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 244 (1982) (describing takings as "a farrago of fumbleings which have suffered too long from a surfeit of deficient theories"); Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Susan Rose-Ackerman, *Against Ad Hocery*, 88 COLUM. L. REV. 1697, 1711 (1988) (stating that takings is a question to which a comprehensive answer is "sorely needed"); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964) (describing takings as "a welter of confusing and apparently incompatible results").

16. In *Eastern Enterprises*, Justice Kennedy described the area as "among the most litigated and perplexing in current law. *Eastern Enters. v. Apfel*, 524 U.S. 498, 541 (1998) (Kennedy, J., concurring and dissenting). He also quoted Justice Brennan's observation that the problem is of "considerable difficulty," *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978), and then-judge Rehnquist's observation that the Court's inquiry must be "essentially ad hoc," *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

17. E.g., *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason

has been unwilling to vindicate those rights through a coherent theory. Such a theory would consider whether there has been an unconstitutional *deprivation* of the property of an individual. This examination would be antecedent to the analysis of whether there has been an uncompensated *taking* of property. The Takings Clause is predicated, after all, on the requirement that the sovereign pay for that which it has *lawfully* acquired for its own use. Together, the Substantive Due Process and Takings Clauses would protect property rights against the wrongful deprivation of property rights and the wrongful deprivation of compensation for property rights legitimately taken, respectively.

The Court's 1998 decision in *Eastern Enterprises v. Apfel*¹⁸ vividly illustrates the central role of fairness in property rights cases and the need for antecedent analysis of whether the initial deprivation of property was justified. At least with respect to the issue of retroactivity, five of the Justices agreed that the "natural home"¹⁹ for such inquiry is the Due Process Clause. The other four Justices not only refused to consider a due process analysis, but also would justify that refusal by extending the already-overburdened Takings Clause to encompass governmental actions not involving a specific property right or interest.²⁰

The Supreme Court's recent decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*²¹ affirms the crucial role of fairness in adjudicating the constitutionality of land use restrictions highlighted in *Eastern Enterprises*. *Del Monte Dunes* leaves unresolved critical aspects of the Court's 1994 decision in *Dolan v. City of Tigard*²² and parries the Solicitor General's forceful

why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation . . . "); *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993) ("Individual freedom finds tangible expression in property rights."); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("Property does not have rights. People have rights. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.").

18. 524 U.S. 498 (1998).

19. *Eastern Enters.*, 524 U.S. at 556 (Breyer, J., dissenting).

20. *Id.* at 522-23.

21. 526 U.S. 687 (1999). See *infra* text accompanying note 313.

22. 512 U.S. 374 (1994). See *infra* Part V.E.

demand that the Court explicate its "substantially advance" test in *Agin v. City of Tiburon*.²³ Concentrating on the issues and analysis in *Eastern Enterprises* as a starting point, this Article sketches the benefits that might result from a renewed supplementation of the Takings Clause by the Due Process Clause in resolving property rights issues. As the Supreme Court has recently reiterated, it has "rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another."²⁴

This Article advocates increased recognition of the need for discerning whether governmental restrictions on private property is legitimate under due process principles apart from the issue of compensation under the Takings Clause. Such an examination of governmental means and ends must occur through the lens of meaningful judicial scrutiny.²⁵

II. *EASTERN ENTERPRISES*

A. *Factual Background*

In *Eastern Enterprises v. Apfel*,²⁶ petitioner Eastern Enterprises ("Eastern") challenged the Coal Industry Retiree Health Benefit Act of 1992 (the Coal Act or the "Act")²⁷ as violating the Due Process and Takings Clauses of the Fifth Amendment. The Act established a mechanism for funding health care benefits for coal industry retirees and their dependents.²⁸

Coal operators and the United Mine Workers of America ("UMWA") had entered into the National Bituminous Coal Wage Agreement of 1947 (the "1947 NBCWA"), providing that operators would pay fixed royalties from which plan trustees could provide various benefits.²⁹ Disagreements over benefits led to the creation of a 1950 NBCWA, establishing a new multi-em-

23. 447 U.S. 255, 260 (1980).

24. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993).

25. See discussion *infra* Part IV.B.2.a.

26. 524 U.S. 498 (1998).

27. 26 U.S.C. §§ 9701-9722 (1994 & Supp. III 1997).

28. *Eastern Enters.*, 524 U.S. at 504.

29. *Id.* at 505-06.

ployer trust, the "United Mine Workers of America Welfare and Retirement Fund of 1950 (1950 W&R Fund)."³⁰ Signatory operators agreed to pay a thirty-cents-per-ton royalty on coal produced, on a "several and not joint" basis, for the duration of the 1950 agreement.³¹ In 1974, an amended plan (the "1974 NBCWA") for the first time expressly provided that there would be retiree and dependent health benefits.³² Royalties were still fixed, and operators were not liable beyond the life of the agreement.³³

However, declining coal production, the retirement of a generation of miners, and accelerating medical costs caused serious financial problems for the funds and caused operators to withdraw, leaving the remaining signatories to absorb increasing costs.³⁴ An ensuing 1978 NBCWA obligated signatories to make sufficient payments to maintain benefits, and an "ever-green" clause obligated them to contribute as long as they remained in the coal business, regardless of whether they signed a subsequent agreement.³⁵ Despite these changes, costs continued to rise; operators continued to abandon the plan; there was significant labor unrest; and by 1990, the 1950 and 1974 Benefit Plans had a deficit of about \$110 million, with expenses continuing to exceed revenues.³⁶

As a result of these developments, a commission appointed by the Secretary of Labor recommended that "a statutory obligation to contribute to the plans should be imposed on current and former signatories to the [NBCWA],' but [the commission] disagreed about 'whether the entire [coal] industry should contribute to the resolution of the problem of orphan retirees.'"³⁷ Ultimately, Congress passed the Coal Act, which "purported 'to identify persons most responsible for [1950 and 1974 Benefit Plan] liabilities in order to stabilize plan funding and allow for the provision of health care benefits to . . . retirees.'"³⁸ The Coal

30. *Id.* at 506.

31. *Id.*

32. *Id.* at 509.

33. *Eastern Enters.*, 524 U.S. at 509.

34. *Id.* at 510.

35. *Id.*

36. *Id.* at 511.

37. *Id.* at 512.

38. *Eastern Enters.*, 524 U.S. at 514.

Act required plans to be financed by annual premiums assessed against 'signatory coal operators,' i.e., coal operators that signed any NBCWA or any other agreement requiring contributions to the 1950 or 1974 Benefit Plans. Any signatory operator who 'conducts or derives revenue from any business activity, whether or not in the coal industry,' may be liable for those premiums.³⁹

Eastern was organized as a Massachusetts business trust in 1929 and still is "in business," although not as a coal operator. Eastern had completed a transfer of its coal-related operations to a subsidiary, Eastern Associated Coal Corp. ("EACC") by the end of 1965 in exchange for EACC stock.⁴⁰ EACC had agreed to assume Eastern's coal-related liabilities.⁴¹ At the time, the 1950 W&R Fund had a positive balance of over \$145 million.⁴² When Eastern sold its EACC stock in 1987, the 1950 and 1974 Benefit Plans reported surplus assets totaling over \$33 million.⁴³

Pursuant to the Coal Act, the Commissioner of Social Security assigned to Eastern the obligation for premiums for benefits "respecting over 1,000 retired miners who had worked for the company before 1966."⁴⁴ This was based on Eastern's status as the pre-1978 signatory operator for whom the miners had worked for the longest period of time. Eastern's premium for a twelve-month period exceeded \$5 million.⁴⁵ The parties estimated that Eastern's cumulative payments under the Act would be on the order of \$50 to \$100 million.⁴⁶

Eastern sued for a declaratory judgment and an injunction, asserting that the Coal Act, either on its face or as applied, violates substantive due process and constitutes a taking of its property in violation of the Fifth Amendment.⁴⁷

39. *Id.*

40. *Id.* at 516.

41. *Id.*

42. *Id.*

43. *Eastern Enters.*, 524 U.S. at 516-17.

44. *Id.* at 517.

45. *Id.*

46. *Id.* at 529.

47. *Id.* at 517.

B. *The Judgment*

The Supreme Court divided five-to-four in holding that the Coal Act's contribution requirement was unconstitutional as applied to Eastern.⁴⁸

Justice O'Connor's plurality opinion, in which Chief Justice Rehnquist and Justices Scalia and Thomas joined, declared:

Our decisions . . . have left open the possibility that legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience.

* * *

We believe that the Coal Act's allocation scheme, as applied to Eastern, presents such a case.⁴⁹

The plurality⁵⁰ and Justice Kennedy⁵¹ stressed that Eastern departed from the coal industry before benefit expectations rose and before plan funding fell. Justices Stevens, Souter, Ginsburg and Breyer joined in two dissenting opinions in which Justice Stevens stressed that Eastern had been party to an "implicit understanding" regarding benefits,⁵² and Justice Breyer emphasized that Eastern's burden had been moderated by other aspects of the Coal Act and was deserved.⁵³

48. *Eastern Enters.*, 524 U.S. at 503.

49. *Id.* at 528-29.

50. *Id.* at 530.

([W]hile Eastern contributed to the 1947 and 1950 W&R Funds, it ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the Benefit Plans under the 1974, 1978, or subsequent NBCWA's. It is the latter agreements that first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members.).

51. *Id.* at 550 (Kennedy, J., concurring in judgment and dissenting in part) ("Eastern was once in the coal business and employed many of the beneficiaries, but it was not responsible for their expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 plans. . .").

52. *Id.* at 551 (Stevens, J., dissenting)

([T]here was an implicit understanding on both sides of the bargaining table that the operators would provide the miners with lifetime health benefits. It was this understanding that kept the mines in operation and enabled Eastern to earn handsome profits before it transferred its coal business to a wholly owned subsidiary in 1965.).

53. *Eastern Enters.*, 524 U.S. at 560-61 (Breyer, J., dissenting) (asserting that

In addition to the issue of retroactivity, the Court's decision and opinions in *Eastern Enterprises* implicate other constitutional protections for property rights. One is the Ex Post Facto Clause,⁵⁴ which for two centuries has been held applicable to criminal prosecutions only,⁵⁵ but which Justice Thomas, in his short *Eastern Enterprises* concurrence, suggests should be reexamined.⁵⁶ Another is the Contract Clause, which the Court recently has touched upon in *United States v. Winstar Corp.*,⁵⁷ where it addressed the federal government's own contractual obligations.

C. *The Court's Takings vs. Due Process Split*

While the Court in *Eastern Enterprises* split five-to-four on the judgment, it also split five-to-four in discerning the provision of the Constitution under which the case should have been analyzed. Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, deemed the Act unconstitutional under the Takings Clause.⁵⁸ Justice Breyer's dissent, joined by Justices Stevens, Souter and Ginsberg, deemed the Act constitutional under the Due Process Clause.⁵⁹ Justice Kennedy, concurring in the judgment and dissenting in part, deemed the Act unconstitutional under the Due Process Clause.⁶⁰ Thus, the plurality plus Justice Kennedy judged the Act unconstitutional as applied, but the dissent plus Justice Kennedy constituted a majority for a due process analysis.

There is asymmetry in the process by which the Justices reached their conclusions. Justice Kennedy's swing opinion⁶¹

Eastern's obligation ran only with respect to miners it had employed, that it had created expectations, albeit not contractually enforceable, of retiree medical benefits, and that poor care from company doctors in company towns had made retiree health care an important issue since before the 1940s.

54. U.S. CONST. art. I, § 9, cl. 3.

55. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

56. *Eastern Enters.*, 524 U.S. at 539. (Thomas, J., concurring).

57. 518 U.S. 839 (1996).

58. *Eastern Enters.*, 524 U.S. at 553.

59. *Id.* at 558.

60. *Id.* at 568.

61. *Id.*

and Justice Breyer's dissent⁶² both argue (1) that a Due Process analysis is correct and (2) that a Takings Clause analysis is incorrect.

The Kennedy swing opinion notes that since the Coal Act's constitutionality "appears to turn on the legitimacy of Congress' judgment rather than on the availability of compensation . . . the more appropriate constitutional analysis arises under general due process principles."⁶³ Furthermore, Kennedy believes the plurality's Takings Clause analysis to be "incorrect and quite unnecessary for decision of the case."⁶⁴ Justice Breyer asserts not only that the issue of retroactive liability "finds a natural home in the Due Process Clause,"⁶⁵ but also that he "agree[s] with Justice Kennedy that the plurality views this case through the wrong legal lens. The Constitution's Takings Clause does not apply."⁶⁶

Justice O'Connor's plurality opinion argues (1) that a Takings Clause analysis is correct and (2) that a Due Process Clause analysis need not be considered.⁶⁷ On the first point, she states:

That Congress sought a legislative remedy for what it perceived to be a grave problem in the funding of retired coal miners' health benefits is understandable; complex problems of that sort typically call for a legislative solution. When, however, that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action *implicates* fundamental principles of fairness *underlying* the Takings Clause. Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised. Accordingly, in the specific circumstances of this case, we conclude that the Coal Act's application to Eastern effects an

62. *Id.* at 553.

63. *Eastern Enters.*, 524 U.S. at 545 (Kennedy, J., concurring in judgment and dissenting in part).

64. *Id.* at 539.

65. *Id.* at 556 (Breyer, J., dissenting).

66. *Id.* at 554.

67. *Id.* at 538 ("Because we have determined that the . . . allocation scheme violates the Takings Clause as applied to Eastern, we need not address Eastern's due process claim.").

unconstitutional taking.⁶⁸

However, "fundamental fairness" is much more closely associated with due process than with the Takings Clause, and it is unclear why the invocation should be of the Takings Clause, rather than of another provision of the Constitution. The unfairness in the sovereign seizing property without compensation sometimes resides in the lack of compensation and sometimes in the seizure itself. While it might be that "[l]ife is the art of drawing sufficient conclusions from insufficient premises,"⁶⁹ Justice O'Connor is not asserting that the lack of other modes of constitutional analysis drive us to the Takings Clause even though it is not fully suitable.

One might conjecture that this plurality response would be adequate were Justice Kennedy a lone dissenter or the case a trivial one. However, *Eastern Enterprises* is an important case, and Justice Kennedy's adherence to the dissent's due process argument relegates the O'Connor opinion to that of a plurality. As it stands, appellate and trial judges will have to interpret the meaning of *Eastern Enterprises* in light of the fact that five Justices adhere to a due process analysis and that five Justices hold the government's act unconstitutional.

On the other hand, the Supreme Court has taught that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .'"⁷⁰ This language was quoted by Court of Federal Claims Judge Francis Allegra in describing *Eastern Enterprises* as lacking any precedential value.⁷¹ However, Chief Judge Loren Smith has stated that in *Eastern Enterprises* "a majority of the Supreme Court held that a regulation must relate to a specific interest for the Takings Clause to apply."⁷²

The United States Court of Appeals for the Third Circuit, in

68. *Eastern Enters.*, 524 U.S. at 537 (emphasis added).

69. SAMUEL BUTLER, *THE NOTE-BOOKS OF SAMUEL BUTLER* 11 (Henry Festing Jones ed., Mitchell Kennerley 1914).

70. *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia* 428 U.S. 153, 169 n.15 (1976)).

71. *Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 39 (2000).

72. *Florida Rock Indus., Inc. v. United States*, 45 Fed. Cl. 21, 43 n.13 (1999).

