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## The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis

Lynda J. Oswald

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# The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis

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Lynda J. Oswald

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*In this Article Professor Oswald contends that judicial and scholarly analysis in recent years has focused on the per se and ad hoc tests for regulatory takings. Little attention has been given to two tools that the Supreme Court historically used in distinguishing a noncompensable regulation from a compensable taking: the harm/benefit test and the average reciprocity of advantage rule. In simple terms, the harm/benefit test states that a regulation intended to prevent a public harm is a valid exercise of the police power, while a regulation intended to confer a public benefit is potentially a regulatory taking. The average reciprocity of advantage rule maintains that there is a subset of benefit-conferring regulations that do not rise to the level of a compensatory taking: those that provide reciprocal benefits to the regulated parties.*

*In this Article, Professor Oswald explores the historical evolution and development of these two rules, and their roles as building blocks of a comprehensive takings theory. Professor Oswald concludes that while the two rules, as originally articulated, provided valuable paradigms for distinguishing between valid and invalid exercises of the police power, the rules have since been corrupted to the point where they have become unusable. Revival of the historical articulations of these two rules would enable courts to draw a clearer distinction between regulatory takings and valid police power actions, and would thus provide a critical first step toward resolving the current takings “dilemma.”*



# The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis

*Lynda J. Oswald\**

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\* Associate Professor of Business Law, University of Michigan. Copyright 1997 Lynda J. Oswald. All rights reserved. I gratefully acknowledge the research support of the University of Michigan Business School and the able research assistance of Curtis Weidler, Christopher Winter, and Benjamin Schwartz.

## I. INTRODUCTION

A "regulatory taking" occurs when the government does not formally exercise its power of eminent domain, but enacts a law or undertakes an action that results in a de facto "taking" of property for which compensation is constitutionally mandated.<sup>1</sup> The United States Supreme Court has struggled for decades to determine when a land use regulation is a valid exercise of the police power (and thus not subject to the compensation requirement of the Fifth Amendment to the United States Constitution) and when such a regulation goes "too far" and becomes a regulatory taking.<sup>2</sup>

The Supreme Court has developed a number of tools to assist courts and legislatures in determining when a regulation crosses the critical line to become a compensable taking.<sup>3</sup> The Court has carved out two categories of per se takings: those involving permanent physical occupation by the government<sup>4</sup> and those involving deprivation of "all economically productive or beneficial uses of land," provided the regulated use is not a nuisance-like activity prohibited or constrained at common law.<sup>5</sup> Per se takings cases are relatively rare, however, and the Court has relied primarily upon ad hoc determina-

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1. The Fifth Amendment to the U.S. Constitution provides "nor shall private property be taken for public use without just compensation." U.S. Const. Amend. V. The United States Supreme Court has determined that this protection is made applicable to the states through the Due Process Clause of the Fourteenth Amendment. See *Chicago, Burlington and Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 235-41 (1897).

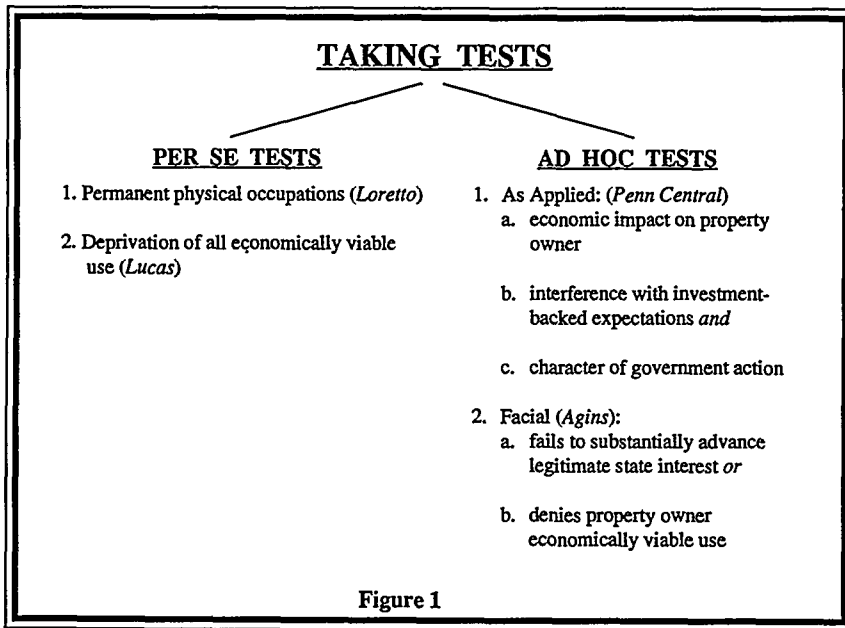
2. The Supreme Court held in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), that "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

3. The Supreme Court has defined regulatory takings law in terms of a continuum—at one end are valid exercises of the eminent domain power, and at the other are valid exercises of the police power. Regulatory takings occur at some undefined spot in between, where a regulation crosses an invisible line and becomes, in effect, an exercise of eminent domain rather than a police power act. See *id.* at 413 ("When [regulation] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."). I have criticized the continuum notion, arguing that it "obscures a very potent fact: An invalid exercise of the police power is not necessarily an exercise of the eminent domain power requiring compensation; rather, it may be an *invalid regulation*." The continuum notion results in muddled analysis and, ultimately, incorrect outcomes. Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 Wash. L. Rev. 91, 139 (1995). See notes 23-24 and accompanying text.

4. See, for example, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982) (holding that a permanent physical occupation of property is a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner"); *United States v. Causby*, 328 U.S. 256, 265 (1946) (holding that a physical invasion of airspace is a taking even though "the owner does not in any physical manner occupy that stratum of airspace or make use of it in the conventional sense").

5. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-30 (1992).

tions,<sup>6</sup> guided by notions of “justice and fairness.”<sup>7</sup> To aid in this complicated task of ad hoc decision making, the Court has created two “tests” or sets of factors to be considered. When considering “as applied” challenges to regulations, courts are to be guided by the three-factor test articulated in *Penn Central Transportation Co. v. New York City*,<sup>8</sup> which examines “[t]he economic impact of the regulation on the claimant . . . , the extent to which the regulation has interfered with distinct investment-backed expectations, [and] the character of the governmental action.”<sup>9</sup> Facial challenges, on the other hand, are to be decided under the two-factor analysis laid out in *Agins v. Tiburon*,<sup>10</sup> which maintains that a regulation results in a taking if the regulation fails to advance substantially a legitimate state interest or if it denies a property owner economically viable use of the property.<sup>11</sup>



6. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (stating that determination of “whether a taking has occurred is essentially an ‘ad hoc, factual’ inquiry”) (citation omitted); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (noting that the Supreme Court has been unable to formulate a definitive test for when a regulatory taking has occurred).

7. *Penn Central*, 438 U.S. at 124.

8. 438 U.S. 104 (1978).

9. *Id.* at 124 (citation omitted).

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

11. *Id.* at 260. Although the Court has indicated that this facial/as-applied distinction in tests exists, it has failed to honor the distinction in several cases. See generally Oswald, 70 Wash. L. Rev. at 98 (cited in note 3) (citing cases).

Historically, the Supreme Court has used two additional tools in distinguishing a noncompensable regulation from a compensable taking: the harm/benefit test and the average reciprocity of advantage rule. Simply put, the harm/benefit test states that a regulation intended to prevent a public harm is a valid exercise of the police power (for which no compensation is required), while a regulation intended to confer a public benefit is potentially a regulatory taking (for which compensation is constitutionally mandated). The average reciprocity of advantage rule maintains that there is a subset of benefit-conferring regulations that do *not* rise to the level of a compensable taking: those that provide reciprocal benefits to the regulated parties. These two once-powerful rules have become less effective in recent years. Courts and commentators have decried the harm/benefit test as being little more than a linguistic sham, while the Supreme Court has read the average reciprocity of advantage rule so broadly that almost any regulation could be validated under its tenets.

In a recent article<sup>12</sup> in which I discussed (and dismissed) the role of the economic factors laid out in *Penn Central* and *Agins*, I suggested that both the harm/benefit test and the average reciprocity of advantage rule have an important, if limited, role to play in the proper resolution of regulatory takings claims. In this Article, I explore the evolution and development of these two rules as well as their roles as building blocks of a comprehensive takings theory. I conclude that while the two rules as originally articulated were valuable tools for distinguishing between valid and invalid exercises of the police power, the rules have since been corrupted to the point that they are no longer helpful. A return to the original intent of these two rules would enable courts to draw a clearer distinction between regulatory takings and valid police power actions, and would thus provide a critical first step toward resolving the current takings dilemma.

Part II of this Article discusses the distinction between the police power and the eminent domain power and reiterates the two-step takings analysis set forth in my earlier work. I maintain that takings analysis should focus first upon the nature of the government power being exercised—eminent domain or police power—and second, once that power has been identified, upon the validity of the government's exercise of that power.

The remainder of this Article fleshes out the first step in this analysis—identification of the government power. Parts III and IV address the role of the harm/benefit and average reciprocity of advan-

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12. See generally Oswald, 70 Wash. L. Rev. at 91 (cited in note 3).

tage rules in making this critical distinction. Part III examines the doctrinal development of the harm/benefit test and evaluates the efficacy of the test in light of the criticisms typically raised against it. Part IV examines the historical development and modern application of the average reciprocity of advantage rule, and evaluates the Supreme Court's application of this principle. Part V concludes with a discussion of the relationship between the police power and the harm/benefit and average reciprocity of advantage rules, urging a revival of police power analysis that fully incorporates both of these principles.

## II. DISTINGUISHING BETWEEN THE EMINENT DOMAIN AND POLICE POWERS: THE BIFURCATED TAKINGS ANALYSIS

All takings cases ultimately require a court to distinguish between an exercise of the eminent domain power, which requires payment of just compensation, and an exercise of the police power, which does not. Although the Fifth Amendment provides a succinct definition of the eminent domain power—a taking of private property for public use<sup>13</sup>—no such concise definition of the police power exists.<sup>14</sup> The police power is considered an inherent attribute of sovereignty, a necessary tool by which the state can promote the public welfare.<sup>15</sup>

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13. See note 1 and accompanying text (quoting Fifth Amendment).

14. See *Lochner v. New York*, 198 U.S. 45, 53 (1905) (noting that "police power" lacks a specific definition). As the Supreme Court cautioned, the police power "is not confined . . . to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people." *Bacon v. Walker*, 204 U.S. 311, 318 (1907).

15. Professor Freund provided the classic definition of the distinction between the eminent domain and police powers:

Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interests; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful or as Justice Bradley put it, because "the property itself is the cause of the public detriment."

Ernst Freund, *The Police Power: Public Policy and Constitutional Rights* § 511 at 546-47 (1904) (footnote omitted). See also Allison Dunham, *A Legal and Economic Basis for City Planning (Making Room for Robert Moses, William Zeckendorf, and a City Planner in the Same Community)*, 58 Colum. L. Rev. 650, 665 (1958):

From time immemorial the common law and statute law have evidenced a community judgment that it is proper to make an activity assume the burdens or costs which that activity might cause . . . . But to compel a particular owner to undertake an activity to benefit the public, even in the form of a restriction, is to compel one person to assume the cost of a benefit conferred on others without hope for recoupment of the cost . . . .



The United States Supreme Court provided its "classic" statement<sup>16</sup> of the police power in 1894:

To justify the state in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.<sup>17</sup>

The Court has noted, however, that the police power "is, and must be from its very nature, incapable of any very exact definition or limitation."<sup>18</sup> The Court has interpreted the power broadly,<sup>19</sup> and has steadfastly refrained from setting forth any specific test for the validity of a police power act.<sup>20</sup>

Nonetheless, courts have long recognized the important distinction between the police power and the eminent domain power.<sup>21</sup> In an 1851 case, for example, the Massachusetts Supreme Court stated:

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16. *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).

17. *Lawton v. Steele*, 152 U.S. 133, 137 (1894). As Professor Freund stated:

[The state] exercises its compulsory power for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power. The maxim of this power is that every individual must submit to such restraints in the exercise of his liberty or of his rights of property as may be required to remove or reduce the danger of the abuse of these rights on the part of those who are [unskillful], careless or unscrupulous.

Freund, *The Police Power* § 8 at 6 (cited in note 15) (emphasis omitted).

18. *The Slaughterhouse Cases*, 83 U.S. (16 Wallace) 36, 62 (1872).

19. See, for example, *Goldblatt*, 369 U.S. at 594 ("[P]olice power" connotes the time-tested conceptual limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria.").

20. See, for example, *Cusack Co. v. City of Chicago*, 242 U.S. 526, 531 (1917) (stating that the Court would overturn a state police power act "only when it is plain and palpable" that the government action has no "real or substantial relation to the public health, safety, morals, or to the general welfare"); *Chicago, Burlington and Quincy Railway Co. v. Illinois ex rel. Drainage Comm'rs*, 200 U.S. 561, 592 (1906) ("[T]he police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as . . . the public health, the public morals or the public safety."); *Mayor, Alderman and Commonalty of the City of New York v. Miln*, 36 (11 Peters) U.S. 102, 139 (1837) (noting that it is "emphatically" difficult to define "with the proper precision and accuracy . . . a subject so diversified and multifarious as the [police power]").

21. See, for example, *California Reduction Co. v. Sanitation Reduction Workers*, 199 U.S. 306, 324-25 (1905) ("[T]he clause prohibiting the taking of private property without compensation is not intended as a limitation of those police powers which are necessary to the tranquillity of any well-ordered community, nor of that general power over private property which is necessary for the orderly exercise of all governments. It has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property, and though no compensation is made.") (citations omitted).

We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and qualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right of enjoyment of their property, nor injurious to the rights of the community. . . . This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. . . . Nor does the prohibition of such noxious use of property [i.e., injurious to the public] although it may diminish the profits of the owner, make it an appropriation to public use, so as to entitle the owner to compensation.<sup>22</sup>

Takings law is currently viewed as existing along a continuum.<sup>23</sup> One end of the continuum is anchored by the traditional form of eminent domain: a physical confiscation of property, no matter how trivial. The other end is anchored by a valid police power action. Traditional takings analysis maintains that a police power regulation that crosses some invisible line such that it has substantially the same effect as a physical confiscation ceases to be a valid police power action, and becomes instead a "regulatory" taking. That notion of a continuum is incomplete and inaccurate, for it ignores the possibility that an invalid police power action is not necessarily an exercise of the eminent domain power; rather, it may simply be an invalid regulation.<sup>24</sup>

Courts should abandon the flawed continuum model in favor of a two-step process. First, the nature of the government power being exercised—police power or eminent domain—must be identified. Second, the validity of the government's exercise of that power must be evaluated, for not all exercises of the police power or eminent domain are legitimate.

This Article focuses on the first step of this bifurcated takings analysis and the tools that the Supreme Court has developed to address the distinction between police power and eminent domain actions.<sup>25</sup> Early on, the Court articulated the harm/benefit test,<sup>26</sup> which

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22. *Commonwealth v. Alger*, 61 Mass. (7 Cushing) 53, 84-86 (1851). See also *Commonwealth v. Tewksbury*, 22 Mass. (11 Met.) 55, 57 (1846); *Brick Presbyterian Church v. City of New York*, 5 Cow. 538 (N.Y. 1826); *Lakeview v. Rose Hill Cemetery Co.*, 70 Ill. 191, 197-99 (1873).

