BYU Law Review

Volume 2007 | Issue 4 Article 2

11-1-2007

Property Tests, Due Process Tests and Regulatory Takings Jurisprudence

Steven J. Eagle

Property Tests, Due Process Tests and Regulatory Takings Jurisprudence

*Steven J. Eagle**

Abstract

The United States Supreme Court recently clarified in Lingle v. Chevron U.S.A., Inc. *that its often-expressed "substantially advance" formulation sounds in due process, and thus should be rejected as an appropriate takings test. The Court also explained that due process provides an independent and legitimate basis for attacking government deprivations of private property. Paradoxically,* Lingle *also reaffirmed as the Court's principal takings test the ad hoc, multifactor formulation in* Penn Central Transportation Co. v. City of New York.

The Article asserts that Penn Central *itself is a due process test. Also, building upon* Lingle*'s incomplete analysis, it outlines separate and independent takings and due property tests. The proffered due process test is based on the need for meaningful scrutiny. The suggested takings test applies property law concepts in determining whether government arrogated private property to itself, and thus must compensate. Most particularly, the Article advocates the "commercial unit" as a necessarily objective measure of what constitutes a relevant interest for takings analysis.*

I. INTRODUCTION

The United States Supreme Court's regulatory takings jurisprudence has long been infamous for its incoherence.[1] The lack of cohesion in takings law was both exemplified and exacerbated by

* Professor of Law, George Mason University, Arlington, VA. seagle@gmu.edu. The author wishes to thank Ryan M. Schmalzle, a student at George Mason, for his excellent research assistance and the Law and Economics Center of the George Mason University School of Law and the Program for Judicial Awareness of the Pacific Legal Foundation for their financial support.

1. *See, e.g.*, Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 561 (1984); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964) ("[T]he predominant characteristic of this area of law is a welter of confusing and apparently incompatible results.").

the Court's 2005 decision in *Lingle v. Chevron U.S.A., Inc.*[2] In *Lingle*, the Court reviewed its often-articulated statement, first made in *Agins v. City of Tiburon*,[3] that compensation is required under the Takings Clause[4] for a regulatory action that "does not substantially advance legitimate state interests."[5] The *Lingle* Court unanimously renounced its prior standard as merely an inapposite takings "formula." The gravamen of the Court's opinion was that the "substantially advances" standard is a substantive due process test, and that the application of such a test "is not a valid method of identifying regulatory takings."[6] The problem highlighted by *Lingle* is not that the "substantially advances" test is a bad test, but that clarity in takings jurisprudence would be greatly enhanced by a test more attuned to traditional property law concepts.

Even as it re-characterized the "substantially advances" standard as a due process test, *Lingle* affirmed that an owner deprived of a property interest has a separate due process cause of action.[7] Thus, taken as a whole, *Lingle* stands for the proposition that both asserted government *takings* of property, and asserted government *deprivations* of property without due process of law, raise separate, legitimate legal issues to be resolved using different legal standards.

Yet the Court's *ipse dixit* cannot banish substantive due process from its regulatory takings jurisprudence for the simple reason that the Court's own general takings test is based on substantive due process.[8] The Court's preoccupation with the property owner's status in its regulatory takings jurisprudence prevents its regulatory takings test from being a true takings test, since, as the Court itself noted in 1893, "just compensation is for the property, and not to the owner."[9]

This Article first examines the substantive due process origins of the Supreme Court's takings jurisprudence.[10] The Article analyzes

2. 544 U.S. 528 (2005).

3. 447 U.S. 255 (1980).

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

5. *Agins*, 447 U.S. at 260–61.

6. *Lingle*, 544 U.S. at 545; *see infra* Part V.A.1.

7. *Lingle*, 544 U.S. at 543; *see infra* Part V.A.2.

8. *See infra* Part II.

9. Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893). For elaboration, see *infra* Part IV.D.

10. *See infra* Part II.

how the Court's principal regulatory takings doctrine, established in *Penn Central Transportation Co. v. City of New York*,[11] remains steeped in due process.[12] The Article also scrutinizes the due process tests employed by the United States Courts of Appeals.[13] These tests typically are based on the "egregious government misconduct" test developed by the Supreme Court in a different context.[14] The Article then proposes to replace the Court's ostensible takings test, embodied in *Penn Central*, with a takings test properly grounded in relevant property law principles.

The concern for "fairness," that is the *leitmotif* of *Penn Central*, focuses on the relationship between property and the owner deprived of that property. In other words, it focuses on deprivation. A true takings test would focus not on what the owner has been deprived of (except as a measure of just compensation), but rather on what the government has taken.[15] This Article sketches how such a takings jurisprudence might work.[16] In particular, it calls for adoption of a model of commercial viability to designate units of property amenable to constitutional protection.[17]

Finally, the Article advocates that the Court adopt a due process test for property deprivations based not on a requirement that government misconduct be so egregious as to shock the conscience,[18] but rather on the same meaningful scrutiny requirements thar the Court has imposed in other land use regulation contexts.[19]

II. THE SUPREME COURT'S REGULATORY TAKINGS JURISPRUDENCE IS GROUNDED IN DUE PROCESS PRINCIPLES

The origins of the Supreme Court's regulatory takings jurisprudence are based on substantive due process. This remains

11. 438 U.S. 104 (1978).

12. *See infra* Parts III.A, III.B, III.D.

13. *See infra* Part V.A.2.

14. *See infra* Part V.C.2 (referring to conduct so egregious that it "shocks the conscience" of the court).

15. *See infra* Parts IV.A, IV.D.

16. *See infra* Part IV.A.

17. *See infra* Part IV.

18. County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998).

19. *See infra* Part V.B.

true despite the Court's attempt to recast earlier precedents to fit into its current Takings Clause model.[20]

A. A Millennium of Anglo-American Law and History

As the United States Court of Federal Claims has observed: "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."[21] The Framers of the Constitution regarded themselves as heirs to the historic "rights of Englishmen."[22] These rights included what Chancellor Kent referred to as the inalienable right to be secure in "person, property and privileges."[23] Thus, the capacity to own property was regarded as an intrinsic and coherent characteristic of the individual.[24]

"The Framers of the Constitution, by and large, subscribed to the Lockean view of the essential nature of individual property rights." John Adams declared, "[p]roperty must be secured or liberty cannot exist."[25] Even critics of the Lockean perspective have been forced to conclude, "[t]he great focus of the Framers was the security of basic rights, property in particular, not the implementation of political liberty."[26]

The popularity of this Lockean view of the founding, combined with the increasing popularity of originalism in constitutional scholarship, led other scholars to mount a counterattack by turning to the theory of Civic Republicanism.[27] They aspired to demonstrate

20. *See infra* Part II.C.

21. Hage v. United States, 35 Fed. Cl. 147, 151 (1996).

22. FORREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 13 (1985).

23. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 2 (1st ed. 1827). For elaboration, see JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS (2d ed. 1998); Steven J. Eagle, *The Development of Property Rights in America and the Property Rights Movement*, 1 GEO. J.L. & PUB. POL'Y 77 (2002).

24. *See, e.g.*, Douglas W. Kmiec, *The Coherence of the Natural Law of Property*, 26 VAL. U. L. REV. 367, 367–69 (1991).

25. 6 THE WORKS OF JOHN ADAMS 280 (Charles Francis Adams ed., 1850), *quoted in* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 388 (1996).

26. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 92 (1990).

27. *See* LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 139 (1996) ("Some legal liberals determined to appropriate originalism for themselves. They would meet the proponents of original intent on the battleground of history. They would advance

that the Framers' generation was steeped in civic virtue, not Lockean individualism. The classic articles by Professors William Treanor[28] and John Hart[29] met with considerable acceptance. However, this view has been challenged by more recent scholarship.[30] "Regardless of the Lockean-Civic Republicanism debate, the evidence is overwhelming that the Framers took property seriously and that a major goal of the Constitution was to protect it."

B. A History of Due Process and Property Deprivations

The doctrine that there are natural, higher-law limitations on the power of government to deprive an individual of property or limit their liberty has a long history in English thought and in the American Colonies. In the young American Republic, for example, Justice Joseph Story averred to "principles of natural justice" and "fundamental laws of free government."[31]

Substantive due process is the basis for early judicial determinations that private property cannot be taken for private purposes. In the early case of *Baltimore & Ohio R.R. v. Van Ness*, a federal court noted that

> [t]he [F]ifth [A]mendment of the [C]onstitution of the United States says, that private property shall not be taken for public use without just compensation. But the objection [in this case] is that private property [has been] taken for private use, with just compensation; which is not within the prohibition of the constitution; ***although it would be an arbitrary proceeding.***[32]

---

alternative interpretation of the Founding to justify legal liberalism.").

28. William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785–92 (1995).

29. John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1107–31 (2000).

30. *See, e.g.*, Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1552 (2003) (reviewing nineteenth century case law and educing that "we make [the problem of takings jurisprudence] worse by assuming that regulatory takings law is a relatively recent invention"); David A. Thomas, *Finding More Pieces for the Takings Puzzle: How Correcting History Can Clarify Doctrine*, 75 U. COLO. L. REV. 497, 520 (2004) (asserting that "the idea that compensation would be owed for deprivation of property rights short of complete appropriation was also widely accepted, even if not often tested" in early cases and summarizing prior scholarship).

31. Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 52 (1815).

32. Baltimore & Ohio R.R. v. Van Ness, 2 F. Cas. 574, 576 (C.C.D.C. 1835) (No. 830) (emphasis added).

In one of the most important decisions of the nineteenth century, *Slaughter-House Cases*, a five-four Supreme Court majority upheld a state monopoly on butchering and rejected the notion that the Fourteenth Amendment and natural rights theory guaranteed individuals the right to follow lawful occupations.[33] However, during the latter part of the century, in *Allgeyer v. Louisiana*, the Court addressed a narrow insurance regulation statute using broad dicta:

> The "liberty" mentioned in [the Fourteenth Amendment] means, not 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.[34]

Subsequently, in *Lawton v. Steele*, the Court declared that the mere invocation of the police power as justification for a regulation was insufficient.[35] This theme was carried forward in a case that has become known as the pinnacle of economic substantive due process cases, the now often-reviled *Lochner v. New York*:

> The mere assertion that the subject [of the law] relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and his power to contract in relation to his own labor.[36]

These examples provide a brief glimpse into how American law applied natural rights theory to the deprivation of property in the first 150 years of the country's existence.

33. 83 U.S. (16 Wall.) 36 (1873).

34. 165 U.S. 578, 589 (1897).

35. 152 U.S. 133, 137 (1894) ("To justify the state in thus interposing its authority in behalf of the public, it must appear—First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.").

36. 198 U.S. 45, 57–58 (1905).

C. The Due Process Origins of Regulatory Takings Law

As the Supreme Court recognized in *Kohl v. United States*,[37] the power of eminent domain "is essential to [the] independent existence and perpetuity" of any government.[38] The power is the offspring of political necessity; and it is inseparable from sovereignty, unless denied to it by its fundamental law.[39] The Fifth Amendment implicitly recognized that the United States possessed this power. At the same time, it cabined the power to instances where the taking would be for "public use" and upon payment of "just compensation." Only after the Civil War, and the consequent ratification of the Fourteenth Amendment, were these qualifications first applied to the states in *Chicago, Burlington & Quincy R.R. v. City of Chicago*.[40] While *Lingle* briefly noted the application of the just compensation requirement to the states in *Chicago, Burlington & Quincy R.R.*,[41] it did not refer to its roots in substantive due process.[42] *Chicago, Burlington & Quincy R.R.* says:

> [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.[43]

Thus, *Chicago, Burlington & Quincy R.R.* suggests that payment of just compensation is a procedural requirement for the provision of due process even in the absence of the official exercise of eminent domain. Long after *Chicago Burlington & Quincy R.R.* had been

37. 91 U.S. 367 (1875).

38. *Id.* at 371.

39. *Id.* at 371–72.

40. 166 U.S. 226 (1897).

41. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 536–37 (2005).

42. *See* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings Muddle*, 90 MINN. L. REV. 826 (2006) (examining the development of property protection through substantive due process).

43. *Chicago, Burlington & Quincy R.R.*, 166 U.S. at 236.

decided, Justice John Paul Stevens, dissenting in *Dolan v. City of Tigard*, averred that the case contained "no mention of either the Takings Clause or the Fifth Amendment," but rather "applied the same kind of subsrantive due process" as gave rise to *Lochner*.[44] Writing for the Court, Chief Justice Rehnquist summarily responded 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, Burlington & Quincy R.R. v. City of Chicago* to reach that result."[45]

While Justice Rehnquist's response may have accurately stated the conventional, modern-day interpretation of *Chicago*, the language of the case supports Justice Steven's interpretation. Other Justices have engaged in similar recasting of old precedents. Justice O'Connor's plurality opinion in *Eastern Enterprises v. Apfel*[46] provides another example of recasting an old precedent. O'Conner'sopinion discussed *Calder v. Bull*,[47] known primarily for Justice Chase's classic exposition of natural rights[48] and Justice Iredell's assertion of the supremacy of positive law.[49] Yet, Justice O'Connor treated *Calder* as dealing with the Takings Clause only.[50]

Likewise, substantive due process was not far from the surface in *Village of Euclid v. Ambler Realty Co.*,[51] where rhe Supreme Court first upheld the constitutionality of comprehensive zoning. Justice Sutherland indicated that zoning provisions would not survive a substantive due process challenge if they were "clearly arbitrary and unreasonable, having no substantial relation to the public health,

44. Dolan v. City of Tigard, 512 U.S. 374, 405–06 (1994) (Stevens, J., dissenting).

45. *Dolan*, 512 U.S. at 384 n.5.

46. 524 U.S. 498 (1998).