*Unity Real Estate Co. v. Hudson*⁷³ declared that "[t]he splintered nature of the Court makes it difficult to distill a guiding principle from *Eastern*.⁷⁴ However, it added: "To the extent that *Eastern* embodies principles capable of broader application, we believe that due process analysis encompasses the relevant concerns."⁷⁵

It is plausible that at least some judges will interpret Justice Kennedy's opinion as representing the Court's view on this point, much as some leading academics have interpreted Justice Powell's swing opinion in *Regents of the University of California v. Bakke*⁷⁶ as the Court's view on affirmative action in higher education.⁷⁷

The plurality opinion does observe that the Court's takings and due process analyses of legislation are "correlated to some extent."⁷⁸ More importantly, however, it notes that "this Court has expressed concerns about using the Due Process Clause to invalidate economic legislation."⁷⁹ This, of course, is a delicate allusion to the haunting "specter" of *Lochner*,⁸⁰ a particular "Victorian melodrama"⁸¹ in which the "centerpiece in this tale of wickedness is *Lochner v. New York*.⁸² Justice Breyer is more direct:

Insofar as the plurality avoids reliance upon the Due Process Clause for fear of resurrecting *Lochner v. New York* and related

73. 178 F.3d 649 (3d Cir. 1999).

74. *Unity Real Estate*, 178 F.3d at 658.

75. *Id.* at 659.

76. 438 U.S. 265, 269 (1978) (Powell, J., announcing judgment).

77. See, e.g., Comment, *Scholars' Reply to Professor Fried*, 99 YALE L.J. 163, 164, 166 (1989) (setting forth characterizations by 29 leading constitutional scholars of Powell's opinion as binding authority). But cf. Alan J. Meese, *Reinventing Bakke*, in 1 GREEN BAG 381, 390 (1998) (compiling extensive authority that academics hold this view but concluding that Powell wrote "a quintessential advisory opinion").

78. *Eastern Enters.*, 524 U.S. at 537.

79. *Id.* (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963); *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955)).

80. *Lochner v. New York*, 198 U.S. 45 (1905); see Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873 (1987) (characterizing *Lochner* as a "specter" that "has loomed over most important constitutional decisions").

81. James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 211-12 (1993).

82. James W. Ely, Jr., *Economic Due Process Revisited*, 44 VAND. L. REV. 213 (1991) (reviewing PAUL KENS, *JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK* (1990) (citing *Lochner*, 198 U.S. 45)).

doctrines of "substantive due process," that fear is misplaced. As the plurality points out, an unfair retroactive assessment of liability upsets settled expectations, and it thereby undermines a basic objective of law itself.⁸³

As Justice Breyer suggests, "substantive due process" is not synonymous with "economic substantive due process."⁸⁴ However, the Supreme Court has not indicated that its limitation of substantive due process to the protection of "fundamental" rights⁸⁵ excludes all property interests. For instance, reform legislation that stringently but prospectively reduces the availability of tort damages would not come under the purview of the Takings or Contract Clauses. Yet, in many cases, recovery for injuries may invoke "fundamental" property interests.⁸⁶

The Supreme Court earlier had relied on the Due Process Clause for the protection of individual rights. There are considerable difficulties associated with its current Takings Clause jurisprudence. *Eastern Enterprises* involves not specific property rights, but rather the imposition of a monetary burden that constitutes a general obligation. All of these factors make *Eastern Enterprises* a propitious occasion to reexamine the role that due process should play in property rights adjudication.

III. THE SUPREME COURT'S PROPERTY RIGHTS JURISPRUDENCE

Before considering an appropriate balance of the Takings and the Due Process Clauses, it is useful briefly to review the principal developments respecting constitutional protection for private property.

83. *Eastern Enters.*, 524 U.S. at 557-58 (Breyer, J., dissenting) (case references and citations omitted).

84. See, e.g., *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1129 (7th Cir. 1995) (reiterating Judge Frank Easterbrook's eviscerative literary style).

85. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 499-500 (1977) (holding that a zoning ordinance cannot preclude residence by an owner's family); *Roe v. Wade*, 410 U.S. 113, 163 (1973) (abortion rights). For a recent enumeration of many protected rights and a summary of due process methodology, see *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997).

86. See Ronald J. Krotoszynski, *Fundamental Property Rights*, 85 GEO. L.J. 555, 556 (1997).

A. Property Rights Principles

1. *The Development of Traditional Property Rights Jurisprudence.*—The principles of the Declaration of Independence were not new to America,⁸⁷ but they originated in the entitlement to property and liberty that the colonists regarded as historic “rights of Englishmen.”⁸⁸ Those rights had been “elaborated by the generation of . . . Sidney, Milton, and above all John Locke in seventeenth-century England.”⁸⁹ James Madison⁹⁰ and John Locke⁹¹ both believed in the lack of a clear distinction between property and liberty interests. The Declarations of George Madison⁹² and Thomas Jefferson⁹³ hewed to this theme. Indeed, as Professor Nedelsky has noted, the subject of property rights was the “great focus” of the Framers.⁹⁴ “By the late eighteenth cen-

87. HENRY S. COMMAGER, JEFFERSON, NATIONALISM, AND THE ENLIGHTENMENT

84 (1975) (“[N]either Jefferson nor the American people invented these principles.”).

88. FORREST McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS

OF THE CONSTITUTION 13 (1985).

89. *Id.*; see also COMMAGER, *supra* note 87.

90. James Madison, *Property*, 1 NATIONAL GAZETTE, Mar. 29, 1792, at 174, re-

printed in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865) (“As a

man is said to have a right to his property, he may be equally said to have a prop-

erty in his rights.”).

91. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 123 (Peter Laslett

ed., 2d ed., Cambridge Univ. Press 1967) (1688) (“lives, liberties, and estates, which

I call by the general Name, ‘Property’”).

92. See *Preamble of the Virginia Constitution*, PENNSYLVANIA GAZETTE, June 12,

1776, reprinted in PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION

OF INDEPENDENCE 126-27 (1997) (“All men are born equally free and independent,

and have certain inherent natural rights . . . among which are the enjoyment of life

and liberty, with the means of acquiring and possessing property, and pursuing and

obtaining happiness and safety.”).

93. See CARL BECKER, THE DECLARATION OF INDEPENDENCE: A STUDY IN THE

HISTORY OF POLITICAL IDEAS 27-28 (1922). Jefferson, an avid reader of Locke, closely

followed certain sentences of the *Second Treatise* in the form and phraseology of

parts of the Declaration of Independence. *Id.*; see also DAVID N. MAVER, THE CON-

STITUTIONAL THOUGHT OF THOMAS JEFFERSON 78 (1994) (stating that Jefferson might

have substituted “pursuit of happiness” in the *Declaration* in place of Mason’s “prop-

erty” because he regarded “pursuit of happiness” as “a kind of generic term for a

bundle of rights that included property rights”); JOSEPH J. ELLIS, AMERICAN SPHINX:

THE CHARACTER OF THOMAS JEFFERSON 56 (1997) (asserting that Jefferson might

have wanted to obfuscate the apparent disharmony between his personal view of

natural rights and the perpetuation of the slave system).

94. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN

CONSTITUTIONALISM 92 (1990) (“The great focus of the Framers was the security of

basic rights, property in particular, not the implementation of political liberty.”).

ture, 'Lockean' ideas of government and revolution were accepted everywhere in America; they seemed, in fact, a statement of principles built into English constitutional tradition."⁹⁵

Questions about the role that natural law should play in American jurisprudence were highlighted in the early Supreme Court case *Calder v. Bull*.⁹⁶ Justice Iredell's view that courts cannot enforce natural law over legislation prevailed over Justice Chase's view that natural rights restricted the power of government. In keeping with this restraint, the Court held only two acts of the federal government unconstitutional from the time of its formation until the Civil War. These were *Marbury v. Madison*⁹⁷ and the ill-fated *Dred Scott v. Sandford*.⁹⁸ However, during this period there were relatively few federal restrictions on individual property or liberty rights. In *Barron v. Mayor and City Council of Baltimore*,⁹⁹ an 1833 case involving the taking of private property for public use without just compensation, the Court held that the Takings Clause and the rest of the Bill of Rights did not apply to the states.

The Fourteenth Amendment, ratified in 1868, imposed sweeping constitutional burdens on the states. It precluded them from making and enforcing measures that "shall abridge the privileges or immunities of citizens of the United States."¹⁰⁰ It made the due process language of the Fifth Amendment applicable to the states.¹⁰¹ It also mandated that no state shall "deny to any person within its jurisdiction the equal protection of the laws."¹⁰²

The watershed interpretation of this new Amendment came four years later, in 1872. A group of butchers challenged a Loui-

95. MAIER, *supra* note 92, at 87; cf. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996) (asserting that colonial legislators widely restricted private property for public good).

96. 3 U.S. (3 Dall.) 386 (1798) (holding the constitutional Connecticut legislative setting aside of a probate decree).

97. 5 U.S. (1 Cranch) 137 (1803) (striking down a section of the Judiciary Act).

98. 60 U.S. (19 How.) 393 (1856) (holding the Missouri Compromise unconstitutional).

99. 32 U.S. (7 Pet.) 243 (1833).

100. U.S. CONST. amend. 14, § 1.

101. *Id.* ("nor shall any State deprive any person of life, liberty, or property, without due process of law . . .").

102. *Id.*

siana law granting a monopoly on the slaughter of animals in the New Orleans area to one slaughterhouse. In the *Slaughter-House Cases*,¹⁰³ Justice Miller, writing for the five-to-four majority, rejected the butchers' equal protection argument based on the view that Congress intended only to protect the newly-freed slaves, and the majority rejected their due process argument on the grounds that the Fourteenth Amendment required procedural due process only.¹⁰⁴ Finally, Justice Miller noted that the first sentence of the Fourteenth Amendment provided that "[a]ll persons born . . . in the United States . . . are citizens of the United States, and of the state wherein they reside."¹⁰⁵ This, Justice Miller reasoned, meant that the Privileges or Immunities Clause, referring to "citizens of the United States," had to pertain only to aspects of national citizenship, such as free access to the Nation's seaports.¹⁰⁶ These rights did not include engaging in the slaughtering business in New Orleans.¹⁰⁷

A strong dissent by Justice Field, joined by Chief Justice Chase and Justices Bradley and Swayne, declared that the Constitution already protected the national citizenship rights enumerated by the majority.¹⁰⁸ Rather, the Fourteenth Amendment protected those privileges and immunities "which of right belong to the citizens of all free governments."¹⁰⁹

The grant, with exclusive privileges, of a right thus appertaining to the government [to build bridges, roads, etc.], is a very different thing from a grant, with exclusive privileges, of a right to pursue one of the ordinary trades or callings of life, which is a right appertaining solely to the individual.¹¹⁰

Furthermore, separate dissents by Justices Bradley¹¹¹ and Swayne¹¹² insisted that the state regulation deprived the butchers of their property right without due process of law, a

103. 83 U.S. (16 Wall.) 36 (1872).

104. *Slaughter House Cases*, 83 U.S. (16 Wall.) at 80-81.

105. *Id.* at 73 (quoting U.S. CONST. amend. 14, § 1).

106. *Id.* at 79.

107. *Id.*

108. *Id.*

109. *Slaughter House Cases*, 83 U.S. at 98.

110. *Id.* at 88.

111. *Id.* at 111.

112. *Id.* at 124.

practice in contravention of the Fourteenth Amendment.

While the Privileges or Immunities Clause had remained dormant until the Court's new and intriguing decision in *Saenz v. Roe*,¹¹³ continued dissents from Justice Field, the influential treatise of Thomas M. Cooley,¹¹⁴ and pressures from a growing national business community argued for more federal protection of property rights.¹¹⁵ These efforts started to bear fruit in *Munn v. Illinois*,¹¹⁶ where the Court stated that it was particularly appropriate to defer to state regulation of grain elevators since they were "affected with a public interest."¹¹⁷ In *Mugler v. Kansas*,¹¹⁸ the Court went on to consider a statute prohibiting the manufacture of alcoholic beverages that resulted in severe economic losses to the owner of a brewery. The Court upheld the statute as the view of the people of Kansas, as "expressed by their chosen representatives," that prohibition should be imposed "to guard the community against the evils attending the excessive use of such liquors."¹¹⁹

The principle, that no person shall be deprived of life, liberty, or property, without due process of law, was embodied, in substance, in the constitutions of nearly all, if not all, of the States at the time of the adoption of the Fourteenth Amendment; and it has

113. 119 S. Ct. 1518 (1999) (striking down a state law denying welfare benefits to newly arrived residents in part on the ground that it denied them the "third component" of the right to travel, consisting of the right elect to become permanent residents of and to be treated like other citizens of their new state of residence). *Saenz*, 119 S. Ct. at 1525-26. The Court noted: "Despite fundamentally differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment, most notably expressed in the majority and dissenting opinions in the *Slaughter-House Cases*, . . . it has always been common ground that this Clause protects the third component of the right to travel." *Id.* at 1526-27 (citing the *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 36 and quoting from Justice Miller's majority opinion, *id.* at 80, and Justice Bradley's dissent, *id.* at 112-13).

114. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE UNION (1868). Cooley encouraged an expansive reading of the Fourteenth Amendment and "linked the Jacksonian principles of equal rights and opposition to special economic privileges with due process protection of property." JAMES W. ELY, JR., *Introduction to PROPERTY RIGHTS IN THE AGE OF ENTERPRISE* vii, xii (1997).

115. See, e.g., RICHARD C. CORTNER, *THE IRON HORSE AND THE CONSTITUTION: THE RAILROADS AND THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1993).

116. 94 U.S. 113, 126 (1876).

117. *Munn*, 94 U.S. at 126.

118. 123 U.S. 623 (1887).

119. *Mugler*, 123 U.S. at 662.

never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.¹²⁰

Even as it upheld the statute, *Mugler* served notice that the Court would decide the boundary¹²¹ between a state's police power and substantive economic rights, which the Constitution protected.¹²²

In 1890, in *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*,¹²³ the Court held that railroads had a due process right to judicial review of rate regulations to ensure that they could achieve a fair return on their investments. Seven years later, in *Allgeyer v. Louisiana*,¹²⁴ a case with a narrow holding¹²⁵ but extensive dicta, the Court noted that "liberty" as protected by the Fourteenth Amendment transcended freedom from physical restraint:

[W]e think the statute is a violation of the Fourteenth Amendment of the Federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The liberty mentioned in that amendment means not

120. *Id.* at 665.

121. *Id.* at 661 ("It does not at all follow that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the State.").

122. It is interesting to observe that none of this set well with Justice Holmes, who much later privately confided that he found Justice Harlan's opinion in *Mugler* to be "pretty fishy." MARK L. POLLOT, GRAND THEFT AND PETTY LARCENY: PROPERTY RIGHTS IN AMERICA 78 (1993) (quoting letter to Harold J. Laski, Jan. 13, 1923, reprinted in 1 THE HOLMES-LASKI LETTERS 473 (1953)). Holmes, being cynical about the whole matter, confided that tests employed to distinguish police power regulation from compensable takings were simply a matter of "determining a line between grabber and grabbee that turns on the feeling of the community." *Id.* (quoting letter to Harold J. Laski, Oct. 23, 1926, reprinted in 2 THE HOLMES-LASKI LETTERS 888 (1953)).

123. 134 U.S. 418 (1890).

124. 165 U.S. 578 (1897).

125. The Court struck down a state law prohibiting anyone from giving effect to insurance policies on property located in Louisiana by companies not complying in all respects with Louisiana law. *Allgeyer*, 165 U.S. at 593. It held that the state had no jurisdiction over contracts made outside the state with foreign corporations. *Id.* at 592-93.

only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.¹²⁶

Subject to this limitation, the Court acknowledged the "right of the State to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper."¹²⁷

While economic substantive due process often is maligned as siding with business against workers, minorities and others less well off, in fact there was no concerted effort to protect business against economic and social legislation.¹²⁸ Courts employed substantive due process to sustain more statutes than they struck down.¹²⁹ Neither the Slaughter-House Cases, in which due process was employed to attempt to invalidate a monopoly, nor *Allgeyer*, which struck down protective business legislation, could be characterized as "choosing sides' with the propertied at the expense of the penniless."¹³⁰ Likewise, despite an overshadowing by the decisions involving industrial strife, most cases did not fit that mold, and many overturned occupational entry or licensing restrictions. These decisions gave immigrants and the poor the opportunity to compete with established businesses in the marketplace.¹³¹

The Due Process Clause accomplished such good in *Buchanan v. Warley*,¹³² where the Court found residential racial segregation ordinances unconstitutional. It distinguished its support

126. *Id.* at 589.