23. Oswald, 70 Wash. L. Rev. at 136-38 (cited in note 3).

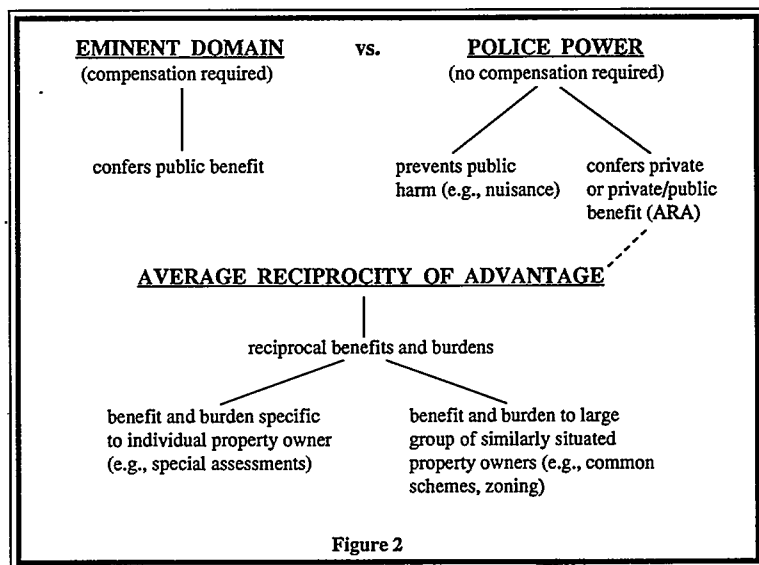
24. *Id.* at 139.

25. Because of space limitations, I save analysis of the second step for a later paper.

26. Professor Kmiec has argued that the original meaning of the Takings Clause supports the harm/benefit distinction. See Douglas W. Kmiec, *The Original Understanding of the Taking*

maintains that government actions that are intended to extract benefits by appropriating private property for public use are exercises of the eminent domain power, while government actions intended to prevent harm to the community's health, safety, welfare, or morals are exercises of the police power.

This traditional sectoring of the eminent domain and police powers in terms of benefit-conferment and harm-prevention works well as a general proposition. However, a more exacting statement of the distinction between the two powers recognizes that while all eminent domain actions confer benefits, some exercises of the police power do so as well, such as zoning ordinances and other similar measures that result in reciprocal benefits to the burdened property owners. The Supreme Court has upheld such actions on the ground that they afford an "average reciprocity of advantage" to property owners affected by the regulation.<sup>27</sup> The key distinction is that eminent domain must, by definition, result in benefit to the *public*, while police power actions validated under the average reciprocity of advantage rule (i.e., those conferring benefits) may result in benefits solely to the regulated property owners or jointly to the property owners and the public—but never to the public alone. Rather, police power actions that benefit solely the public must be validated, if at all, under the harm/benefit test.



*Clause is Neither Weak nor Obtuse*, 88 Colum. L. Rev. 1630, 1635 (1988) (tracing historical roots of the Takings Clause).

27. *Mahon*, 260 U.S. at 415. See Part IV (discussing average reciprocity of advantage theory).

Unfortunately, over the past few decades, legal doctrine has ignored the distinction between the police power and the eminent domain power, causing the two to converge.<sup>28</sup> Moreover, the Supreme Court obliterated any remaining distinction between the two powers when it held that “[t]he ‘public use’ requirement [of the Takings Clause] is thus ‘coterminous’ with the scope of a sovereign’s police powers,”<sup>29</sup> effectively rendering the public use requirement a dead letter. Having merged these two powers and thus having destroyed the most fundamental distinction between regulations that require compensation and those that do not, the Court has been left ever since with the monumental (and so far insurmountable) task of articulating a comprehensive takings theory.<sup>30</sup> The Supreme Court has been reduced to emphasizing the “ad hoc, factual” nature of takings analysis,<sup>31</sup> to asserting that there is “no set formula to determine where regulation ends and taking begins,”<sup>32</sup> and to stating that the determination relies “as much [on] the exercise of judgment as [on] the application of logic.”<sup>33</sup> Revival of the eminent domain/police power distinction in conjunction with careful application of the harm/benefit and average reciprocity of advantage rules is necessary to resolve many of the thorny issues surrounding modern takings analysis, and is an essential first step in the articulation of a clear, comprehensive takings theory.

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28. See John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. Rev. 465, 478-82 (1983) (describing the convergence of police and eminent domain powers); John J. Costonis, *“Fair” Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 Colum. L. Rev. 1021, 1033-37 (1975) (same).

29. *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984); see also *Berman v. Parker*, 348 U.S. 26, 32 (1952) (“Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.”). See generally Lynda J. Oswald, *Goodwill and Going-Concern Value: Emerging Factors in the Just Compensation Equation*, 32 B.C. L. Rev. 283, 295 (1991); Jed Rubenfeld, *Usings*, 102 Yale L. J. 1077, 1078-79 (1993); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 Yale L. J. 599 (1949).

30. See notes 3-11 and accompanying text (discussing Court’s takings theories).

31. See notes 6-7 and accompanying text.

32. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348-49 (1986) (citation omitted).

33. *Id.* at 349 (citation omitted).

## III. THE HARM/BENEFIT TEST

Simply put, the harm/benefit test states that a regulation that prevents a property owner from inflicting harm upon the legal rights of others is a valid exercise of the police power and thus not a taking subject to the compensation requirement of the Fifth Amendment. A regulation intended to confer a benefit upon the public, on the other hand, can give rise to a compensable regulatory taking. The harm/benefit test was originally espoused in an 1887 United States Supreme Court case, *Mugler v. Kansas*.<sup>34</sup> After a sporadic and checkered career, the test was explicitly rejected by the Supreme Court in its 1992 decision in *Lucas v. South Carolina Coastal Council*,<sup>35</sup> and then implicitly revived by its 1994 decision in *Dolan v. Tigard*.<sup>36</sup>

Commentators have long noted that there is a "beguiling simplicity and a perpetual appeal,"<sup>37</sup> an "intuitive fairness"<sup>38</sup> to the harm/benefit test. It seems axiomatic that the state should be able to constrain a property owner whose actions inflict harm upon the legal rights of others without having to compensate the property owner; likewise, a government action that extracts value from a property owner in an effort to transfer such value to the public at large is precisely the type of taking of private property for public use for which the Constitution mandates compensation.<sup>39</sup>

Despite the acknowledged theoretical attractiveness of the harm/benefit test, it has been heavily criticized by the United States Supreme Court<sup>40</sup> and commentators<sup>41</sup> in recent years. Perhaps it is time to ask whether a test that has consistently survived repeated attempts to kill it does not have some underlying legitimacy that contributes to its continued existence.

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34. 123 U.S. 623, 648-81 (1887).

35. 505 U.S. 1003, 1022-26 (1992). *Lucas* is discussed in notes 119-34 and accompanying text.

36. 512 U.S. 374 (1994). *Dolan* is discussed in note 135 and accompanying text (in the context of the harm/benefit test) and in notes 391-94 and accompanying text (in the context of the average reciprocity of advantage rule).

37. Joseph L. Sax, *Takings and the Police Power*, 74 Yale L. J. 36, 48 (1964).

38. Kmiec, 88 Colum. L. Rev. at 1635 (cited in note 26).

39. See generally Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1236-37 (1967).

40. See, for example, *Lucas*, 505 U.S. at 1022-26 (discussed in notes 119-34 and accompanying text).

41. See, for example, Michelman, 80 Harv. L. Rev. at 1199-1201 (cited in note 39); Rubinfeld, 102 Yale L. J. at 1099-1100 (cited in note 29); Sax, 74 Yale L. J. at 48-50 (cited in note 37). Not all modern commentators have rejected the test. See, for example, Kmiec, 88 Colum. L. Rev. at 1633-38 (cited in note 26) (attributing the "continued life" of the distinction between harm and benefit to the test's "intuitive fairness").

### A. *The Harm/Benefit Test in the Supreme Court*

Because the evolution of the harm/benefit test has been comprehensively addressed by several commentators,<sup>42</sup> no attempt is made here to provide a complete accounting of its development. An examination of the jurisprudential context in which the harm/benefit test grew would reveal expanding notions of the scope of the police power and the extent of government regulatory power.<sup>43</sup> All that is relevant for our purposes here, however, are the broad brush strokes with which the Supreme Court has painted the legal landscape of the harm/benefit test.

#### 1. Historical Development of the Test: *Mugler*, *Mahon*, and *Euclid*

Although the harm/benefit test is generally regarded as having its genesis in *Mugler v. Kansas*,<sup>44</sup> regulation of nuisance-like or noxious uses of private property dates back to colonial times.<sup>45</sup> Indeed, heavy overtones of nuisance law permeate the cases discussing and developing the harm/benefit test. *Mugler*, however, represents the Court's first deliberate attempt to articulate the principles underlying regulation of noxious or nuisance-like uses.

In *Mugler*, the defendant property owners had brewed beer at their respective premises for several years.<sup>46</sup> The state constitution was amended to prevent the manufacture and sale of alcohol except

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42. See generally Catherine R. Conners, *Back to the Future: The "Nuisance Exception" to the Just Compensation Clause*, 19 Cap. U. L. Rev. 139 (1990); Glynn S. Lunney, Jr., *Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence*, 6 Fordham Envir. L. J. 433 (1995); Thomas A. Hippler, Comment, *Reexamining 100 Years of Supreme Court Regulatory Takings Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantage," and "Bundle of Rights" from Mugler to Keystone Bituminous Coal*, 14 B.C. Envir. Aff. L. J. 653 (1987).

43. Among those were the notions that certain industries were so important or so large that they were "clothed with the public interest" and thus subject to greater regulatory control. See Lunney, 6 Fordham Envir. L. J. at 455-59 (cited in note 42). Additional legal factors included ratemaking issues regarding monopolies or near-monopolies, such as utilities and railroads. *Id.* at 445-49.

44. 123 U.S. at 623.

45. In a recent and provocative study, Professor Hart demonstrated that colonial land use legislation did not regulate merely harmful uses, but also regulated for purposes unrelated to preventing nuisance. John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 Harv. L. Rev. 1252, 1259-81 (1996). It would appear to me that at least some of the benefit-conferring regulations discussed in his work could be explained in terms of average reciprocity of advantage. See Part IV (discussing the average reciprocity of advantage rule).

46. *Mugler*, 123 U.S. at 656-57.

for medicinal, scientific, and mechanical purposes,<sup>47</sup> and the state legislature passed supporting legislation.<sup>48</sup> The defendants continued their brewing activities in defiance of the statute, arguing that the legislation diminished the value of their breweries without just compensation, thus depriving them of property without due process of law in contravention of the Fourteenth Amendment.<sup>49</sup>

Justice Harlan, writing for the majority, began by acknowledging that the breweries involved were "of little value" for purposes other than the manufacture of beer, and that enforcement of the prohibitory statute would "very materially diminish[]" the value of the properties.<sup>50</sup> The *Mugler* Court then provided a two-pronged analysis of the constitutional question. First, the Court established that police power regulations are "not—and consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate" property owners for the losses inflicted upon them by such regulations.<sup>51</sup>

Second, the Court drew a distinction between exercises of the police power and exercises of the eminent domain power based upon the nature of the government action at stake—i.e., abatement of a nuisance versus physical invasion.<sup>52</sup> The Court explicitly grounded this part of its analysis "upon the fundamental principle that every one shall so use his own as not to wrong and injure another."<sup>53</sup>

The Court relied upon *Fertilizing Co. v. Hyde Park*,<sup>54</sup> an 1878 case in which it had acknowledged that a city ordinance effectively prohibited a fertilizer company from operating within the city, thus destroying its business and severely diminishing its property values. However, because the business had become a nuisance to the community in which it was conducted, producing discomfort and often sick-

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47. *Id.* at 655.

48. *Id.* at 655-56.

49. *Id.* at 654, 657, 664.

50. *Id.* at 657.

51. *Id.* at 669. The Court stated: "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." *Id.* at 668-69.

52. *Id.* at 668-69.

53. *Id.* at 667 (quoting *Fertilizing Co. v. Hyde Park*, 97 U.S. (7 Otto) 659, 667 (1878)). The "fundamental principle" to which the Court referred was the common law's historical refusal to recognize as property rights uses that caused injury to the rights of others. The traditional saying is *sic utere tuo ut alienum non laedes*, or "[u]se your property in such a manner as not to injure that of another." Black's Law Dictionary 1380 (West, 6th ed. 1990). See also *Munn v. Illinois*, 94 U.S. 113, 124 (1877) (asserting that the state may require "each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another").

54. 97 U.S. (7 Otto) 659 (1878).

ness among huge masses of people,<sup>55</sup> the city was entitled to act, under its police power, to abate that nuisance in order to further the public health.<sup>56</sup> Finding that the statute at issue in *Mugler* operated to abate a similar type of nuisance, the *Mugler* Court concluded that the statute was a valid, noncompensable police power regulation.<sup>57</sup>

The clear distinction drawn by Justice Harlan in *Mugler* between the police power and the eminent domain power was blurred in 1922, when Justice Holmes penned his influential opinion in *Pennsylvania Coal Co. v. Mahon*.<sup>58</sup> Justice Holmes abandoned the early Court's conception of the eminent domain and police powers as distinct and separate government acts that necessarily define the limits of compensation. Instead, he introduced the concept of the takings continuum that still persists today.<sup>59</sup> In striking down the Kohler Act, a Pennsylvania statute that prohibited coal companies from mining in such a manner as to cause subsidence of overlying structures, Justice Holmes uttered his now-famous tenet that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."<sup>60</sup> Although Justice Holmes conceded that the question of "too far" was one "of degree" and not susceptible of easy formulation,<sup>61</sup> he emphasized the "danger of forgetting

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55. *Mugler*, 123 U.S. at 667.

56. *Id.*

57. *Id.* at 669. The *Mugler* Court distinguished cases involving physical invasion, finding that such cases necessarily involved exercises of the eminent domain power. The Court discussed *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871), in which a property owner sued for damages for the flooding of his land caused by the state's construction of a dam to improve irrigation. The *Mugler* Court characterized *Pumpelly* as "a case in which there was a 'permanent flooding of private property,' a 'physical invasion of the real estate of the private owner, and a practical ouster of his possession.'" *Mugler*, 123 U.S. at 668 (citation omitted). Because the owner's property was, "in effect," converted to public use as a result of the physical invasion, an exercise of eminent domain had arisen which required compensation. *Id.* *Mugler*, on the other hand, involved the use of the police power to prohibit a use of property that the legislature had determined to be injurious to the public health, morals, or safety. As the *Mugler* Court characterized the distinction, "in the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner." *Id.* at 669. At the time *Mugler* was decided, eminent domain actions were viewed in terms of physical invasions. Since then, the Court has determined that where the economic effect of a regulation upon the property owner has the practical effect of a physical invasion, the Constitution mandates payment of just compensation. See, for example, *Lucas*, 505 U.S. at 1028-29. Thus, the modern impact of *Mugler* is far broader than its relatively narrow language would suggest.

58. *Mahon*, 260 U.S. 393 (1922).

59. See Oswald, 70 Wash. L. Rev. at 136-37 (cited in note 3) (explaining the development of the continuum notion). See also notes 23-24 and accompanying text (criticizing the continuum notion).

60. *Mahon*, 260 U.S. at 415.

61. *Id.* at 416.



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."<sup>62</sup> In Justice Holmes's view, at some point a police power action will cross over some invisible line—measured in terms of economic impact upon the owner—and cease to be a valid police power action, becoming instead a "regulatory taking" for which compensation is constitutionally mandated.<sup>63</sup>

The *Mahon* Court framed the issue before it in terms of the police power; specifically, it asked whether the police power could "be stretched so far" as to "destroy [the coal companies'] previously existing rights of property and contract."<sup>64</sup> The Court went on to conclude that the dispute before it was essentially a private one and thus did not justify the intervention of the police power.<sup>65</sup> The coal company had conveyed a deed to surface rights to the plaintiffs, expressly retaining the right to remove all coal underlying the property and expressly placing the risk of all injury from such activities upon the plaintiffs.<sup>66</sup> The Court characterized the Kohler Act as an invalid legislative attempt to alter the positions that private parties had negotiated through contractual bargaining.<sup>67</sup>

The *Mahon* Court specifically emphasized, though, that its holding did not depend upon notions of nuisance law.<sup>68</sup> Rather, Justice Holmes's opinion revolved around the notion that the degree of economic harm determines the existence of a regulatory taking.<sup>69</sup> By

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62. *Id.*

63. *Id.* at 413 ("When [diminution in value caused by police power regulation] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.").