47. *Id.* at 533–34 (citing Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)); *see also infra* Part V.A.

48. *Calder*, 3 U.S. at 388 ("The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundation of the legislative power, they will decide what are the proper objects of it: The nature, and ends of legislative power will limit the exercise of it.").

49. *Id.* at 399.

50. *E. Enters.*, 524 U.S. at 533–34, 537–38 (discussing *Calder* in its analysis of the Takings Clause but omitting it in its brief analysis of substantive due process).

51. 272 U.S. 365 (1926).

safety, morals, or general welfare."[52] Thus, while Euclid is most-often cited for the proposition that comprehensive zoning ordinances are facially constitutional, the case also contains dicta suggesting a substantive due process limitation on zoning enactments.

In *Nectow v. City of Cambridge*,[53] decided two years after *Euclid*, a small parcel thrust into a commercial area was zoned as residential. As Justice Sutherland 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."[54] Justice Sutherland then 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."[55] He 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."[56]

Other cases also have demonstrated a lack of clear separation of takings and due process analysis by referring to deprivations of property without due process of law as "takings."[57]

These precedents were not unknown to the *Lingle* Court. To the contrary, Justice O'Connor cited to them in the course of explaining: "There is no question that the 'substantially advances' formula [from *Agins*] was derived from due process, not takings, precedents."[58]

III. PRESENT TAKINGS LAW REMAINS ENMESHED IN ITS DUE PROCESS ANTECEDENTS

Given that the Supreme Court discerns that the Takings Clause should be separate and independent from the Fifth and Fourteenth

52. *Id.* at 395.
53. 277 U.S. 183 (1928).
54. *Id.* at 185.
55. *Id.* at 188 (citing *Euclid*, 272 U.S. at 395).
56. *Id.* at 189.
57. *See, e.g.*, Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 740 (1970).
58. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540 (2005).

Amendment Due Process Clauses, it is germane to ask why takings law remains enmeshed in due process analysis. The general disfavor of the traditional concept of property among academics, the ascendency of fairness as the standard against which all government action is measured, and the Court's unwillingness to abandon substantive due process principles in its takings jurisprudence all help to explain why a robust body of property-based takings law has not yet emerged.

A. The Alleged Disintegration of In Rem Property

The establishment of robust protection of property rights must begin with taking property seriously. However, at least in the academy, there is strong sentiment that the concept of "property" is outmoded and should be discarded. Thomas Grey, who asserted the "disintegration of property," made a seminal argument along these lines.[59] Grey argues that the everyday term "private property" is bereft of uniform meaning.[60] Indeed, among law and economics theorists, both "property" and "contract rights" have become conflated into a utilitarian notion of command over resources.[61] One property theorist concludes that there is "entropy in property," explaining that "[p]roperty division creates a one-directional inertia: unlike ordinary transfers of rights from one individual to another, reunifying fragmented property rights usually involves transaction and strategic costs higher than those incurred in the original deal."[62] In a broader sense, the denial that the term "property" has meaning might be viewed as a subset of the more general indeterminacy postulated by postmodernism.[63]

59. Thomas Grey, *The Disintegration of Property*, *in* PROPERTY 163, 163 (J. Roland Pennock & John W. Chapman eds., NOMOS monograph no. 22, 1980).

60. *Id.*; *see also infra* text accompanying note 206.

61. *See* Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics*, 111 YALE L.J. 357 (2001). "[T]here is a tendency among economists to use the term property 'to describe virtually every device—public or private, common-law or regulatory, contractual or governmental, formal or informal—by which divergences between private and social costs or benefits are reduced.'" *Id.* at 358 (quoting RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 53 (5th ed. 1998)).

62. Francesco Parisi, *Entropy in Property*, 50 AM. J. COMP. L. 595, 595–96 (2002).

63. *See, e.g.*, GERTRUDE HIMMELFARB, ON LOOKING INTO THE ABYSS: UNTIMELY THOUGHTS ON CULTURE AND SOCIETY 133 (Alfred A. Knopf, Inc. 1995).

B. Takings and the "Armstrong Principle" of Fairness

Correlative with a loss of faith in property as a right possessing internal integrity is the rise of the concept of "fairness" as an all-purpose remedy to be employed by government. In *Armstrong v. United States*, the Supreme Court declared that the Takings Clause was "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole."[64] *Armstrong*, with its soft contours, is the predicate for the Court's general takings test, first enunciated in *Penn Central Transportation Co. v. New York City*:

> While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.[65]

In her concurring opinion in *Palazzolo v. Rhode Island*, Justice O'Connor stressed that *Penn Central* remained the Court's "polestar" in regulatory takings cases.[66] Subsequently, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, Justice Stevens emphasized Justice O'Connor's *Palazzolo* concurrence, quoting the "polestar" language,[67] and referring, for the first time in a Supreme Court opinion, to the "*Armstrong* principle."[68]

The emphasis that courts place on lack of fairness as the indicator of a regulatory taking resonates in much of the academic literature. In an early article stressing infirmities of process that redound to the

64. 364 U.S. 40, 49 (1960).

65. 438 U.S. 104, 123–24 (1978) (quoting *Armstrong*, 364 U.S. at 49) (citation omitted).

66. 533 U.S. 606, 633 (2001) (O'Connor, J., concurring). The importance of the concurrence, agreeing that regulations antedating a purchase were not dispositive of the landowner's rights, but that the existence of the regulations were important in some unspecified way, lies in the fact that O'Connor was the necessary fifth vote to Justice Kennedy's majority.

67. 535 U.S. 302, 327 n.23 (2002).

68. *Id.* at 321.

detriment of individual property owners in land use determinations, Professor Robert Ellickson noted that "[a]ntigrowth measures have one premier class of beneficiaries: those who already own residential structures in the municipality doing the excluding."[69] Professor William Fischel subsequently warned of "majoritarianism," which he deemed "the twentieth century's parallel to Madison's 'democratick despotism.'"[70] According to Fischel, local governments in homogeneous suburbs can enhance the pecuniary interests and amenity values in the land of the majority of residents, without concern for bicameral legislatures and separation of powers.[71] Exclusionary zoning and other barriers to development can flourish, with little political cost to elected officials, "since those affected live outside the jurisdiction or belong to the small minority of citizens who own tracts that might be developed profitably."[72]

C. The Penn Central Factors: Economic Impact, Expectations and Character

As the Court acknowledged in *Lingle*, Justice Brennan's opinion in *Penn Central Transportation Co. v. New York City*[73] carries over some of the Court's older due process rhetoric into modern takings law.[74] While *Penn Central* departed to a large extent from the Court's earlier due process language, it has proven to be an incomplete break—and, as has been mentioned, one that conflates takings and due process analyses. Partly for that reason, the *Penn Central* line of cases provides insufficient protection to secure either Constitutional guarantee.

69. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 400 (1977).

70. William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581, 1582 (1988) (quoting James Madison, *The Vices of the Political System of the United States*, *in* 2 THE WRITINGS OF JAMES MADISON 363–66 (G. Hunt ed., 1904)).

71. *Id.*

72. *Id.*

73. 438 U.S. 104 (1978).

74. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 541 (quoting *Penn Central*'s dictum, 438 U.S. at 127, that "[i]t is . . . implicit in *Goldblatt* [*v. Hempstead*, 369 U.S. 590 (1962),] that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose.").

In *Penn Central*, the Court noted that it had been "unable to develop any 'set formula'" for evaluating regulatory takings claims, but found "several factors" of "particular significance."[75]

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment backed expectations are, of course, relevant considerations. So, too, is the character of the governmenral action. 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.[76]

At the beginning, it was by no means evident that *Penn Central* would be a very deferential test that would benefit government. At least one eminent land use scholar, Professor Daniel Mandelker, thought that the "investment-backed expectations" doctrine might well augment the mote stringent vested rights doctrine, which gives developers property rights to development in narrow circumstances, thus resulting in a "landowner tilt."[77] Additionally, it certainly was not evident at the beginning that *Penn Central* would be the pivotal case in takings jurisprudence.[78]

---

75. 438 U.S. at 124.

76. *Id.* (citations omitted).

77. Daniel R. Mandelker, *Investment-Backed Expectations: Is There A Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3, 5–6 (1987).

> Curiously, Justice Brennan did not mention either the estoppel or vested rights doctrines in *Penn Central*. This omission may be an oversight, or may indicate that investment-backed expectations must be considered even though they do not create an estoppel or a vested right. If this interpretation is correct, the expectations taking factor introduces a landowner tilt in taking theory that did not exist before. By emphasizing the property owner's investment in his property, the Court favors the property owner's rather than government's interests.

Id. at 223–24.

78. *See* Transcript, *Looking Back on* Penn Central*: A Panel Discussion with the Supreme Court Litigators*, 15 FORDHAM ENVTL. L. REV. 287 (2004). The clerk who worked on the draft of the *Penn Central* opinion much later reminisced:

> At the time I thought Justice Brennan was making some modest efforts to bring a little content to an area of law that was . . . then quite formalist and in disarray. But I was trying very hard really to hold the Court, that was the number one objective when you were working on an opinion for Justice Brennan, to produce an opinion that at least five Justices would join that would hold the court. As I noted, other clerks had told me that the opinion better not say very much before I started work on the draft and in fact after it was circulated, Justice Stewart's clerk read it and said

In *Lingle*, however, the Court declared that *Penn Central*'s three-factor test constitutes the standard that still governs most regulatory takings challenges.[79] It is instructive to consider, *ad seriatim*, the ramifications of these factors upon takings and due process law.

1. The "economic impact" standard

The "economic impact" of a regulation refers to the impact upon the property owner. If the primary issue in a takings claim is fairness to the owner, this prong of the test is quite understandable. If the issue is whether the government took property, this standard seems irrelevant. To use the analogy of a criminal expropriation, whether a mugger's victim had a large quantity of undiscovered cash in another pocket is not germane to the crime. Likewise, "impact" measured by a given property owner's possession of other assets has nothing to do with what should be the central issues in a takings claim: whether the asset taken was "property" or whether the government compensated for the taking.

2. The "investment-backed expectations" standard

Penn Central's notion of "investment-backed expectations"[80] has become, by far, the most important inquiry in regulatory takings cases.[81] Justice Brennan described *Pennsylvania Coal* as "the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'"[82] Brennan noted that Justice Holmes deemed the reliance interest of the coal company, which had reserved the right to mine coal and the right of support of the surface in its deed of sale of the surface land, particularly important.[83] Brennan also cited a seminal article by Professor Frank Michelman in which the "investment-backed expectations" phrase

---

he was pretty sure it doesn't say anything at all. [Laughter].

Id. at 307–08 (comment by David Carpenter, Esq.).

79. *Lingle*, 544 U.S. at 538–39.

80. 438 U.S. at 124.

81. *See generally* Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations,"* 32 URB. LAW. 437 (2000).

82. *Penn Central*, 438 U.S. at 127 (citing Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922)).

83. *Id.*

originated.[84] In discussing Holmes's "too far" language in *Pennsylvania Coal*,[85] Michelman declared:

> [T]he 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.[86]

Michelman added:

> The zoned-out apartment house owner no longer has the apartment investment he depended on, whereas the nearby land speculator who is unable to show that he has yet formed any specific plans for his vacant land still has a package of possibilities with its value, though lessened, still unspecified—which is what he had before.[87]

Yet such a narrow interpretation of reliance ignores the fact that the adaptability of property for new uses is one of its primary attributes.[88] Neither *Penn Central* nor subsequent have contained even the hint of a 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. While it is difficult to ascertain exactly what Justice Brennan meant by "investment-backed expectations," at the least he undoubtedly was making an appeal to fairness in the intuitive sense that the pang of the loss of a sought after advantage might be greater than the pang of a windfall not received.[89]

---

84. *Id.* at 128 (citing Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1229–34 (1967)).

85. "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pa. Coal*, 260 U.S. at 415.

86. Michelman, *supra* note 84, at 1233.

87. *Id.* at 1234.

88. *In re* Jacobs, 98 N.Y. 98, 105 (1885) (noting that property's "capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived . . . . [A]ny law which . . . takes away any of its essential attributes, deprives the owner of his property."); *see* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1579–80 (2003).

89. This concept, known as "framing theory," now has developed its own theoretical and empirical literature. *See, e.g.*, Amos Twersky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, *in* RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND

The "investment-backed expectations" phrase itself has undergone a number of subtle changes. Professor Michelman's original use of the term was "distinctly perceived, sharply crystallized, investment-backed expectation."[90] This was reworded by Justice Brennan to become "distinct investment-backed expectations" in *Penn Central*.[91] Then, without explanation, in a case strongly upholding the right to exclude others from private property, then-Justice Rehnquist introduced a new phrase, "reasonable investment-backed expectations."[92] In its subsequent decisions, the Court often has used this new formulation.[93] The inclusion of the term "reasonable" seems to impose, on top of the task of discerning the property owner's own subjective "expectations," a determination as to whether society is prepared to validate those expectations. Remarkably, neither Justice Rehnquist nor other members of the Court commented upon the change.

Yet it is not clear that "investment backed expectations," whether unembellished or denominated as "crystalline" or "reasonable," has any intrinsic meaning at all. As Professor Richard Epstein explained, "[n]either [Justice Brennan in *Penn Central*] nor anyone else offers any telling explanation of why this tantalizing notion of expectations is preferable to the words 'private property' (which are, after all, not mere gloss, but actual constitutional text)."[94] The genesis of the "expectations" language is not a desire to prevent the windfall of devises from unknown distant relatives, but rather the desire to treat as unworthy the property interests of speculators.[95]

The most troubling aspect of the "expectations" analysis is its self-referential quality. As Justice Kennedy conceded in his opinion concurring in the judgment in *Lucas v. South Carolina Coastal*

PSYCHOLOGY 25 (Robin M. Hogarth & Melvin W. Reder eds., 1987); *see also* William A. Fischel, *The Offer/Ask Disparity and Just Compensation for Takings: A Constitutional Choice Perspective*, 15 INT'L REV. L. & ECON. 187 (1995).