127. *Id.* at 591.

128. See JAMES W. ELY, JR., *THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910*, at 74-75 (1995) (referring to the period of Fuller's tenure).

129. See David Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 U. CHI. L. REV. 324, 381 & n.341 (1985).

130. Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 387-88 (1988).

131. *Id.* at 388-90 (citing cases).

132. 245 U.S. 60 (1917).

for "separate but equal" railway coaches in *Plessy*,¹³³ since here the issue was one of state interference with a purchaser's contract to buy a home. The *Buchanan* Court noted:

We think this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law.¹³⁴

The result was a great impediment to the spread of *de jure* housing segregation and an expansion of housing and economic opportunity.¹³⁵

Nevertheless, with the rise of large-scale businesses and then the Great Depression, charges that substantive due process represented class interests grew. Congress passed redistributive legislation, and finally, the Justices were induced to sustain it.

2. *The New Deal Revolution.*—In 1934, in *Nebbia v. New York*,¹³⁶ the Court opined that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare." In 1937, in *West Coast Hotel v. Parrish*,¹³⁷ the Court sustained a state minimum wage law for women over a substantive due process objection, thus overruling its fourteen-year-old precedent in *Adkins v. Children's Hospital*.¹³⁸ Finally, in 1938, *United States v. Carolene Products Co.*¹³⁹ established the now-familiar dichotomy between general economic and social legislation, on the one hand, and legislation protecting "fundamental" rights and protected classes, on the other.¹⁴⁰ This decision con-

133. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

134. *Buchanan*, 245 U.S. at 82.

135. See David E. Bernstein, *Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 797, 859 (1998).

136. 291 U.S. 502, 537 (1934) (upholding state regulatory scheme for milk production).

137. 300 U.S. 379 (1937).

138. 261 U.S. 525 (1923).

139. 304 U.S. 144 (1938).

140. In its famous "footnote 4," the opinion went on to state that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to

solidated the Justices' repudiation of substantive due process. It also, in Professor Ackerman's words, "brilliantly endeavored to turn the Old Court's recent defeat into a judicial victory" by turning from property and contract to making "the ideals of the victorious activist Democracy serve as a primary foundation for constitutional rights in the United States."¹⁴¹

Justice Stone declared that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of legislators."¹⁴² The impact of this on property rights was plain. *Euclid* departed from the Lockean tradition, in which property was central to individual liberty by permitting a wide range of local land controls. *Carolene Products* suggested more fundamentally that property rights were less intrinsically deserving and therefore "much more subject to governmental intrusion than the rights that more directly safeguard political liberty and equality to insulated minority groups."¹⁴³

The "ideals of the victorious activist Democracy" were embodied in footnote four, the "most celebrated"¹⁴⁴ footnote in constitutional law. In three paragraphs, Justice Stone outlined a higher degree of scrutiny for legislation that was facially violative of the Bill of Rights, restrictive of political processes that might repeal undesirable legislation, and directed at "discrete and insular minorities."¹⁴⁵ While nominally substituting a "process model"¹⁴⁶ for a substantive one, footnote four has been de-

be embraced within the Fourteenth. . . ." *Carolene Products*, 304 U.S. at 152-53 n.4.

141. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 714-15 (1985).

142. *Carolene Products*, 304 U.S. at 152.

143. Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577, 580 (1990) (citations omitted).

144. Lewis Powell, *Carolene Products Revisited*, 82 COLUM. L. REV. 1087 (1982); cf. *Kovacs v. Cooper*, 336 U.S. 77, 90-91 (1949) (Frankfurter, J., concurring) ("A footnote hardly seems to be an appropriate way of announcing a new constitutional doctrine. . . .").

145. *Carolene Products*, 304 U.S. at 152-53 n.4.

146. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (advocating the Court's role in enhancing democratic processes).

scribed both by skeptics¹⁴⁷ and friends¹⁴⁸ as more accurately substituting one set of preferred rights for another.

B. *The Ascendancy of the Takings Clause*

In recent years the Supreme Court has applied the Fourteenth Amendment's Due Process Clause to the states as though it incorporated the Fifth Amendment's Takings Clause.¹⁴⁹ In general, the Court also has recharacterized and limited access to the substantive due process roots of constitutional property protection.

1. *The Recharacterization of Past Precedent.*—The plurality opinion in *Eastern Enterprises v. Apfel*¹⁵⁰ quotes Justice Chase's opinion in *Calder v. Bull*,¹⁵¹ not in its usual context of supporting natural rights or due process, but rather for the proposition that "economic regulation . . . may . . . effect a taking."¹⁵² This indicates the tendency of the Court to recharacterize past fundamental rights jurisprudence into a Takings Clause analysis.

In 1872, in *Pumpelly v. Green Bay Co.*, the Supreme Court deemed it "well settled" that the Takings Clause "is a limitation on the power of the Federal government, and not on the States."¹⁵³ Fifteen years later, in *Chicago, Burlington & Quincy*

147. *E.g.*, *United States v. Carlton*, 512 U.S. 20, 41-42 (1994) (Scalia, J., concurring in the judgment) ("The picking and choosing among various rights to be accorded 'substantive due process' protection is alone enough to arouse suspicion; but the categorical and inexplicable exclusion of so-called 'economic rights' (even though the Due Process Clause explicitly applies to 'property') unquestionably involves policymaking rather than neutral legal analysis.").

148. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 769 (2d ed. 1988) (recounting that after 1937, "the basic relation between federal judges and political bodies has continued, without real interruption, to be one in which general constitutional principles are regularly invoked to strike down governmental choices").

149. *See, e.g.*, *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 481 n.10 (1987).

150. 524 U.S. 498 (1998).

151. 3 U.S. (3 Dall.) 386 (1798). *See supra* text accompanying note 91.

152. *Eastern Enters.*, 524 U.S. at 523 (quoting *Calder*, 3 U.S. at 388 (Chase, J.) ("It is against all reason and justice' to presume that the legislature has been entrusted with the power to enact 'a law that takes property from A and gives it to B'")).

153. 80 U.S. (13 Wall.) 166, 177 (1872).

Railroad v. City of Chicago,¹⁵⁴ the Court held that states may not take private property for public use without just compensation, but the theory was substantive due process (albeit viewed in retrospect as a forerunner of incorporation).

In his dissent in *Dolan v. City of Tigard*,¹⁵⁵ Justice Stevens asserted that *Chicago, Burlington & Quincy Railroad* "applied the same kind of substantive due process" as gave rise to *Lochner*.¹⁵⁶ He noted that "[l]ater cases have interpreted the Fourteenth Amendment's substantive protection against uncompensated deprivations of private property by the States as though it incorporated the text of the Fifth Amendment's Takings Clause."¹⁵⁷ While finding "nothing problematic" about this practice in cases involving the "actual physical invasion" of private property,¹⁵⁸ he added:

Justice Holmes charted a significant new course, however, when he opined that a state law making it "commercially impracticable to mine certain coal" had "very nearly the same effect for constitutional purposes as appropriating or destroying it." *Pennsylvania Coal Co. v. Mahon* [260 U.S. 393 (1922)]. . . . The so-called "regulatory takings" doctrine that the Holmes dictum kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.¹⁵⁹

154. 166 U.S. 226, 236 (1897)

([I]f, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the Fourteenth Amendment, it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use and without compensation of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation.)

155. 512 U.S. 374, 405 (1994) (Stevens, J., dissenting) (asserting that shifting the burden to municipalities to justify administrative exactions from landowners represented a "resurrection of a species of substantive due process analysis").

156. *Dolan*, 512 U.S. at 406.

157. *Id.* at 406.

158. *Id.* (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-33 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979)).

159. *Id.* at 406-07 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414

Chief Justice Rehnquist responded for the Court that "there is no doubt that later cases have held that the Fourteenth Amendment does make the Takings Clause of the Fifth Amendment applicable to the States. . . . Nor is there any doubt that these cases have relied upon *Chicago, B. & Q. R.R. Co. v. Chicago* . . . to reach that result."¹⁶⁰ Rehnquist did not directly address Stevens' distinction between physical and regulatory takings. While *Dolan* is not *Lochner*, the physical invasion standard provides a near bright-line rule.¹⁶¹ When the Court goes beyond that standard, it implicitly has to decide the baseline of property rights that the Fifth and Fourteenth Amendments protect. This judicial override of legislative power creates a "countermajoritarian difficulty" that is the central facet in takings law for judges and critics alike.¹⁶²

There has been general agreement with Justice Stevens' observation¹⁶³ that Holmes "charted a significant new course" in *Pennsylvania Coal*.¹⁶⁴ However, the case can be seen as an incremental extension of Contract and Due Process Clause jurisprudence.¹⁶⁵ As Holmes saw the central issue: "As applied to this case the statute is admitted to destroy previously existing rights of property and contract. The question is whether the

(1922) (internal citation omitted)).

160. *Id.* at 384 n.5.

161. While Justice Stevens cited *Loretto* approvingly, *supra* note 158, there is some problem in justifying the requirement for compensation when an ordinance mandates that a landlord allow a cable company to install a bread box-sized junction box on a roof and yet there is lack of such a requirement that the landlord must install large racks of mailboxes in the lobby. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 448-49 (1978) (Blackmun, J., dissenting).

162. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 334 (1998) (describing countermajoritarian difficulty as "the central obsession of modern constitutional scholarship").

163. *Dolan v. City of Tigard*, 512 U.S. 374, 406-07 (1994). See *supra* text accompanying note 159.

164. See, e.g., Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1086 (1993); *supra* text accompanying note 159.

165. See, e.g., Robert Brauneis, "The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in *Pennsylvania Coal Co. v. Mahon*, 106 YALE L.J. 613, 666 (1996).

police power can be stretched so far.¹⁶⁶

2. *Eastern Enterprises and Non-Specific Property.*—The *Eastern Enterprises* plurality conclusion that the financial burden created by the Coal Act constitutes a taking would take a giant step towards expanding the subject matter of the Takings Clause to encompass claims which are unconnected with any specific parcel of land or other tangible or intangible asset. As Justice Kennedy noted:

The plurality opinion would throw one of the most difficult and litigated areas of the law into confusion, subjecting States and municipalities to the potential of new and unforeseen claims in vast amounts. The existing category of cases involving specific property interests ought not to be obliterated by extending regulatory takings analysis to the amorphous class of cases embraced by the plurality's opinion today.¹⁶⁷

Furthermore, as Justice Breyer wondered: "If the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, i.e., when it assesses a tax?"¹⁶⁸ Indeed, the plurality opinion is a considerable step towards judicial receptivity to the argument that the Takings Clause requires courts to enjoin any governmental program that redistributes wealth.¹⁶⁹ Obviously, that is not the path that the plurality intends, but it is ironic that it should put these issues in play. Regardless of continual warnings about the resurgence of *Lochner*,¹⁷⁰ the contemporary Court's property rights cases have targeted only a few categories of governmental regulations and not its principal redistributive programs.¹⁷¹ As Judge Posner has noted, "[t]he

166. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

167. *Eastern Enters.*, 524 U.S. at 542 (Kennedy, J. concurring in the judgment and dissenting in part).

168. *Id.* at 556 (Breyer, J., dissenting).

169. A small group of scholars has advocated just this approach. See, e.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 281 (1985) ("The New Deal is inconsistent with the principles of limited government and with the constitutional provisions designed to secure that end."); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) ("The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.").

170. See *infra* text accompanying note 218.

171. See Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and*

Court is not about to cut the welfare state down to size by invalidating unreasonable economic regulation."¹⁷²

It is more likely that the Takings Clause's gain in subject matter applicability would be more than offset by an additional loss of coherence. To give one concrete example, treating a general exaction pertaining to no specific asset as the "numerator" in a Takings Clause case could well lead to a determination that all of a plaintiff's assets constituted the takings fraction "denominator." The result might well be a determination that the plaintiff had suffered a less significant loss and was less entitled to just compensation.¹⁷³

3. *Excluding Substantive Due Process through the Graham Doctrine.*—In *Graham v. Connor*,¹⁷⁴ the Supreme Court rejected the claim that excessive force in the course of an arrest was a denial of substantive due process. It declared: "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."¹⁷⁵

While this "disarmingly simple principle" received little notice at the time,¹⁷⁶ it was invoked by the Court in subsequent Fourth¹⁷⁷ and Eighth Amendment¹⁷⁸ cases and by a number of courts of appeals.¹⁷⁹ However, *Graham's* most significant application might be the Ninth Circuit's *en banc* decision

Its Impact on Economic Legislation, 76 B.U. L. REV. 605, 608-09 (1996) (citing targeted areas of environmental regulation, developmental exactions, and remobilization of capital tied to specific land uses).

172. *Chicago Bd. of Realtors, Inc. v. City of Chicago*, 819 F.2d 732, 745 (7th Cir. 1987) (Posner, J. concurring).

173. See discussion *infra* Part V.D.

174. 490 U.S. 386 (1989).

175. *Graham*, 490 U.S. at 395.

176. See Toni M. Massaro, *Reviving Hugo Black? The Court's "Jot for Jot" Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086, 1087 (1998).

177. *Albright v. Oliver*, 510 U.S. 266 (1994) (plurality opinion) (malicious prosecution).

178. *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997).

179. See, e.g., *Gehl Group v. Koby*, 63 F.3d 1528 (10th Cir. 1995) (First Amendment); *Holman v. Page*, 95 F.3d 481 (7th Cir. 1996) (Eighth Amendment).

involving property rights in *Armendariz v. Penman*.¹⁸⁰ The full court's review was in response to an opinion by Judge Alex Kozinski in *Sinaloa Lake Owners Association v. City of Simi Valley*.¹⁸¹ Kozinski had determined that the plaintiffs' substantive due process claim was ripe for adjudication even though a takings claim was not.¹⁸²

In *Armendariz*, the plaintiffs owned or resided in low-income housing.¹⁸³ They alleged that city officials, under color of state law, used housing code over-enforcement and aggressive sweeps to drive out criminals.¹⁸⁴ They claimed that this caused landlords to lose certificates of occupancy and caused tenants to be evicted.¹⁸⁵ It also, they argued, violated their right to substantive due process and equal protection.¹⁸⁶

The Ninth Circuit rejected their due process claims and *Sinaloa* based claims, declaring that "*Graham* dictates" that the Fourth and Fifth Amendments provide explicit limitations on the type of government conduct challenged by the plaintiffs, and those amendments, not substantive due process, should guide the analysis.¹⁸⁷ The Ninth Circuit took the matter one step further in *Macri v. King County*,¹⁸⁸ where the appellants at oral argument characterized the denial of their plat application as, not a taking, but solely the result of the denial's failure to substantially advance a legitimate government purpose. The court brushed this off as an attempt to "sidestep" *Armendariz*,¹⁸⁹ which would thereby circumvent the *Williamson County*¹⁹⁰

180. 75 F.3d 1311 (9th Cir. 1996) (en banc).

181. 882 F.2d 1398 (9th Cir. 1989).

182. The opinion found that the due process deprivation would occur at the moment of the governmental action. *Sinaloa Lake*, 882 F.2d at 1407. The landowners' association claimed that its private dam was breached and a lake destroyed. There was no emergency, no notice or opportunity to be heard, and deceitful promises were made. Judge Kozinski found these circumstances sufficient to show clearly arbitrary and unreasonable conduct having no substantial relation to the public health, safety, morals or general welfare. *Id.* at 1408. In order to prevail at trial, he added, the plaintiff would have to meet the high standard of demonstrating that the government's actions were "malicious, irrational and plainly arbitrary." *Id.* at 1409.

183. *Armendariz*, 75 F.3d at 1313.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 1320.

188. 126 F.3d 1125 (9th Cir. 1997).

189. *Macri*, 126 F.3d at 1129.

190. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172

ripeness doctrine.¹⁹¹

In its *en banc* opinion in *Armendariz*, the Ninth Circuit noted that if the plaintiffs could prove that the city created "an irrational distinction" in its treatment of property owners, then the distinction would lack "any rational basis" and "would constitute a violation of the plaintiffs' clearly established rights under the equal protection clause."¹⁹² But surely the Equal Protection Clause is as open-ended as the Due Process Clause, and therefore, it should be just as susceptible to attack under the *Graham* doctrine.¹⁹³

Likewise, *Armendariz*¹⁹⁴ quoted approvingly from *Moore v. City of East Cleveland*.¹⁹⁵ There, the Supreme Court had invalidated a zoning ordinance that defined a single-family district so as to preclude children who were not siblings from permanently living with their grandmother.¹⁹⁶ The rationale was that the ordinance violated substantive due process because it unduly interfered with fundamental family relationships.¹⁹⁷

At best, *Armendariz* raises difficult questions. By what standard should a claim be characterized as falling under one Amendment or another? Which Amendment should dominate? Should the losing plaintiff on a dominant claim in federal court be able to pursue a subordinate claim in state court and vice versa?

The Supreme Court recently reasserted that a litigant can claim rights under multiple constitutional provisions in *United States v. James Daniel Good Real Property*,¹⁹⁸ a civil forfeiture case. In *James Daniel Good*, the Court found a substantive due process argument that pre-seizure notification was required to be sufficiently disparate from the petitioner's Fourth Amendment claim respecting the seizure.¹⁹⁹ Given the separate role,

(1985).

191. *Macri*, 126 F.3d at 1128-29 (citing *Williamson County*, 473 U.S. 172).

192. *Armendariz*, 75 F.3d at 1326.

193. See generally *Massaro*, *supra* note 176, at 1100-02.

194. *Armendariz*, 75 F.3d at 1326.

195. 431 U.S. 494 (1977).

196. *Moore*, 431 U.S. at 495-97.

197. *Armendariz*, 75 F.3d at 1318-19.

198. 510 U.S. 43, 49 (1993) (stating that it had "rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another").

199. *James Daniel Good*, 510 U.S. at 49.

standards and history of the Due Process Clause, the Court should reject the *Armendariz* application of *Graham*.

IV. THE NEED TO REEVALUATE THE TAKINGS-DUE PROCESS BALANCE

The principal reasons necessitating a re-evaluation of the roles of the Takings and Due Process Clauses are that the current law is chaotic²⁰⁰ and that it countenances unfair deprivations of rights. Much of this problem results from the Supreme Court's attempt to cabin all of a property owner's constitutional claims within the Takings Clause. Although it is better for the Court to expand its recognition of property rights within the Takings Clause than not to do so at all, coherence often would benefit from an explicit due process treatment. Implicit in this assertion is that the Court would evaluate property owners' claims through the lens of meaningful scrutiny.²⁰¹

A. Discrete Roles for the Due Process and Takings Clauses

As Justice Breyer wrote in his dissent in *Eastern Enterprises*, "at the heart of the [Takings] 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.'²⁰² "The Clause," Justice Kennedy added, "operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government

200. See, e.g., BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 8 (1977) ("I have not encountered a single lawyer, judge, or scholar who views existing case-law as anything but a chaos of confused argument which ought to be set right if one only knew how.").

201. See discussion *infra* Part IV.B.2.c. I want to clearly distinguish my view from those that advocate removing ends-means considerations from the Takings Clause, only to all but ensure their demise by relegating them to very deferential due process review akin to that accorded under the rational basis test. See *infra* note 327 and accompanying text. See, e.g., Karena C. Anderson, Comment, *Strategic Litigating in Land Use Cases: Del Monte Dunes v. City of Monterey*, 25 ECOLOGY L. Q. 465, 468 (1998); John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695 (1993).

202. *Eastern Enters.*, 524 U.S. at 554 (Breyer, J., dissenting).

intends to do is otherwise constitutional."²⁰³

The Due Process Clause, on the other hand, is concerned with fairness. In its most pervasive sense, "substantive due process doctrine reflects the simple but far-reaching principle . . . that government [action] cannot be arbitrary . . . and there must be a 'rational' or reasonable relationship between [the] government's ends and its means."²⁰⁴

This Article's emphasis is on the Due Process Clause as the primary vehicle for considering allegations of governmental deprivation of property. Given that the Due Process and Takings Clauses both are predicated upon notions of fundamental fairness, some overlap between the Clauses is to be expected and welcomed.

A comprehensive property rights jurisprudence would entail recognition of the following three paradigmatic models:

I. *Cases in Which the Government Has No Right*.—When the government wrongfully deprives an individual of property rights, the response must be rectification. The return of the rights to the deprived owner is a necessary remedy since market value damages, which are the measure of "just Compensation,"²⁰⁵ do not recompense the owner for real but idiosyncratic losses, such as sentimental attachment or fitness for a particular business purpose.²⁰⁶ Among other wrongful deprivations are racially discriminatory acts, malicious acts, acts favoring business competitors or regulators in their personal capacities, and unreasonable delays. Also included are regulations that are unfairly retroactive in effect and in which there is not a rational relationship between the means employed by the government and the legitimate ends it seeks. The "natural home"²⁰⁷ for such analysis is the Due Process Clause.

203. *Id.* at 545 (Kennedy, J., concurring in the judgment and dissenting in part).
 204. Richard A. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 310 (1993).
 205. See *Olson v. United States*, 292 U.S. 246, 255 (1934) ("Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined").
 206. See *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988).
 207. *Eastern Enters.*, 524 U.S. at 556 (Breyer, J., dissenting). See *supra* text accompanying note 67.

2. *Cases in Which the Owner Has No Right*:—Owners who wish to engage in what clearly are common law nuisances are precluded from doing so without the need for compensation. Such uses could be enjoined by neighbors as “private nuisances” or by the locality as “public nuisances.” They do not constitute “rights” under background principles of property and nuisance law, as reiterated in *Lucas v. South Carolina Coastal Council*.²⁰⁸ The “natural home” for such analysis is the arena of substantive due process and a state’s police power.

3. *Cases in Which Both the Government and the Owner Have Rights*:—When an owner is lawfully in possession and making lawful use of a resource, the government may not restrict or take those use rights without payment of compensation. In other words, regulation that does more than enforce the law of private or public nuisance is a taking and requires compensation.²⁰⁹ This does not mean that the government cannot regulate for the common good. In many cases, perhaps in most, compensation would not have to be paid in cash but would be afforded through “reciprocity of advantage.”²¹⁰ For instance, an ordinance preserving the façades of the New Orleans *Vieux Carre* district provides mutuality of benefit to the various owners within the district.²¹¹ However, the prohibition on use of air rights over Grand Central Terminal does not provide mutuality since the owners of the 400 buildings designated with “landmark” status were required to sacrifice the opportunity to make otherwise

208. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). See *infra* text accompanying notes 353-55.

209. This point has been made most notably in EPSTEIN, *supra* note 169; see, e.g., *id.* at 102.

210. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922). Holmes used the term to signify that the police power might be employed for the public welfare, in the sense that each resident would derive a benefit from a regulation greater than the burden imposed upon other residents. “But where the police power is exercised, not to confer benefits upon property owners but to protect the public from detriment and danger, there is, in my opinion, no room for considering reciprocity of advantage.” *Pennsylvania Coal*, 260 U.S. at 422.

211. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). Without existing restrictive covenants, one owner would sell at a high price to an incompatible use and others would sell for lesser prices in turn. Once the unique attributes of the neighborhood were destroyed, property values would fall. See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

permissible use of their parcels so as to satisfy the aesthetic tastes of the owners and residents of over one million other buildings.²¹² In addition, general ordinances that make it impossible to determine winners and losers without inordinate expense would be assumed to be reciprocal.²¹³ The "natural home" for evaluating deprivations intended to add to the stock of public goods is the Takings Clause.

B. *The General Need for Substantive Due Process*

Those who favor a positivist or communitarian model of property rights are disposed to grant the legislature maximum latitude. Those viewing property rights in the context of natural rights see them as pre-political and frame the issue in terms of discerning the boundary between the rights of the owner and those of other individuals.²¹⁴ As Professor Sunstein admits, even under a positivist approach it is difficult to read economic substantive due process entirely out of the Constitution since the Contract and Takings Clauses unquestionably presuppose existing rights.²¹⁵

Nevertheless, there is a great deal of hostility towards use of substantive due process to protect economic liberties. For many liberals, it brings to mind a "property-conscious Supreme Court," and the "slightest indication of judicial interest in reviewing economic legislation produces dire warnings of a return to the *Lochner* era."²¹⁶ From the perspective of a politically conservative judge, the integration of economic rights with other constitutionally protected interests may be constrained by a desire to adhere to precedent.²¹⁷ In addition, as Justice Scalia

212. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978) (Rehnquist, J., dissenting) ("Of the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks.").

213. See EPSTEIN, *supra* note 169, at 195-99.

214. See Brauneis, *supra* note 165, at 624.

215. Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 890 (1987).

216. Ely, *supra* note 82, at 213-14.

217. See, Richard E. Levy, *Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329 (1995).

has noted, it is not clear that judges will "limit their constitutionalizing of economic rights to those rights that are sensible."²¹⁸ But the role of the judge is not to strive for "activism" one way or another, but rather, it is to discern the requirements of the law. Charges of "reviving *Lochner*," like other charges of "judicial activism," relate to the view of the commentator that the judge is trying to move beyond legitimate constitutional baselines. For those who believe that in the field of property rights legislatures should be constrained only by a "conceivable basis" test,²¹⁹ almost any enforcement of the Takings and Contract Clauses will invoke such criticisms.

The proposals set forth here have the modest goal of adding coherence to property rights law by recognizing that substantive due process has a role in property rights jurisprudence that is separate from that of the Takings Clause.

1. No Constitutional Principle Precludes Greater Use of Due Process.—Given the Supreme Court's increased solicitude for property rights since *Penn Central* was decided in 1978,²²⁰ it is unlikely that the Court would be totally unresponsive to reconsidering a more distinct role for substantive due process in its property jurisprudence. In addition, there is no consensus in the Court or among mainstream legal scholars that the pre-1937 Court had committed any identifiable fundamental error. As has been hypothesized, perhaps neither its theory nor its methodology was wrong, but the Court instead just reached what dominant opinion soon regarded as the wrong answer.²²¹ Perhaps the Justices simply "made the unfortunate mistake of attaching themselves to the dominant economic view just as that view was

218. Antonin Scalia, *Economic Affairs as Human Affairs*, in *ECONOMIC LIBERTIES AND THE JUDICIARY* 31, 35 (James E. Dorn & Henry G. Manne eds., 1987).

219. See *infra* text accompanying note 348.

220. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978); see, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Suitum v. Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

221. John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1797 (1998) (discussing this possibility).

on the verge of falling apart, to be replaced by a more complex, and much more regulatory, economic view of the world.²²² This seems the import of the joint opinion by Justices O'Connor, Kennedy and Souter in *Planned Parenthood v. Casey*,²²³ which said that the Court's interpretation of contractual freedom "rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare."²²⁴

Similarly, in its analogy in *Planned Parenthood to Plessy*²²⁵ and *Brown*,²²⁶ the joint opinion said that whether "separate but equal" segregation constituted invidious discrimination could be ascertained only "on the ground of history and of common knowledge about the facts of life in the times and places aforesaid."²²⁷

Given this recognition of the moral imperatives of changing times, it is worth reconsidering New Deal era assumptions based on economic determinism. The 1930s model of mass production and workers carrying their lunchpails through the gates of large factories seems increasingly anachronistic. Likewise, the growth of "behavioral economics" and related disciplines belies the notion that "economic man" is a creature solely defined by rationality and wealth-seeking.²²⁸ In a society where people's personal and economic lives often meld, the strict separation between economic substantive due process and the process due other fundamental rights seems less tenable. There is nothing in the Su-

222. Hovenkamp, *supra* note 130, at 439.

223. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (reiterating the constitutionality of abortion choice).

224. 505 U.S. at 861-62 (citing *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937)).

225. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding legislatively mandated racial segregation in public transportation), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

226. *See Brown*, 347 U.S. at 495 (ordering desegregation of public schools).

227. *Planned Parenthood of Southeastern Pa.*, 505 U.S. at 863 (quoting Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 427 (1960)).

228. *See, e.g.*, GARY S. BECKER, A TREATISE ON THE FAMILY (1991); Herbert A. Simon, *Behavioural Economics*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS 221 (John Eatwell et al. eds., 1991); Stephen D. Hurd, *The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law*, 51 VAND. L. REV. 1497, 1497 (1998); Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499 (1998).

preme Court's jurisprudence that would make it especially difficult to reconsider the role of due process in the situations described in the last part of this Article.²²⁹

a. "Institutional" Constraints

To the extent that the Court is constrained from reconsidering the expansion of due process protection for property rights, the cause is less likely "fundamental," as that term relates to human flourishing, and more likely "ad hoc" or "intuitionist."²³⁰ Large institutions embarking on significant change have to move incrementally.²³¹ One such consideration, in our pluralistic society, is whether there has developed what John Rawls has termed an "overlapping consensus" of people of otherwise competing moral views.²³²

Another constraint is the strong influence of legal precedent, as broadly conceived.²³³ This obviously binds judges since "the elaboration of constitutional values proceeds mostly from prior decisions."²³⁴ It also tends to constrain academics, who tend to build their constitutional theories around the landmark cases.²³⁵

Still another concern is that critics, who look from the outside in, can assert that the Court has distorted or neglected constitutional provisions without being responsible for implementing their proffered corrections.²³⁶ From the viewpoint of the judge looking inside out, however, there is a need to be concerned with the traditional judicial virtues of adherence to precedent, impartiality, restraint and also with the practical limitations on judicial power.²³⁷

229. See *infra* Part V.

230. Fallon, *supra* note 204, at 320-23.

231. See *id.*

232. *Id.* (quoting John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 2-5 (1987)).

233. See Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1064 (1990).

234. *Id.*

235. See Sunstein, *supra* note 215, at 873.

236. See Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591, 591 (1998) (explaining that most scholars reach the same conclusion: "the judges got it wrong").

237. *Id.* at 594; GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING*

Yet as we examine these institutional constraints within the legal culture, it is important to consider that they have grown within the context of a balance between public and private law that has changed with the growth of the administrative state.²³⁸ As Professor Carol Rose has observed:

The key point is that regulatory regimes have an evolution, too. In many ways, the evolution of regulatory regimes replicates, at a meta-level, the evolution of private property regimes. Just as we used to say, "anything goes" about private land uses, and just as private landowners became accustomed to uncontrolled use of their land, we have also gone through a period when we said "anything goes" for the regulation of private land uses. During this time, land use regulators became accustomed to believing that they were entitled to regulate anything that they pleased under the auspices of Euclidean zoning.²³⁹

As governmental controls affecting land uses become more and more pervasive, ordinary citizens are affected as well as the traditional targets of economic regulation.²⁴⁰

b. "Process Theory" is an Inadequate Explanation

The *Carolene* footnote protects "discrete and insular minorities."²⁴¹ However, as Professor Ackerman has demonstrated, the Supreme Court got this point backwards.²⁴² Insularity is an advantage to minority groups and not a detriment:²⁴³ "It is the members of anonymous or diffuse groups who, in the future, will have the greatest cause to complain that pluralist bargaining exposes them to systematic—and undemocrat-

ABOUT SOCIAL CHANGE? (Benjamin Page ed., University of Chicago 1991) (examining the circumstances under which courts can produce social change and concluding that they can rarely lead significant social reform).

238. See generally Rose, *supra* note 143.

239. *Id.* at 589 (emphasis in original).

240. Peter A. Buchsbaum & Thomas C. Shearer, *Report of the Subcommittee on Federal Regulation of Land Use*, 26 URB. LAW. 831, 831-32 (1994) (stating that the "federal government has become intimately involved in land-use regulation [and that federal regulation] may be as pervasive and significant for many projects and in many communities as the local and state [regulation]").

241. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

242. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 717 (1985).