64. *Id.*

65. *Id.* at 413-14.

66. *Id.* at 412.

67. *Id.* at 416 ("So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they thought.").

68. *Id.* at 413. Although the *Mahon* majority did not analyze the case under a noxious use or nuisance theory, Justice Brandeis, in his dissent, did. *Id.* at 416 (Brandeis, J., dissenting). Justice Brandeis argued that the regulation at issue merely prevented a noxious use and correctly pointed out that property owners have no right to use their property in a manner that creates a public nuisance. *Id.* at 417 (Brandeis, J., dissenting). The fact that specific individuals (for example, owners of overlying houses) might garner "special benefits" from the regulation did not negate the statute's public purpose, nor, in Justice Brandeis's view, was the regulation rendered invalid merely because it left the property owner without a profitable use. *Id.* at 417-18 (Brandeis, J., dissenting).

69. See Sax, 74 Yale L. J. at 41 (cited in note 37) ("While [Justice Holmes] never flatly stated that degree of economic harm was *the* critical factor in his theory, a reading of his opinions leaves little doubt that this was indeed the theory he devised."). Thus, while Justice Holmes recognized that exercises of the police power in some instances will have a negative impact on

introducing economic factors into the takings analysis, Justice Holmes set takings law on a very different course from that envisioned by the *Mugler* Court.<sup>70</sup> By shifting the inquiry from the nature of the governmental action at issue (i.e., police power or eminent domain) to the economic impact of the action upon the property owner, the *Mahon* Court not only obscured the valuable role that the harm/benefit test can play in resolving takings disputes, but also overstated the importance of economic factors to takings analysis, thereby generating much of the confusion that pervades this field today.<sup>71</sup>

Just four years after *Mahon*, the Supreme Court issued its ground-breaking opinion in *Village of Euclid v. Ambler Realty Co.*,<sup>72</sup> in which it upheld the concept of comprehensive zoning ordinances. The *Euclid* Court held that zoning ordinances must be based in the police power,<sup>73</sup> and that such actions must be upheld unless they are found to be “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>74</sup> The Court noted that the validity of an ordinance will vary with “circumstance and conditions”;<sup>75</sup> for example, an ordinance valid in a big city may well be invalid in a rural setting.<sup>76</sup> The Court identified the common law of nuisance as a “helpful” analogy, though not the controlling factor, in determining the scope of the police power.<sup>77</sup> Zoning restrictions on particular uses cannot be analyzed in the abstract, but only in the context of the surrounding “circumstances and the locality,” for as the Court noted, “[a] nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard.”<sup>78</sup>

Unfortunately, the eloquence of the oft-quoted pig simile obscures the fact that the nuisance analogy is incomplete in the zoning

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private property values, he also emphasized that such impacts must necessarily be limited or the Contract and Due Process Clauses are meaningless. See *Mahon*, 260 U.S. at 415.

70. Although Justice Holmes did not explain why he felt *Mugler* was wrongly reasoned or decided, he characterized in private correspondence “old Harlan’s decision in *Mugler v. Kansas*” as “pretty fishy.” Mark D. Howe, 1 *Holmes-Laski Letters: The Correspondence of Justice Holmes and Harold J. Laski 1916-35*, at 346 (Harvard U., 1953).

71. See Oswald, 70 Wash. L. Rev. at 91 (cited in note 3) (discussing dangers of the economic tests).

72. 272 U.S. 365 (1926). *Euclid* is discussed more fully in notes 312-28 and the accompanying text.

73. *Euclid*, 272 U.S. at 387.

74. *Id.* at 395.

75. *Id.* at 387.

76. *Id.* at 386-87.

77. *Id.*

78. *Id.* at 388.

context. *Euclid* implicitly suggests that the validity of a zoning ordinance under the police power is to be gauged solely in terms of the harm/benefit test. Zoning regulation does incorporate notions of nuisance law, in the sense that it provides a mechanism for controlling the externalities created by land uses.<sup>79</sup> Indeed, zoning regulation is more efficient than nuisance law in achieving this purpose because it identifies potential problems in advance and works to prevent them from occurring.<sup>80</sup>

Nonetheless, many zoning ordinances do not truly act to prevent a harm, but rather confer widespread benefit upon the public and the affected property owners by ensuring that development will be compatible and uses harmonious or by providing other reciprocal benefits. Such ordinances, despite their lack of focus on harm-prevention, can nonetheless be valid police power actions under the average reciprocity of advantage rule—a topic taken up in Part IV below.

## 2. Modern Application of the Harm/Benefit Test: The Nuisance Exception

After these few early cases, the regulatory takings issue lay dormant for several decades. The harm/benefit distinction did not go completely unaddressed in this timespan, however. In fact, the Supreme Court indirectly addressed the relationship between the harm/benefit test and the average reciprocity of advantage rule on several occasions, in the context of articulating what has been termed the “more modern version” of the harm/benefit test—the “creation-of-the-harm” test.<sup>81</sup> This standard arose in grade-separation cases, that

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79. See, for example, Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 *Tenn. L. Rev.* 577, 586 (1990) (describing how externalities from the construction of skyscrapers in New York City precipitated the city's first zoning ordinances); Richard A. Epstein, *An Outline of Takings*, 41 *U. Miami L. Rev.* 3, 11 (1986) (“[Z]oning, for example, can be a method to prevent pollution by certain types of firms.”).

80. See Alfred Bettman, *Constitutionality of Zoning*, 37 *Harv. L. Rev.* 835, 837 (1924) (stating that zoning operates to prevent nuisances); Thomas A. Byrne, *The Constitutionality of a General Zoning Ordinance*, 11 *Marq. L. Rev.* 189, 194 (1927) (noting that zoning “partakes of the character of the injunctive jurisdiction of equity to prevent nuisances, save that the regulations are statutory in nature and suit need not ordinarily be resorted to in order to work out the rights of the parties”).

81. Sax, 74 *Yale L. J.* at 48 (cited in note 37) (“[T]he ‘creation of the harm’ test [is] based on the argument that while in general established economic interests cannot be diminished merely because of a resulting public benefit, that rule does not apply where the individual whose interest is to be diminished himself created the need for the public regulation by his conduct.”). Sax rejected the creation-of-the-harm test on the grounds that the test simply addressed

is, cases in which the legislature determined that a grade separation was required where a railroad track crossed a highway at street level and sought to make the railroad pay all or part of the cost of the improvement. For example, *Nashville, C. & St. L. Ry. Co. v. Walters*,<sup>82</sup> decided by the Court in 1935, dealt with the validity of a state statute that required a railroad to separate the grade of a railroad track and a public highway if such separation was deemed necessary by the State Highway Commission to protect the safety of either highway or railroad users. Half of the costs of all such projects were to be borne by the implicated railroad, and half by the state highway system.<sup>83</sup>

The railroad challenged the ability of the state, under its police power, to arbitrarily assign a set percentage of the costs of such improvements to the railroad without individual consideration of the facts presented in each instance. Justice Brandeis, writing for the majority, agreed with the railroad. He noted that while the police power confers broad power to regulate upon a state, "when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured."<sup>84</sup> In short, police power regulations must prevent a harm (i.e., under the harm/benefit test) or confer a private benefit (i.e., under the average reciprocity of advantage test).

The Court revisited this analysis in 1953 in *Atchison, T. & S.F. R. Co. v. Public Utilities Comm'n.*<sup>85</sup> The railroads there attempted to argue that the costs of improvement could be assessed only on the basis of the benefits conveyed by the project to the railroads.<sup>86</sup> The Court rejected this contention, noting that it embraced only half of the two-part test set forth by Justice Brandeis in *Nashville* and improperly ignored the "evils-to-be-eradicated" portion of the test. The *Atchison* Court noted:

The railroad tracks are in the streets not as a matter of right but by permission from the State or its subdivisions. The presence of these tracks in the streets creates the burden of constructing grade separations in the interest of public safety and convenience. Having brought about the problem, the railroads are

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situations involving the "unfortunate juxtaposition" of lawful but incompatible uses. *Id.* at 49. See generally Part III.B.1 (discussing conflicts between "valid but competing uses").

82. 294 U.S. 405 (1935).

83. *Id.* at 412.

84. *Id.* at 429.

85. 346 U.S. 346 (1953).

86. *Id.* at 352.

in no position to complain because their share in the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements.<sup>87</sup>

Although commentators concede the appeal of the creation-of-the-harm test,<sup>88</sup> they also note that it does not cover every situation in which the state exercises the police power, nor will it resolve every regulatory takings challenge.<sup>89</sup> Recognizing the same limitations, courts continued to formulate different variations of the harm/benefit test in their quest for a definitive test to apply. The next major innovation came in 1978, when Justice Rehnquist articulated the "nuisance exception" in his dissent in *Penn Central Transportation Co. v. New York City*.<sup>90</sup> The exception was adopted by a majority of the Court in 1987 in *Keystone Bituminous Coal Association v. DeBenedictis*<sup>91</sup> and was significantly narrowed by Justice Scalia's majority opinion in *Lucas v. South Carolina Coastal Council* in 1992.<sup>92</sup> Although Justice Rehnquist by no means invented the legal theory underlying the nuisance exception,<sup>93</sup> he is largely responsible for the vocabulary that the modern Court uses to discuss takings issues.

*Penn Central* involved a challenge to a New York City ordinance banning alteration of certain designated historic landmarks.<sup>94</sup> The petitioner alleged a regulatory taking when it was prohibited from leasing to a third party the right to construct an office tower over its own property, the historic Penn Central Terminal. A majority of the Court rejected the claim, finding that the property retained sufficient economic value and reasonable return to counter any takings allegation.<sup>95</sup>

Justice Rehnquist, writing for the dissent, disagreed, finding that the diminution in value of the property was sufficiently great to constitute a taking and that the challenged regulation could not be supported by what he called the "nuisance exception."<sup>96</sup> He noted that

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87. *Id.* at 353.

88. See Allison Dunham, Griggs v. Allegheny County in *Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 S. Ct. Rev. 63, 75 (noting that the test "has some element of objectivity"); Sax, 74 Yale L. J. at 48 (cited in note 37) (noting that the test "has considerable popularity").

89. See, for example, Dunham, 1962 S. Ct. Rev. at 75-76 (cited in note 88); Sax, 74 Yale L. J. at 49-50 (cited in note 37).

90. *Penn Central*, 438 U.S. at 104, 145 (Rehnquist, J., dissenting).

91. 480 U.S. 470 (1987).

92. See notes 119-34 and accompanying text for a fuller discussion of *Lucas*.

93. See Conners, 19 Cap. U. L. Rev. at 148-82 (cited in note 42) (discussing the antecedents of the "nuisance exception").

94. 438 U.S. at 108.

95. *Id.* at 136-38.

96. *Id.* at 141-45 (Rehnquist, J., dissenting).

while the government owes no compensation for forbidding an owner to make noxious use of his property,<sup>97</sup> “[t]he nuisance exception to the taking guarantee is not coterminous with the police power itself.”<sup>98</sup> Rather, the relevant question is “whether the forbidden use is dangerous to the safety, health, or welfare of others.”<sup>99</sup> Here, Justice Rehnquist contended, the city was not attempting to regulate a nuisance, but rather was requiring the Terminal owner to confer a benefit upon the city by forcing the owner to maintain its structure for aesthetic reasons. The difference, as he viewed it, was that the city was not “*prohibit[ing]* Penn Central from using its property in a narrow set of noxious ways,” but rather had “placed an *affirmative* duty on Penn Central to maintain” its structure for the benefit of the public.<sup>100</sup>

The nuisance exception thus was coined in a dissenting opinion in a case in which the author found it had not even been satisfied. Despite this precarious foundation, the exception was incorporated into regulatory takings law by Justice Stevens’s majority opinion in *Keystone* in 1987. This case is most notable for its striking factual similarity to *Mahon* and for the very different outcomes that the Court reached in the two cases. At issue in *Keystone* was a state statute, the Subsidence Act, which, like the Kohler Act in *Mahon*, was intended to prevent subsidence of overlying structures caused by coal mining activities. Essentially, the Subsidence Act required fifty percent of the coal under designated structures to remain in place to provide support.<sup>101</sup> As in *Mahon*, much of the coal at issue had long been severed from surface rights, and at the time of severing, the risk of subsidence or other injury had been passed to the surface owner.<sup>102</sup>

The *Keystone* Court distinguished the case before it from *Mahon* on two grounds: (1) the existence of a legitimate public purpose (as opposed to the private interest at stake in *Mahon*), and (2) the lack of “undue interference” with the petitioner’s “investment-backed expectations” (as opposed to the complete destruction of the peti-

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97. *Id.* at 144-45 (Rehnquist, J., dissenting) (citing *Mugler, Goldblatt, and Hadacheck v. Sebastian*, 239 U.S. 394 (1915)). The majority dismissed the dissent’s characterizations of these cases, finding instead that they were explained by a notion of “social” reciprocity of advantage, not noxious use. *Id.* at 133-34 n.30. For further discussion, see also notes 340-41 and accompanying text.

98. *Penn Central*, 438 U.S. at 45 (Rehnquist, J., dissenting).

99. *Id.*

100. *Id.* at 146 (Rehnquist, J., dissenting).

101. *Keystone*, 480 U.S. at 476-77.

102. *Id.* at 478.

tioner's mining interests in *Mahon*).<sup>103</sup> Although the Court's decision ultimately rested upon the latter ground, only the former is relevant to our discussion here.<sup>104</sup> The Court found that, unlike the Kohler Act, which the *Mahon* Court had found was simply an invalid attempt to elevate one private interest over another (i.e., the interest of a private home owner over that of the coal company),<sup>105</sup> the Subsidence Act was intended to protect the general *public* interest in surface lands from the adverse effects of mining operations and to protect the *public* safety.<sup>106</sup> Even though the surface owner in *Keystone*, as in *Mahon*, had contracted for the risk of subsidence, the Court stated that the fact "[t]hat private individuals erred in taking a risk cannot estop the Commonwealth from exercising its police power to abate activity akin to a public nuisance."<sup>107</sup> The Court went on to state that "the public interest in preventing activities similar to public nuisances is a substantial one," and that "[t]he Subsidence Act, unlike the Kohler Act, plainly seeks to further such an interest."<sup>108</sup> The Court provided little other discussion of the extent of the nuisance exception, except to agree with Justice Rehnquist's statement in *Penn Central* that the exception was not "coterminous with the police power itself."<sup>109</sup>

Chief Justice Rehnquist, writing a dissent in which three other Justices joined,<sup>110</sup> seized upon the majority's discussion of the nuisance exception, which he himself had crafted in *Penn Central*, as a launching point for his own interpretation of the limits of the police power. He noted that the exception must be interpreted narrowly lest it, and the police power, swallow up all government regulation, "for nearly every action the government takes is intended to secure for the

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103. *Id.* at 485.

104. For a discussion of the "investment-backed expectations" test in takings law, see generally Oswald, 70 Wash. L. Rev. at 99-117 (cited in note 3).

105. *Mahon*, 260 U.S. at 413-14.

106. *Keystone*, 480 U.S. at 485-86. The stated purposes of the Subsidence Act were "conservation of surface land, . . . protection of the safety of the public, [enhancement of] the value of such lands . . . preservation of surface water drainage and public water supplies, and generally [improvement of] the use and enjoyment of such lands." *Id.* at 485-86 (citing Pa. Stat. Ann., Tit. 52, § 1406.2 (Purdon Supp. 1986)). The Court noted that while the Kohler Act did not apply to land where the surface and subsurface rights were held by the same owner, the Subsidence Act had no such exception, making its public purpose evident. *Id.* at 486. In addition, while the purposes of the Kohler Act could have been achieved through a notice requirement, the broader objectives of the Subsidence Act were not so easily satisfied. *Id.*

107. *Id.* at 488.