90. Michelman, *supra* note 84, at 1233.

91. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

92. Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

93. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016–1017 n.7 (1992); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 847 (1987) (Brennan, J., dissenting).

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

95. *See* Michelman, *supra* note 84, at 1229–34.

Council,[96] "[t]here is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is."[97]

Perhaps anticipating such a ratcheting down of property rights, Justice Holmes observed in *Pennsylvania Coal* that, when the Fifth Amendment's protection for private property "is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States."[98] Circuit Judge Stephen Williams recently put the matter more starkly:

> [T]he majority's analysis begs the question whether any landowner, in a world where zoning regulations are prevalent, could ever argue that a particular regulation was "unexpected." The presumption is insurmountable: "Businesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative needs." . . . Although the Takings Clause is meant to curb inefficient takings, such a notion of "reasonable investment-backed expectations" strips it of any constraining sense: except for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations. Thus regulation begets regulation.[99]

96. 505 U.S. 1003 (1992).

97. *Id.* at 1034 (Kennedy, J., concurring in judgment). Justice Kennedy immediately added:

> Some circularity must be tolerated in these matters, however, as it is in other spheres. *E.g.*, Katz v. United States, 389 U.S. 347 (1967) (Fourth Amendment protections defined by reasonable expectations of privacy). The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.

Id. at 1034–35.

98. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

99. Dist. Intown Props. Ltd. v. District of Columbia, 198 F.3d 874, 886–87 (D.C. Cir. 1999) (Williams, J., concurring) (quoting majority opinion at 883–84), *cert. denied*, 531 U.S. 812 (2000).

3. The character of the regulation standard

The final prong of the *Penn Central* test, the character of the regulation, served in that case to distinguish physical from regulatory takings. Beyond the context of the case at bar, the test was curiously bereft of any explicit connection between the sentence announcing the test,[100] and the sentence applying it.[101] The suggestion appears to be that, while "interference" that might be "characterized" as a physical invasion is repugnant, mere "adjusting" (i.e., tinkering with) "the benefits and burdens of economic life" is redolent with the possibilities of "reciprocity of advantage." The possibility that "character" simply was synonymous with "physical invasion" lost any relevance four years after *Penn Central*, when the Court ruled that even a minor permanent physical occupation constituted a taking in *Loretto v. Teleprompter*.[102]

While it might be possible to read the tea leaves of *Lingle* as suggesting a subtle demotion of the "character" prong of the *Penn Central* test,[103] the very same paragraph prefaced mention of the physical invasion vs. adjustment of economic benefits and burdens dichotomy with the words "for instance," thus clarifying the dichotomy as merely an example of the character test.[104]

A few recent cases have attempted to find new content for this test, such as its employment when government regulations, although ostensibly general in application, in fact specifically "targeted" an individual owner's specific item of property.[105] For example, in *American Pelagic*, one large and specialized fishing vessel was the explicit target of prohibitory legislation.[106] While the targeting of one

100. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (declaring that one of three factors of "particular significance" is "the character of the governmental action").

101. *Id.* ("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." (internal citation omitted)).

102. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

103. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538–39 (2005) (describing as "primary" among the *Penn Central* factors economic impact and interference with expectations, and, "in addition," the "character of the governmental action").

104. *Id.* at 539.

105. *See, e.g.*, Am. Pelagic Fishing Co. v. United States, 49 Fed. Cl. 36, 50–51 (2001), *rev'd on other grounds*, 379 F.3d 1363 (Fed. Cir. 2004).

106. *Id.* at 51 (declaring that "[a]ll of the legislation in question here was clearly targeted at the *Atlantic Star*, as the predecessor bills to the appropriations riders indicate").

vessel, or parcel of land, might not be the norm, it is an extreme example of *Armstrong*'s aspiration that "some people alone" should not unduly bear burdens.[107] More generally, Professor Saul Levmore decried "singling out," and posited a compensation remedy for those "burdened in a way that makes it unlikely that they can find political allies."[108]

Yet, in the end, just as exemplary government motives do not excuse a taking,[109] bad government motives do not convert a deprivation of due process of law into a taking.[110]

D. Lingle*'s Paradoxical Fealty to Due Process-Based Takings Law*

In addition to holding that the "substantially advances" formulation is a due process rather than a takings test, *Lingle* also presents a summary of its jurisprudence in the area.[111]

1. Eastern Enterprises*: A prologue*

In *Eastern Enterprises v. Apfel*, the Supreme Court considered a company's challenge to the heavy financial imposition that Congress placed upon it as part of the bailout of a coal industry health benefits plan.[112] In her plurality opinion, Justice O'Connor explained that the Court's earlier 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."[113] She wrote that the Court should consider the government's action through the lens of takings analysis:

107. Armstrong v. United States, 364 U.S. 40, 49 (1960); *see supra* Part III.B.

108. Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344–45 (1991).

109. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922). "We are in danger of forgetting that 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." *Id.* at 416.

110. *See* D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of* Lingle v. Chevron *and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 355 (2005) (asserting that *Lingle* thus "represents a setback to takings opponents who, like Justice Stevens, tend to argue that a government act should not be found to be a taking when it furthers a *really important* public purpose") (emphasis added).

111. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 536–40 (2005).

112. 524 U.S. 498 (1998).

113. *Id.* at 528–29.

> 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.[114]

The upshot of *Eastern Enterprises* is that while the O'Connor four-justice plurality found the federal statute violative of the Takings Clause, four dissenters found the statute permissible using due process analysis, and the swing voter, Justice Kennedy, found it violative of due process.[115] Thus, *Eastern* is regarded as a due process, rather than a takings, case.[116]

In *Lingle*, Justice O'Connor remained content to use due process-type analysis in Takings Clause applications and did not discuss *Eastern Enterprises* at all. Justice Kennedy, who wrote a short concurrence to the Court's unanimous opinion in *Lingle*, rehearsed his argument in *Eastern Enterprises* that due process and takings analyses are distinct.[117]

2. "Permanent" physical invasions

Next, the *Lingle* court discussed the two different types of regulatory takings, beginning with a summary of its cases dealing with permanent physical invasions." It noted that its "precedents srake out two categories of regulatory action that generally will be deemed per se takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation."[118] The Court explained that "physical takings

114. *Id.* at 537 (emphasis added).

115. *Id.* at 547–50 (Kennedy, J., concurring in part, dissenting in part), 550–68 (Stevens, Souter, Ginsburg & Breyer, JJ., dissenting).

116. *See* Marks v. United States, 430 U.S. 188 (1977); Commonwealth Edison Co. v. United States, 46 Fed. Cl. 29, 37–38 (2000), *aff'd*, 271 F.3d 1327, 1339 (Fed. Cir. 2001).

117. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 548 (2005) (Kennedy, J., concurring) ("This separate writing is to note that today's decision does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process.) (citing *E. Enters.*, 524 U.S. at 539 (Kennedy, J., concurring in judgment and dissenting in part)).

118. *Id.* at 538 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419

require compensation because of the unique burden they impose: A permanent physical invasion, however minimal the economic cost it entails, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests."[119]

The description of a government act as having a "unique" effect, like the description of a child as "very special," is, at the same time, both emphatic and devoid of particularized substantive content. In fact, in a series of cases involving government commandeering of leasehold interests during World War II, the Court ruled that "temporary" physical invasions, too, are compensable.[120] Furthermore, in a different case, the United States Court of Appeals for the Federal Circuit came to the same conclusion:

> "[P]ermanent" does not mean forever, or anything like it. . . . If the term "temporary" has any real world reference in takings jurisprudence, it logically refers to those governmental activities which involve an occupancy that is transient and relatively inconsequential, and thus properly can be viewed as no more than a common law trespass . . . .[121]

In *Kaiser Aetna*, the Court proposed that "that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation."[122] Rather anomalously, however, the Court backtracked in *PruneYard Shopping Center v. Robins*.[123] There, the Court held that a state could authorize third parties to speak and collect petition signatures within privately-owned shopping centers, against the will of the owners.[124] The Court acknowledged *Kaiser Aetna*, but added: "it is well established that 'not every destruction or injury to property by governmental action has been held ro be a "taking" in the

(1982)).

119. *Id.* at 539 (citing Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979) and other cases).

120. *See, e.g.*, United States v. Gen. Motors Corp., 323 U.S. 373, 380 (1945).

121. Hendler v. United States, 952 F.2d 1364, 1376–77 (Fed. Cir. 1991), *remanded and rev'd on other grounds*, 38 Fed. Cl. 611 (1997), *aff'd*, 175 F.3d 1374 (Fed. Cir. 1999).

122. *Kaiser Aetna*, 444 U.S. at 179–80.

123. 447 U.S. 74 (1980).

124. *Id.* at 88.

constitutional sense.'"[125] The Court went on to say that the exercise of free expression in shopping centers would not "unreasonably impair the value or use of their property," that the signature gatherers were "orderly," and so on.[126] Thus, what started as a "per se" right to be free of permanent physical invasions ended up enmeshed in a generalized discussion of burdens.

3. Deprivation of "all economically beneficial use"

The *Lingle* court also discussed the case law surrounding the second type of regulatory taking, which occurs when a "regulation[] . . . completely deprive[s] an owner of '*all* economically beneficial use' of her property."[127] This rule does seem property-based, since the right to use a thing is a traditional property right, and, in complete deprivation cases, the government has appropriated it. A property-based takings jurisprudence would result in the simple recital that government had taken the right of use and not paid compensation.

As *Lingle* put it, "We held in *Lucas* that the government must pay just compensation for such 'total regulatory takings,' except to the extent that 'background principles of nuisance and property law' independently restrict the owner's intended use of the property."[128] This statemenr in *Lucas* was dicta writ large, because five years earlier Justice Scalia, writing for the Court, had found the right to construct a residence to be an intrinsic property right.[129]

However, the upshot of *Lucas* might be quite different than an almost-categorical victory for landowners. As an aspect of takings law and property rights more generally, *Lucas* has become enmeshed in "the turn to history" and the battle over the fruits of originalism in American law.[130] The result recently led two commentators to exclaim:

125. *Id.* at 82 (quoting Armstrong v. United States, 364 U.S. 40, 48 (1960)).

126. *Id.* at 77, 83.

127. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 538 (2005) (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992)).

128. *Id.* (quoting *Lucas*, 505 U.S. at 1026–32).

129. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 n.2 (1987) ("[T]he right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.'").

130. *See* Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87 (1997). Kalman discusses the clash between Cass Sunstein aud other civic republicans and Richard Epstein and others who saw the Founders as

> [S]urprisingly enough, *Lucas*'s chief effect has been to make the nature of a claimant's property interest a threshold issue in all takings cases. Instead of increasing the likelihood of either landowner compensation or deregulation, *Lucas*'s principal legacy lies in affording government defendants numerous effective categorical defenses with which to defeat takings claims.[131]

Thus, Justice Scalia's "background principles" dictum, inserted in Lucas out of regard for completeness, has taken on a life of its own. Together with the closely related concepts of custom and public trust, background principles might be broadly used, and misused, by courts.[132]

4. The "parcel as a whole" rule

Lingle also provided a brief summary of the cases dealing with another difficult question in regulatory takings law: what is to constitute the relevant parcel for takings analysis. In *Penn Central Transportation Co. v. New York City*, Justice Brennan declared:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . ."[133]

The Court confessed in *Lucas* that "uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court."[134] The Court subsequently "expressed discomfort" with the "parcel as a whole"

"acquisitive Lockeans." *Id.* at 97–98.

131. Michael C. Blumm & Lucus Ritchie, Lucas*'s Unlikely Legacy: The Rise of Background Principles as Categorical Takings Defenses*, 29 HARV. ENVTL. L. REV. 321, 321 (2005).

132. *See* David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Background Principles, Custom and Public Trust "Exceptions" and the (Mis) Use of Investment Backed Expectations*, 36 VAL. U. L. REV. 339 (2002).

133. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130–31 (1978).

134. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 n.7 (1992); *see also* City of Coeur D'Alene v. Simpson, 136 P.3d 310, 319 n.6 (Idaho 2006) (noting that "even commentators have experienced much difficulty in ascertaining any definitive test for defining the denominator parcel" (citing John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994))).

doctrine.[135] Nevertheless, the Court pledged renewed fealty to the "parcel as a whole" principle the following year, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.[136] In *Tahoe-Sierra*, the total deprivation of economic use for a limited period of time was considered in the context of the indefinite time for which it had value.[137] Thus, despite the clear rule that any commandeering of a leasehold interest in physical takings cases requires compensation, the owner may be deprived through regulation of his or her entire right of development and use for a substantial period, so long as the regulator refrains from assuming physical possession.[138] The parcel as a whole rule remains subject to numerous additional infirmities.[139]

Despite her acknowledgment of the conflation of due process and takings analysis in *Lingle*, Justice O'Connor articulated no justification for the Court's continued emphasis on the fairness principle as opposed to property-based or other justifications for the Takings Clause. Instead, she merely declared that "[w]hile scholars have offered various justifications for [the Takings Clause], we have emphasized its role in 'bar[ring] Government from forcing some people along to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[140] Such a statement does nothing more than perpetuate the Court's conflation of takings and due process analyses and fails to take property seriously.

IV. TAKINGS JURISPRUDENCE SHOULD BE BASED ON ARROGATION OF PROPERTY

This Article undertakes to do what Justice O'Connor left undone in *Lingle*: set out a property-based test for the Takings Clause rooted in the text of the Fifth Amendment that separates it from due process analysis. The following sections outline both the comparative benefits of the property-based approach as well as set out how such an approach would work.