243. *Id.* at 722-28.

ic—disadvantage."²⁴⁴

Landowners, who are scattered throughout the United States, are difficult to organize to protect their mutual interests.²⁴⁵ Furthermore, state-enabling acts confer broad discretion upon local communities, and they have no built-in incentives to treat minority economic interests fairly.²⁴⁶ As Professor Fischel has noted:

Local governments require more scrutiny in land use issues because they are not as likely to perceive the full cost of their actions. Since they have all the land they are usually going to get, and since none of it can be removed if its owners are not treated fairly, there are no mobility and few reputation disciplines. Even if there is a social cost to the taking, the cost will be borne mainly by people in other jurisdictions.²⁴⁷

In the classic work on the subject, Professor Ellickson has noted the ability of suburban governments to restrict the supply of homesites through various forms of exclusionary zoning and growth limitations.²⁴⁸ The major beneficiaries would be existing homeowners and landlords since an unchanging number of prospective residents would be bidding for a smaller supply of units than otherwise would be the case.²⁴⁹ The major losers would be owners of undeveloped land, who could obtain lower prices for their lots and who often live in other communities.²⁵⁰ Other losers include prospective residents, who would pay higher housing prices or find them prohibitive.²⁵¹ Community governance may be comfortable for the homeowners majority, but those who wish to further develop may find them protectionist and unforgiving.²⁵² Indeed, the residents of suburbs may en-

244. *Id.* at 737.

245. OLSON, *supra* note 211, at 2 ("[U]nless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or group interests.*").

246. See WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 326-31 (1995).

247. *Id.* at 331.

248. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *YALE L.J.* 385, 388 (1977).

249. *Id.* at 400.

250. *Id.* at 401.

251. *Id.* at 400-03.

252. See, e.g., Carol M. Rose, *The Ancient Constitution vs. The Federalist Empire:*

hance their local monopoly positions if their governments adopt low-growth policies simultaneously, to form what Ellickson describes as "cartels."²⁵³

c. Public Choice

One interesting aspect of the plurality opinion in *Eastern Enterprises v. Apfel*²⁵⁴ is its awareness of interest group theory, otherwise known as public choice theory.²⁵⁵ Retroactive laws, Justice Kennedy wrote, may be a means of "retribution against unpopular groups or individuals" and "may be passed with an exact knowledge of who will benefit from it."²⁵⁶ As public choice theory puts it, "market forces provide strong incentives for politicians to enact laws that serve private rather than public interests, and hence statutes are supplied by lawmakers to the political groups or coalitions that outbid competing groups."²⁵⁷ There is substantial evidence that the statute upheld in *Carolene Products*²⁵⁸ itself was special interest legislation, designed to drive from the market a nutritious milk product favored by low-income consumers.²⁵⁹

Anti-Federalism From the Attack on "Monarchism" to Modern Localism, 84 NW. U. L. REV. 74, 95 (1989) ("As between neighbors, local institutions play less the role of the protector of entitlements, and more the role of ad hoc mediators. These same local institutions, however, are apt to make considerably higher demands on outsiders and innovators than they do on established uses.").

253. Ellickson, *supra* note 248, at 434 & n.131 (attributing in part the doubling of housing prices in the Washington, D.C. suburbs during 1968-1975 to such a combination).

254. 524 U.S. 498 (1998).

255. *Eastern Enters.*, 524 U.S. at 547-50 (Kennedy, J., concurring in the judgment and dissenting in part). The seminal works of public choice theory include KENNETH ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

256. *Eastern Enters.*, 524 U.S. at 548 (Kennedy, J., concurring in the judgment and dissenting in part) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) and quoting Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693 (1960) (internal quotations omitted)).

257. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 224 (1986).

258. 304 U.S. 144 (1938) (upholding the Filled Milk Act, 21 U.S.C. §§ 61-63 (1994)).

259. See Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT.

To be sure, public choice analysis is not always easy since activities which appear clearly in the public interest to some might appear to be selfish rent seeking to others.²⁶⁰ Nonetheless, the continuing subordination of property rights to what are deemed more "fundamental" interests seems less plausible when public choice considerations are taken into account.

An important exposition of public choice analysis is Justice Scalia's dissenting opinion to *Pennell v. City of San Jose*.²⁶¹ At issue was a rent control ordinance specifying six "objective" factors relating to landlords' costs and other aspects of the housing market.²⁶² In addition, as a seventh factor, a hearing officer was permitted to disallow a portion of an otherwise justified increase if it "constitute[d] an unreasonably severe financial or economic hardship on a particular tenant."²⁶³ Scalia observed that the objective factors would limit the landlord to a reasonable rate of return, but that the seventh was related to a tenant's poverty, which is "no more caused or exploited by landlords than it is by the grocers who sell needy renters their food."²⁶⁴

The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities . . . has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). . . .

Of course all economic regulation effects wealth transfer. When excessive rents are forbidden, for example, landlords as a class become poorer and tenants as a class (or at least incumbent tenants as a class) become richer. Singling out landlords to be the transferors may be within our traditional constitutional notions of fairness, because they can plausibly be regarded as the source or the beneficiary of the high-rent problem. Once such a connection is no longer required, however, there is no end to the social trans-

REV. 397, 399.

260. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 70 (1991).

261. 485 U.S. 1 (1988) (holding takings claims premature and that the ordinance at issue did not on its face violate the Due Process or Equal Protection Clauses).

262. *Pennell*, 485 U.S. at 9.

263. *Id.* at 6.

264. *Id.* at 21 (Scalia, J., concurring in part and dissenting in part).

formations that can be accomplished by so-called "regulation," at great expense to the democratic process.

The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved "off budget," with relative invisibility and thus relative immunity from normal democratic processes.²⁶⁵

The implications of this analysis for a process-based jurisprudence that has as its goal the enhancement of democratic participation in decisionmaking should be troubling.

2. Due Process and Property Deprivations.—

a. The Court's Penn Central Takings Analysis

Given that the plurality opinion in *Eastern Enterprises v. Apfel* refers to the "vague contours" of the Due Process Clause,²⁶⁶ it would seem that the Supreme Court would be keenly interested in preserving the sharp distinctions among "things" and "property," and "value" and "expectations." However, the Court's present regulatory takings jurisprudence wanders far afield from clearly-defined relational interests. Its recourse is to the "essentially ad hoc and fact intensive"²⁶⁷ test first enunciated by Justice Brennan in *Penn Central Transportation Co. v. City of New York*.²⁶⁸

While application of the *Penn Central* balancing test is ad hoc, Justice O'Connor in *Eastern Enterprises* summarized its articulated prongs: "We have identified several factors, however, that have particular significance: 'the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.'"²⁶⁹

265. *Id.* at 21-22 (Scalia, J., concurring in part and dissenting in part).

266. *Eastern Enters.*, 524 U.S. at 537 (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)).

267. *Id.* at 523.

268. 438 U.S. 104 (1978). The *Penn Central* test remains generally employed by the Court for regulatory takings cases in which there is no complete deprivation of beneficial enjoyment of property, see *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), or permanent physical invasions, see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

269. *Eastern Enters.*, 524 U.S. at 523-24 (quoting *Kaiser Aetna v. United States*,

By its nature, this balancing test does not permit a clear understanding of the actual bases of *Penn Central* or of the subsequent federal and state cases applying it. As balancing tests are wont to do, it obscures analysis and responsibility.²⁷⁰ As Justice Kennedy observed, "If the plurality is adopting its novel and expansive concept of a taking in order to avoid making a normative judgment about the Coal Act, it fails in the attempt; for it must make the normative judgment in all events."²⁷¹

The "economic impact of the regulation" prong spawns all sorts of problems since it begs the question of "impact compared to what?" This gives rise to a "denominator problem" that is among the less tractable in regulatory takings jurisprudence.²⁷² In *Eastern Enterprises*, the plurality opinion avoids this issue by reviewing the estimates of the parties that the cumulative payments will be on the order of \$50 to \$ 100 million and concluding that "there is no doubt that the Coal Act has forced a considerable financial burden upon Eastern."²⁷³ The plurality also treats within its "economic impact" discussion questions relating to the extent of Eastern's employment of miners who, with their families, received benefits from the Coal Act fund.²⁷⁴ The inclusion of those issues, together with the plurality's comment upon the "tenuous" relationship between the payments Eastern had agreed to and those imposed by the Coal Act,²⁷⁵ might suggest some implicit "denominator" determination respecting Eastern's involvement with the coal industry.

The meaning of "reasonable investment backed expectations," the second *Penn Central* prong, is particularly elusive. Justice Brennan described Justice Holmes' "too far" language in *Pennsylvania Coal Co. v. Mahon*²⁷⁶ as supporting the proposi-

444 U.S. 164, 175 (1979) (internal quotation marks omitted).

270. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 349 (1993) (describing balancing tests as "[l]ikely to be particularly attractive to those who by virtue of their inexperience feel unable to articulate the bases of their judgments, or who simply lack confidence in them and are therefore afraid to expose their own deliberations too nakedly").

271. *Eastern Enters.*, 524 U.S. at 544 (Kennedy, J., concurring in the judgment and dissenting in part).

272. See *infra* Part V.D.

273. 524 U.S. at 529.

274. *Eastern Enters.*, 524 U.S. at 529-30.

275. *Id.* at 531.

276. 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property

tion that "a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'"²⁷⁷ The phrase "investment backed expectations" appears to have originated in an article by Professor Michelman:²⁷⁸

[T]he ["too far"] test poses not nearly so loose a question of degree; it does not ask "how much," but rather (like the physical-occupation test) it asks "whether or not": whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.²⁷⁹

In essence, however, "investment-backed expectations" is not really concerned with "investment" at all; it is concerned with fairness and reliance.²⁸⁰ For instance, neither *Penn Central* nor any subsequent case has broached the suggestion that an owner would have a less viable claim if the property were an inherited family business, a devise from a distant relative, or even a prize in a lottery. In his concurrence in *Lucas v. South Carolina Coastal Council*,²⁸¹ Justice Kennedy observed that the "reasonable expectations" test was subject to "an inherent tendency towards circularity."²⁸² Expectations define rights, and judicial determinations of rights define expectations.²⁸³ Kennedy added, without analysis, that the test was "not circular in its entirety [because] expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved."²⁸⁴

Twenty years after *Penn Central*, it is difficult to discern

may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

277. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978).

278. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1229-34 (1967).

279. *Id.* at 1233.

280. See STEVEN J. EAGLE, REGULATORY TAKINGS § 64-(c)(2)(iii) (1996). Regulatory takings law does take "investment" into account with respect to prior nonconforming structures, previously granted zoning and development permits, and the like, but this is under the "vested rights doctrine." See generally *id.* § 6-5.

281. 505 U.S. 1003 (1992).

282. *Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring).

283. *Id.*

284. *Id.* at 1035.

any objective content in the "investment backed expectations" (later often known as "reasonable expectations") test. Remaining unanswered is Professor Epstein's charge that "[n]either [Justice Scalia] nor anyone else offers any telling explanation of why this tantalizing notion of expectations is preferable to the words 'private property.' . . ."²⁸⁵ In the recent *Good v. United States*,²⁸⁶ the United States Court of Appeals for the Federal Circuit reviewed the denial of a permit pursuant to a statute enacted after the appellant had purchased his land.²⁸⁷ Although terming his position "not entirely unreasonable," the court said that under the "regulatory climate that existed when Appellant acquired the subject property, Appellant could not have had a reasonable expectation that he would obtain approval. . . ."²⁸⁸

The third *Penn Central* prong involves "the character of the governmental action."²⁸⁹ As explained by Justice Brennan, "[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."²⁹⁰

In *Eastern Enterprises*, the "character" of the governmental action is that it imposes "severe retroactive liability."²⁹¹ To be sure, the plurality opinion, following the three-factor *Penn Central* balancing test, draws other considerations into its conclusion.²⁹² Thus, Justice O'Connor's full conclusion is that the Coal Act imposes "severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."²⁹³ However, "severity" is unlikely to be crucial since there is no indication in the Court's jurisprudence

285. Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993).

286. 189 F.3d 1355 (Fed. Cir. 1999), cert. denied, 120 S. Ct. 1554 (2000).

287. *Good*, 189 F.3d at 1359, 1361.

288. *Id.* at 1361-62 (emphasis added).

289. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (internal citation omitted).

290. *Penn Cent.*, 438 U.S. at 124 (internal citation omitted).

291. *Eastern Enters.*, 524 U.S. at 528-29.

292. See generally *id.* at 529-37.

293. *Id.* at 528-29.

that a "severe" burden falling short of a total deprivation of economic enjoyment would be considered a categorical taking, and there are affirmative indications to the contrary.²⁹⁴ The opinions of the plurality²⁹⁵ and of Justices Kennedy,²⁹⁶ Stevens²⁹⁷ and Breyer²⁹⁸ all leave little doubt that the "character" prong of the *Penn Central* balancing test was determinative.

Yet there is no reason why retroactivity, or any other aspect of the "character" (or, more precisely, the "characterizing") of the government's action, is particularly a Takings Clause concern. A characterization of the Coal Act as helping the destitute families of miners would not change the result since "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."²⁹⁹ Putting it another way, since "just compensation" is measured by the fair market value of what the government takes,³⁰⁰ motivation or intent is irrelevant to the fact that the owner receives what the Court has said is the fair measure of reimbursement for the owner's deprivation.

In advocating a Due Process Clause alternative, Justice Kennedy explained:

If the plurality is adopting its novel and expansive concept of a taking in order to avoid making a normative judgment about the Coal Act, it fails in the attempt; for it must make the normative judgment in all events. The imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions. This sort of analysis is

294. See, e.g., *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992) (disagreeing with Justice Stevens' claim in his dissent that it is arbitrary to deprive an owner suffering 95% diminution in value of categorical rule with the response, "[t]akings law is full of these 'all-or-nothing' situations.").

295. See *Eastern Enters.*, 524 U.S. at 534-36.

296. See *id.* at 542-47 (Kennedy, J., concurring in the judgment and dissenting in part).

297. See *id.* at 550-53 (Stevens, J., dissenting).

298. See *id.* at 558 (Breyer, J., dissenting) ("[A]n unfair retroactive assessment of liability upsets settled expectations, and it thereby undermines a basic objective of law itself.").

299. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

300. See *Olson v. United States*, 292 U.S. 246, 255 (1934) ("Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined.").

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. The Clause operates as a conditional limitation, permitting the Government to do what it wants so long as it pays the charge. The Clause presupposes what the Government intends to do is otherwise constitutional[.]³⁰¹

Justice Kennedy referenced his comment about "wisdom of government decisions"³⁰² to *Agins v. Tiburon*.³⁰³

b. *The Agins Two-Prong Test*

The *Agins* plaintiffs owned a parcel of land in affluent Marin County that included ridglands said to "possess magnificent views of San Francisco Bay and the scenic surrounding areas [and] have the highest market values of all lands' [sic] in Tiburon."³⁰⁴ The city had discontinued condemnation proceedings after determining that the parcel would be too expensive.³⁰⁵ Subsequently, acting pursuant to an intervening state law requiring it to adopt a land use and open-space plan, the city re-zoned the parcel to allow single-family residences and considerable open spaces in place of the plaintiffs' intended development.³⁰⁶ The California Supreme Court held that the petitioners had failed to state a cause of action,³⁰⁷ and the United

301. *Eastern Enters.*, 524 U.S. at 544-45 (Kennedy, J., concurring in the judgment and dissenting in part) (internal citations omitted and emphasis added).

302. *Id.* at 545.

303. 447 U.S. 255 (1980).

304. *Agins*, 447 U.S. at 258 (citation omitted) (alteration in original).

305. *Id.* at 257; see also MARK L. POLLOT, GRAND THEFT AND PETTY LARCENY: PROPERTY RIGHTS IN AMERICA 114-15 (1993).

306. *Agins*, 447 U.S. at 257.