108. *Id.* at 492.

109. *Id.* at 491 n.20 (citing *Penn Central*, 438 U.S. at 145 (Rehnquist, J., dissenting)).

110. Those who joined included Justice Scalia, who would write the majority opinion in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), five years later. See notes 119-34 and accompanying text (discussing *Lucas*).

public an extra measure of health, safety, and welfare.”<sup>111</sup> Justice Rehnquist therefore argued that past cases employing the nuisance exception embraced two “narrowing principles.”<sup>112</sup> First, prior regulations falling under the nuisance exception involved “discrete and narrow purposes,”<sup>113</sup> not the “economic concerns” raised by the Subsidence Act.<sup>114</sup> Second, and in Chief Justice Rehnquist’s view, “more significantly,” a regulation validated under the nuisance exception had never been permitted to extinguish a property interest completely or prohibit all use.<sup>115</sup> Rather, the nuisance exception applies only “where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others.”<sup>116</sup> Chief Justice Rehnquist found that not only did the statute at issue extend beyond this limited definition of the exception,<sup>117</sup> but “more significantly,” the statute completely destroyed all beneficial use of the petitioners’ property.<sup>118</sup>

The seeds of Justice Scalia’s majority opinion in 1992 in *Lucas v. South Carolina Coastal Council* are evident in Chief Justice Rehnquist’s dissent in *Keystone*. *Lucas* involved a challenge to a state coastal conservation zone statute that had the effect of preventing the petitioning property owner from constructing any permanent habitable structures on his beachfront lots. The Court held that a taking occurs whenever the owner of real property is “called upon to sacrifice *all* economically beneficial uses in the name of the common good”<sup>119</sup> provided that the regulated activity is not a nuisance-like activity prohibited or constrained at common law.<sup>120</sup>

*Lucas*’s per se test,<sup>121</sup> based on destruction of all economically viable use but modified by a limited nuisance exception, was not with-

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111. *Penn Central*, 480 U.S. at 513 (Rehnquist, C.J., dissenting).

112. *Id.*

113. *Id.* (citing *Goldblatt, Hadacheck, Mugler, and Miller v. Schoene*, 276 U.S. 272 (1928)).

114. *Id.*

115. *Id.*

116. *Id.* at 511 (Rehnquist, C.J., dissenting).

117. *Id.* at 513 (Rehnquist, C.J., dissenting) (“The central purposes of the Act, though including public safety, reflect a concern for preservation of buildings, economic development, and maintenance of property values to sustain the Commonwealth’s tax base. We should hesitate to allow a regulation based on essentially economic concerns to be insulated from the dictates of the Fifth Amendment by labeling it nuisance regulation.”).

118. *Id.* at 513-14 (Rehnquist, C.J., dissenting).

119. *Lucas*, 505 U.S. at 1019.

120. *Id.* at 1029-30.

121. This was the second per se takings test articulated by the Court. See note 5 and accompanying text.



out precedent. Professor Freund presaged the *Lucas* holding by almost a century, stating in his 1904 treatise that "a prohibition of profitable use is to all intents and purposes a taking of property."<sup>122</sup> Like Justice Scalia, Freund qualified this blunt assertion. Specifically, Freund stated:

The absolute destruction or abrogation of property rights—including confiscatory regulation leaving no reasonable profit to the owner—is an extreme exercise of the police power. Where it is proposed to exercise such an authority, the constitutional right of private property must be weighed against the demands of the public welfare, and it is obvious that a public interest which is strong enough to justify regulation may not be strong enough to justify destruction or confiscation without compensation.<sup>123</sup>

Freund went on to discuss instances in which destruction or total confiscation may be permitted, however. He cited, among others, cases in which property was imminently dangerous to the community and so constituted a nuisance per se,<sup>124</sup> and cases involving useful but noxious establishments that were inappropriately located.<sup>125</sup>

While the *Lucas* Court also perceived the need for a nuisance exception to its per se takings test, it contemplated a narrower nuisance test than that espoused by earlier courts and commentators. Justice Scalia talked at length about the nuisance exception in *Lucas*, largely in an attempt to discredit the exception as a limiting principle in takings analysis. First, he distinguished traditional "noxious-use" cases, such as *Mugler*, finding that those cases involved lawful uses which the government had determined were detrimental to public policy goals.<sup>126</sup> Justice Scalia stated:

The 'harmful or noxious uses' principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate—a reality we nowadays acknowledge explicitly with respect to the full scope of the State's police power.<sup>127</sup>

Thus, he concluded, "[h]armful or noxious use' analysis was . . . simply the progenitor of our more contemporary statements

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122. Freund, *The Police Power* § 515 at 549 (cited in note 15).

123. *Id.* § 517 at 550.

124. *Id.* § 520 at 554.

125. *Id.* § 529 at 561.

126. *Lucas*, 505 U.S. at 1022-23 (citing also *Goldblatt, Hadacheck, and Miller*).

127. *Id.* at 1022-23.

that 'land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" . . . .'<sup>128</sup>

Second, Justice Scalia went on to state that the harm/benefit test could play no role in regulatory takings analysis because of the difficulty of determining whether a particular regulation confers a benefit or prevents a harm.<sup>129</sup> He concluded: "A given restraint will be seen as mitigating 'harm' to the adjacent parcels or securing a 'benefit' for them, depending upon the observer's evaluation of the relative importance of the use that the restraint favors."<sup>130</sup>

Finally, Justice Scalia distinguished the cases in which the harm/benefit test had been applied on the grounds that none of them posed the complete elimination of economic value at issue in *Lucas*.<sup>131</sup> According to Justice Scalia, if mere recitation of a harm-prevention purpose were sufficient to support a complete destruction of property values in every instance, compensation would never be required in any instance. Thus, he found that complete deprivation of economic use necessarily results in a compensable taking unless "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."<sup>132</sup> A regulation having such an effect must "do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise."<sup>133</sup> Moreover, Justice Scalia fixed nuisance law at a specific point in time, stating that "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."<sup>134</sup>

*Lucas* was a narrow case, explicitly limited to those rare situations in which the regulation resulted in deprivation of *all* economically viable use. The Supreme Court's most recent takings case,

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128. *Id.* at 1023-24 (citations omitted).

129. *Id.* at 1024 ("[T]he distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder.").

130. *Id.* at 1025 (citing Sax, 74 Yale L. J. at 49 (cited in note 37)).

131. *Id.* at 1026 n.13 (citing *Mugler, Hadacheck, Goldblatt, Reinman v. City of Little Rock*, 237 U.S. 171 (1915), and *Plymouth Coal v. Pennsylvania*, 232 U.S. 531 (1914)).

132. *Id.* at 1027.

133. *Id.* at 1029 (footnote omitted).

134. *Id.* at 1024.

*Dolan v. Tigard*, did not present a total takings issue. There, the Court implicitly reembraced the tenets of the harm/benefit distinction that it had sought to reject in the context of *Lucas*. Chief Justice Rehnquist, writing for the majority, held that a government body may impose conditions upon a land use permit, but that those conditions must bear a "rough proportionality" that is "related both in nature and extent" to the negative impacts of the proposed land use.<sup>135</sup> In effect, restrictions placed upon the property owners' actions are valid provided they serve to remedy or prevent harm caused by those actions.

The inherent inconsistency between the treatment of the harm/benefit test in *Lucas* and in *Dolan* illustrates the Supreme Court's ambivalence toward the test over the past seven decades. The Court's own uncertainties as to the scope of the harm/benefit test have diminished the effectiveness of the test and have obscured the important role it can play in resolving takings disputes.

### B. Evaluating the Harm/Benefit Test

Given the Supreme Court's own inconsistency in dealing with the harm/benefit test, it is not surprising that commentators have found ample fodder for their own denunciations of the test. Their criticisms can be grouped into three general categories: (1) the inability of the test to address conflicts between "valid but competing" uses; (2) the inability of the test to define adequately the distinction between a "harm" and a "benefit" in any given instance; and (3) the test's improper interjection of nuisance law into takings analysis. As this Section illustrates, these arguments do not hold up under close scrutiny. The harm/benefit test will not resolve *all* takings issues; it is unrealistic to suppose that any test might. However, the harm/benefit test does address a substantial subset of takings cases and, properly configured, is a useful and necessary tool for analyzing takings claims.

#### 1. Conflicts Between "Valid but Competing" Uses

A common complaint raised against the harm/benefit test is that in many instances it addresses not a problem of harmful or noxious use, but rather one of "inconsistency between perfectly innocent and independently desirable uses."<sup>136</sup> The classic example presented is the 1928 Supreme Court case of *Miller v. Schoene*,<sup>137</sup> in which the

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

136. Sax, 74 Yale L. J. at 49 (cited in note 37).

137. 276 U.S. 272 (1928).

owner of red cedar trees was ordered by statute to destroy his trees because nearby apple trees were threatened by cedar rust. Professor Sax's argument is typical:

To say that the cedar tree owner caused the harm is no more accurate than to say that the apple growers caused the harm by locating near cedar groves. If we are talking about blameworthiness, some moral wrongdoing or conscious act of dangerous risk-taking which induces us to shift the cost to a [particular] individual, it simply does not exist in these cases.<sup>138</sup>

However, nuisance law is not intended to address blameworthy or morally incorrect behavior. Rather, it is a system for balancing competing and generally incompatible behaviors to determine which should proceed. The level of intent required for imposing liability for nuisance is merely intent to commit the invasion, not intent to harm another or to engage in some other sort of morally blameworthy behavior.<sup>139</sup> Introducing notions of culpability into the equation raises a red herring that detracts attention from the true purposes of the harm/benefit test. *Miller* presented an unusual and rare set of facts and the outcome of that particular case could be brushed off as simply an idiosyncratic oddity.<sup>140</sup> The Court's reasoning is far more difficult to dismiss, however, and far more damaging because of its potential influence on future cases. The *Miller* Court explicitly stated: "We need not weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute."<sup>141</sup> Rather, the Court found that the state necessarily was required to choose between the competing interests of the two groups of property owners and that failure to legislate would itself have been a choice of elevating the interests of cedar tree owners over apple tree owners.<sup>142</sup> Thus, the Court reasoned, "[w]hen forced to such a choice the state does not exceed its

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138. Sax, 74 Yale L. J. at 49-50 (cited in note 37).

139. Although liability for a nuisance is not imposed without fault, the fault required is "intentional merely in the sense that the defendant has created or continued the condition causing the interference with full knowledge that the harm to the plaintiff's interests [is] occurring or [is] substantially certain to follow." W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 87 at 624-25 (West, 5th ed. 1984) (footnote omitted).

140. The situation posed in *Miller*, while rare, was not unique. In colonial New England, legislation required landowners to destroy all barberry bushes (which had been cultivated for food and medicinal purposes) to prevent wheat blight on neighboring properties. See Hart, 109 Harv. L. Rev. at 1273 (cited in note 45).

141. *Miller*, 276 U.S. at 280.

142. *Id.* at 279.

constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public."<sup>143</sup>

What the *Miller* Court missed, of course, is that legislative action was not required to resolve the conflict. In the absence of legislation, the orchard owners would not have been left to suffer their harm without recourse, as the Court seemed to indicate. Rather, the parties would have been left either to negotiate a solution themselves or to seek recourse in the courts in a private action—a nuisance action. And, in such a setting, the court would be empowered to make the fine distinctions and balancing of interests that such a close case demands. By framing the issue as one in which legislative action was inevitable and essential, the Court skewed the analysis and outcome in such a way as to distort the application of the harm/benefit test and to derail the correct resolution of the case.

More specifically, by finding that the legislature had a right to draw a distinction based upon the relative economic values *to the public* of the trees involved, the *Miller* Court converted the police power from a power used *to prevent public harm* to a power used *to promote societal benefit*—in effect, converging the police and eminent domain powers and obliterating any distinction between the two. Years later, Justice Brennan, writing for the majority in *Penn Central*,<sup>144</sup> reinforced the *Miller* Court's redefinition of the police power as a tool intended to confer public benefit, rather than to prevent public harm.<sup>145</sup> In *Penn Central*, the Court rejected the property owners' contention that cases such as *Miller* were based upon prevention of a noxious use, finding that such "cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property."<sup>146</sup> Thus, the "valid but competing uses" notion has

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143. *Id.*

144. 438 U.S. at 125 (noting that "land-use regulations that destroyed or adversely affected recognized real property interests" have been upheld when they promote "the health, safety, morals, or general welfare" of the public).

145. Justice Rehnquist, writing for the dissent, challenged Justice Brennan's characterization of the police power. *Id.* at 145 (Rehnquist, J., dissenting). In particular, Justice Rehnquist explicitly stated that "[e]ach of the cases cited by the Court for the proposition that legislation which severely affects some landowners but not others does not effect a 'taking' involved noxious uses of property." *Id.* at 145 n.8 (Rehnquist, J., dissenting).

146. *Id.* at 134 n.30. The argument feeds directly into Justice Brennan's misguided "social reciprocity" view of the average reciprocity of advantage rule. See notes 340-52 and accompanying text (discussing Justice Brennan's "social reciprocity" view).

severely eroded the underlying constraining principles of the police power.

A second example that commentators raising this criticism often focus upon is that of an industrial user that locates in an unpopulated area, but over time finds itself surrounded by residential users, who complain of the industrial user's emissions of noise or odor or of other activities incompatible with residential uses.<sup>147</sup> The example is typically drawn from *Hadacheck v. Sebastian*,<sup>148</sup> a 1915 case in which the Supreme Court upheld as a valid police power action a city ordinance prohibiting the operation of a brickyard within specified areas of the city limits. Years earlier, the defendant property owner had located his brickyard in an unpopulated area originally outside the city limits. Over time, the city limits expanded and residential housing developed nearby. The city passed the challenged ordinance, which prevented the brickyard owner from operating his business, and which reduced the value of his property from \$800,000 to \$60,000. A similar example is presented by *Goldblatt v. Hempstead*,<sup>149</sup> in which the Court upheld a city ordinance prohibiting excavation beneath the water table within the city limits, effectively eliminating all productive use of the petitioner's existing sand and gravel pit. Although the pit was a valuable land use, it was deemed incompatible with the residential uses which had grown up around it over time. Commentators have decried the results reached in cases such as *Hadacheck* and *Goldblatt*, arguing that any harm resulted solely from the "unfortunate juxtaposition of two lawful activities,"<sup>150</sup> and that the "incompatibility" between uses was just as much the fault of the residential users as the industrial user.<sup>151</sup>

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147. See, for example, Sax, 74 Yale L. J. at 49 (cited in note 37) ("The typical nuisance situation is one in which a perfectly lawful industrial enterprise located on the outskirts of the city suddenly finds itself in the midst of a new and unforeseen residential development.").

148. 239 U.S. 394 (1915). Similar examples are presented by *St. Louis Poster Advertising Co. v. St. Louis*, 249 U.S. 269 (1919) (upholding billboard prohibition); *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919) (upholding regulation of storage of petroleum products in residential areas); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (upholding ban on livery stables in central business district); *Murphy v. California*, 225 U.S. 623 (1912) (upholding ban on billiard halls); *Laurel Hill Cemetery v. City & County of San Francisco*, 216 U.S. 358 (1910) (upholding ban on interments); *Fertilizing Co. v. Hyde Park*, 97 U.S. (7 Otto) 659 (1878) (upholding ban on fertilizer plant within city limits). See Bettman, 37 Harv. L. Rev. at 841 (cited in note 80) (discussing changed-conditions cases).

149. 369 U.S. 590 (1961).