135. Palazzolo v. Rhode Island, 533 U.S. 606, 631 (2001).

136. 535 U.S. 302, 303 (2002).

137. *Id.* at 331.

138. *Id.* at 322–323.

139. *See infra* Part IV.E.1.

140. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 537 (2005) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

A. Reasserting the Integrity of Property

The Takings Clause focuses on acts of government with respect to property. When the State arrogates private property to itself, there is a taking. Property, in the common law tradition, is in rem and not in personam in nature.[141] The in rem nature of property differentiates property jurisprudence from contract jurisprudence. Thus, takings law should not focus on the relationship between government and owners, or even necessarily upon the relationship between property and its ownership claimants.[142] Instead, the relevant questions should be: was there private property, and, if so, did government take it?

Presumably, the legal scholarship should concentrate upon property-based answers to property takings questions. Yet modern legal scholarship has not been particularly interested in property-based solutions to the regulatory takings conundrum. One explanation is the conventional wisdom among academics that "property" is an "(almost meaningless) label."[143] Another explanation is the popular notion that "property is simply a label for whatever 'bundle of sticks' the individual has been granted."[144] Furthermore, those in the academy who might be expected to take the concept of property most seriously, the law and economics scholars, focus not on traditional property concepts, but rather on undifferentiated command over resources.[145]

While the nature of private property and its ethical and economic utility are intuitively understood, theorists have long had substantial problems in defining "property,"[146] and jurists have marveled at the many forms that property takes.[147]

---

141. *See generally* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 780–83 (2001) (noting that property is distinguished from contract by its in rem nature).

142. In condemnation law, for instance, "[w]hen there are different interests or estates in the property, the proper course is to ascertain the entire compensation as though the property belonged to one person, and then apportion this sum among the different parties according to their respective rights." Stanpark Realty Corp. v. City of Norfolk, 101 S.E.2d 527, 534 (Va. 1958) (quoting JOHN LEWIS, LEWIS ON EMINENT DOMAIN, § 716 (1909)).

143. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 357 (2001); *see also supra* Part III.A.

144. Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1086 (1984).

145. *See* Merrill & Smith, *supra* note 143, at 358 (asserting that "modern economists assume that property consists of an ad hoc collection of rights in resources").

146. For a recent survey of issues and scholarship, see Abraham Bell & Gideon

If courts were to use a jurisprudence based on property rights, resolution of an inverse condemnation claim would be a simple two-step process. The court would determine whether (1) government took property, and, if so, (2) did it tender just compensation to the owner? If the answer to the first question was "yes," and the answer to the second "no," it would have violated the command of the Fifth Amendment's Takings Clause. The court would not need to determine whether the property interest belonged to a private individual or entity, since the Takings Clause is applicable where one unit of government takes property belonging to another.[148]

B. Bases for Constraining the Takings Power Not Considered by the Court

While the *Armstrong* fairness principle, as amplified by *Penn Central*, serves as the basis for the Court's regulatory takings jurisprudence, the Court has not attempted to explain why this approach is constitutionally mandated, or even why it is preferable to alternatives.[149] To the extent that the Court fails to articulate why it views a provision of the Bill of Rights in one manner rather than others, it detracts from the credibility of its holdings.

Beyond the fact that a property-based takings inquiry would almost assuredly provide more guidance to lower courts than the

---

Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531 (2005).

147. *See, e.g.*, Fla. Rock Indus. v. United States (*Florida Rock IV*), 18 F.3d 1560 (Fed. Cir. 1994). "Property interests are about as diverse as the human mind can conceive. Property interests may be real and personal, tangible and intangible, possessory and nonpossessory. They can be defined in terms of sequential rights to possession (present interests—life estates and various types of fees—and future interests), and in terms of shared interests (such as the various kinds of co-ownership). There are specially structured property interests (such as those of a mortgagee, lessee, bailee, adverse possessor), and there are interests in special kinds of things (such as water, and commercial contracts)." *Id.* at 1572 n.32. This despite the restraint that the common law has placed upon property not conforming to the standard models. *See generally*, Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000).

148. *See, e.g.*, United States v. Carmack, 329 U.S. 230, 242 (1946) (holding that, under the Fifth Amendment, the Federal Government has "the obligation to pay just compensation when it takes another's property for public use . . . . Accordingly when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision . . . the Federal Government recognizes its obligation to pay just compensation."); *see also* S. Ga. Dep't of Transp. v. Jasper County, 586 S.E.2d 853, 855 (S.C. 2003) (treating Georgia state agency owning land in South Carolina as a private landowner).

149. *See supra* text accompanying note 140.

Supreme Court's current "ad hoc" approach,[150] the Court has failed to recognize at least additional bases for limiting application of the Takings Clause: protection of liberty, encouragement of economic efficiency, avoidance of corruption, and prohibiting individual discrimination.

1. Property protects liberty

The protection of property is vital to the protection of liberty, a point not adequately recognized by the Court's decision in *Lingle*. Walter Lippmann wrote that

> the only dependable foundation of personal liberty is the personal economic security of private property . . . . Men cannot be made free by laws unless they are in fact free because no man can buy and no man can coerce them. That is why the Englishman's belief that his home is his castle and that the king cannot enter it . . . [is] the very essence of the free man's way of life.[151]

Justice Thurgood Marshall observed that "[t]he constitutional terms 'life, liberty, and property' . . . have a normative dimension . . . establishing a sphere of private autonomy which government is bound to respect."[152] Justice Kennedy, in *United States v. James Daniel Good Real Property*,[153] applied what he termed "an essential principle: Individual freedom finds tangible expression in property rights."[154] Because ir focuses on property itself rather than balancing

150. *See, e.g.*, Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transp. Co. v. City of New York, 13 WM. & MARY BILL RTS. J. 679 (2005).

> *Penn Central* lacks doctrinal clarity because of its outright refusal to formulate the elements of a regnlatory taking cause of action, and because of its intellectual romp through the law of eminent domain that paid scant attention to preexisting legal doctrine. Its aftermath has become an economic paradise for specialized lawyers, a burden on the judiciary, as well as an indirect impediment to would-be home builders, and an economic disaster for would-be home buyers and for society at large.

Id. at 681 (citing RICHARD F. BABCOCK, THE ZONING GAME 101–06 (1966)).

151. WALTER LIPPMANN, THE METHOD OF FREEDOM 100–02 (1934) (quoted in Loveladies Harbor v. United States, 28 F.3d 1171, 1175 n.8 (Fed. Cir. 1994)).

152. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 93 (1980) (Marshall, J., concurring).

153. 510 U.S. 43 (1993) (holding that absent exigent circumstances, the Due Process Clause of the Fifth Amendment requires that the government give notice and an opportunity to be heard prior to its seizure of real property subject to civil forfeiture).

154. *Id.* at 61.

concerns about fairness, a property-based takings jurisprudence best secures both property and the individual freedom that flows from it.

2. Economic efficiency

Similarly, *Lingle* failed to express that limiting application of the Takings Clause can promote economic efficiency. Indeed, one reason for the "just compensation" requirement is to prevent government from being wasteful with resources that it otherwise would obtain at no cost—meaning, no direct expenditure from the public fisc. Public officials may perceive that property taken without compensation to the owner is "free." However, such a taking imposes opportunity costs, consisting of the fair market value of the asset, together with private losses of subjective value borne by the former owner.[155] It also discourages investment in property through the imposition of "demoralization costs" on actual and potential property owners who empathize with the owner.[156] Thus, uncompensated takings are apt to result in a net loss to society and a net reduction in the general welfare.

Unfortunately, the just compensation requirement does not eliminate these problems. For understandable practical reasons, constitutional "just compensation" is defined as fair market value, not the subjective value asserted by the owner.[157] However:

> Compensation in the constitutional sense is . . . not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to *his* property. Many owners are "intramarginal," meaning that because of relocation costs, sentimental attachments, or the special suitability of the property for their particular (perhaps idiosyncratic) needs, they value their property at more than its market value (i.e., it is not "for sale").[158]

155. *See, e.g.*, Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 584 (1984).

156. Michelman, *supra* note 84, at 1214. These costs are defined to include the dollar amount that would be necessary to offset the disutility accruing to losers and their sympathizers from the realization that no compensation is offered, together with the present value of lost future production caused by the demoralization of those who suspect that they might later be subject to similar treatment. *Id.*

157. United States v. 50 Acres of Land, 469 U.S. 24, 25 (1984).

158. Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988).

When government takes property, it destroys the owner's subjective value. To the extent that this asserted value is merely conjectured as a strategic bargaining ploy, the aggregate wealth of society is none the worse off.[159] However, the assumption that the owners asserted subjective value is merely a bargaining ploy might well be wrong. Presumably, the value of the parcel to the condemnor exceeds its market price. However, the value to the condemnee might be higher than either the market price or the value to the condemnor. There simply is no easy way to discern the owner's subjective value.[160]

Professor James Buchanan noted that our satisfaction with the beneficial results produced by individuals who trade within markets have been subject to a "subtle shift toward a teleological interpretation."[161] "'[T]he market' came to be interpreted functionally, as if something called 'the economy' existed for the purpose of value maximization."[162] Casual disregard of the wiping out of owners' subjective (i.e., non-market) value as a by-product of condemnation is an excellent example of Buchanan's insight that "[e]fficiency in the [market] allocation of resources came to be defined independently of the processes through which individual choices are exercised."[163]

3. Avoidance of corruption

Corruption also stands as a limiting principle of the Takings Clause, albeit one largely ignored by the *Lingle* Court.

In *Calder v. Bull*, Justice Chase declared, with reference to "a law that takes property from A. and gives it to B: It is against all reason and justice . . . ."[164] As the Supreme Court noted in *Hawaii Housing Authority v. Midkiff*, "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve

159. *See, e.g.*, Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 83 (1986) (noting that amount of subjective losses often is small and that the "basic model" of eminent domain does not take subjective losses into account).

160. *See, e.g.*, William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEGAL STUD. 269, 288 (1988).

161. James M. Buchanan, *The Constitution of Economic Policy*, 77 AM. ECON. REV. 243, 244 (1987).

162. *Id.*

163. *Id.*

164. 3 U.S. (3 Dall.) 386, 388 (1798).

no legitimate purpose of government and would thus be void."[165] This language sounds in substantive due process.

Calder explains such forced transfers from an ex post perspective, in terms of arbitrary government conduct. While government-mandated exchange always contains the possibility of arbitrary terms, government review is generally neither needed nor desirable in consensual market transactions, since the consenting parties all regard themselves as gaining from them. Each party to an agreement prefers it to any alternatives and thereby has maximized value and minimized costs.[166]

While the exercise of eminent domain for retransfer to private redevelopers often is justified on the grounds of market failure, public choice theory indicates that inducements dangled before, or demanded by, public officials may indicate government failure.[167] Under this economic (or "interest group") theory of law, "legislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it, regardless of overall social welfare . . . ."[168]

Local legislatures and officials might most often show bias in favor of established majorities (principally suburban homeowners),[169] however, the high stakes involved and highly localized nature of the decision has long led to concern that American land use determinations are marked by questionable deal-making and bias.[170] "Whatever the merit of such practices, they heighten the potential

165. 467 U.S. 229, 245 (1984).

166. *See* James M. Buchanan, *Rights, Efficiency, and Exchange: The Irrelevance of Transaction Cost*, *reprinted in* ECONOMICS: BETWEEN PREDICTIVE SCIENCE AND MORAL PHILOSOPHY 161 (Robert D. Tollison & Victor J. Vanberg eds., 1987), *quoted in* Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE W. RES. L. REV. 961, 974 n.42 (1996).

167. The seminal works of public choice theory include KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951); JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); and ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

168. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982).

169. *See* WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS 209, 211–21 (1985).

170. *See* ROBERT C. ELLICKSON & DAN TARLOCK, LAND USE CONTROLS 236–38 (1981) (discussing dealmaking and land use regulation); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 837 (1983) (noting problems arising from unfair and irrational decisions).

for personal abuse and undermine the perception of zoning legitimacy."[171] While there is little systematic evidence, a 2003 study of Iowa localities indicated a skewing of occupational interests of local decision makers towards those that would favor development and a general lack of regulations regarding disqualification for conflict of interests in particular cases.[172]

Nevertheless, the Supreme Court recently affirmed in *Kelo v. City of New London* that private individuals may benefit from exercises of the eminent domain power, so long as the primary benefit is to the public.[173] But any lawful and profitable private business must cater to the needs of the community and thereby generate public benefit. "To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain."[174] The conflation of "public use" and "public benefit" will engender strategic alliances of private interests and public officials who will find mutual benefit in initiating eminent domain actions and in resisting reform of eminent domain laws.[175]

A due process approach to the problem of arbitrary condemnation and arbitrary retransfer, based on fairness to individual landowners, is perfectly understandable and consistent with American law since Justice Chase's admonition in *Calder* two centuries ago.[176] It also discourages "rent seeking" conduct, whereby private individuals expend resources on convincing public officials to

171. Mark W. Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D. L. Rev. 161, 162 (1989).

172. Jerry L. Anderson & Erin Sass, *Is the Wheel Unbalanced? A Study of Bias on Zoning Boards*, 36 URB. LAW. 447 (2004).

173. 545 U.S. 469, 486 n.14 (2005) (observing that "the achievement of a public good often coincides with the immediate benefiting of private parties").

174. County of Wayne v. Hathcock, 684 N.W.2d 765, 786 (Mich. 2004) (repudiating broad view of "public use" previously adopted in Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981)).