307. *Agins v. City of Tiburon*, 598 P.2d 25, 32 (1979), *aff'd*, 447 U.S. 255 (1980). The court also held that invalidation of the regulation was the proper remedy for a regulatory taking and precluded the award of monetary damages. *Agins*, 598 P.2d at 28, 32. The U.S. Supreme Court reversed this holding in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). The Court's view in *First English* that a wrongful deprivation constitutes a temporary taking illustrates the melding of the Takings and Due Process Clauses approaches. The California Supreme Court is still wrestling with the problem of whether a deprivation of due process gives rise to a taking. See, e.g., *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851, 865-66 (Cal. 1997). See *infra* text accompanying notes 387-404.

States Supreme Court unanimously affirmed.³⁰⁸

Justice Powell found that appellants' failure to file a development plan precluded a challenge to a specific zoning application and that the only question to be decided was whether the mere enactment of the zoning ordinances constituted a taking.³⁰⁹ He then propounded what has become known as the *Agins* two-prong test:

The application of a general zoning law to particular property effects a taking if the ordinance [1] does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, . . . or [2] denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*. . . .³¹⁰

The second prong of the *Agins* test flows from the Court's 1945 decision in *United States v. General Motors Corp.*,³¹¹ that "[g]overnmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."³¹²

The first prong obscures the fact that *Nectow* was a due process case.³¹³ Justice Sutherland, who wrote the opinion, two years earlier had written for the Court in *Village of Euclid v. Ambler Realty Co.*³¹⁴ In *Euclid*, Sutherland upheld a comprehensive land use plan against a facial challenge.³¹⁵ In *Nectow*, he found a zoning ordinance unconstitutional as applied to a particular parcel.³¹⁶ The ordinance had caused the formerly valuable parcel to become undevelopable so that it would not yield a reasonable return on any investment.³¹⁷ The opinion al-

308. *Agins*, 447 U.S. at 263.

309. *Id.* at 260.

310. *Id.* (citing *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 n.36 (1978)).

311. 323 U.S. 373 (1945).

312. *General Motors*, 323 U.S. at 378 & n.5 (citing *United States v. Welch*, 217 U.S. 333 (1910) (permanently flooded land); *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914) (holding that fumes from railroad tunnel vented onto land were a taking)).

313. See generally *Nectow*, 277 U.S. at 185.

314. 272 U.S. 365 (1926).

315. *Euclid*, 272 U.S. at 396-97.

316. *Nectow*, 277 U.S. at 188-89.

317. *Id.* at 187.

so found that the inclusion of the site in its assigned zone was not indispensable to the general plan.³¹⁸

As the Court categorized it: "The attack upon the ordinance is that . . . it deprived [the plaintiff] of his property without due process of law in contravention of the Fourteenth Amendment."³¹⁹ Justice Sutherland cited his *Euclid* opinion for the proposition that the power of the government "to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."³²⁰ *Nectow* concluded that "the action of the zoning authorities comes within the ban of the [Due Process Clause of the] Fourteenth Amendment and cannot be sustained."³²¹

Again, the *Eastern Enterprises* plurality finding that the Coal Act "effects an unconstitutional taking" because it "implicates fundamental principles of fairness underlying the Takings Clause"³²² is a reinterpretation of earlier precedent under selective incorporation. However, it does not preclude the use of a due process approach as the preferred vehicle for a continuation of the "substantial advancement" test in appropriate circumstances.

In the recent case of *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,³²³ the United States made a strong attempt to convince the Supreme Court to reconsider the first prong of the *Agins* test in its amicus brief on behalf of the city.³²⁴ Although

318. *Id.* at 188.

319. *Id.* at 185.

320. *Id.* at 188 (citing *Euclid*, 272 U.S. at 395).

321. *Nectow*, 277 U.S. at 189.

322. 524 U.S. at 537.

323. 526 U.S. 687 (1999) (upholding, for the first time, a damages award for a regulatory taking).

324. Brief for the United States as Amicus Curiae Supporting Petitioner in Part at *1 (Questions Presented), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) (No. 97-1235). The brief proposed a question in addition to those upon which certiorari had been granted: "Whether a land-use restriction that does not substantially advance a legitimate public purpose can be deemed, on that basis alone, to effect a taking of property requiring the payment of just compensation." Brief for the United States as Amicus Curiae Supporting Petitioner at *1, *Del Monte Dunes* (No. 97-1235).

the Court has considered questions presented only by amici before,³²⁵ Justice Kennedy's opinion, written for a unanimous Court on this issue, pointedly spurned its efforts.³²⁶

c. Due Process Requires Meaningful Scrutiny

It is appropriate to consider how rigorously the Supreme Court should scrutinize claims that landowners were deprived of their property rights through arbitrary or oppressive governmental conduct. The term "meaningful scrutiny" is used here because it conveys my intent, because it is not a term of art in the Supreme Court's lexicon, and because the existing terms of art are increasingly fuzzy.

In addition to the traditional "rational basis" review for the general run of economic and social legislation,³²⁷ there is "strict scrutiny" for "fundamental" rights.³²⁸ Supplementing this two-tier scheme is "mid-level" review for gender and illegitimacy.³²⁹ Perhaps Justice Marshall was prescient in 1973 when he advocated variable review³³⁰ since, as Professor Fallon noted recent-

325. See, e.g., *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 243-45 (1989).

326. *Del Monte Dunes*, 526 U.S. at 699.

As the city itself proposed the essence of the instructions given to the jury, it cannot now contend that the instructions did not provide an accurate statement of the law. In any event, although this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions, we note that the trial court's instructions are consistent with our previous general discussions of regulatory takings liability.

Id. (citations omitted).

327. See, e.g., *Allied Stores v. Bowers*, 358 U.S. 522, 530 (1959) (upholding any classification based "upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy").

328. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973) (abortion rights); see also Gerald Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (referring to "strict scrutiny" as "strict' in theory and fatal in fact").

329. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983) (providing that legislation must be "narrowly tailored to serve a significant government interest").

330. See *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 460 (1984) (Marshall, J., dissenting).

ly, the Court's "articulated framework both reflects and invites confusion."³³¹ Fallon attributes this to the Court's tendency to give the rational basis test "enhanced bite" where classifications are apt to stigmatize or come close to trenching on protected rights.³³² He also cites, inter alia, the Court's "ad hoc balancing of 'the liberty [interest] of the individual' against 'the demands of an organized society.'"³³³ Furthermore, in cases identifying substantive due process rights such as those pertaining to "minimum contacts" requirements for a state's assertion of personal jurisdiction, the Court "has not even tried to fit [those rights] into a two-tiered model."³³⁴

This Article uses "meaningful scrutiny" as standing for the proposition asserted by the Court in another context that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."³³⁵ Similarly, the Court uses the term "rough proportionality" in *Dolan v. City of Tigard*.³³⁶ There, the Court examined whether the demanded exaction "substantially advance[d] legitimate state interests"—whether it was a rational means to achieve a legitimate end and also whether the regulation properly placed a burden upon the landowner.³³⁷

"Meaningful scrutiny" also encompasses the type of rational basis review used by the Court in *City of Cleburne v. Cleburne Living Center*.³³⁸ In *City of Cleburne*, the zoning ordinance required a special use permit for a group home for the mentally retarded, notwithstanding that hotels, fraternity houses and similar intense uses could locate in the same residential district as a matter of right.³³⁹ The Court carefully reviewed the proffered reasons for the requirement and concluded that it was not

331. See Fallon, *supra* note 204, at 315.

332. *Id.* at 316-17.

333. *Id.* at 317 (alteration in original) (citing *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982) (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting))).

334. *Id.*

335. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (holding that the Religious Freedom Restoration Act exceeded Congressional powers).

336. 512 U.S. 374, 391 (1994).

337. *Dolan*, 512 U.S. at 385.

338. 473 U.S. 432 (1985).

339. *Cleburne*, 473 U.S. at 435-39.

"rationally related to a legitimate governmental purpose."³⁴⁰

Professor Tribe has referred to the Court's review in *City of Cleburne* as "covertly heightened scrutiny,"³⁴¹ but his contrast is with maximum deference to legislative decisions, comporting with his characterization of the "rational basis" test as a "conceivable basis test."³⁴² Tribe warns:

The lack of openly acknowledged criteria for heightened scrutiny permits arbitrary use of the type of inquiry undertaken in *Cleburne*, for which courts will remain essentially unaccountable. With no articulated principle guiding the use of this more searching inquiry, even routine economic regulations may from time to time succumb to a form of review reminiscent of the *Lochner* era.³⁴³

It is inescapable, however, that legitimate "rational basis" review does require judges to make substantive evaluations about legislative goals and their conformity with the states' police powers.³⁴⁴

V. SPECIFIC TAKINGS ISSUES THAT DUE PROCESS MIGHT ADDRESS

The issues that follow are among the most opaque in the murky sea of regulatory takings law. Each is complex, in part due to a lack of doctrinal clarity. This categorization of issues and approaches sketches how due process analysis might help make each more coherent. It makes no attempt to treat sub-issues and their branches in present law in a comprehensive fashion.

340. *Id.* at 446.

341. See TRIBE *supra* note 148, at 1612 (describing the analysis in *Cleburne*, 473 U.S. 432 (striking down housing restrictions targeting the mentally retarded)).

342. *Id.* at 1443.

343. *Id.* at 1445 (internal footnote omitted). See *supra* text accompanying note 218.

344. See, e.g., *Texas Manufactured Housing Ass'n Inc. v. City of Nederland*, 101 F.3d 1095, 1106 (5th Cir. 1996).

A. "Takings" of Property vs. "Deprivations" of Property

The Supreme Court's present takings jurisprudence simply assumes that the normal recourse for a landowner aggrieved by a governmental restriction is a suit for compensation under the Takings Clause.³⁴⁵ Prior to *Chicago, Burlington and Quincy Railroad v. City of Chicago*,³⁴⁶ however, protection against property deprivations by states and localities had to be provided under state constitutions and laws.³⁴⁷ In many instances, courts interpreted this requirement to impose legislative disabilities instead of remedial duties.³⁴⁸ Thus, a statute that authorized the taking of private property without providing for the payment of compensation would be deemed void.³⁴⁹

In a contemporary context, this issue is not dissimilar from that involving ultra vires takings, where courts have upheld regulatory takings claims against a state in spite of a determination that the action was ultra vires.³⁵⁰ While a Takings Clause remedy might provide just compensation, a due process remedy should entail injunctive relief and consequential damages to make the landowner whole.³⁵¹

345. See, e.g., *Dolan*, 512 U.S. at 383-84.

346. 166 U.S. 226 (1897). See *supra* text accompanying notes 156-66.

347. *Chicago, Burlington and Quincy R.R.*, 166 U.S. at 232-36.

348. See Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 60 (1999).

349. See *id.*

350. See, e.g., *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 587 (11th Cir. 1990) (considering a takings claim where an ordinance had been invalidated as unauthorized); *Fountain v. Metropolitan Atlanta Rapid Transit Auth.*, 678 F.2d 1038, 1043 (11th Cir. 1982) ("If official authorities act on behalf of the state so as to take private property for public use without just compensation, even if they are acting outside of the scope of their official powers, they have violated the fifth and fourteenth amendments and are subject to an inverse condemnation suit.") (dictum); see also Matthew D. Zinn, Note, *Ultra Vires Takings*, 97 MICH. L. REV. 245, 245 (1998) (asserting that ultra vires determination is "fatal" to takings claims).

351. Unlike the Takings Clause, the Due Process Clause does not directly allow for suits for damages, U.S. CONST. amend. XIV, § 1. However, plaintiffs may sue under 42 U.S.C. § 1983 (providing for damages against persons depriving others of federally protected rights under color of law). Local governments are "persons" for this purpose. See *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1968).

B. Retroactive Legislation and "Background Principles"

Justice Breyer noted in *Eastern Enterprises* that "there is no need to torture the Takings Clause" since "the Due Process Clause can offer protection against legislation that is unfairly retroactive at least as readily as the Takings Clause might, for as courts have sometimes suggested, a law that is fundamentally unfair because of its retroactivity is a law which is basically arbitrary."³⁵²

Concern about the type of unfairness to which Justice Breyer referred might have resulted in the "background principles" limitation on the police power enunciated in *Lucas v. South Carolina Coastal Council*.³⁵³ The government may deprive an owner of all beneficial enjoyment of his or her land, but that would constitute a categorical taking.³⁵⁴ In order to prevent the government from imposing draconian rules for the public benefit and from blithely recharacterizing them as being for prevention of harm, such rules must "inhere in the . . . background principles" of state property and nuisance law.³⁵⁵

Since "background principles" refers to state law, it does not freeze the common law at some early or definitive time. However, the insertion of these words must add something that "state property and nuisance law" otherwise would not contain.³⁵⁶

352. 524 U.S. at 556-57 (Breyer, J., dissenting).

353. 505 U.S. 1003, 1029 (1992).

354. *Lucas*, 505 U.S. at 1015-19.

355. *Id.* at 1029 ("Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.").

356. See generally *Hage v. United States*, 35 Fed. Cl. 147 (1996).

In the concrete taking case the court must initially decide if the plaintiff has an actual property interest, if this is a point of dispute. This determination is based upon long and venerable case precedent, developed over the last two centuries. It is further clarified in the light of our law's Common Law antecedents. The Anglo-American case precedent is literally made up of tens of thousands of cases defining property rights over the better part of a millennium. The legal task is very unlike legislative policy-making because judicial decision-making builds historically and logically upon past precedent in narrow cases and controversies rather than current general exigencies or sweeping political mandates. The genius of our Framers' tripartite division of constitutional power is the creation of separated institutions that each best deal with different categories of governmental decisions.

However, a few courts, most notably the New York Court of Appeals, have ruled that any restriction inserted into the positive law prior to a purchase inheres in the buyer's title.³⁵⁷ In the most encompassing of these cases, *Kim v. City of New York*,³⁵⁸ the city had raised the legal grade of a street by over four feet prior to the plaintiffs' purchase.³⁵⁹ Ten years later, the Kims purchased the land, with no knowledge of the change and no practical way to learn of it.³⁶⁰ Two years after their purchase, the city regraded the road.³⁶¹ In the process, it permanently covered 2400 square feet of the Kims' land with fill dirt.³⁶² The court of appeals refused to consider the plaintiffs' contention that the deposit of fill dirt constituted a physical taking rather than a regulatory taking, insisting instead that the raised grade and a duty to provide lateral support for the reconstructed road were "background principles" that inhered in the plaintiffs' title.³⁶³

In *Nollan v. California Coastal Commission*,³⁶⁴ Justice Scalia observed:

Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.³⁶⁵

Hage, 35 Fed. Cl. at 151 (citing THE FEDERALIST No. 47 (James Madison)).

357. *Basile v. Town of Southampton*, 678 N.E.2d 489 (N.Y. 1997); *Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870 (N.Y. 1997); *Gazza v. New York State Dep't of Env'tl. Conservation*, 679 N.E.2d 1035 (N.Y. 1997); *Kim v. City of New York*, 681 N.E.2d 312 (N.Y. 1997); see also *Hunziker v. State*, 519 N.W.2d 367 (Iowa 1994); *Grant v. South Carolina Coastal Council*, 461 S.E.2d 388 (S.C. 1995).

358. 681 N.E.2d at 312.

359. *Id.* at 313.

360. *Id.*; see also Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating From the "Rule of Law,"* 42 N.Y.L. SCH. L. REV. 345, 369 (1998). The change was affected through a modification of an engineering map in a municipal office. *Id.* These records were not customarily checked in the title examination process. *Id.*; see also John M. Armentano, *Taking Claims; Property Owners Limited in Challenging Zoning Regulations*, N.Y.L.J., Mar. 5, 1997, at 5.

361. *Kim*, 681 N.E.2d at 313.

362. *Id.*

363. *Id.* at 316-18.

364. 483 U.S. 825 (1987).

365. *Nollan*, 483 U.S. at 834 n.2.