150. Sax, 74 Yale L. J. at 49 (cited in note 37).

151. Michelman, 80 Harv. L. Rev. at 1198 (cited in note 39).

In truth, however, the residential users can be faulted at most for coming to the nuisance—an argument which Professor Freund had little difficulty rejecting in his influential police power treatise<sup>152</sup> and which the courts also have been reluctant to embrace.<sup>153</sup> As Freund noted, while an offensive industrial user is not a nuisance *per se* when located in a particular place,

it may become so when the character of the neighborhood changes, and it is in that case no defence either that it is conducted with great care, or that the complaining public "has come to the nuisance." The theory is that no one can by prior occupancy establish for himself a right to annoy or incommode the public, or, as it has been put, that the "right of habitancy is superior to the exigencies of trade."<sup>154</sup>

The situation brings to mind the hoary question of whether, when a tree falls in an empty forest, it still makes a sound. The complained-of externalities produced by the industrial user—noise, odor, etc.—existed before the residential users were present. The only distinction is that the prior owners of the (presumably vacant) neighboring lands were not present to complain of the brickyard's operations. Denying relief to the current, discomposd owners, then, would necessarily rest upon some notion of prescriptive use gained by the industrial user as a result of the neighboring property owners' failure to assert their rights in a timely fashion. The mere fact that the brickyard was a lawful use at the time of its inception—i.e., that it was located in an area originally zoned for such activities—does not grant it a license to engage in nuisance-like behavior that inflicts harm upon its neighbors.<sup>155</sup>

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152. Freund, *The Police Power* § 529 at 561 (cited in note 15). Although a few courts have fashioned creative remedies for the "coming to the nuisance" scenario, see, for example, *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (1972) (holding that the defendant's feedlot could be enjoined as a nuisance but the complaining developer had to indemnify the defendant), "[t]he prevailing rule is that in the absence of a prescriptive right, the defendant cannot condemn the surrounding premises to endure his operation, and that the purchaser is entitled to a reasonable use and enjoyment of his land to the same extent as any other owner . . ." Keeton, et al., *The Law of Torts* § 88B at 635 (cited in note 139). See generally Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 118-20 (Harvard U., 1985).

153. See William L. Prosser, John W. Wade, and Victor E. Schwartz, *Cases and Materials on Torts* 846 n.1 (Foundation, 8th ed. 1988) ("The majority rule is that the plaintiff is not barred from recovery for either a public or a private nuisance by the sole fact that he 'comes to the nuisance' by buying property adjoining it.") (citing Restatement (Second) of Torts § 840D (1979)).

154. Freund, *The Police Power* § 529 at 561 (cited in note 15) (footnotes omitted).

155. Even opponents of the harm/benefit test concede that this is true. See generally Michelman, 80 Harv. L. Rev. at 1242 (cited in note 39).

Moreover, the Supreme Court early on put in place a protective measure that would ensure judicial scrutiny of legislative determinations of incompatible uses, such as those found in *Hadacheck* and *Goldblatt*. In *Dobbins v. Los Angeles*,<sup>156</sup> a 1904 case, the Court invalidated a Los Angeles ordinance, finding an insufficient fit between the ends sought by the regulation and the means used to achieve that goal. In that case, the city enacted an ordinance outlining a district in which gasworks could be built. In reliance upon the ordinance, the appellant purchased property within the district, obtained a permit, and laid the foundation for a gasworks. The city council then passed a second ordinance which changed the district boundaries, rendering the appellant's project illegal.

The Court stated that the second ordinance would be valid, notwithstanding the appellant's reliance upon the first, if the operation of the gasworks or the changed character of the community rendered the ban necessary to protect public health or safety.<sup>157</sup> The facts before the Court indicated, however, that the gasworks could be constructed in a safe manner, that the project was not incompatible with neighboring property uses, and that the community character had not changed.<sup>158</sup> In such an instance, the ordinance was not necessary to protect the public health, safety, or welfare, and was thus an "arbitrary and discriminatory exercise of the police power which amounts to a *taking* of property . . ."<sup>159</sup>

Close examination, therefore, makes it evident that the "valid but competing" uses argument rests on very shaky ground. In a true instance of such uses, it would be difficult, if not impossible, to articulate a legitimate reason for an exercise of the police power. *Miller* is such a difficult example. Although it may be a close call whether either of the competing uses at stake in *Miller* could be said to be a public nuisance, the final determination, where it is disputed, is within the usual purview and competence of the courts. The legislative authority to regulate a public nuisance is unquestioned. If, on the other hand, it turns out that neither of the uses is a nuisance, then any legislative action taken by the state must be based in the eminent domain power and accompanied by payment of just compensation to the affected landowner.

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156. 195 U.S. 223 (1904).

157. *Id.* at 238.

158. *Id.* at 238-40.

159. *Id.* at 241 (emphasis added).



## 2. Inability to Distinguish Between Harm and Benefit

The second complaint raised against the harm/benefit test is the allegation that it is impossible to distinguish between prevention of a harm and conferment of a benefit. For example, Professor Michelman has argued that the harm/benefit distinction "will not work unless we can establish a benchmark of 'neutral' conduct which enables us to say where refusal to confer benefits (not reversible without compensation) slips over into readiness to inflict harms (reversible without compensation)."<sup>160</sup> Similarly, Justice Scalia, writing for the majority in *Lucas*, dismissed the harm/benefit test by noting that "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder."<sup>161</sup> Thus, he found, "[o]ne could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from 'harming' South Carolina's ecological resources; or, instead, in order to achieve the 'benefits' of an ecological preserve."<sup>162</sup> Noting that a harm-prevention rationale "can be formulated in practically every case," he concluded: "We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations."<sup>163</sup>

Commentators, too, have engaged in the same sort of definitional gymnastics, though often providing much more extreme examples.<sup>164</sup> For example, Professor Rubinfeld argues:

Even if the state reached out and took money directly from my pocket, still we could not say that *here* the state has merely expropriated a benefit and not prevented harm. Perhaps the harm lay in my saving rather than consuming, perhaps in my plan to consume one thing rather than another, or perhaps simply in *my* having the money when others don't.<sup>165</sup>

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160. Michelman, 80 Harv. L. Rev. at 1197 (cited in note 39).

161. *Lucas*, 505 U.S. at 1003, 1024.

162. *Id.* (footnote omitted).

163. *Id.* at 1025-26 n.12.

164. See, for example, Robert Kratovil and Frank J. Harrison, Jr., *Eminent Domain—Policy and Concept*, 42 Cal. L. Rev. 596, 608 (1954) (arguing that the distinction between "averting detriment to the public and promoting the public advantage" is "a distinction without a difference"); Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 Mich. L. Rev. 1892, 1934 (1992) ("In the absence of some accepted standard of proper conduct, one may describe any government action equally well as extracting a benefit or preventing a harm."); Michelman, 80 Harv. L. Rev. at 1197 (cited in note 39) (noting that a regulation banning billboards could be construed "as one which prevents the 'harm' of roadside blight and distraction, or as one securing the 'benefits' of safety and amenity"); Sax, 74 Yale L. J. at 50 (cited in note 37) (noting that it is not always possible to determine whether the individual or the public "caused" the harm complained of).

165. Rubinfeld, 102 Yale L. J. at 1099-1100 (cited in note 29) (footnote omitted).

Moreover, Rubenfeld argued, when “pursued to its logical conclusion,” the harm/benefit test would obviate the need for compensation even in clear cases of eminent domain:

If a piece of land is needed to complete a railroad that would maximize the public interest, then any use of land *other* than to complete the railroad is in fact harmful to the public. Or again: the very fact of one person’s private ownership of a piece of property could be found to have harmful effects, warranting the state in its harm-preventing capacity to seize the property and convert it to some other form of ownership.<sup>166</sup>

Professor Epstein correctly dismisses such arguments as falling within the “face gets in the way of the fist” category.<sup>167</sup> The question ultimately is one of causation—did the property owner cause a harm which the regulation seeks to prevent? In a 1972 article,<sup>168</sup> Epstein explored the role of causation in establishing prima facie tort liability, an argument that provides a reasonably apt analogy for takings analysis. He rejected the traditional formulation of the causation question—“whether, but for the negligence of the defendant, the plaintiff would not have been injured.”<sup>169</sup> Instead, Epstein postulated that causation should reflect ordinary language usage by ordinary persons.<sup>170</sup> Thus, in a situation where A strikes B, the inquiry should not focus on “but for” causation, because it is as easy to state that but for B’s standing in the way of A’s fist, B would not have been struck as it is to say that but for A’s striking out, B would not have been injured. However, ordinary people, using ordinary language, would inevitably define the situation as “A hit B,” thereby implicitly assigning causation and hence liability (absent a justifiable legal excuse) to A.<sup>171</sup>

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166. *Id.* at 1100. An analogous argument was made by Professor Lunney. See Lunney, 6 *Fordham Envir. L. J.* at 437 (cited in note 42) (“Because government or even other private individuals could have preemptively purchased the property rights and thereby prevented the threatened harm, their failure to act is also a factual cause of the threatened harm.”) (footnote omitted).

167. Epstein, *Takings* at 117 (cited in note 152). Other commentators agree. See, for example, William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* 354 (Harvard U., 1995) (“The question of the appropriate base point for compensation is not seriously addressed by saying it all depends upon how you phrase it. ‘Down’ does not become ‘up’ just because one can invert oneself on a trapeze.”).

168. Richard A. Epstein, *A Theory of Strict Liability*, 2 *J. Legal Stud.* 151 (1973).

169. *Id.* at 160.

170. *Id.*

171. Implicit within his argument is a requirement that A’s action interfered with B’s legal rights. See Richard A. Epstein, *Intentional Harms*, 4 *J. Legal Stud.* 391, 424-33 (1975). Epstein has refined his original argument over the years. See, for example, Richard A. Epstein, *Causation—In Context: An Afterword*, 63 *Chi. Kent L. Rev.* 653 (1987).

Professor Ellickson made an analogous argument in a 1973 land use article, phrasing his position in terms of "ordinary speech."<sup>172</sup> Drawing upon the example of a grocery store locating in a residential neighborhood, Ellickson noted that some commentators would argue that it is impossible to distinguish whether the grocer is harming the residential users with its incompatible use, or the homeowners are harming the grocer through their "sensitivities."<sup>173</sup> As Ellickson stated, however:

In ordinary speech, . . . people consistently distinguish "harms" from "benefits" and would agree that the grocery is doing the harming there. Evaluative terms like good, bad, beneficial, and harmful are easily used because people have remarkably consistent perceptions of normal conditions and thus can agree in characterizing deviations from normalcy. In any community, observers empirically establish standards of normal conduct for repetitive activities; people largely agree on normal clothes styles or normal behavior in public places. Similarly there is considerable agreement on the identification of normal land uses . . . .<sup>174</sup>

Ellickson went on in a 1977 article to re-articulate this normal behavior model, which posited a standard higher than nuisance law but which nonetheless imposed some limits on governmental regulation of land use.<sup>175</sup> "Normal behavior," in his model, was defined by community practice.<sup>176</sup>

In his recent book, Professor Fischel adopted Ellickson's normal behavior standard, arguing that "the appropriate base point for compensation" is determined by what "ordinary citizens" regard as normal within their communities.<sup>177</sup> Similarly, Professor Freyfogle

172. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681, 729 (1973).

173. *Id.* at 728-29 (citing R.H. Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1, 34-35 (1960); Michelman, 80 Harv. L. Rev. at 1196-1201, 1235-45 (cited in note 39)).

174. *Id.* at 729. Professor Freyfogle recently made a similar argument, contending that in evaluating a takings claim involving ecologically sensitive lands, a court should begin by "assessing whether the landowner's proposed use is deemed harmful by the community under its then-prevailing norms," or, for other takings claims, "whether the new rule sets an ownership norm of generalized applicability." Eric T. Freyfogle, *The Owning and Taking of Sensitive Lands*, 43 U.C.L.A. L. Rev. 77, 124 & n.161 (1995).

175. Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L. J. 385, 418-24, 468-69 (1977) (proposing legal rules to determine when a community can or cannot regulate land use without providing compensation).

176. Professor Peterson offered a similar theory in which she argued that the Court should not find a taking where the regulation is intended to prevent or punish action (or inaction) that the public would likely consider wrongful. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 Cal. L. Rev. 55, 85-93 (1990). The consistency of the public's "ordinary perceptions of the world" would make the outcome in most cases relatively obvious. *Id.* at 91-92.

177. Fischel, *Regulatory Takings* at 354 (cited in note 167).

has argued that “[w]hen courts long ago applied the nuisance law in actual cases, they did so in the only way that they could, by drawing on the community’s sense of acceptable and unacceptable land use. They turned to the community’s sense of value . . . because it was the standard that made the most sense, the standard that comported best with the idea of law as the people’s will.”<sup>178</sup>

Whether one calls it ordinary causation, ordinary speech, normal behavior, or the community’s sense of value, the principle provides a rough-and-ready analytical tool for resolving most takings questions as well.<sup>179</sup> Although the principle is not exactly apt for all takings issues, it is reasonably and sufficiently close. In *Hadacheck*, for example, ordinary people would describe the situation as one in which the brickyard intruded upon residential uses, rather than the residential uses intruding upon the brickyard, and with good reason. The residential users produce no externalities that conflict with the brickyard’s intended operations, other than their utterly understandable desire to use their property for ordinary, unexceptional uses. The same cannot be said of the brickyard.<sup>180</sup> Even the difficult *Miller* case lends itself to resolution on these grounds. The apple tree owners did not infringe on the rights of others by having their orchards, since their activities were perfectly lawful and contained within their own grounds. The cedar tree owners, on the other hand, were, albeit inadvertently and passively, the cause of injury to property outside their own borders.

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178. Freyfogle, 43 U.C.L.A. L. Rev. at 123 (cited in note 174).

179. But see Lunney, 6 Fordham Envir. L. J. at 519 (cited in note 42) (arguing that Epstein’s “notion of ordinary causation, while intuitively attractive, . . . is inappropriate for direct application to resolve the takings issue”). The notions apply in broad terms, and no argument is made here that they are exactly apt for all takings issues. However, neither would I accept Professor Lunney’s position that Epstein’s argument is irrelevant to the takings arena. See *id.* at 514-19 (describing “ordinary” causation and takings). Lunney’s position seems to be based in part upon his finding that applying ordinary causation to takings would not promote deterrence of similarly undesirable government behavior, *id.* at 515, and in part upon his assertion that ordinary causation may not recognize the situations in which a “forced sale” is most advantageous in terms of fairness or efficiency. *Id.* at 517.

180. The Supreme Court has also adopted the notion of ordinary causation in the sense of stating that the party who “caused” the harm can legitimately be made to pay for correcting it. See, for example, *Atchinson*, 346 U.S. at 353 (“Having brought about the problem, the railroads are in no position to complain.”).

### 3. The Interjection of Nuisance Law

A third argument raised against the harm/benefit test is that it embodies notions of nuisance law—an area of law long criticized as being unacceptably vague and unpredictable. For example, Justice Blackmun noted: “There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance’ . . . It is an area of law that straddles the legal universe, virtually defies synthesis, and generates case law to suit every taste.”<sup>181</sup> Commentators likewise have criticized both nuisance law in general and Justice Scalia’s recent modification of nuisance law in the context of takings law in *Lucas* as increasing doctrinal ambiguity and unpredictability in this already confusing field.<sup>182</sup>

That Justice Scalia did not outright reject nuisance law as a gauge for identifying takings, however, indicates its essential role in takings law. Unless we embrace the notion that government can never regulate land use without paying compensation (and even the *Lucas* Court was unwilling to go that far), we must have some method for evaluating the legitimacy of government regulation. Nuisance law provides a time-tested mechanism for making such a determination.