175. *See* Joshua E. Baker, Note, *Quieting the Clang:* Hathcock *as a Model of the State-Based Protection of Property Which* Kelo *Demands*, 14 WM. & MARY BILL RTS. J. 351, 373–74 (2005); Timothy Sandefur, *The "Backlash" So Far: Will Citizens Get Meaningful Eminent Domain Reform?*, SL049 ALI-ABA 703, 741–42 (noting that benefits conferred by the transfer of private property through eminent domain will be localized and concentrated, while the costs are broadly dispersed, leading to effective lobbying against reform).

176. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).

provide them with private gain. Such conduct not only wastes highly compensated professionals' time and other valuable resources but also reduces the efficacy of government by increasing public cynicism about the motives of public officials. "[M]arket 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."[177] One might also say that lawmakers satisfy the desire of developers for eminent domain, a practice that Professor Thomas Merrill described in this context as "secondary rent seeking."[178]

4. Specific vs. general arrogations (takings and taxation)

The antidiscrimination principle is another doctrine limiting takings that the Court failed to consider. As Professor John Fee has asserted:

> [t]he right of just compensation accorded to every property owner by the Takings Clause is fundamentally an antidiscrimination principle. This explains, for example, why general taxes have never been understood to violate the Takings Clause, although taxes do diminish a person's private wealth for public use.[179]

The antidiscrimination principle is an important element in judging the constitutionality of both taxation and takings. However, the antidiscrimination principle would be no more offended by general takings, which typically are compensated through reciprocity of advantage than by general taxes.[180] Likewise, taxes that are not general, but rather targeted out of malice, may constitute

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

178. Merrill, *supra* note 159, at 85–88 (discussing capture of assembly value, the gain in value derived from assembling many small parcels into one large one suitable for development).

179. John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1007 (2003).

180. Reciprocity of advantage concisely states that owners harmed by the imposition of a general regulation upon them, such as a neighborhood requirement that houses be set back a certain distance from the street, are correspondingly benefited by the application of the same regulation to their neighbors. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976) (upholding stringent restrictions on changes in façades for mutual benefit of owners in the French Quarter of New Orleans). Justice Holmes invoked "reciprocity of advantage" in Jackman v. Rosenbaum Co., 260 U.S. 22, 30 (1922); and, six weeks later, in his seminal takings case, Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

unconstitutional bills of attainder.[181] Therefore, while we might accept the proposition that taxes, in practice, tend to be more evenly (fairly) distributed than takings, the key is how "general" the taxes are and how extensive the takings are.

Another, and perhaps more potent explanation for the different treatment of taxes and takings, is that the former is manifested in undifferentiated demands for payment and the latrer in the arrogation of specific assets. In his swing opinion in *Eastern Enterprises v. Apfel*,[182] Justice Kennedy asserted that Takings Clause analysis ought to be reserved for government demands that "operate upon or alter an identified property interest," while Due Process Clause analysis is employed for allegedly impermissible demands for money.[183] Noting that regulatory takings cases "are among the most litigated and perplexing in current law," he added that "[u]ntil today, however, one constant limitation has been that in all of the cases where the regulatory taking analysis has been employed, a specific property right or interest has been at stake."[184]

Since a tax is payable from the taxpayer's fungible assets, the government's receipt ought to be the measure of the taxpayer's loss. On the other hand, where specific property is taken, the prior owner loses idiosyncratic value. When an individual loses a house in which he or she has lived for many years, and often, in consequence, a neighborhood with friends, family, doctors, and house of worship, much is lost that could not be compensated by money. In any event, what is lost is not included in the constitutional measure of "just compensation."[185]

The dignitary interest of the individual is implicated as well. "When the state puts a person's things to use, the individual does

181. *See, e.g.*, United States v. Lovett, 328 U.S. 303, 315 (1946) (holding that "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution").

182. 524 U.S. 498, 541 (1998) (Kennedy, J., concurring in judgment and dissenting in part).

183. *Id.* at 540.

184. *Id.* at 541.

185. *See* Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988) (noting that, for these reasons, "[c]ompensation in the constitutional sense is therefore not full compensation").

not merely suffer economic injury. A servitude is forced upon him. He is made in a small or large way an instrumentality of the state."[186]

C. The Nature of Property Rights

The legitimacy of a property-based approach to takings depends upon the presence of a serviceable definition of "property." While there is no definition that satisfies all theorists, the best should not be the enemy of the good. Many fundamental rights and important statutory codes are incompletely defined.[187] The concept of property is sufficiently definable—in both the physical and regulatory takings contexts—to serve as an important and workable limit on governmental power.

1. Property consists not of things, but rights to use, exclude, and alienate

The term "property" arises in many contexts and, partly for that reason, is susceptible to many interpretations. The most basic referent is "property" as "physical thing," of which, as Blackstone famously put it, an individual could have "sole and despotic dominion."[188] In Blackstone's view, the elements of "property" were the "physicalist" conception that "some 'external thing' [had] to serve as the object of property rights."[189]

Professor Bruce Ackerman has distinguished the "ordinary observer," who would envision property as physical objects, from "scientific policymakers" who would appreciate that property refers to rights in things vis-à-vis other people.[190] Legal "things," however, do not need to be tangible objects. Pollock and Maitland declared that "[t]he realm of medieval law is rich with incorporeal things. Any permanent right which is of a transferable nature . . . is thought of as

186. Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1143 (1993).

187. *See, e.g.*, I.R.C. § 61(a) (enumerating principal categories of, but not completely defining, "gross income"); United States v. Seeger, 380 U.S. 163, 176 (1965) (defining "religious belief" of a nonbeliever for conscientious objector to military service status to include a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God"). {BB1.4(b), (d)}

188. WILLIAM BLACKSTONE, 2 COMMENTARIES *2, *available at* http://www.yale.edu/lawweb/avalon/blackstone/bk2ch1.htm.

189. Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 331 (1980).

190. BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 15 (1977) (contrasting the "Ordinary Observer's" physical understanding of property with the "Scientific Policymaker's" abstract understanding).

a thing that is very like a piece of land."[191] Similarly, while Blackstone had sometimes referred to property as "things," he treated both corporeal and incorporeal hereditaments as "property," i.e., those that "affect the senses," and those that "exist only in contemplation."[192] Professors Bell and Parchomovsky recently reiterated: "Property's usage of the concept of 'thing' is capacious, including nor just tangible items but also ideas and qualities. Accordingly, intangible goods such as ideas, expressions, or symbols may be proper subjects of property law."[193]

The term "bundle of rights" originated in the late nineteenth century.[194] Wesley Hohfeld[195] and A.M. Honoré[196] developed the concept that property is a complex set of rights and duties among individuals. Unlike the unitary "sole and despotic dominion" posited by Blackstone, Hohfeld's property owner possesses "a complex aggregate of rights (or claims), privileges, powers, and immunities."[197] The various sticks in the bundle owned by different landowners constitute "different classes of jural relations" which are "strikingly independent" of each other.[198]

The model quickly gained "broad acceptance" among legal scholars,[199] and was accepted to the point where lawyers and judges shared a "near unanimous" agreement on the bundle of rights

191. 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 124 (2d ed. 1905).

192. WILLIAM BLACKSTONE, 2 COMMENTARIES *17, *available at* http://www.yale.edu/lawweb/avalon/blackstone/bk2ch2.htm. A "hereditament" is "whatsoever may be inherited." *Id.*

193. Bell & Parchomovsky, *supra* note 146, at 577.

194. The term seems to have originated in JOHN LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 43 (1888) ("The dullest individual among the *people* knows and understands that his *property* in anything is a bundle of rights."), *quoted in* J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 713 n.8 (1996).

195. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter *Fundamental Legal Conceptions*]; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter *Some Fundamental Legal Conceptions*].

196. *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *in* FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 65, 96 (Walter Wheeler Cook ed., 1923); A.M. Honoré, *Ownership*, *in* OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 1961).

197. Hohfeld, *Fundamental Legal Conception*, *supra* note 195, at 746.

198. *Id.* at 747.

199. Vandevelde, *supra* note 189, at 361.

analysis.[200] However, while the "bundle of rights" model remains popular with judges and lawyers, it has lost its cachet among property theorists, many of whom conclude that the term "property" has no useful meaning at all.[201]

Notably, Professor Thomas Grey argued that, in ordinary speech, the term "private property" has no uniform meaning, and that the term refers to, among other things, a parcel, the right to exclude others, or the right to resist or to be compensated for eminent domain.[202]

> The conclusion of all this is that discourse about property has fragmented into a ser of discontinuous usages. The more fruitful and useful of these usages are those stipulated by theorists; but these depart drastically from each other and from common speech. Conversely, meanings of "property" in the law that cling to their origin in the thing-ownership conception are integrated least successfully into the general doctrinal framework of law, legal theory, and economics. It seems fair to conclude from a glance at the range of current usages that the specialists who design and manipulate legal structures of the advanced capitalist economies could easily do without using the term "property" at all.[203]

Professor Heller attributes the "demise" of the property-as-thing metaphor in part to the fact that "it does not help identify boundaries of complex governance arrangements and modern intangible property."[204] He notes that, although the thing-ownership metaphor is "superseded in property theory," it still resonates today in popular understanding.[205]

Other commentators, however, have criticized Professor Grey's approach.[206] Professor Richard Epstein asserts that "[t]he great vice

200. CURTIS J. BURGER & JOAN C. WILLIAMS, PROPERTY, LAND OWNERSHIP AND USE 4 (4th ed. 1997).

201. *See* Michael A. Heller, *Three Faces of Private Property*, 79 OR. L. REV. 417, 431–32 (2000) (describing the model as "waning" and naming leading scholars who are searching for a replacement that would "resonate with existing property debates" and "better describe new possibilities").

202. Thomas Grey, *The Disintegration of Property*, *in* PROPERTY 69, 69 (J. Roland Pennock & John W. Chapman eds., NOMOS monograph no. 22, 1980).

203. *Id.* at 163.

204. Heller, *supra* note 201, at 430.

205. *Id.*

206. *See, e.g.*, STEPHEN R. MUNZER, A THEORY OF PROPERTY 31–36 (1990) (disapproving of the "claim that . . . the notion of property is too fragmented to allow for a

in Grey's argument is that it fosters an unwarranted intellectual skepticism, if not despair. He rejects a term that has well-nigh universal usage in the English language because of some inevitable tensions in its meaning, but he suggests nothing of consequence to take its place."[207] Epstein cites Hanna Pitkin's observation that "[a] varied usage is not the same thing as a vague usage; . . . the need for making distinctions is exactly contrary to the vagueness which results from failure to distinguish."[208]

The importance of freedom of expression in a democratic society is a powerful justification for not getting bogged down in the problem, at the margin, of discerning speech from conduct. Likewise:

> If property is not a "thing," not a special entity, not a sacred right, but a bundle of legal entitlemenrs subject, like any other, to rational manipulation and distribution in accordance with some vision of public policy, then it can serve neither a real nor a symbolic function as boundary between individual rights and governmental authority. Property must have a special nature to serve as a limit to the democratic claims of legislative power.[209]

Professor Stephen Munzer, among others, shares this view.[210] Moreover, the persistence of the strong associative link between "property" and "thing" is powerful testimony to its intuitive importance.[211]

---

general theory").

207. RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 21 (1985).

208. *Id.* (quoting HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 8–9 (1967)).

209. JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 239 (1990). "Eliminate the sense of the term 'private property,' and it becomes easy to knock out the constitutional pillars that support the institution, thereby expanding both the size and discretionary power of government." EPSTEIN, *supra* note 207, at 21.

210. STEPHEN A. MUNZER, A THEORY OF PROPERTY 31–36 (1990) (disparaging the "claim that . . . the notion of property is too fragmented to allow for a general theory").

211. *See, e.g.*, Bell & Parchomovsky, *supra* note 146, at 577 ("The popular view, in fact, reflects the accurate perception that the law of property has an important relationship to things.").

2. Property is not a different concept for physical and regulatory takings

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Supreme Court found that a thirty-two month moratorium on all economically viable use did not constitute a taking.[212] The physical occupation of the land by the Agency for a similar period clearly would have constituted a taking,[213] as would a regulation of indefinite duration prohibiting all economically viable use.[214] By way of explaining this apparent disparity, the Court stated:

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.
>
> Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vinrage and is characterized by "essentially ad hoc, factual inquiries," designed to allow "careful examination and weighing of all the relevant circumstances."[215]

The Court's decision to base its takings jurisprudence on the "*Armstrong* principle" was of this same "recent vintage," and this reasoning also is an extended *ipse dixit*.[216] The fact that the Fifth Amendment provides a basis for drawing a particular distinction does not imply that the distinction must, or even should, be drawn. Indeed, in the absence of a Constitutional mandate to the contrary, the presumption should be that takings concepts should be applied consistently to physical invasions and other arrogations of property rights. The Court surely is on safe ground in suggesting that

212. 535 U.S. 302, 342–43 (2002).

213. *Id.* at 322 (citing United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. Gen. Motors Corp., 323 U.S. 373 (1945)).

214. *Id.* at 325 n.19 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992)).

215. *Id.* at 321–22 (internal citations omitted).

216. *See supra* text accompanying note 140. *See generally supra* Part III.B.

compensation is the necessary outcome of a judicial proceeding in which the State seeks title and where the Public Use Clause also is satisfied. Beyond that, the Court proceeds by analogies, the validity of which is not self-evident.

The *Tahoe-Sierra* Court defined "property" as the parcel of land,[217] which is precisely the "vulgar" usage it earlier rebuked in *United States v. General Motors Corp.*[218] Thus, it asserts that "plain language" requires compensation for a physical appropriation and that the Fifth Amendment includes "no comparable reference" to regulations prohibiting "certain uses."[219] The distinction between "property" and "use" is one not stated in "plain language," but rather inferred from the Court's language.