I have argued elsewhere that the results in cases such as *Kim* and *Nollan* are manifestly unfair in light of the restraint upon governmental re-definition of rights by fiat that the "background principles" language in *Lucas* was intended to achieve.³⁶⁶ My metaphor was that "[l]ike the sea anchor, background principles do not prevent gradual change, but do keep individual rights from being capsized by squalls of legislative passion."³⁶⁷ In a similar point made with greater elaboration, Professor Brauneis draws from Holmes' opinion in *Pennsylvania Coal* that the "structural habits" by which common law judges habitually resolve disputes in accordance with a variety of principles or paradigmatic cases creates a web of expectations on which individuals should be able to rely.³⁶⁸ A jurisprudence emphasizing the substantive unfairness of such outcomes would be entirely consistent with respect for settled expectations.

C. *Ends-Means Analysis*

In *Nollan v. California Coastal Commission*, the Court held that there must be an "essential nexus" between the government's means and ends.³⁶⁹ Without it, the California Coastal Commission's condition on development did not serve "legitimate state interests" but was merely a "plan of extortion."³⁷⁰ In his response to a forceful dissent by Justice Brennan, Justice Scalia implicitly acknowledged that some sort of heightened scrutiny was appropriate.³⁷¹

366. See *Eagle*, *supra* note 360, at 383. Among other reasons why this approach is unfair is that often it would be practically impossible for the previous owner to mount an "as applied" challenge under the *Williamson County* ripeness requirements. *Id.* at 373.

367. *Id.* at 399 n.337.

368. Brauneis, *supra* note 165, at 639-60 (discussing Holmes' "too far" aphorism in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). "Although gradual legal change is inevitable, sudden changes that drastically undermine basic principles, unaccompanied by compensation to disadvantaged parties, should be struck down as inconsistent with the settled will of the community, so long as those changes are not perceived as 'irresistible.'" *Id.* at 642.

369. *Nollan*, 483 U.S. at 837.

370. *Id.*

371. *Id.* at 834 n.3.

*Yee v. City of Escondido*³⁷² lent some support to this proposition. When juxtaposed with state law, the municipal mobile home park rent control ordinance at issue had the effect of permitting a park tenant to sell his mobile home at a premium that capitalized the difference between future market and controlled rents.³⁷³ The result would be a one-time transfer of the value of rent control to the incumbent, leaving successors bereft of the lower-cost housing that the statute intended.³⁷⁴ Justice O'Connor noted that the issue had not been properly presented.³⁷⁵ She added, however, that it "might have some bearing on whether the ordinance causes a regulatory taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance."³⁷⁶

As a result of the Court's introduction of the "rough proportionality" test in *Dolan*,³⁷⁷ other courts have used similar analyses.³⁷⁸ For instance, a ban on the demolition, conversion or warehousing of single room occupancy hotels was invalidated by the New York Court of Appeals in *Seawall Associates v. City of New York*.³⁷⁹ It found the nexus between preservation of Single Room Occupancy hotel rooms and the problem of homelessness that the city intended to address "indirect at best and conjectural."³⁸⁰

A pair of recent decisions by the California Supreme Court³⁸¹ illustrates the lack of clarity in United States Supreme Court regulatory takings jurisprudence, particularly with respect to the similar formulations of Takings Clause and Substantive Due Process Clause standards.³⁸² In *Kavanau v. Santa*

372. 503 U.S. 519 (1992).

373. *Yee*, 503 U.S. at 524-25.

374. *Id.*

375. *Id.* at 532-33.

376. *Id.* at 530.

377. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994). See *supra* text accompanying note 298.

378. See, e.g., *infra* note 355 and accompanying text.

379. 542 N.E.2d 1059 (1989).

380. *Seawall*, 542 N.E.2d at 1068-69.

381. See generally *Kavanau v. Santa Monica Rent Control Bd.*, 941 P.2d 851 (Cal. 1997); *Santa Montica Beach Ltd. v. Superior Court*, 968 P.2d 993 (Cal. 1999).

382. See *infra* notes 342-45 and accompanying text; notes 346-56 and accompanying text.

Monica Rent Control Board,³⁸³ the California Supreme Court reviewed a landlord's claim for takings damages that arose from an earlier proceeding, in which an appellate court had determined that a rent control ordinance had deprived him of due process of law.³⁸⁴ Kavanau then brought the present action for damages, alleging that the earlier deprivation of rents constituted a taking.³⁸⁵ In an opinion by Justice Chin, the court declined to decide that the due process violation constituted a taking on the grounds that there was an available and adequate remedy that obviated the need for such a finding.³⁸⁶ The cost to Kavanau of any confiscatory rent ceiling in the past would have to be taken into account in future rent increase assessments.³⁸⁷ The case is notable for Justice Chin's careful attempt to distinguish Takings Clause from Due Process Clause jurisprudence in the area of price regulation.³⁸⁸ A concurring opinion by Justice Mosk asserted that Kavanau did not have a viable takings or due process claim since he voluntarily chose to be in the business of renting apartments and could have withdrawn from that business at any time.³⁸⁹

Less than eighteen months later, in *Santa Monica Beach, Ltd. v. Superior Court*,³⁹⁰ the California Supreme Court reversed an appellate court's reinstatement of a complaint alleging that a Santa Monica rent control ordinance violated the Takings Clause as not substantially advancing a legitimate state interest.³⁹¹ Substantial evidence submitted by Santa Monica Beach demonstrated that under the city rent control ordinance, Santa Monica's housing stock had become much less available to young families (especially those headed by single-parent mothers) and to the elderly than housing in comparable other cities.³⁹² The appellate court found that the ordinance was ineffective as ap-

383. 941 P.2d 851 (Cal. 1997).

384. *Kavanau*, 941 P.2d at 854 (noting rents were arbitrarily capped below the level needed for a just and reasonable return).

385. *Id.* at 854-55.

386. *Id.* at 863.

387. *Id.* at 865-66.

388. *Id.* at 857-61.

389. *Kavanau*, 941 P.2d at 871 (Mosk, J., concurring).

390. 968 P.2d 993 (Cal. 1999), cert. denied, 119 S. Ct. 1804.

391. *Santa Monica Beach, Ltd.*, 968 P.2d at 995.

392. *Id.* at 995-97.

plied.³⁹³ It applied a heightened standard of scrutiny under *Nollan*,³⁹⁴ but it declared that the ordinance would fail even under a rational basis test.³⁹⁵ "Deference to legislative authority cannot salvage a regulation that defeats rather than accomplishes its stated purpose."³⁹⁶

Writing for the four-to-three majority of the California Supreme Court, Justice Mosk declared that "[t]he notion that a court may invalidate legislation that it finds . . . to have failed to live up to expectations[] is indeed novel."³⁹⁷ The court found the rational basis test appropriate, regarding *Dolan*³⁹⁸ heightened scrutiny as limited to adjudicative determinations respecting development exactions.³⁹⁹ Under either standard, however, "any complex piece of social or economic legislation will often have unanticipated consequences . . . and . . . the legislative body or the electorate . . . must be entrusted to weigh whatever harms and benefits result. . . ." ⁴⁰⁰ A dissent by Justice Chin argued that "[t]he majority . . . inappropriately conflates takings jurisprudence with due process jurisprudence, thus undoing much of our effort in *Kavanau v. Santa Monica Rent Control Board* to disentangle these two areas of law."⁴⁰¹ He emphasized his view that the court was treating the Takings Clause "substantially advance" test as if it were the Due Process Clause "rational basis" test.⁴⁰² He argued that "substantially advance" has an objective meaning and that the plaintiff should be allowed an opportunity to prove its case.⁴⁰³ Justice Baxter's dissent agreed, but he stressed that the deference due to legislation under the states' police power is not applicable to claims for just compensation under the Takings Clause.⁴⁰⁴ The opinions of Justices Chin and Baxter reflect the problems inherent in the

393. *Id.* at 997.

394. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

395. *Santa Monica Beach Ltd.*, 968 P.2d at 997.

396. *Id.* at 998.

397. *Id.* at 999-1000.

398. 512 U.S. 374 (1994).

399. *Santa Monica Beach, Ltd.*, 968 P.2d at 1005.

400. *Id.* at 1004.

401. *Id.* at 1036 (Chin, J., dissenting) (citations omitted).

402. *Id.* at 1037 (Chin, J., dissenting).

403. *Id.* at 1037, 1040 (Chin, J., dissenting).

404. *Santa Monica Beach, Ltd.*, 968 P.2d at 1013 (Baxter, J., dissenting).

Supreme Court's attempt to cabin due process considerations within a Takings Clause framework.

*D. Ripeness, Delay and Deliberate
Governmental Misconduct*

Dealing with regulatory takings ripeness requirements traditionally has been thought to result in one set of legal problems, and deliberate governmental attempts to delay owners have typically been thought to result in another set of legal problems. In fact, both are aspects of one problem: Localities systematically withhold definitive land use rulings and challenge compensation requests, knowing that the economics of litigation and holding undeveloped land will cause almost all owners to yield.

The Supreme Court's *Williamson County* ripeness test⁴⁰⁵ imposes two major tests before an "as applied" takings case is ripe for review.⁴⁰⁶ An owner has to obtain a "final" decision by a governmental actor,⁴⁰⁷ and the owner must be denied compensation in state court.⁴⁰⁸ These tests seem simple and reasonable but in fact have become complex and illusive.⁴⁰⁹ The driving force behind this complexity and illusiveness is that the agency has nothing to gain and potentially everything to lose by issuing a "final" decision.⁴¹⁰ The first Supreme Court opinion to use the term "regulatory taking" was Justice Brennan's dissent in *San Diego Gas & Electric Co. v. City of San Diego*.⁴¹¹ He noted that the appellant had been denied all use of its land for seven years before the Supreme Court determined that its claim was not ripe.⁴¹² Furthermore, Brennan cited the transcript of an attorney bragging, at a California municipal law

405. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

406. *Williamson County*, 473 U.S. at 186, 194.

407. *Id.* at 186.

408. *Id.* at 194; see also Stein, *supra* note 4.

409. See BERGER, *supra* note 2 (containing detailed roadmaps and strategic discussion of the *Williamson County* prongs); see also Michael Berger, *The Ripeness Mess*, SB14 ALI-ABA 155 (1997) (same).

410. See Stein, *supra* note 4, at 12-13.

411. 450 U.S. 621 (1981).

412. *San Diego Gas*, 450 U.S. at 655 n.22 (Brennan, J., dissenting).

officers' conference, that if a locality was sued, all it would have to do was to slightly modify the statute and force the owner to begin anew.⁴¹³

Modern zoning techniques typically do not give landowners uses as of right.⁴¹⁴ Proposals have to be negotiated with planning commission staff members, who are in a position to suggest that approval is possible if slight modifications are made.⁴¹⁵ These proposals typically engender the need for additional modifications, with the process repeating itself many times over.⁴¹⁶ Overlaying this is the availability of appeals within the planning commission, appeals to the city council, and requests for variances and zoning amendments.⁴¹⁷ Should the owner ever receive a final decision, he or she must begin litigating anew by seeking compensation in state court, and he or she must be prepared to challenge adverse rulings.⁴¹⁸ The owner must pay attorney's fees and litigation expenses, in addition to paying taxes and interest on land that may be unproductive.⁴¹⁹ Responses by planners and municipal law officers are paid for by taxpayers, and their ensuing workload justifies the size of the staff.⁴²⁰

Two federal cases⁴²¹ have held that agency delays in granting permits constituted takings.⁴²² In the first, decided by the Court of Claims in 1970,⁴²³ the National Park Service failed to follow statutory requirements in dealing with a developer.⁴²⁴ The second, *Eastern Minerals International, Inc. v. United*

413. *Id.*

414. See BERGER, *supra* note 2, at 158; see also WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS* 21 (1985) (citing ROBERT H. NELSON, *ZONING AND PROPERTY RIGHTS* (1977)).

415. See EAGLE, *supra* note 280, at 222.

416. See generally Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. LAW 91 (1994).

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. See generally *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970), *supplemental opinion*, 459 F.2d 504 (1992); *Eastern Minerals Int'l, Inc. v. United States*, 36 Fed. Cl. 541 (1996).

422. See *infra* note 381 and accompanying text; notes 390-93 and accompanying text.

423. *Drakes Bay*, 424 F.2d at 574.

424. *Id.*

States,⁴²⁵ was decided by the Court of Federal Claims in 1996.⁴²⁶ The court found that the federal Office of Surface Mining's six year delay in responding to the plaintiff's mining permit application was "extraordinary" and that the delay constituted a permanent taking even though there was no final agency action.⁴²⁷ In other cases, judges clearly have been concerned about extended proceedings.⁴²⁸

The California Supreme Court's recent decision in *Kavanau v. Santa Monica Rent Control Board*⁴²⁹ illustrates how even a judicial vindication of rights may lead to endless delay. In *Kavanau*, a landlord had challenged the ceiling on increases contained in a rent control ordinance in 1989.⁴³⁰ Four years later, a California appellate court ruled that he had been deprived of a just and reasonable return.⁴³¹ The landlord then pursued just compensation for the rents of which he had been deprived while his challenge to the ordinance was pending.⁴³² The California Supreme Court refused to rule upon his request for damages under 24 U.S.C. § 1983, based on its view that the local board should consider its earlier deprivation in setting *Kavanau's* future rents.⁴³³ The court stated:

We think one of the costs associated with rent control that the Rent Board must consider is the cost to *Kavanau* of any confiscatory rent ceilings the Rent Board previously imposed on the apartments in question. . . . Thus, irrespective of whether section 1983 would have afforded *Kavanau* a remedy for the due process violation, his continuing right to an adjustment of future rents can provide an adequate remedy.⁴³⁴

425. 36 Fed. Cl. 541 (1996).

426. *Eastern Minerals*, 36 Fed. Cl. at 541.

427. *Id.* at 548.

428. See, e.g., *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1229 (D. Nev. 1999) ("On December 1, 1998, after fourteen and a half years of litigation, the first phase of the trial in this action finally began. . . . The first ten years or so were spent largely in an effort to determine whether any of the claims in the case were justiciable at all.").

429. 941 P.2d 851 (Cal. 1997).

430. *Kavanau*, 941 P.2d at 854.

431. *Kavanau v. Santa Monica Rent Control Bd.*, 23 Cal. Rptr. 2d 724 (1993).

432. *Kavanau*, 941 P.2d at 855.

433. See *id.* at 863-67.

434. *Id.* at 865 (citations omitted).

Thus, after a decade of continual litigation up and down the California judicial system, Kavanau was sent back to seek fair treatment from the Santa Monica Rent Board.⁴³⁵

Cases like *Kavanau* have been the rule, and cases like *Eastern Minerals* have been the rare exception; undue delay has been almost impossible to establish as a matter of law. The Supreme Court heard oral argument in one of the more egregious examples of deliberate delay, *PFZ Properties, Inc. v. Rodriguez*.⁴³⁶ In *PFZ Properties*, the company had attempted for eleven years to make the Commonwealth of Puerto Rico process its development plan for a resort hotel.⁴³⁷ PFZ introduced substantial evidence in the U.S. district court to show that the Commonwealth's failure was deliberate and malicious and that it even had gone so far as to remove records from its files in order to hinder the developer's progress.⁴³⁸ Nevertheless, the Court of Appeals for the First Circuit ruled that the landowner's constitutional rights were not violated even if all of the charges of official misconduct were true.⁴³⁹ Without explanation, the Supreme Court after oral argument dismissed the action without deciding its merits.⁴⁴⁰ It would be inconceivable that a court would countenance such protracted negotiations and delays respecting the exercise of any other individual right.

The Supreme Court's new opinion in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*⁴⁴¹ is a model of how an unfair administrative process can lead the Supreme Court to grant relief based on due process. Justice Kennedy's summary of the facts seemingly incorporated Del Monte's argument whole: Del Monte Dunes emphasized the tortuous and protracted history of

435. See *id.* at 867.

436. *PFZ Properties, Inc. v. Rodriguez*, 503 U.S. 257 (1992) (dismissing writ of certiorari as improvidently granted).

437. *PFZ Properties, Inc. v. Rodriguez*, 928 F.2d 28, 29 (1st Cir. 1991), *cert. dismissed*, 503 U.S. 257 (1992).