As noted above,<sup>183</sup> the most recent and most complete articulation of the nuisance exception came in the 1992 Supreme Court decision in *Lucas*. The *Lucas* Court’s discussion of the nuisance exception is hardly without problem, however. For example, commentators have criticized the Court’s tying of the validity of land use regulation to the state common law of nuisance. As Professor Byrne argued, *Lucas* “reverses the majoritarian premise of every state’s constitution,

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181. *Lucas*, 505 U.S. at 1055 n.19 (Blackmun, J., dissenting) (citation omitted).

182. See, for example, J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *Ecol. L. Q.* 89, 113 (1995) (“The vagueness of nuisance law requires courts to make loosely guided policy judgments about the comparative harms and benefits of competing uses of land.”); William W. Fisher, III, *The Trouble With Lucas*, 45 *Stan. L. Rev.* 1393, 1407 (1993) (“[W]hat is most striking about the holding of *Lucas* is that it embeds in the already muddy law of takings . . . the even muddier law of nuisance . . .”).

It is important for critics of the nuisance exception to note, however, that the interjection of nuisance law into takings law is a double-edged sword. While principles of nuisance law may be used to characterize a regulation as harm-preventing, and thus not a taking of private property, the principles have also been used to protect private property from confiscatory acts. In *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914), for example, the Supreme Court held that a legislature could not insulate a railroad from liability for noxious gases and smoke that intruded onto a private owner’s land. The Court stated that “while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.” *Id.* at 553.

183. See notes 119-34 and accompanying text (discussing *Lucas*).

namely, that legislation supersedes common law rules.”<sup>184</sup> Moreover, because Justice Scalia made it clear in *Lucas* that a state court’s characterization of nuisance law would be scrutinized carefully to make certain that it was based on “an objectively reasonable application of precedent,”<sup>185</sup> federal courts evaluating takings claims will henceforth be much more embroiled in interpretation of state common law than is normally the case—a situation which, as Professor Fisher noted, may well “lead to considerable awkwardness and resentment.”<sup>186</sup> Finally, because by its very nature nuisance law continues to evolve, it does not provide the solid benchmark against which the Court can avoid the ad hoc decisions that have characterized its modern takings opinions.<sup>187</sup>

Perhaps the biggest flaw in the use of nuisance law in takings analysis, however, is the Court’s own waffling on the manner in which it should apply. Nuisance law is no newcomer to takings analysis. Though commentators speak of Justice Rehnquist’s creation of the “nuisance exception” in *Penn Central* and the Court’s adoption of the exception in *Keystone*,<sup>188</sup> nuisance law has played a substantial, though varied, role in the harm/benefit test and in takings law in general for a long time.<sup>189</sup> The early Court made no determined effort to articulate the scope or role of nuisance law in takings analysis. The *Mugler* Court, for example, explicitly discussed nuisance law and noxious uses in its original articulation of the harm/benefit test, but without defining its boundaries.<sup>190</sup> While the *Mahon* Court subsequently dismissed nuisance law as a controlling or influencing factor

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184. Byrne, 22 Ecol. L.Q. at 113 (cited in note 182). See also John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 Colum. J. Envir. L. 1, 3 (1993) (“Ironically, [under *Lucas*,] future legislative efforts to remedy deficiencies in the common law of nuisance can now be overturned precisely because the common law fails to protect people from the particular harm in question.”). Professor Kmiec counters that nuisance law is the traditional vehicle used to balance individual property rights and public interests, and that state courts are bound by precedent and clothed with a general cloak of disinterest which state legislatures, with their political agendas and ad hoc decision making, conspicuously lack. Douglas Kmiec, *At Last, The Supreme Court Solves the Takings Puzzle*, 19 Harv. J. L. & Pub. Pol. 147, 153 (1995).

185. *Lucas*, 505 U.S. at 1032 n.18.

186. Fisher, 45 Stan. L. Rev. at 1407 (cited in note 182). One might question, however, which is (or ought to be) the greater jurisprudential concern: avoiding stepping on the toes of state courts, or protecting individual constitutional rights.

187. *Id.* at 1407-08 (noting that “the answer to the question of whether a challenged land use regulation could have been effected through the state’s nuisance law will sometimes depend upon the date as of which the state’s nuisance law is measured”).

188. See Part III.A.2 (discussing the development of the nuisance exception).

189. See Connors, 19 Cap. U. L. Rev. at 139 (cited in note 42).

190. See notes 44-57 and accompanying text (discussing *Mugler*).

in its decision,<sup>191</sup> four years later the *Euclid* Court found it provided a "helpful" analogy.<sup>192</sup>

The Court's opinions do not make it clear whether the Court perceived noxious uses and nuisances to be interchangeable, nor whether the Court believed that the harms encompassed within the harm/benefit test were more expansive than private or public nuisances. Not until Justice Rehnquist's dissent in *Penn Central* was any suggestion provided as to the scope of the nuisance exception, and even that was only the elliptical statement that the exception was not "coterminous with the police power."<sup>193</sup> Chief Justice Rehnquist's two "narrowing principles" in his *Keystone* dissent—that the nuisance exception does not embrace "economic" concerns and that the exception could not be used to extinguish all use of private property<sup>194</sup>—provided only marginally more explication.

Justice Scalia's articulation of the nuisance exception in *Lucas* provided an even narrower version of the exception than that suggested in Justice Rehnquist's earlier opinions. Justice Scalia seized upon Justice Rehnquist's observation that the nuisance exception had never been permitted to completely extinguish a property interest, and articulated a very narrow per se test that essentially froze nuisance law in time. *Lucas* held that a regulation could not completely extinguish a property interest or destroy all profitable use, unless the same result could have been reached under the State's "background principles" of nuisance and property law already in place.<sup>195</sup> By articulating such a test, Justice Scalia proposed to do away with the difficulties and uncertainties of the harm/benefit test.

As Justice Blackmun noted in his dissent in *Lucas*, however, nuisance law itself requires state courts to engage in the same type of harm/benefit analysis that Justice Scalia had attempted to reject.<sup>196</sup> Justice Scalia responded to this criticism by emphasizing that "an affirmative decree eliminating all economically beneficial uses may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in

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191. See note 68 and accompanying text (discussing *Mahon's* treatment of nuisance law).

192. *Euclid*, 272 U.S. 386-87. See notes 72-80 and accompanying text (discussing *Euclid*).

193. *Penn Central*, 438 U.S. at 145 (Rehnquist, J., dissenting). See note 98 and accompanying text (discussing *Penn Central*).

194. *Keystone*, 480 U.S. at 513 (Rehnquist, C.J., dissenting). See notes 110-18 and accompanying text (discussing Chief Justice Rehnquist's dissent in *Keystone*).

195. See notes 126-34 and accompanying text (discussing *Lucas*).

196. See *Lucas*, 505 U.S. at 1054-55 (Blackmun, J., dissenting) ("Common-law public and private nuisance law is simply a determination whether a particular use causes harm.").

which the land is presently found.”<sup>197</sup> Two years later, in his dissent for denial of certiorari in *Stevens v. City of Cannon Beach*,<sup>198</sup> Justice Scalia made clear his belief that a “more objective” evaluation of state nuisance law was required when he again emphasized that states may not avoid takings “by invoking nonexistent rules of state substantive law,” adding that “[o]ur opinion in *Lucas* . . . would be a nullity if anything that a state court chooses to denominate ‘background law’—regardless of whether it really is such—could eliminate property rights.”<sup>199</sup>

Because nuisance law is continually evolving, it does not provide a fixed benchmark by which the Court can avoid the ad hoc decisions that have characterized its modern takings opinions. Yet the inherent flexibility of nuisance law can just as easily be viewed as an advantage, because it allows the law to adapt readily to changing times and circumstances. Although some analysts are made uncomfortable by the unpredictability of outcomes in the nuisance area, it is patently unreasonable to expect much certainty in areas as fact-specific and behavior-dominated as either nuisance or takings law. We might be better satisfied with a correct, or justifiable, outcome, rather than waiting in vain for a predictable one.

### C. *The Harm/Benefit Test: A Summary*

In *Lucas*, Justice Scalia rejected the harm/benefit test, finding that “the distinction between regulation that ‘prevents harmful use’ and that which ‘confers benefits’ is difficult, if not impossible, to discern on an objective, value-free basis.”<sup>200</sup> Rather, “[w]hether one or the other of the competing characterizations will come to one’s lips in a particular case depends primarily upon one’s evaluation of the worth of competing uses of real estate.”<sup>201</sup>

What Justice Scalia does not discuss is why such an “objective, value-free” basis is needed in takings law, especially when values play such a large role in other areas of constitutional law. As the *Euclid* Court noted seventy years ago, notions of legitimate land use necessarily change over time, as populations grow denser and

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197. *Id.* at 1032 n.18.

198. 510 U.S. 1207, 1207 (1994) (Scalia, J., dissenting from denial of cert.).

199. *Id.* at 1211 (Scalia, J., dissenting from denial of cert.).

200. *Lucas*, 505 U.S. at 1026.

201. *Id.* at 1025.



understandings of the effects of land use change.<sup>202</sup> So, for example, while a century ago compulsory drainage of wetlands was regarded as a social good, today preservation of wetlands is generally viewed as necessary for protecting the environment.<sup>203</sup>

The real issue is how the legal system should respond to periods of fluctuating public norms. Although one can fashion complex theories to address this situation,<sup>204</sup> at some level all that is needed is a healthy dose of common sense—a principle that seems increasingly divorced from takings analysis. The mere facts that the courts are not overrun with takings cases brought by disaffected property owners and that state and local governments are not too paralyzed to regulate suggest that public and private actors are able to deduce what is and is not acceptable regulation in most contexts.<sup>205</sup> Of course, some cases will clearly fall at the edges, where classification of the legislative action as either preventing a harm or conferring a benefit will be much more difficult. *Lucas* is a paradigmatic example of the difficult, marginal case.

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202. *Euclid*, 272 U.S. at 386-87. The *Euclid* Court stated:

Until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity, and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

Id.

203. See, for example, Freyfogle, 43 U.C.L.A. L. Rev. at 80-88 (cited in note 174) (discussing wetlands regulation and takings law).

204. Fischel would address the problem through a process-theory approach that would favor decisions made at higher levels of government (for example, the state level) rather than lower levels (for example, the local level). As Fischel states:

Where does this leave the normal-behavior standard, wherein judges have to decide what is normal, when normalcy is not a constant? The key to the judges' role is the level of government that adopts the new and higher standard of normal behavior. My idea is that the larger republics are more appropriate sources of declarations of what is normal behavior for property owners. This is not because I think state legislatures are unerring readers of the public pulse, but because they are no worse at it than judges.

Fischel, *Regulatory Takings* at 354-55 (cited in note 167).

205. Many commentators have implicitly recognized this. See, for example, Peterson, 78 Cal. L. Rev. at 91-92 (cited in note 176) (arguing that "widely shared judgments of wrongdoing" render many takings disputes "easy cases").

Nonetheless, the intuitive pull of the implicit notions of the harm/benefit test is self-evident even within Justice Scalia's own opinions. His rejection of the harm/benefit test in *Lucas* is difficult to reconcile with his 1988 opinion in *Pennell v. City of San Jose*,<sup>206</sup> where he contended that no compensation is required for a regulation if "there is a cause-and-effect relationship between the property use restricted by [a] regulation and the social evil that the regulation seeks to remedy."<sup>207</sup> Justice Scalia stated in *Pennell* that "since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly."<sup>208</sup> He then concluded that stricter rent control restrictions on housing occupied by poor tenants could not be justified because the landlords are no more responsible for their tenants' poverty than are "the grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them their wages . . ."<sup>209</sup> In *Pennell*, therefore, Justice Scalia did consider whether the actions of the property owner were the cause of the social ill that the regulation was intended to address—in effect, he evaluated whether the regulation addressed a harm created by the regulated property owner.<sup>210</sup>

Moreover, the harm/benefit test offers certain advantages not found in other formulations of taking tests,<sup>211</sup> not least of which is its inherent flexibility. In a 1971 article, Professor Sax argued that the traditional view of property rights, which examines only those activities occurring within the physical limits of the owner's property, failed to accommodate modern scientific knowledge and the realities of property use.<sup>212</sup> Rather, he argued, property is more correctly viewed "as an interdependent network of competing uses."<sup>213</sup> It is certainly true that modern science has provided us with a much greater, though still incomplete, understanding of land and the environment as an

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206. 485 U.S. 1 (1988).

207. *Id.* at 20 (Scalia, J., concurring in part and dissenting in part). In effect, Justice Scalia was stating one-half of the creation-of-harm test. See notes 81-87 and accompanying text (discussing the creation-of-harm test).

208. *Pennell*, 485 U.S. at 20 (Scalia, J., concurring in part and dissenting in part).

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

210. See generally Fisher, 45 *Stan. L. Rev.* at 1395-97 (cited in note 182).

211. For a discussion of these tests, see generally Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 *Cal. L. Rev.* 1301 (1989).

212. Joseph L. Sax, *Takings, Private Property, and Public Rights*, 81 *Yale L. J.* 149, 150 (1971).

213. *Id.*

interconnected, interrelated whole. It is also true that this new knowledge and understanding alters our definitions of acceptable regulations and permissible property uses. Because the harm/benefit test is based in notions of nuisance law—itsself a flexible and mutable legal doctrine—it has the ability to adapt to new scientific knowledge and new understandings of the externalities created by even traditional or commonplace uses of property.

A principled application of the harm/benefit test will take care of most cases, which are, after all, essentially easy ones. Although difficult cases, such as *Lucas*, do not lend themselves to such facile analysis, that hardly means the harm/benefit test does not work. It simply indicates that the analysis must not stop with a blind application of the test.

Proper application of police power analysis will eliminate the difficulty of distinguishing between harms and benefits. *Nollan v. California Coastal Commission*,<sup>214</sup> for example, addressed a state regulation that conditioned issuance of a building permit for a beachfront house on the property owners' agreeing to grant an easement to the public to traverse their private beach. The *Nollan* majority characterized the regulation as requiring the property owners to dedicate private land to public uses—a form of benefit extraction.<sup>215</sup> In his dissent, however, Justice Brennan characterized the action as "preservation of public access to the ocean and tidelands"—a form of harm prevention.<sup>216</sup>

Although this case seems to me to be a clear case of benefit-extraction, not harm-prevention, we need not choose between these two characterizations. Rather, we could simply take the formulation that is most favorable to the state—that the action prevents a harm—and examine it to see if it is valid under the police power. Although the government action at stake is undeniably legitimate—protection of public access to public beaches—the means chosen to achieve it bear little relationship to that interest, and the burden inflicted upon the property owner is excessive. The regulation should thus be struck down as an invalid exercise of the police power.<sup>217</sup>

Although the harm/benefit test's role is merely to demonstrate under which power the government action should be analyzed, the role is nonetheless a crucial one. The test is necessary to provide a deline-

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214. 483 U.S. 825 (1987).

215. *Id.* at 831.

216. *Id.* at 843-44 (Brennan, J., dissenting).

217. For a fuller explication of the police power analysis, see Oswald, 70 Wash. L. Rev. at 144-45 (cited in note 3).

ation between the eminent domain and police powers; that delineation itself is necessary to ensure that the line between compensable takings and noncompensable regulations remains clear and distinct.

#### IV. THE AVERAGE RECIPROCITY OF ADVANTAGE RULE

The "average reciprocity of advantage" rule was the second of the two tools developed by the early Supreme Court to draw the critical distinction between valid and invalid police power acts.<sup>218</sup> Although most government regulations that confer a benefit are compensable takings, the average reciprocity of advantage rule identifies a critical subset of government actions that, although they convey a private or mixed public/private benefit, are nonetheless valid police power actions.