Similarly, the fact that cases involving physical takings are "as old as the Republic" and that regulatory takings cases are of "more recent vintage" may say more about the sweeping severity of recent regulations, particularly those pertaining to the environment, than they do about distinctions in modes of adjudication. A footnote to the Court's discussion adds that in the case of physical appropriation,

> the fact of a taking is typically obvious and undisputed. . . . When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.[220]

Basic definitions of "property" and "takings" are not altered by the fact that determinations in some cases are more complex than in others. Furthermore, the fact that physical appropriations constituting a taking "typically" are obvious and undisputed downplays the fact that there are many instances in which they are not.[221]

---

217. 535 U.S. at 331.

218. *Compare id. with General Motors*, 323 U.S. at 378 (warning against use of the term "property" "in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law") *and* Steward Mach. Co. v. Davis, 301 U.S. 548, 581 (1937) (containing the first U.S. Supreme Court use of term "bundle of rights" with respect to property). "Indeed, ownership itself . . . is only a bundle of rights and privileges invested with a single name." *Id.* at 581.

219. *Tahoe-Sierra*, 535 U.S. at 321–22.

220. *Id.* at 322 n.17.

221. *See, e.g.*, Hendler v. United States, 952 F.2d 1364, 1377 (Fed. Cir. 1991) (noting the difficulty in distinguishing the "permanent" occupation constituting a taking from "occupancy that is transient and relatively inconsequential" so as to constitute common law

D. The Takings Clause Relates to the Property Taken—Not Its Owners

Section 1 of the Fourteenth Amendment speaks uniformly of the rights of "persons" and "citizens," including the requirement that States shall not "deprive any person of life, liberty, or property, without due process of law; nor deny *to any person* within its jurisdiction the equal protection of the laws."[222]

Every element of the Fifth Amendment has as its immediate reference the protection of "persons," except for the requirement for just compensation. As the Supreme Court articulated over a century ago, in *Monongahela Navigation Co. v. United States*:

> [T]his just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. 'No person shall be held to answer for a capital or otherwise infamous crime,' etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the 'just compensation' is to be a full equivalent for the property taken.[223]

To be sure, the owner of the property at the time of the taking is entitled to receive the compensation.[224] Nevertheless, the Constitution commands that it is the government's taking of "private property" that will trigger the obligation to pay, not any characteristics of the property owner. Thus, any property-based takings test would have to begin with an analysis of how the government action affects the relevant property. The following section discusses how that property has been, and should be, defined.

---

trespass); *see also* McCarran Int'l Airport v. Sisolak, 137 P.3d 1110, 1124 (Nev. 2006) (holding land use regulations limiting height of buildings adjacent to airport a per se regulatory taking).

222. U.S. CONST. amend. XIV, § 1 (emphasis added).

223. 148 U.S. 312, 326 (1893).

224. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001) ("[I]t is a general rule of the law of eminent domain that any award goes to the owner at the time of the taking, and that the right to compensation is not passed to a subsequent purchaser.").

E. Moving from "Parcel as a Whole" to Objective Definitions of "Property"

1. The inadequacies of the "parcel as a whole" rule

In *Penn Central Transportation Co. v. New York City*, Justice Brennan declared that "[i]n deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."[225] The Court soon added, though, that *Penn Central* "gave no guidance on how one is to distinguish a 'discrete segment' from a 'single parcel.'"[226]

Indeed, in many cases, courts have mechanically defined the "property" as the full extent of contiguous land under a common ownership.[227] Often the courts apply this definition without conscious awareness.[228] In its most extravagant form, the "relevant parcel" in *Penn Central* was deemed by the New York Court of Appeals to include all of the land that the railroad company owned for miles along Park Avenue, in addition to Grand Central Terminal, or the air rights above it.[229]

Even where the landowner has previously sold a part of his or her initial holding, some courts still regard the original contiguous land as the standard for takings fraction analysis.[230] There is a cottage industry in ascertaining what effect the prior history of a parcel, sales involving parts of the parcel, the owners' expectations, and other factors have on determining whether the "parcel as a whole" or some lesser "relevant parcel" is appropriate for analysis in a given case.[231] The nature of the property right taken may affect the court's

225. 438 U.S. 104, 130–31 (1978).

226. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 517 n.5 (1987).

227. *See, e.g.*, Fee, *supra* note 134, at 1546 (citing cases).

228. *Id.*

229. 366 N.E.2d 1271, 1276–77 (1977), *aff'd*, 438 U.S. 104 (1978); *see* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) (referring to this analysis as "extreme—and, we think, unsupportable").

230. *See* Deltona Corp. v. United States, 657 F.2d 1184 (Ct. Cl. 1981) (treating as relevant the original 10,000-acre parcel acquired for residential development even though the developer had previously sold off parts of the tract).

231. *See, e.g.*, Dwight H. Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353 (2003).

determination of the relevant parcel.[232] Additionally, the "discreteness" of the property right will affect how broadly the court interprets the relevant parcel.[233]

The Court noted its "discomfort" with the "parcel as a whole doctrine" in *Palazzolo v. Rhode Island*.[234] Nevertheless, the Court reaffirmed the importance of the concept the following year, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.[235] While *Tahoe-Sierra* acknowledged that the Court has long treated government arrogation of physical possession as compensable, regardless of the "parcel as a whole" rule,[236] it found that more "complex" analysis was required in regulatory takings cases.[237]

Critics claim that determinations of whether there have been regulatory takings must occur within a context of relative deprivation to the owner because of the insurmountable problem of "conceptual severance."[238] "[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."[239]

This subjective interpretation means that owners will assert that a given "property right" should be defined so narrowly as to closely correspond with the proscriptions of a governmental regulation. By identifying the right that is taken with the limitation the government imposes by regulation, there will always be a complete taking. However, the same objections could be made, *mutatis mutandis*,

232. *See id.* at 412 ("When the right to exclude others is at stake, the courts have tended to find that the relevant parcel is insignificant or at least relatively insignificant.").

233. *Id.* ("[W]ith water, mining, grazing, billboards or similar property rights, most jurisdictions would find that the claimed right is separate from the land to which it is appurtenant, so the relevant parcel becomes insignificant in the face of the loss of the right.").

234. 533 U.S. 606, 631 (2001).

235. 535 U.S. 302 (2002) (extending "parcel as a whole" to the temporal axis of ownership, so that the significance of a complete deprivation of viable economic use for a thirty-two-month period was considered within the context of an indefinite time frame).

236. *Id.* at 322 (citing United States v. Pewee Coal Co., 341 U.S. 114, 115 (1951)).

237. *Id.* at 322 n.17; *see also supra* text accompanying note 220.

238. *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

239. *Id.* at 1678.

from the landowner's perspective. Through what I have termed "conceptual agglomeration,"[240] disparate parcels would be argued to constitute the relevant parcel, for the purpose of minimizing the owner's loss.[241]

What is needed is an objective definition of the property right; one that neither favors, nor readily could be manipulated by, either owner or government actor.

2. The "commercial unit" and "independent economic viability" as objective definitions of "property"

At least two plausible definitions embodying the needed clarity and objectivity have been proposed. The employment of either would prevent the need for arcane inquiries in which the provenance and disposition of all of the landowner's holdings in the vicinity would be needed.

The first test, proposed by Professor John Fee, employs the standard of "independent economic viability."[242] "Under this standard, a taking has occurred when any horizontally definable parcel, containing at least one economically viable use independent of the immediately surrounding land segments, loses all economic use due to government regulation."[243] The other standard, advocated by the present author,[244] is based on the idea of the "commercial unit," as delineated by the Uniform Commercial Code. The commercial unit "[m]eans such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use."[245] Under this standard, an owner could claim a taking of a particular property interest but would have the burden of demonstrating that the interest asserted is one actually recognized as traded in a market in the community in which it is located.

240. STEVEN J. EAGLE, REGULATORY TAKINGS § 7-7(b)(2) (3d ed. 2005).

241. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016–17 n.7 (1992) (decrying the decision of the New York Court of Appeals in *Penn Central* to include in the relevant parcel the "total value of the taking claimant's other holdings in the vicinity" as an "extreme—and we think, unsupportable—view of the relevant calculus." (citing Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1276–77 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978)).

242. *See* Fee, *supra* note 134, at 1557–62.

243. *Id.* at 1537.

244. EAGLE, *supra* note 240, § 7-7(e)(5).

245. U.C.C. § 2-105(6).

The "commercial unit" quite naturally fits into our concept of property. As a legal term of art, the "complete property unit" would be a far more appropriate standard against which the government's action is to be measured than the "parcel as a whole."[246] The latter is a measure not of the property but of its owner, *i.e.*, the landholdings attributable to the takings claimant at some earlier time.

In addition to more clearly reflecting the property taken, the "commercial unit" also is responsive to the concept of ownership through its fidelity to rectification to harm to the property of others through nuisance law. Justice Robert Braucher[247] has explained that an aspect of the "commercial unit" standard was it worked to ensure that "good faith and commercial reasonableness must be used to avoid undue impairment of the value of the remaining portion of the goods."[248]

Under the "commercial unit" test, a government regulatory action affecting any interest in land might be asserted to constitute a complete[249] or partial[250] regulatory taking. The claimant, however, would have the burden to establish that the relevant interest was a commercial unit. This would mean that the claimant would have to obtain evidence, likely through expert testimony from appraisers or brokers, that a market for such units did exist in the community. Sales of lots possessing similar characteristics and sales of air rights above similar commercial parcels are illustrative.

Under the "independent economic viability" test, both the takings claimant and the government would be free to obtain appraisals showing that the proffered relevant interest did or did not possess freestanding economic value.

Both the "commercial unit" and "independenr economic viability" tests are intended to provide objective measures that would not only prevent owners from engaging in "conceptual severance,"[251]

246. *See Penn Central*, 438 U.S. at 130–31; *see also supra* Part III.D.4.

247. Braucher served as Reporter for the Restatement of Contracts, Second before being appointed to the Supreme Judicial Court of Massachusetts. *See* Lance Liebman, *In Memoriam–E. Allan Farnsworth*, 105 COLUM. L. REV. 1429, 1429 n.1 (2005).

248. Axion Corp. v. G.D.C. Leasing Corp. 269 N.E.2d 664 (Mass. 1971) (discussing the relationship between the "Commercial Unit" provision, U.C.C. § 2-105(6), and the "Buyer's Rights on Improper Delivery" provision, U.C.C. § 2-601(c)).

249. Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

250. *Penn Central*, 438 U.S. at 122–38 (discussing takings in the context of land-use regulations).

251. *See* Radin, *supra* note 239.

but also prevent governmental bodies from engaging in "conceptual agglomeration."[252]

As between the "commercial unit" and "independent economic viability" tests, I prefer the former because the latter includes the artificial constraint that the property be "horizontal." There is no substantial reason why property interests such as those involving upper-floor condominiums, air rights, or mineral interests should be excluded.

A property-based takings analysis is both feasible and desirable. By replacing its preoccupation with a government regulation's effect on the owner with a focus on the regulation's effect on the "commercial unit" of property itself, courts would cabin takings law to where the Fifth Amendment envisions it and receive the benefits that come from separating it from due process analysis and taking property seriously.

V. DEPRIVATION OF PROPERTY AND MEANINGFUL SUBSTANTIVE DUE PROCESS JURISPRUDENCE

The Supreme Court's conflation of due process and takings analysis stems not only from its failure to take property seriously but also from its failure to articulate a meaningful standard of review for due process deprivation claims. The lack of guidance provided by the Supreme Court encourages courts to confuse takings and due process analysis and helps engender the confusion the Court acknowledged in *Lingle*. This section proposes a meaningful standard of review for the substantive due process claims that the *Lingle* Court made clear exist alongside claims under the Takings Clause.

From the founding period of our Nation, private property has been regarded as a fundamental attribute of individual freedom and dignity. One month after she issued her opinion in *Lingle*, Justice O'Connor quoted James Madison's observation: "[T]hat alone is a just government which impartially secures to every man, whatever is his own."[253] This notion of "securing" property evokes John Locke's

252. EAGLE, *supra* note 240, § 64(c)(2)(iii) (1996).

253. Kelo v. City of New London, 545 U.S. 469, 505 (2005) (O'Connor, J., dissenting) (quoting James Madison, *Property*, THE NATIONAL GAZETTE, (Mar. 29, 1792), *reprinted in* 14 PAPERS OF JAMES MADISON 266 (R. Rutland et al. eds., 1983) (emphasis in original)).

account that individuals have the executive authority to protect their lives and property, a part of which they delegate to the State.[254]

Since notions of substantive due process are not readily defined by text, their invocation tends to arouse the suspicion of conservative judges[255] and Supreme Court Justices.[256] At least with respect to areas of the law in which it is out of favor, substantive due process also occasions the ire of liberal justices.[257] One could legitimately observe that the Court's 1937 "switch in time" simply substituted certain Constitutional values preferred by some to those preferred by others.[258]

A. Lingle *Signals the Need to Refocus on Property Deprivations and Due Process*

1. Lingle *rejects the Agins "substantially advances" takings test*

In *Agins v. City of Tiburon*, the Supreme Court enunciated a two-prong test for determining "whether the mere enactment of the zoning ordinances constitutes a taking."[259] The first prong stated that an ordinance effectuates a taking if it "does not substantially

254. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 330–31 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("The only way whereby any one devests himself of his Natural Liberty, and *puts on the bonds of Civil Society*, is by agreeing with other Men to joyn and unite into a Community, for there comfort, safe and peaceable living one amongst another, in their secure Enjoyment of their Properties, and a greater Security against any that are not of it.").