438. *PFZ Properties, Inc. v. Rodriguez*, 739 F. Supp. 67, 69-70 (D. Puerto Rico 1990), *aff'd*, 928 F.2d 28 (1st Cir. 1991), *cert. dismissed*, 503 U.S. 257 (1992).

439. *PFZ Properties*, 928 F.2d at 31 ("This Court has repeatedly held . . . that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation.") (internal citations omitted).

440. *PFZ Properties*, 503 U.S. 257.

441. 526 U.S. 687 (1999).

attempts to develop the property, as well as the shifting and sometimes inconsistent positions taken by the city throughout the process, and argued that it had been treated in an unfair and irrational manner. Del Monte Dunes also submitted evidence designed to undermine the validity of the asserted factual premises for the city's denial of the final proposal and to suggest that the city had considered buying, or inducing the State to buy, the property for public use as early as 1979, reserving some money for this purpose but delaying or abandoning its plans for financial reasons. The State of California's purchase of the property during the pendency of the litigation may have bolstered the credibility of Del Monte Dunes' position.⁴⁴²

The most recent illustration of the Supreme Court's interest in fairness as the keystone to its property rights jurisprudence is its decision in *Olech v. Village of Willowbrook*.⁴⁴³ In a per curiam decision, the Court found that a property owner subjected to an "irrational and wholly arbitrary" demand was deprived of equal protection of the laws under the Fourteenth Amendment.⁴⁴⁴ While there was evidence of malice by local officials, the Court pointedly refused to adopt the "vindictive action" requirement urged in Justice Breyer's concurrence.⁴⁴⁵

A due process-based jurisprudence would place more emphasis upon examining the methods by which agencies negotiate with landowners and defer decisions. The present structure of administrative delays places the burden on landowners to devise plan after plan in order to establish what they are not permitted to do. One possible solution is the adoption of prophylactic rules or burden shifting techniques. The recently enacted Florida "Bert J. Harris, Jr., Private Property Rights Protection Act,"⁴⁴⁶ for example, requires agencies to issue in a timely fashion and upon request "a written ripeness decision identifying the allowable uses to which the subject property may be put."⁴⁴⁷ This

442. *Del Monte Dunes*, 526 U.S. at 696-97 (internal citation omitted).

443. 120 S. Ct. 1073 (2000).

444. *Olech*, 120 S. Ct. at 1074-75.

445. *Id.* at 1075 (Breyer, J., concurring).

446. 1995 Fla. Laws ch. 95-181, § 1 (codified at FLA. STAT. ANN. § 70.001 (Harrison 1997)).

447. *Id.* § 70.001(5)(a).

decision "constitutes the last prerequisite to judicial review."⁴⁴⁸

E. The Denominator Problem

The first two factors in the Supreme Court's three-factor balancing test for regulatory takings require that judges consider a challenged regulation's "economic impact" and its "interference with reasonable investment backed expectations."⁴⁴⁹ While the Court has said that it "does not divide a single parcel into discrete segments" for this purpose,⁴⁵⁰ that begs the question of what the relevant "parcel" is. In addition, parcels are routinely divided into temporal segments, and the Court has no difficulty in requiring just compensation for the taking of leaseholds.⁴⁵¹ Some commentators have warned that owners would define the relevant parcel too narrowly, referring to "conceptual severance"⁴⁵² and "entitlement chopping."⁴⁵³ I have argued elsewhere that this is a game that two could play and that the government could define the relevant parcel too broadly through what I have dubbed "conceptual agglomeration."⁴⁵⁴ The Supreme Court acknowledged this problem in *Lucas v. South Carolina Coastal Council*.⁴⁵⁵ However, the Court declined to deal with it other than to claim that the New York Court of Appeals' conceptual agglomeration in finding the relevant parcel in the *Penn Central* case to be all of the company's lands stretching up

448. *Id.*

449. *Eastern Enters.*, 524 U.S. at 523-24 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)).

450. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978).

451. *See, e.g., United States v. General Motors*, 323 U.S. 373 (1945).

452. Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988). "[E]very regulation of any portion of an owner's 'bundle of sticks,' is a taking of the whole of that particular portion considered separately. Price regulations 'take' that particular servitude curtailing free alienability, building restrictions 'take' a particular negative easement curtailing control over development, and so on." *Id.* at 1678 (footnote omitted).

453. Frank Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600, 1601 (1988).

454. EAGLE, *supra* note 280, § 8-2(h).

455. 505 U.S. 1003, 1016 n.7 (1992) ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured.").

Park Avenue, which it had constructed at the beginning of the twentieth-century over its main line leading to Grand Central Terminal, was "unsupportable."⁴⁵⁶

The Federal Circuit has shown sensitivity to the underlying issues by considering carefully the underlying array of facts and circumstances in specific cases, including how and when an owner acquired a tract, what parts of it might have been sold off before the regulation was imposed, and why, whether and in what context certain parts of the remaining tract may have been deprived of all value or were unimpaired.⁴⁵⁷

However, these issues go far beyond the proper dimensions of the Takings Clause. If the sovereign permanently occupies ten acres, it should have to pay, regardless of whether that was the owner's only holding or if the owner retained 990 contiguous acres. If a regulation deprives the owner of property rights in the ten acres, the same principle should apply. What has been a vexing problem should be dealt with by dividing it into its takings and due process components. I have suggested that the "takings" side of the issue be disposed of by permitting an owner to specify the relevant parcel and then discerning whether this parcel constitutes one of more "commercial unit[s]."⁴⁵⁸ Only if the parcel proposed by the owner is recognized as comprising one of more units of land as customarily sold in the locality would the owner prevail.

Similar issues, such as whether the agency has adopted legitimate ends and adopted rational means and whether it has acted in an arbitrary or oppressive manner in selecting the lands to be regulated, may be better treated under a due process analysis, utilizing meaningful scrutiny.

F. "Legislative" vs. "Adjudicative" Regulation

In *Dolan v. City of Tigard*,⁴⁵⁹ the Supreme Court held that

456. *Lucas*, 505 U.S. at 1016 n.7 (citing *Penn Cent. Transp. Co. v. City of New York City*, 366 N.E.2d 1271, 1276-77 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978)).

457. *See, e.g.*, *Florida Rock Indus. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994); *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

458. *See EAGLE*, *supra* note 280, § 8-(2)(i). The analogy is to U.C.C. § 2-105(6).

459. 512 U.S. 374 (1994).

a municipality could not exact easements as a condition to the granting of a building permit unless it could demonstrate that there was "rough proportionality" between the impact of the development and the exaction.⁴⁶⁰ This rule has been applied to cash exactions as well.⁴⁶¹ The Court adopted the term "rough proportionality" over the term "reasonable relationship" that some states had used for a similar standard, partly because the latter term was similar to "rational basis," which the Court described as denoting the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment.⁴⁶² That term is used for the Due Process Clause as well.⁴⁶³ The Court's opinion, delivered by Chief Justice Rehnquist, also defends its imposition of the duty to justify the exaction upon the city on the grounds that, while the landowner normally has the burden of demonstrating that the regulation is arbitrary, here the decision was "adjudicative."⁴⁶⁴

The issue of burden shifting is extremely important.⁴⁶⁵ On the one hand, in his *Dolan* dissent, Justice Stevens accuses the Court of retreating from the strong presumption of constitutional validity accorded to business regulations, and of returning to substantive due process.⁴⁶⁶ On the other, Justice Thomas challenges the Court's underlying premise in a forceful dissent to the denial of certiorari in *Parking Association of Georgia v. City of Atlanta*.⁴⁶⁷

It is hardly surprising that some courts have applied *Dolan's* rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should

460. *Dolan*, 512 U.S. at 391 ("No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.")

461. See *Ehrlich v. City of Culver City*, 911 P.2d 429, 443-44 (Cal. 1996).

462. *Dolan*, 512 U.S. at 391.

463. *Id.*

464. *Id.* at 385.

465. See, e.g., Marshall S. Sprung, Note, *Taking Sides: The Burden of Proof Switch in Dolan v. City of Tigard*, 71 N.Y.U. L. REV. 1301 (1996).

466. *Dolan*, 512 U.S. at 402 (Stevens, J., dissenting).

467. 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995) (reviewing an ordinance enacted to beautify a central business district by requiring parking lot owners to convert ten percent of a paved area to landscaping and to plant one tree for every eight parking spaces).

turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Although *Dolan* purports to be an exception to *Agins*, the logic of these two cases appears to point in different directions. The lower courts should not have to struggle to make sense of this tension in our case law.⁴⁶⁸

In one sense, Justice Thomas' concerns reflect the long debate at the state level as to whether less than comprehensive rezoning ordinances should be treated as "legislative" or "quasi-judicial" in terms of the deference that they are accorded by courts.⁴⁶⁹ At another level, however, it is likely that many localities will respond to *Dolan* by increasing the specificity of their ordinances and leaving less to the discretion of zoning and building code administrators. However, "a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property."⁴⁷⁰ The problem of discerning which statutes are legislative and which are adjudicative for purposes of a *Dolan* analysis is apt to be open-ended and chronic. While the Court in *Del Monte Dunes* pronounced *Dolan* "inapposite,"⁴⁷¹ given its principal concern with the fairness issue, the scope of *Dolan* remains to be determined.⁴⁷²

468. *Parking Ass'n*, 515 U.S. at 1117-18.

469. See *Fasano v. Board of Comm'rs of Washington County*, 507 P.2d 23 (Or. 1973) (small-scale rezoning quasi-judicial), *overruled by* *Neuberger v. Portland*, 288 Or. 585 (1980); *Board of County Comm'rs v. Snyder*, 627 So. 2d 469 (Fla. 1993) (same); *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980) (all zoning legislative); *Bell v. City of Elkhorn*, 364 N.W.2d 144 (Wis. 1985) (same). *Fasano* remains emblematic although legislatively superseded, *Neuberger v. City of Portland*, 607 P.2d 722, 725 (Or. 1980).

470. *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380, 390 (Ill. App. 1995) (discussing *Parking Ass'n of Georgia*, 515 U.S. at 116).

471. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999).

472. See Steven J. Eagle, *Del Monte Dunes, Good Faith and Land Use Regula-*

G. Adequate Remedies for Constitutional Deprivations

As noted previously, "just compensation" for a taking rarely constitutes full compensation.⁴⁷³ The difference between them is that just compensation relates to the market value of what the government takes, whereas full compensation is the value, to the owner, of all that the owner loses.⁴⁷⁴ Relocation costs, including the cost of locating suitable new land, moving expenses, brokers' commissions and the like, are the easiest additional costs to estimate objectively.⁴⁷⁵ The loss of business goodwill and the prospect of additional business expenses due to the replacement parcel being in a different and less suitable location are less easily measurable.⁴⁷⁶ Hedonic damages, comprising the loss of sentimental attachment to residential property, is least susceptible to objective measurement.⁴⁷⁷

As is the case when other fundamental rights are subjected to governmental attack, the remedy for impermissible governmental land use regulation should be prevention and not compensation. Were property owners primarily interested in compensation, they would put their lands or other assets up for sale. Challenges to alleged impermissible regulations should be dealt with as such and not forced into the compensation-based inquiry of the Takings Clause except for interim damages.

That takings damages do not constitute a sufficient remedy for wrongful property deprivations is highlighted in the situation in which the owner's injury is real but non-pecuniary. A vivid

tion, 30 ENVTL. L. REP. 10,100 (2000) (arguing "inapposite" dictum not determinative); cf. *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, 699 N.Y.S.2d 721, 725 (N.Y. 1999).

473. See *supra* text accompanying note 207-12.

474. Matthew S. Watson, Note, *The Scope of the Supreme Courts Heightened Scrutiny Takings Doctrine and Its Impact on Development Exactions*, 20 WHITTIER L. REV. 181, 186 (1998).

475. See D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES (1973).

476. Mary J. Cavins, Annotation, *Goodwill or "Going Concern" Value as Element of Lessee's Compensation for Taking Leasehold in Eminent Domain*, 58 A.L.R.3d § 566 (1974).

477. See Kyle R. Crowe, *The Semantical Bifurcation of Noneconomic Loss: Should Hedonic Damages Be Recognized Independently of Pain and Suffering Damages?*, 75 IOWA L. REV. 1275, 1291-92 (1990).

illustration is the commandeering of private funds for state-mandated Interest on Lawyers Trust Account ("IOLTA") programs. In *Phillips v. Washington Legal Foundation*,⁴⁷⁸ the Supreme Court considered a challenge to the constitutionality of such programs brought by a client and attorney who objected to the client's funds being impressed for the purpose of generating interest that would be distributed by the Texas IOLTA program to legal services organizations chosen by it.

Chief Justice Rehnquist, writing for the Court, noted that lawyers traditionally established separate savings accounts for funds held in trust for individual clients where the sums involved justified the expense. Smaller client deposits were held in trust in consolidated checking accounts on which federal law prohibited the payment of interest.⁴⁷⁹ In 1980, however, Congress established Negotiable Order of Withdrawal ("NOW") accounts, which permit interest to be paid on checking accounts established for the benefit of non-profit organizations. IOLTA programs were established in response.⁴⁸⁰

While several United States Courts of Appeals had concluded that the interest income generated by funds held in IOLTA accounts is not private property for Takings Clause purposes,⁴⁸¹ the Fifth Circuit in *Phillips* had "conclud[ed] that 'any interest that accrues belongs to the owner of the principal.'"⁴⁸²

Chief Justice Rehnquist noted that the Court had "never held that a physical item is not 'property' simply because it lacks a positive economic or market value."⁴⁸³ Rather, he vouched the Court's "longstanding recognition that property is more than economic value."⁴⁸⁴ His opinion concluded:

In sum, we hold that the interest income generated by funds held in IOLTA accounts is the "private property" of the owner of the principal. We express no view as to whether these funds have

478. 524 U.S. 156 (1998).

479. *Phillips*, 524 U.S. at 160.

480. *Id.* at 161.

481. *See, e.g.,* *Cone v. State Bar of Fla.*, 819 F.2d 1002 (11th Cir. 1987).

482. *Phillips*, 524 U.S. at 163 (quoting *Washington Legal Found. v. Texas Equal Access to Justice Found.*, 94 F.3d 996, 1004 (5th Cir. 1996)).

483. *Id.* at 169-70 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

484. *Id.*

been "taken" by the State; nor do we express an opinion as to the amount of "just compensation," if any, due respondents. We leave these issues to be addressed on remand.⁴⁸⁵

Not surprisingly, on remand,⁴⁸⁶ the United States District Court held that there was no taking: "The client's funds would be unable to generate net interest absent IOLTA. Therefore, the economic impact of the regulations on Plaintiffs is nill [sic]."⁴⁸⁷

In *Eastern Enterprises*, it makes no sense to impose a remedy of "just compensation" where the "taking" was of cash.⁴⁸⁸ Similarly, in *Phillips* it makes no sense to impose of remedy of "just compensation" where the governmental action resulted in a loss of individual autonomy—a loss not measurable in dollars.

VI. CONCLUSION

The Supreme Court's decision in *Eastern Enterprises v. Apfel*⁴⁸⁹ illustrates the shortcomings of shoehorning issues involving the fundamental unfairness of governmental exactions not even involving specific assets into a Takings Clause context. Likewise, the Court's attempt in *Dolan v. City of Tigard*⁴⁹⁰ to limit meaningful review to "adjudicative" acts of their agents and not to local legislatures themselves is unworkable.⁴⁹¹ While the Supreme Court has been reluctant to more fully employ the Due Process Clause in dealing with property rights issues, it cannot provide for coherent judicial review otherwise.

485. *Id.* at 172.

486. *Washington Legal Found.*, 86 F. Supp. 2d at 624.

487. *Id.* at 646.

488. *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998). See text accompanying notes 207-212.

489. 524 U.S. 498 (1998).

490. 512 U.S. 374, 391 (1994).

491. See *supra* discussion Part V.E.