The rule has undergone substantial change since its genesis in the early part of the twentieth century. Simply put, in its original form, the rule stated that a land use regulation that resulted in benefits to *regulated landowners* roughly equal to the burdens imposed on them did not violate the United States Constitution. In its modern, corrupted form, however, the average reciprocity of advantage rule states that if a land use regulation results in benefits to *society as a whole* roughly equal to the burdens imposed upon the regulated landowners, no taking has occurred. As a result of this perversion, the average reciprocity of advantage rule has lost its former potency as a tool for distinguishing valid police power actions from invalid regulatory takings and instead has become a method for simply rubber-stamping legislative acts.

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218. The doctrine was developed in a fairly small set of cases, however. Only seven Supreme Court cases actually use the phrase "average reciprocity of advantage." See *Dolan*, 512 U.S. at 408 (Stevens, J., dissenting); *Lucas*, 505 U.S. at 1018; *Hodel v. Irving*, 481 U.S. 704, 715 (1986); *Keystone*, 480 U.S. at 491; *Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting); *Mahon*, 260 U.S. at 415; *Jackman v. Rosenbaum*, 260 U.S. 22, 30 (1922). See also *Nollan*, 483 U.S. at 856 (Brennan, J., dissenting) (referring to "reciprocity of advantage").

The rule has received considerably less attention from commentators than has the harm/benefit test. See, for example, Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 Am. U. L. Rev. 297 (1990) (discussing average reciprocity of advantage); Conners, 19 Cap. U. L. Rev. at 173-75 (cited in note 42) (same); Hippler, Comment, 14 B.C. Envir. Aff. L. J. at 653 (cited in note 42) (same).

*A. Historical Development of the Rule*

The "average reciprocity of advantage" rule was originally articulated by Justice Holmes in two early, influential cases—*Jackman v. Rosenbaum Co.*<sup>219</sup> and *Pennsylvania Coal Co. v. Mahon*.<sup>220</sup> Even before Justice Holmes uttered this specific phrase, however, the notion of reciprocity had existed as a way of limiting and defining the scope of the police power. The courts and commentators had long recognized that the police power must be supported by more than mere incidental benefits to the public, for virtually every regulation will further the health, safety, and welfare of the public to some extent. Thus, in his famous and influential constitutional law treatise, Judge Cooley stated:

It may be for the public benefit that all the wild lands of the State be improved and cultivated, all the low lands drained, all the unsightly places beautified, all dilapidated buildings replaced by new; because all these things tend to give an aspect of beauty, thrift, and comfort to the country, and thereby to invite settlement, increase the value of lands, and gratify the public taste; but the common law has never sanctioned an appropriation of property based upon these considerations alone; and some *further element* must therefore be involved before the appropriation can be regarded as sanctioned by our constitutions.<sup>221</sup>

One such "further element" to be recognized by the Supreme Court was the existence of a common scheme: Where a regulation resulted in merely an incidental benefit to the public, it could be upheld under the police power if it provided reciprocal benefits and burdens to a specific group of property owners. In such cases, each landowner is forced to bear a regulatory burden, but each shares in the benefit of a concerted action necessary to recognize the full potential of interrelated, interconnected lands. *Jackman* and *Mahon* drew upon this category of cases, as well as special-assessment cases,<sup>222</sup> in establishing the average reciprocity of advantage rule.

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219. 260 U.S. 22, 30 (1922).

220. 260 U.S. at 415. See notes 58-71 and accompanying text for discussion of *Mahon*.

221. Thomas M. Cooley, *Constitutional Limitations* 660 (Little, Brown, 5th ed. 1883) (emphasis added).

222. See notes 256-62 and accompanying text (discussing special-assessment cases).

1. *Jackman* and Its Progenitors

Justice Holmes first coined the phrase “average reciprocity of advantage” in 1922 in *Jackman*.<sup>223</sup> The complaining property owner there challenged a state party wall statute, alleging that it violated the due process guarantees of the Fourteenth Amendment because it permitted the regulation of property for the benefit of a private individual (the neighboring property owner) rather than for the benefit of the community as a whole, and because it provided no compensation for land physically occupied and appropriated by the neighboring property owner.<sup>224</sup> The complaining property owner had a theater, one wall of which was situated along the property line.<sup>225</sup> The neighboring property owner attempted to build a party wall along the line, intending to incorporate the existing theater wall into the new party wall. Because of structural defects in the existing wall, the neighbor was forced by the city to remove it.<sup>226</sup> The theater owner sued.<sup>227</sup>

Justice Holmes, writing for a unanimous Court, noted that the lower court had upheld the challenged statute in reliance upon the state’s power “to impose burdens upon property or to cut down its value in various ways without compensation, as a branch of what is called the police power.”<sup>228</sup> Justice Holmes went on to state: “The exercise of this has been held warranted in some cases by what we may call the average reciprocity of advantage, although the advantages may not be equal in the particular case.”<sup>229</sup> Having tossed out this ambiguous and undefined phrase, Justice Holmes then stated that the Court did not need to consider this ground for upholding the state statute, for the two-hundred-year history of the state party wall statute rendered it impervious to Fourteenth Amendment challenge.<sup>230</sup>

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223. 260 U.S. at 30. Although the phrase sounds awkward and ambiguous to the modern reader, Justice Holmes was quite proud of it. See Howe, 1 *Letters* at 466 (cited in note 70) (“In this [opinion] I coined the formula ‘average reciprocity of advantage’ which I think neatly expressed the rationale of certain cases . . .”).

224. *Jackman*, 260 U.S. at 23-29.

225. *Id.* at 29.

226. *Id.*

227. The plaintiff sued only for the loss of rent on the theater for one rental season and for the costs of restoring the theater to its original condition. *Id.*

228. *Id.* at 30.

229. *Id.* (citing *Noble State Bank v. Haskell*, 219 U.S. 104 (1911); *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112 (1896); *Wurts v. Hoagland*, 114 U.S. 606 (1885)).

230. *Id.* at 30-31. Compare Freund, *The Police Power* § 442 (cited in note 15) (noting that a neighbor gains no benefit from construction of a party wall unless he incorporates it into his own

The three cases cited by Justice Holmes in support of this "average reciprocity of advantage" dicta, *Wurts v. Hoagland*,<sup>231</sup> *Noble State Bank v. Haskell*,<sup>232</sup> and *Fallbrook Irrigation District v. Bradley*,<sup>233</sup> shed some light on what the Court had in mind, but without actually clarifying the notion. These cases were viewed as furthering "common schemes" and hence as not warranting payment of compensation. Professor Freund, in his turn-of-the-century treatise on the police power, explained the common-scheme cases as follows:

While in general, a person will not be compelled to improve his land in a particular manner, the principle suffers some modification where the improvement (without being strictly or directly public, though perhaps remotely and indirectly so) is common to several adjoining estates. In one aspect the compulsion is exercised in favor of other persons, and thus resembles the legislation allowing the construction of private ways, drains, and ditches across the lands of others . . . . But in the cases to be now considered the owner whose land is affected by the exercise of the power shares in the benefit of the improvement to which he is made to contribute, and because he does so share he may be compelled to bear a part of the cost of the joint enterprise.<sup>234</sup>

Freund noted that basing such acts upon the existence of a public benefit, such as protection of the public health was "in many cases rather a specious plea than a reality."<sup>235</sup> Thus, he concluded:

It is true that ordinarily an owner will not be forced to improve his land merely to increase the general prosperity of the country; nor will one party be forced into a partnership with another because the interests of both can be better served by joint than by individual action. But lands may be so situated toward each other as to create a mutual dependence and a natural community. The exercise of the police power then consists in applying to this community the

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structure) and id. § 443 (citing a French jurist who criticized party wall statutes as a violation of private property interests and who argued that such legislation is not excused by its lengthy pedigree).

231. 114 U.S. 606 (1885).

232. 219 U.S. 104 (1911).

233. 164 U.S. 112 (1896).

234. Freund, *The Police Power* § 440 (cited in note 15) (footnote omitted). See also Philip Nichols, 1 *The Law of Eminent Domain* 289 (M. Bender, 2d. ed. 1917):

When a tract of such land is divided into several parcels held by different owners and a general improvement of the whole cannot be effected without the harmonious co-operation of all the owners, the common necessity is met and the common interest secured by the intervention of the state, and the individual rights of each owner are subjected to such modifications as seem most adapted to secure the best advantage of all.

235. Freund, *The Police Power* § 442 (cited in note 15). Freund stated that it was difficult to identify public health benefits from irrigation and noted that if public health were the true purpose behind the drainage legislation, consent of a majority of the owners would not be required. *Id.*

same principle of majority rule which is recognised, as a matter of course, for local purposes in larger neighborhoods constituting political subdivisions.<sup>236</sup>

The lineage of the common-scheme cases cited in *Jackman* is complex. *Wurts* and *Fallbrook Irrigation District* both relied upon an 1884 case, *Head v. Amoskeag Manufacturing Co.*<sup>237</sup> *Head* involved a challenge to the New Hampshire general mill act, which permitted certain mill owners to erect mills and dams that resulted in the flooding of the lands of others, provided that the mill owner paid damages to the affected property owner.<sup>238</sup> The plaintiff challenged the statute, alleging that it resulted in a taking of private property for private, rather than public, use, and as such violated his due process rights.<sup>239</sup> The *Head* Court declined to address this issue, finding that the case could be decided on narrower grounds relating to the joint use of land adjacent to a stream by the property owners.<sup>240</sup> The Court stated:

When property, in which several persons have a common interest, cannot be fully and beneficially enjoyed in its existing condition, the law often provides a way in which they may compel one another to submit to measures necessary to secure its beneficial enjoyment, making equitable compensation to any whose control of or interest in the property is thereby modified.<sup>241</sup>

Thus, the Court noted, the law had long recognized the right of a tenant in common or joint tenant to compel a partition<sup>242</sup> or to compel other co-owners to pay their fair share of repair costs on joint property.<sup>243</sup> Similarly, state statutes had long authorized the majority of owners in severalty of contiguous lands to arrange for the drainage or improvement of such lands and to apportion the cost of such measures among all the owners "in proportion to the benefits received, . . . independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property"<sup>244</sup>—i.e., common-scheme cases.

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236. *Id.*

237. 113 U.S. 9 (1885) (cited in *Fallbrook Irrigation Dist.*, 164 U.S. at 163).

238. *Id.* at 16.

239. *Id.*

240. *Id.* at 20-21.

241. *Id.* at 21.

242. *Id.*

243. *Id.* at 21-22.

244. *Id.* at 22. The Court also provided a maritime law example: Where the owners of a ship cannot agree upon its employment, a court of admiralty can authorize the majority to send it



The *Head* Court found that the facts before it presented an even stronger case for the intervention of state law. Beneficial use of streams, such as the placement of grist or manufacturing mills, often requires that the streams be dammed or diverted. Such uses, though privately owned, nonetheless further the public interest by providing a necessary service.<sup>245</sup> Damming or diversion, however, often results in the flooding of the land of upstream owners, which gives rise to remedies of damages or injunctions.<sup>246</sup> In the absence of state legislation, an impasse could result in which no riparian owner would be able to put the stream to its best and highest use; the public good would suffer as a consequence. General mill acts avoided this problem by permitting the damming of streams provided that damages or compensation were paid to those upstream owners whose land was flooded.<sup>247</sup> The *Head* Court viewed such mill acts not as a tool by which private property was confiscated for use by other private actors, but rather as a means for regulating the rights of riparian owners "in a manner best calculated, on the whole, to promote and secure their common rights in it."<sup>248</sup>

The *Head* Court's analysis is troubling. *Head* did not truly involve a common-scheme use, as everyone's property was not being improved; rather, some individuals were permitted to damage other people's properties provided that they paid for the privilege of doing so.<sup>249</sup> Moreover, the large element of public interest at stake seemed to sway the Court's analysis,<sup>250</sup> suggesting that what was really occurring was a confiscation of private property for *public* use, but with private, not public compensation.

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to sea, indemnifying the minority against loss but denying it the right to share in the profits of the voyage or the compensation for the use of the ship. *Id.* at 22-23.

245. *Id.* at 24 (finding that the justification for mill acts rests "partly upon the interest which the community at large has in the use and employment of mills").

246. *Id.* at 23.

247. For a discussion of mill acts and their role in promoting economic development in early America, see Morton J. Horwitz, *The Transformation of American Law 1780-1860*, at 47-53 (1977). For a discussion of the judicial history of mill acts, see *Head*, 113 U.S. at 16-20; Nichols, 1 *Eminent Domain* §§ 83-84 (cited in note 234).

248. *Head*, 113 U.S. at 25 (quoting *Bates v. Weymouth Iron Co.*, 62 Mass (8 Cush.) 548, 552-53 (1852)).

249. See also Freund, *The Police Power* § 442 (cited in note 15) (finding that mill acts are less justifiable than compulsory drainage or irrigation acts because mill acts "lack[] the element of joint benefit").

250. See, for example, *Head*, 113 U.S. at 24 (noting the interest of "the community at large" in the use and employment of mills); *id.* at 25 (stating that mill acts permit owners to use their property for their own advantage "and for the benefit of the community") (quoting *Bates*, 62 Mass. at 553).

Nonetheless, *Wurts* and *Fallbrook Irrigation District* both relied upon *Head* as precedent. These two cases did not involve mill acts, but rather both involved state statutes designed to modify existing land conditions on designated parcels for the general benefit of all owners of such parcels—i.e., they were true common-scheme cases<sup>251</sup> and thus fall more comfortably into the category of cases that the average reciprocity of advantage rule was meant to reach.<sup>252</sup>

In *Fallbrook Irrigation District*, the Supreme Court upheld a California irrigation act against allegations that it effected a taking of private property without due process of law.<sup>253</sup> The act authorized assessments against properties located within designated irrigation districts and set forth a procedure for the seizure and sale of land where payment was not made. The complaining property owner alleged first that the statute did not serve a public purpose because it benefited primarily the landowners whose property was within the irrigation district; any benefit to the public, the property owner charged, was only the “indirect and collateral benefit” that the public received from any useful land improvement made within the state.<sup>254</sup> The Court dismissed this claim, noting that the irrigation and productive use of millions of acres of otherwise “worthless” land necessarily

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251. In the case of *Fallbrook Irrigation Dist.*, however, the Court did not appear to recognize it as such. See generally notes 253-62 and accompanying text.

252. Professor Hart's recent study calls into question whether drainage acts did indeed benefit all affected owners. See Hart, 109 Harv. L. Rev. at 1269-72 (cited in note 45). Tidal and inland marshes and meadows were not idle, unusable lands, but rather were valued as low-maintenance hayfields. *Id.* at 1269. Affluent property owners seeking to engage in more capital-intensive agricultural production would benefit from drainage projects, but those wishing to engage in more traditional farming would not. *Id.* at 1271.

253. *Fallbrook Irrigation Dist.*, 164 U.S. at 156. The property owner also claimed that: (1) the basis for assessment under the act was not necessarily in proportion to the benefits conferred by the mandated improvement scheme; (2) the act did not exempt lands that were productive even in the absence of legislation; (3) the act failed to grant individual landowners hearings to determine whether their lands could benefit from the irrigation scheme; and (4) the act would require owners of land who could not benefit from irrigation to pay the costs of providing such an improvement to landowners who could so benefit. *Id.* at 156-57. The Court rejected each of these claims. See *id.* at 164-70 (finding that the act provided an adequate scheme for determining which lands should be included); *id.* at 170-75 (finding that the rights to a hearing provided under the act were adequate); *id.* at 175-77 (dismissing the fourth allegation as being essentially the same as the one alleging that the burdens were not distributed in proportion to benefits received and finding that “the way of arriving at the amount may be in some instances inequitable and unequal, but that is far from rising to the level of a constitutional problem and far from a case of taking property without due process of law”).