255. For example, University of Chicago law and economics scholar Frank Easterbrook, after taking his seat on the Seventh Circuit, declared: "Now we have spent some time looking through the Constitution for the Substantive Due Process Clause without finding it." Nat'l Paint & Coatings Ass'n v. City of Chicago, 45 F.3d 1124, 1129 (7th Cir. 1995).

256. *See, e.g.*, United States v. Carlton, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) ("If I thought that 'substantive due process' were [sic] a constitutional right rather than an oxymoron, I would think it violated by bait-and-switch [i.e., 'curative'] taxation.").

257. *See* United States v. Lopez, 514 U.S. 549, 602 (1995) (Stevens, J., dissenting) ("I also agree with Justice Souter's exposition of the radical character of the Court's holding and its kinship with the discredited, pre-Depression version of substantive due process.").

258. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 769 (2d ed. 1988) ("[T]he 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."). Tribe added that "the error of decisions like *Lochner v. New York* lay not in judicial intervention to protect 'liberty' but in a misguided understanding of what liberty actually required in the industrial age." *Id.*

259. 447 U.S. 255, 260 (1980).

advance legitimate state interests."[260] The second prong stated that an ordinance effectuates a taking if it "denies an owner economically viable use of his land."[261]

Some commentators have insisted that "substantially advances" is indeed a takings test.[262] Others have insisted that it is a substantive due process test.[263] In *Lingle*, the U.S. Supreme Court unanimously held that its "substantially advances" takings "test" is a discredited takings "formula."[264] The Court conceded that *Agins* applied the "substantially advances" language and that *Keystone Bituminous Coal Ass'n v. DeBenedictis*[265] "arguably" applied the language.[266] The Court insisted that the formulation was never applied to invalidate an ordinance, and that the other cases that discussed it did so only in dicta.[267] *Lingle* attempted to distinguish other cases in which a "substantially advances" inquiry might have played a role.[268] *Lingle* thereafter began an inquiry into the relationship between takings and due process concepts in the area of asserted property deprivations, but left that analysis incomplete.

In *Lingle*, Justice O'Connor began by implying that the Court in *Agins* simply had not thought through its "substantially advances" language.[269] She concluded:

260. *Id.* (citing Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928)) (basing decision on substantive due process analysis).

261. *Id.* (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 n.36 (1978)).

262. *See, e.g.*, R. S. Radford, *Of Course a Land Use Regulation that Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 FORDHAM ENVTL. L. REV. 353, 354 (2004).

263. *See, e.g.*, Edward J. Sullivan, *Emperors and Clothes: The Genealogy and Operation of the Agins Tests*, 33 URB. LAW. 343, 344 (2001).

264. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540, 545 (2005).

265. 480 U.S. 470, 485–92 (1987).

266. *Lingle*, 544 U.S. at 545–46.

267. *Id.* (citing Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 334 (2002); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992); Yee v. City of Escondido, 503 U.S. 519, 534 (1992); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985)).

268. The Court distinguished *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) on the grounds that the conditions that the regnlators imposed for development permits were the equivalent of the simple appropriations of an easement which, if demanded independently, would have constituted a per se physical taking. *Lingle*, 544 U.S. at 545–46.

269. *Lingle*, 544 U.S. at 531 ("On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined.").

> Although a number of our takings precedents have recited the "substantially advances" formula minted in *Agins*, this is our first opportunity to consider its validity as a freestanding takings test. We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.[270]

To be sure, the distinction between takings and due process is not nearly as simple as Justice O'Connor suggests. From colonial times through the first third of the 20th century, the protection of individuals from government deprivation of private property was predicated on substantive due process. More recently, the Supreme Court has recast the Takings Clause as the source of property protection. In *Lingle*, the Court pointedly disavowed due process terminology in Takings Clause analysis.[271] However, "[t]he past is never dead. It's not even past."[272]

In *United States v. James Daniel Good Real Property*, the Supreme Court "rejected the view that the applicability of one constitutional amendment preempts the guarantees of another."[273] In fact, the Constitution provides many protections for property rights, including the Contract Clause,[274] the Commerce Clause,[275] and the doctrine of enumerated powers.[276]

As *Lingle* makes clear, the Court has nor, and still does not, draw a bright line between its older due process analysis and the substance of its newer takings analysis.[277] Regulatory "takings" are still defined in terms of deprivation suffered by property owners and not in terms of clearly defined "property" taken by government.

2. Lingle *confirms due process-based causes of action*

One salutary aspect of *Lingle* is its clarification that substantive due process claims are viable and are not, as some courts have pronounced, subsumed in property owners' regulatory takings

270. *Id.* at 540.
271. *Id.* at 531–32.
272. WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (Random House 1951) (1950).
273. 510 U.S. 43, 49 (1993).
274. U.S. CONST. art. I, § 10.
275. *Id.* at art. I, § 8, cl. 3.
276. *Id.* at art. I, § 8.
277. *See supra* Part III.D.

claims. Drawing this "clear line" brings clarity to a "muddled area of law."[278]

The *Lingle* Court declared:

> Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is ***logically prior to and distinct from*** the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.[279]

In *Graham v. Connor*,[280] the Supreme Court held that a claim for physical injuries, asserted to result from excessive force in a police investigatory stop, should be analyzed under the Fourth Amendment's "objective reasonableness" standard, as opposed to under the substantive due process standard.[281]

The Court reviewed this holding in *Albright v. Oliver*,[282] and upheld the dismissal of the petitioner's claim that a police officer violated his substantive due process rights by arresting him without probable cause.[283] The plurality opinion quoted *Graham* in declaring: "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'"[284]

Prior to *Lingle*, the Courts of Appeals disagreed on whether the *Graham* doctrine precluded substantive due process claims in property deprivation cases. In *Sinaloa Lake Owners Ass'n v. City of Simi Valley*,[285] a Ninth Circuit panel held that *Graham* does not bar a companion substantive due process claim that alleges that "the government has used its power in an abusive, irrational or malicious

278. Barros, *supra* note 110, at 345.

279. *Lingle*, 544 U.S. at 543 (emphasis added).

280. 490 U.S. 386 (1989).

281. *Id.* at 388.

282. 510 U.S. 266 (1994).

283. *Id.* at 273.

284. *Id.* (quoting *Graham*, 490 U.S. at 395).

285. 882 F.2d 1398, 1404 (9th Cir. 1989) (holding federal district court has jurisdiction over § 1983 due process claim where plaintiff alleged that city arbitrarily drained community lake).

way."[286] However, the court came to a different conclusion when it reviewed the issue *en banc* in *Armendariz v. Penman*.[287] "*Graham* makes clear," the Ninth Circuit declared, "that the scope of substantive due process, however ill-defined, does not extend to circumstances already addressed by other constitutional provisions."[288] Some circuits concurred in the Ninth Circuit approach,[289] while others disagreed.[290] A third approach, apparently adopted by the First Circuit, denied the essential relevance of the inquiry.[291]

In the first post-*Lingle* case on point, *Consolidated Waste Systems, LLC v. Metropolitan Government of Nashville*,[292] the court surveyed the pre-*Lingle* split in the U.S. Circuit Courts of Appeals, explained that it did not regard due process claims as subsumed within takings claims, and added:

> The [Supreme] Court's recent decision in *Lingle* solidifies our conclusion because the Court rejected the "substantially advances" test as part of a regulatory takings analysis and made it clear that the validity of a zoning ordinance as an exercise of the government's police power is to be tested under traditional due process rational basis principles. . . . After explaining the historical basis for the "commingling" in *Agins* of due process and takings inquiries, the Court made it clear that the analytical underpinnings of the claims were different.[293]

286. *Id.* at 1408–09 n.10; *accord* Hoeck v. City of Portland, 57 F.3d 781, 785 (9th Cir. 1995) (holding federal district court has jurisdiction over § 1983 due process claim where owner spent $1 million in attempted restoration of vacant hotel that subsequently was demolished by city because of a crime problem).

287. 75 F.3d 1311, 1326 (9th Cir. 1996) (en banc).

288. *Id.* at 1325.

289. *See, e.g.*, Montgomery v. Carter County, 226 F.3d 758, 769 (6th Cir. 2000).

290. *See, e.g.*, John Corp. v. City of Houston, 214 F.3d 573, 579 (5th Cir. 2000) (holding that due process arguments not subsumed under Takings Clause); *see also*, Robert Ashbrook, Note, *Land Development, the* Graham *Doctrine, and the Extinction of Economic Substantive Due Process*, 150 U. PA. L. REV. 1255, 1265–76 (2002) (collecting cases).

291. S. County Sand & Gravel Co. v. Town of S. Kingstown, 160 F.3d 834, 836 (1st Cir. 1998) ("[T]here is no need to submit to a tyranny of labels. In this case, the district court considered the issue under the substantive due process rubric and both parties cling tenaciously to that characterization. Moreover, the distinction between the two modes of analysis is, in the present circumstances, largely a matter of semantics.").

292. No. M2002-02582-COA-R3-CV, 2005 WL 1541860 (Tenn. Ct. App. June 30, 2005) (not reported in S.W.3d).

293. *Id.* at *22.

Similarly, a U.S. district court in California recently ruled that a substantive due process claim is not preempted in a property rights case, since *Lingle* "makes clear" that it and a takings claim "address two different matters."[294]

The ultimate import of separate due process review, however, depends upon the standard employed by the courts in evaluating property rights due process claims. Generally, the standard has been based upon the Supreme Court's holding in *County of Sacramento v. Lewis*.[295] In the *Lewis* case, the Court stated that "the core of the concept" of due process is "protection against arbitrary action" and that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense[.]'"[296] With respect to the denial of land development approval, substantive due process constrains only "grave unfairness," such as "a substantial infringement of state law prompted by personal or group animus, or [2] a deliberate flouting of the law that trammels significant personal or property rights . . . ."[297]

In *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*,[298] involving a land development application, the Court invoked the "most egregious" language from *Lewis* in dismissing the respondent's due process claim.[299] However, it also termed the city's actions complained of to be "eminently rational" and required by law.[300] Thus, while the Court disposed of the due process claim by quoting *Lewis*, it did so in a context where it was clear that the respondent could not prevail under even the most lenient standard for due process review. Just as the *Agins* "substantially advance" formula was invoked regularly by the Court until it became determinative in *Lingle*,[301] the invocation of *Lewis* in *Buckeye* might be regarded as dicta for present purposes.

294. City of Oakland v. Abend, No. C-07-2142 EMC, 2007 WL 2023506, at *10 (N.D. Cal. July 12, 2007).

295. 523 U.S. 833 (1998).

296. *Id.* at 845–46.

297. George Washington Univ. v. Dist. of Columbia, 318 F.3d 203, 209 (D.C. Cir. 2003) (quoting Silverman v. Berry, 845 F.2d 1072, 1080 (D.C. Cir. 1988)).

298. 538 U.S. 188 (2003).

299. *Id.* at 198.

300. *Id.* at 199.

301. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 536–48 (2005); Agins v. City of Tiburon, 447 U.S. 255 (1980); *see also supra* text accompanying notes 263–67.

In *Kelo v. City of New London*,[302] the concurring opinion of Justice Kennedy, whose vote was necessary to the five-four majority, urged the adoption of "the meaningful rational basis review that in [his] view is required under the Public Use Clause."[303] He also cited to *City of Cleburne v. Cleburne Living Center, Inc.*,[304] a case associated with "covert heightened scrutiny."[305]

In fact, scholars and judges have long considered concepts of fairness and proportionality in connection with takings liability. Professor Saul Levmore has suggested that takings claims are inherently more compelling when the deprived party was singled out as a target of opportunity.[306] He added that the Public Use Clause "hints" at the distinction between easily organized interest groups, which partake somewhat of a "public" character and can protect themselves in the political arena, and isolated individuals, whose protection from deprivations is dependent on the Fifth Amendment.[307] Likewise, United States Court of Federal Claims Judge Eric Bruggink has stated that Congressional "targeting" of a stringent regulation so as to thwart the plans of a particular company is an indication that the "character" of the governmental regulation test should argue in favor of a *Penn Central* partial taking.[308]

The adoption of some form of meaningful due process review in property deprivation cases would go a long way toward placing property rights on a par with other individual rights.[309]

302. 545 U.S. 469 (2005).

303. *Id.* at 492 (Kennedy, J., concurring).

304. *Id.* at 491 (Kennedy, J., concurring); *see* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446–47, 450 (1985).

305. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1612 (2d ed. 1988).

306. Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 306–07 (1990) (contrasting small, isolated, property owners in special need of constitutional protection from large, institutional owners, that easily could become involved in the political process); *see also* Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 439 (1977) ("Development charges . . . are widely used by small suburbs because they cream off the surplus of a particular group of landowners who have little political power."); Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1344–48 (1991) (expanding upon "singling out" distinction).

307. Levmore, *supra* note 307, at 306–07.

308. Am. Pelagic Fishing Co. v. United States, 55 Fed. Cl. 575, 591 (2003), *rev'd on other grounds*, 379 F.3d 1363 (Fed. Cir. 2004).

309. *See* Dolan v. City of Tigard, 512 U.S. 374, 392 (1994) ("We see no reason 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 in these comparable circumstances.").

B. Due Process and Proportionality

In his well-known Supreme Court "Foreword" for the *Harvard Law Review*, Professor Gerald Gunther urged a model of Constitutional interpretation that "would have the Court take seriously a constitutional requirement that has never been formally abandoned: that legislative means must substantially further legislative ends."[310] In *Lingle*, the Court reaffirmed the legitimacy of ends-means review as a means of ensuring substantive due process.[311]

The Supreme Court purports to use a three-tiered model of scrutiny in evaluating burdens placed upon individuals by government regulation: strict scrutiny,[312] heightened scrutiny,[313] and rational basis review, also called deferential scrutiny.[314] As Sixth Circuit Judge Danny Boggs has explained, rational basis review "exists first and foremost as a way of insuring that the economic policy formulated by legislatures will not be struck down as unconstitutional because it does not comport with *laissez-faire*."[315] Judge Boggs added that "[s]trict scrutiny, by way of contrast, is the post-New Deal Supreme Court's way of affirming its view of which rights shine the brightest in the constitutional firmament."[316] "Intermediate scrutiny . . . [reflects] the Supreme Court's desire ro

310. Gerald Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20 (1972).

311. 544 U.S. 528, 542 (2005).

312. *E.g.*, Lawrence v. Texas, 539 U.S. 558, 593 (2003) (Scalia, J., dissenting) ("Our opinions applying the doctrine known as 'substantive due process' hold that the Due Process Clause prohibits States from infringing *fundamental* liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.").

313. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983) (analyzing whether the classification under review is "narrowly tailored to serve a significant government interest").

314. Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 295 (1993) ("A routine legislative classification is, of course, subject only to deferential scrutiny, passing constitutional muster if it bears a rational relationship to some legitimate governmental purpose." (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440–41 (1985); Schweiker v. Wilson, 450 U.S. 221, 230 (1981))). It suffices that the Court could conceive a plausible reason for the regulation. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955) (holding that the state legislature "may have concluded" that eye examinations were necessary to prevent eye disease so as to legitimize the requirement of an optometrist's prescription before acquiring or duplicating a lens).

315. Montgomery v. Carr, 101 F.3d 1117, 1121 (6th Cir. 1996).

316. *Id.* (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (raising the possibility that stricter judicial review should be reserved for legislative action impinging upon "discrete and insular minorities")).

fashion constitutional protections for women, a group that has been historically victimized by intense and irrational discrimination, but that cannot properly be called either 'discrete' or 'insular.'"[317] Judge Boggs noted that "[t]he Supreme Court's authority to delineate these different tiers of judicial review is not apparent. Justices from the entire range of ideological perspectives have expressed their concerns with tiered judicial review."[318]

In practice, the Court's scheme for review has been more elastic. According to Professor Cass Sunstein, "[t]he hard edges" of tiered review "have . . . softened, and there has been at least a modest convergence away from tiers and toward general balancing of relevant interests."[319] Commentators have used names such as "covert heightened scrutiny,"[320] "'second order' rational basis,"[321] and rational basis with "bite"[322] to describe a test that is more stringent than the rubber stamping required by the rational basis test. The crux of the argument for these softer, flexible tests is that the court should examine not whether the regulation might be supportable under the police power in some conceivable circumstance, but whether the regulation is supportable under the police power in the specific circumstances of the case before the court.

City of Cleburne v. Cleburne Living Center[323] is probably the most well-known covert heightened scrutiny case. There, a Texas city had "denied a special use permit for . . . a group home for the mentally retarded," which had requested the permit "pursuant to a municipal zoning ordinance requiring permits for such homes."[324] The site of the home was zoned such that "apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the

317. *Id.*

318. *Id.* at 1122.

319. Cass R. Sunstein, *The Supreme Court, 1995 Term–Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 6, 77 (1996).

320. TRIBE, *supra* note 305, at 1612.

321. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 458 (1985) (Marshall, J., concurring in part and dissenting in part).

322. *See* Gunther, *supra* note 311, at 20–24.

323. 473 U.S. 432 (1985).

324. *Id.* at 435.

insane or feebleminded or alcoholics or drug addicts)" were allowed without request for a special permit.[325] The district court determined that the ordinance was constitutional.[326]

After refusing to recognize the mentally retarded as a protected class or "quasi-suspect classification," Justice White examined and dismissed each of the proffered arguments for treating the group home in this case differently than other hospitals and nursing homes.[327] The court ultimately determined that the ordinance should be invalidated "because . . . the record [did] not reveal any rational basis for believing that the . . . home would pose any special threat to the city's legitimate interests."[328]

The Court has used covert heightened scrutiny in several other cases in recent decades, including *Zobel v. Williams*,[329] *Hooper v. Bernalillo County Assessor*,[330] *Plyler v. Doe*,[331] *Metropolitan Life Insurance Co. v. Ward*,[332] and *United States Department of Agriculture v. Moreno*.[333] These statutes were struck down on the grounds they gave an advantage to long-time or at least existing state residents legally in the United States despite a lack of evidence that the state legislatures did not give the issues careful consideration or that their decisions were implausible.

In *Romer v. Evans*, the Supreme Court ruled that a Colorado constitutional amendment violated the Equal Protection Clause because it prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination.[334] Justice Kennedy, writing for the Court, declared that the

325. *Id.* at 447.

326. *Id.* at 437.

327. *Id.* at 442–50.

328. *Id.* at 448.

329. 457 U.S. 55, 57, 63–65 (1982) (deeming Alaska distribution of natural-resource income according to year residence established irrational, and rewarding citizens for past contributions not "legitimate state purpose").

330. 472 U.S. 612 (1985) (deeming tax exemption to Vietnam Veterans only if residents of state by date arguably related to end of war irrational).

331. 457 U.S. 202 (1982) (deeming denial of public schooling to children of illegal aliens irrational).

332. 470 U.S. 869 (1985) (finding no rational basis for an Alabama statute that gave lower tax rates to Alabama companies).

333. 413 U.S. 528 (1973) (holding that the Food Stamp Act's discrimination against unrelated persons living together was not rationally related to a legitimate government interest).

334. 517 U.S. 620 (1996).

Amendment's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."[335]

The common thread in all of these cases is that they required the court to look beyond whether the state's constitutional or statutory provision could conceivably be justified by the state's police power. Rather, the Court analyzed whether the provision's application was justified given the actual facts presented in the case.

C. Determining a Meaningful Due Process Standard

1. The need for a property interest

Valid due process challenges to governmental action must be related to some form of property interest. In *Board of Regents of State Colleges v. Roth*, the Supreme Court held that a due process challenge to a governmental action must be predicated upon a "deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."[336] The U.S. Courts of Appeals have adopted varying standards for determining what constitutes the requisite property interest in land use cases.

The Third Circuit held, in *DeBlasio v. Zoning Board of Adjustment*, that an ownership interest in the land qualifies.[337] Other courts have utilized a structural "entitlement" analysis, focusing on the degree of discretion permitted the regulator. The Supreme Court's decision in *Board of Regents v. Roth*,[338] plays a pivotal role in this analysis, focusing on reasonable claims of entitlement as well as ownership.[339] Thus, the Second Circuit, in *RRI Realty Corp. v.*

335. *Id.* at 632.

336. 408 U.S. 564, 569 (1972).

337. 53 F.3d 592, 601 (3d Cir. 1995). *DeBlasio* subsequently was overruled because it applied the less "demanding 'improper motive' test" instead of the "shocks the conscience" standard required by *Lewis*. United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 400 (3d Cir. 2003).

338. 408 U.S. 564 (1972).

339. *Id.* at 577 ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.").

Village of Southampton, noted that its post-*Roth* cases "have been significantly influenced by the *Roth* 'entitlement' analysis.'"[340] The court noted that it had earlier "focused initially on whether the landowner had 'a legitimate claim of entitlement' to the license he sought and formulated the test for this inquiry to be that 'absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted.'"[341] Other circuits have adopted similar formulations.[342]

In *George Washington University v. District of Columbia*, the District of Columbia Circuit analyzed the standards for entitlement, and termed entitlement analysis "a 'new property' inquiry."[343] The court concluded that the University had a protectable property interest in use of land under the "new property" standard.[344]

2. What governmental action should constitute a denial of due process?

While it would seem that arbitrary governmental conduct would be inconsistent with the rule of law and hence would not accord due process of law, the Supreme Court has held that arbitrary conduct, by itself, is insufficient to establish a constitutional violation. In *County of Sacramento v. Lewis*, the Court stated that "the core of the concept" of due process is "protection against arbitrary action" and that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"[345] Quoting its earlier decision in *Collins v. Harker Heights*, *Lewis* added "we said again that the substantive component of the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'"[346]

It is understandable that the Supreme Court would be reluctant to impose liability for split-second close calls in life or death matters

340. 870 F.2d 911, 917 (2d Cir. 1989).

341. *Id.* (quoting Yale Auto Parts, Inc. v. Johnson, 758 F.2d 54, 59 (2d Cir. 1985)).

342. Bituminous Materials, Inc. v. Rice County 126 F.3d 1068, 1070 (8th Cir. 1997); Gardner v. City of Baltimore Mayor & City Council, 969 F.2d 63, 68 (4th Cir. 1992); Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991).

343. 318 F.3d 203, 206–07 (D.C. Cir. 2003) (citing Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964)).

344. *Id.* at 207.

345. 523 U.S. 833, 845–46 (1998) (quoting Collins v. Harker Heights, 503 U.S. 115, 129 (1992)); *see also supra* text accompanying note 295.

346. 523 U.S. at 847 (quoting *Collins*, 503 U.S. at 128).

on police officers and their departments. However, it is not apparent that the same standard should apply to situations where government officials have substantial periods of time to consider their actions and the court generally has power to put the plaintiff in the same position he was in before the complained of government action.

Many circuits have adopted the "shocks the conscience" standard in land use cases.[347] In *United Artists Theatre Circuit, Inc. v. Township of Warrington*, then-Judge Samuel Alito held that the allegation that local officials denied a permit to a theater that refused to pay a very high impact fee, and granted the permit to a theater that would pay the fee, stated a cause of action under the "shocks the conscience" standard.[348] Recently, in *County Concrete Corp. v. Town of Roxbury*, the Third Circuit held that while *United Artists* applied the "shocks the conscience" standard in a case involving executive action, the appropriate standard for legislative action was different.[349] The court quoted then-Judge Alito on this point as well:

> "[T]ypically, a legislative act will withstand substantive due process challenge if the government 'identifies the legitimate state interest that the legislature could rationally conclude was served by the statute.'" . . . On the other hand, non-legislative state action violates substantive due process if 'arbitrary, irrational, or tainted by improper motive,' or if 'so egregious that it "shocks the conscience."'[350]

While "shocks the conscience" appears a near insurmountable bar, the Third Circuit's treatment of the test in practice suggests a more meaningful level of scrutiny. Other cases, especially older ones, do not necessarily include the "shocks the conscious" or "egregious" label.[351]

347. *See, e.g.*, Torromeo v. Town of Fremont, 438 F.3d 113, 118 (1st Cir. 2006), *cert. denied*, 127 S. Ct. 257 (2006) ("We recently explained the limits on substantive due process claims arising from land-use disputes: . . . '[S]ubstantive due process prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience . . . .'" (quoting SFW Arecibo Ltd. v. Rodríguez, 415 F.3d 135, 141 (1st Cir. 2005))).

348. 316 F.3d 392, 397 (3d Cir. 2003).

349. 442 F.3d 159, 169 (3d Cir. 2006).

350. *Id.* (quoting Nicholas v. Pa. State Univ., 227 F.3d 133, 139 (3d Cir. 2000)).

351. *See, e.g.*, Estate of Himelstein v. City of Fort Wayne, 898 F.2d 573, 577 (7th Cir. 1990) (indicating that a substantive due process claim requires deprivation of property to be done "[in an] arbitrary and unreasonable [manner] bearing no substantial relationship to the public health, safety or welfare." (quoting Burrell v. City of Kankakee, 815 F.2d 1127, 1129

Unlike the life or death consequences of the police chase in *County of Sacramento v. Lewis*,[352] property rights cases typically involve determinations that are reviewable by supervisors and local officials at their leisure, and with the assistance of the municipal attorney. As such, the final rendition of decisions based on arbitrary or capricious behavior may be seen as premeditated ratification of such misconduct.

Meaningful substantive due process review would not necessarily require that burdens be placed upon the regulator in the nature of heightened or strict scrutiny. All that meaningful substantive due process review would require is basic ends-means analysis and some showing of proportionality. The bar would be low, but unlike the situation with deferential rational basis review, the locality would have to meet it.

In *Lingle v. Chevron U.S.A.*,[353] the Court did not repudiate its pronouncement, first made in *Agins v. City of Tiburon*,[354] that a regulation does not pass muster if it "does not substantially advance legitimate state interests."[355] To the contrary, it ratified that formulation—not as a takings test—but rather as a test to determine if landowners have been accorded due process.[356] The simple comparison of the asserted interests and how they would be advanced with the facts employed by the Supreme Court in cases such as *Cleburne*[357] and *Zobel*,[358] would exemplify the "meaningful" requirement.

VI. CONCLUSION

The Supreme Court has a responsibility to clearly state effective due process and takings tests for application by federal and state courts. In *Cohens v. Virginia*, Chief Justice Marshall declared: "It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that [it] must take jurisdiction if it should. . . .

(7th Cir. 1987))).

352. 523 U.S. 833 (1998).

353. 544 U.S. 528 (2005).

354. 447 U.S. 255 (1980), *abrogated by Lingle*, 544 U.S. 528 (1992).

355. *Id.* at 260–61.

356. *See supra* Part V.A.2.

357. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

358. Zobel v. Williams, 457 U.S. 55 (1982).

We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."[359]

The Supreme Court recently quoted this "famous[] caution" in the first sentence of a case that pruned back the so-called "probate" exception to federal jurisdiction.[360] It is instructive to compare such treatment in a highly technical and compact subject matter area with the Court's unwillingness to decide property rights cases.

It would be ironic if the current Supreme Court, clinging as it does to the "*Armstrong* principle" of fairness,[361] would shirk in its duty to clearly state effective due process and takings tests for application by federal and state courts.

359. 19 U.S. 264, 404 (1821).

360. Marshall v. Marshall, 126 S. Ct. 1735, 1741 (2006).

361. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 321 (2002).