254. *Id.* at 156.

serves the public interest, even though the lands are privately owned.<sup>255</sup>

*Fallbrook Irrigation District* was decided during the time period in which the courts were attempting to hash out the rules addressing special assessments.<sup>256</sup> Special-assessment districts were regarded as a particular form of "benefit" tax.<sup>257</sup> In general, the rules stated that where public improvement resulted in a special benefit to a specific class of owners—such as property owners abutting a new public highway—those owners could be required to pay for the costs of such improvements, at least to the extent they received a special benefit.<sup>258</sup> This requirement rested on the general principle that "he who reaps the benefit should bear the burden,"<sup>259</sup> even where the

255. *Id.* at 161-62. The Court's lengthy discussion of whether a public use existed, *id.* at 158-63, is misplaced and reflects the Court's confusion of two separate underlying theories about state regulation of property. In part, the property owner was probably misled into making the public benefit argument by the manner in which the case was required to be brought, which itself was just a matter of historical happenstance. It was not until *Mahon* was decided in 1922, just two months after *Jackman*, that the Court acknowledged the existence and possibility of a "regulatory" taking. See note 60 and accompanying text. Thus, cases brought prior to *Mahon*, such as *Fallbrook Irrigation Dist.*, were typically phrased in terms of due process challenges. In addition, *Fallbrook Irrigation Dist.* was decided in 1896, just before the Supreme Court's 1897 decision that the Fourteenth Amendment extended the Takings Clause to the states. See note 1. Challenges to state legislation prior to the 1897 decision were also phrased in due process terms. See, for example, *Jackman*, 260 U.S. at 29, in which the plaintiff argued that the legislation was contrary to the Fourteenth Amendment. See also *Fallbrook Irrigation Dist.*, 164 U.S. at 158 (recognizing the claim that the citizen is deprived of his property without due process if land is taken for other than public use); *Head*, 113 U.S. at 15 (deciding whether the plaintiff had been deprived of his property without due process of law in violation of the Fourteenth Amendment). As a result, the phrasing of the claim in *Fallbrook Irrigation Dist.* was as inevitable as it was misleading: Was "the citizen . . . deprived of his property without due process of law, if it be taken by or under state authority for any other purpose than a public use, either under the guise of taxation or by the assumption of the right of eminent domain?" 164 U.S. at 158.

256. See generally Stephen Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth-Century America*, 12 J. Legal Stud. 201, 226-32 (1983) (discussing evolution of special-assessment law). See Thomas M. Cooley, *Taxation* § 31 at 105-08 (Callaghan, 2d ed. 1886); John F. Dillon, 2 *Commentaries on the Law of Municipal Corporations* § 7612 (Little, Brown, 4th ed. 1890); Dean J. Misczynski, *Special Assessments*, in Donald G. Hagman and Dean J. Misczynski, eds., *Windfalls for Wipeouts: Land Value Capture and Compensation* 311 (Am. Society of Planning Officials, 1978), for summaries of turn-of-the-century rules regarding special assessments.

257. See Diamond, *Special Assessments* at 201 (cited in note 256) ("[B]enefit taxes—of which special-assessment taxes are the most common form—attempt to apportion the cost of a particular public improvement according to the benefit that the parties have received from it.")

258. See *Norwood v. Baker*, 172 U.S. 269, 278 (1898) (citing *Mobile County v. Kimball*, 102 U.S. 691, 703, 704 (1880); *Illinois Central Railroad Co. v. Decatur*, 147 U.S. 190, 202 (1893); *Bauman v. Ross*, 167 U.S. 548, 589 (1897)).

259. *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 706 (1884). See also Diamond, *Special Assessments* at 209-10 & nn.34 & 35 (cited in note 256) (quoting the phrase "*qui sentit commodum sentire debet onus*").

reaping was done involuntarily or reluctantly.<sup>260</sup> The Court's emphasis on the need for a public use reflected not only contemporaneous understandings of the taxation power, specifically the power to impose special assessments, but also notions regarding the distinction between taxation and confiscation. In the first edition of his constitutional law treatise, for example, Judge Cooley clearly regarded public use as a necessary component of a valid tax: "In the first place, taxation having for its legitimate object the raising of money for the public purposes and proper needs of government, the exaction of moneys from the citizens for other purposes is not a proper exercise of this power, and must therefore be unauthorized."<sup>261</sup> "Unauthorized" taxes, in his view, were "unlawful confiscation[s] of property, unwarranted by a principle of constitutional government."<sup>262</sup> The Court's initial analysis in *Fallbrook Irrigation District*, with its heavy focus on public use, seemed to suggest that the Court viewed the case as falling within the special-assessment category.

The *Fallbrook Irrigation District* Court then went on to analogize the irrigation act to an earlier common-scheme case involving the reclamation of swamps—*Hagar v. Reclamation District*.<sup>263</sup> The Court apparently did not recognize that common-scheme cases were a distinct category, which would have made any comparison to them inapplicable and unnecessary if the irrigation act really fell into the class of special assessments. The *Fallbrook Irrigation District* Court noted that state statutes authorizing the drainage of swamps need not be based on public health grounds, but instead the state may act through "reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property."<sup>264</sup> The Court explained:

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260. Although precise calculation of the benefits and burdens was not required, see *Fallbrook Irrigation Dist.*, 164 U.S. at 176, the Court viewed special assessments in excess of the benefit conveyed to the burdened property owner as a taking. See *Martin v. District of Columbia*, 205 U.S. 135, 140 (1907) (finding that a state statute should be interpreted as limiting the assessment to the amount of benefit conveyed, rather than permitting an assessment in excess of the value of the property, so as to preserve the constitutionality of the statute).

261. Cooley, *Constitutional Limitations* at 479 (cited in note 22).

262. *Id.* See also *Cole v. LeGrange*, 113 U.S. 1, 6 (1884) ("The general grant of legislative power in the Constitution of a State does not enable the legislature, in the exercise either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object.").

263. 111 U.S. 701, 705 (1884) (stating that the expense of swamp reclamation may be "charged against parties specially benefitted . . . according to the benefit received").

264. *Fallbrook Irrigation Dist.*, 164 U.S. at 163 (citing *Head*, 113 U.S. at 22; *Wurts*, 114 U.S. at 611; Cooley, *Taxation* at 617 (cited in note 256)).

If it be essential or material for the prosperity of the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made and the land rendered useful to all and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit.<sup>265</sup>

The Court's explanation confused the notion of a common scheme, which focuses on the private benefit inuring to a group of similarly situated property owners, with special assessments, which necessarily contain an element of public purpose and use as well as off-setting benefits and burdens to particular landowners.<sup>266</sup>

The distinction between the two categories had been drawn much more sharply and accurately in *Wurts v. Hoagland*, which was the second of the three cases relied upon in *Jackman*, and which, like *Fallbrook Irrigation District*, relied upon *Head* as precedent. The state drainage statute at issue in *Wurts* provided a procedure by which marshland could be drained at the request of some of the owners of the land, with the costs of the drainage operation to be charged against all of the owners.<sup>267</sup> The complaining property owner's land was drained against her wishes, and she was assessed the costs.<sup>268</sup> The Supreme Court rejected the property owner's claim that the statute deprived her of property without due process of law, noting that because "of the peculiar natural condition of the whole tract," no portion of the tract could be improved without the improvement of all portions.<sup>269</sup> Even in the absence of a benefit to the public health or welfare, the *Wurts* Court stated, the police power of the state necessar-

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265. *Id.*

266. The Court ultimately seemed to base its decision on special-assessment grounds, concluding that "we have no doubt that the irrigation of really arid lands is a public purpose, and the water thus used is put to a public use." *Id.* at 164. The Court's confusion is even more graphically illustrated by the three authorities that it cites in support of its common-scheme argument: *Head*, which, as discussed in notes 237-50 and accompanying text, is really *not* a common-scheme case, and Cooley's treatise on taxation, which addressed special assessments. See Cooley, *Taxation* at 617 (cited in note 256) ("[I]t may well be said that the public have such an interest in the [drainage] improvement, and the consequent advancement of the general interest of the locality, as will justify the levy of assessments upon the owners for drainage purposes."). Only *Wurts*, discussed in notes 267-72 and the accompanying text, was a true common-scheme case.

267. *Wurts*, 114 U.S. at 607.

268. *Id.* at 609-10.

269. *Id.* at 614.

ily extends to regulations which result in the improvement of jointly held lands at the joint expense of the property owners.<sup>270</sup>

To identify the basis of the legislature's power to pass legislation such as drainage statutes, the *Wurts* Court looked to the decisions of several state cases.<sup>271</sup> These courts drew a distinction between drainage and other improvement projects undertaken at the request of some or all of the property owners for the primary benefit of the owners, and improvements undertaken by the state to benefit primarily the public, with incidental benefits flowing to affected property owners in excess of the public benefit. The former category encompasses common schemes, which may be undertaken by the state under the police power and which do not give rise to compensation claims. The latter encompasses projects for which special assessments against property owners may be made under the state's taxing power, provided such assessments are limited to the benefits conveyed by the project to those affected landowners.<sup>272</sup>

The third case cited in *Jackman, Noble State Bank*, was, like *Jackman* itself, authored by Justice Holmes. In a short and rather uninformative opinion, the Court upheld the constitutionality of an Oklahoma statute which levied an assessment against each state bank's average daily deposits for the purpose of creating a fund to secure the repayment of deposits in the event of a bank's insolvency.<sup>273</sup> The plaintiff bank, which contended that it was financially sound and not in need of such a guarantee program, alleged the act resulted in a taking of private property without just compensation because the funds of a solvent bank would be taken to pay the debts of a failing competitor.<sup>274</sup> Justice Holmes, writing for a unanimous Court, noted that although the act might at first glance seem to result in a taking of private property to support a private interest (the shoring-up of failing banks), the act served the greater public interest of preventing wide-

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270. *Id.* at 614-15. See also *id.* at 611 ("It is the power of the government to prescribe public regulations for the better and more economical management of property of persons whose property adjoins, or which, from some other reason, can be better managed and improved by some joint operation . . .") (citation omitted).

271. *Wurts*, 114 U.S. at 611-12 (citing *State v. City of Newark*, 3 Dutcher 185, 194 (N.J. 1858) (noting that drainage laws are exercises of police power and not taxing power); *Coster v. Tide Water Co.*, 3 C.E. Green 54, 58 (N.J. 1866); *State v. Blake*, 6 Vroom 208 (N.J. 1871) and 7 Vroom 442 (N.J. 1872)).

272. *Id.* at 611-14 (citations omitted).

273. *Noble State Bank*, 219 U.S. at 109.

274. *Id.*

spread bank failures and resultant public panic.<sup>275</sup> Moreover, Justice Holmes stated that in addition to the usual example of taxation, there are other instances "in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume."<sup>276</sup> Although the specter of the average reciprocity of advantage rule is evident in *Noble State Bank*, it is unclear whether the Court viewed this as a special-assessment or common-scheme case.

What does this line of cases tell us, other than that the history of the average reciprocity of advantage rule is muddled? First, the differences between special assessments and common schemes are striking in certain respects. Special assessments require the existence of a public benefit and arise under the taxation power; common schemes create essentially private benefits for the affected property owners and arise under the police power. The distinction between the common-scheme and special-assessment cases, however, while important to a principled and clear articulation of the jurisprudential development of the average reciprocity of advantage rule, in the final analysis matters very little to the application of the rule and the outcomes reached under it.

Second, the similarities between the two categories of government acts are even more striking and are far more relevant to the average reciprocity of advantage rule. In both instances, the evaluating court looks to see whether the burdened landowner is benefited by the government act; if not, no special assessment may be made nor may the property owner be forced into a common scheme.<sup>277</sup> In each instance, only a rough calculation of benefits conveyed is required.<sup>278</sup>

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275. *Id.* at 112.

276. *Id.* at 111 (citing *Ohio Oil Co. v. Indiana*, 177 U.S. 190 (1900)). As an alternative ground, Justice Holmes stated that "an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use." *Id.* at 110-11 (citations omitted). *Ohio Oil* was one of a group of cases in which the Supreme Court established that restrictions on extractions from a common pool of natural resources are valid when such restrictions serve to protect the rights of all common owners. See, for example, *Walls v. Midland Carbon Co.*, 254 U.S. 300 (1920) (upholding a statute prohibiting burning and consumption of natural gas under certain circumstances); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911) (upholding a statute that forbade a land owner from pumping water, gas, and oil from his own land).

277. See *Myles Salt Co. v. Iberia Drainage Dist.*, 239 U.S. 478, 485 (1916) (stating that formation of a special-assessment district "to include property which is not and cannot be benefitted directly or indirectly . . . is an abuse of power and an act of confiscation") (citing *Wagner v. Baltimore*, 239 U.S. 207 (1915); *Gast Realty Co. v. Schneider Granite Co.*, 240 U.S. 55 (1916); *Kansas City Southern Ry. v. Road Improvement Dist. No. 6*, 256 U.S. 658 (1920); Freund, *The Police Power* § 442 (cited in note 15)).

278. See, for example, *Fallbrook Irrigation Dist.*, 164 U.S. at 176 (noting that "the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in

Both categories of cases provide ample theoretical underpinnings for the average reciprocity of advantage rule, for both encompass the notion of balancing the benefits conveyed to and the burdens inflicted upon regulated property owners.

At the most fundamental level, *Jackman* and its three precursors each dealt with a situation in which a private property owner was forced to participate with similarly situated property owners in a common project initiated either by the state or by other property owners. Although in all of these cases the property owners incurred a burden in the form of restrictions on the use of their property and the imposition of financial obligations, they also received offsetting benefits in the form of assurance that all such similarly situated owners would be required to act in a manner that would further the interests of the entire group as a whole.<sup>279</sup> It is this balancing of reciprocal benefits and burdens that underlies the notion of "average reciprocity of advantage" laid out in *Jackman*.

## 2. *Mahon* and Its Precursor, *Plymouth Coal*

Justice Holmes also referred to "average reciprocity of advantage" in *Pennsylvania Coal Co. v. Mahon*,<sup>280</sup> which was decided just two months after *Jackman* was decided. In *Mahon*, as in *Jackman*, Justice Holmes tossed out the phrase without explanation, using it to distinguish the holding in *Mahon* from that in an earlier, seemingly analogous case, *Plymouth Coal Co. v. Pennsylvania*.<sup>281</sup>

geometry"); *Hagar*, 111 U.S. at 705 (stating that "absolute equality" in apportioning costs is not required).

279. Nonetheless, these cases gave some early commentators pause. As one noted:

When a drain is built through private land it seems a stretch of language to say there has not been a taking; but the explanation is that the whole swamp is treated as a unit and as constituting in itself a single estate, although it is divided into separate parcels held by different proprietors. Such a view prevailed when the constitutions were adopted and the drainage statutes were then considered proper. It is now too late to raise literal objections to their constitutionality. It is to be noted however that it would not be possible, as an exercise of the branch of the police power in question, to take land for a drain or dykes outside the limits of the tract which it was sought to improve, and this power is consequently by no means as extensive as the power of eminent domain.

*Nichols*, 1 *Eminent Domain* § 88 at 241 (cited in note 234).

280. 260 U.S. at 415. See also notes 58-71 and accompanying text.

281. 232 U.S. 531 (1914). Interestingly, the discussion that would support the average reciprocity of advantage rule came not from the U.S. Supreme Court's holding in *Plymouth Coal* but rather from an earlier holding of the Pennsylvania Supreme Court.

In *Mahon*, Justice Holmes stated:

It is true that in *Plymouth Coal Co. v. Pennsylvania* . . . it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that,



*Plymouth Coal* involved a challenge to a Pennsylvania statute, the Anthracite Mine Laws, which required owners of adjoining coal mines to leave in place pillars of coal along their property lines so as to protect miners in the event the adjoining mine was abandoned and allowed to fill with water.<sup>282</sup> The statute was challenged by a mine owner, who originally contended in state court that the statute deprived mine owners of a valuable property interest—the pillar of coal left unmined—without providing them with just compensation as required under the Constitution.<sup>283</sup>

The opinion of the United States Supreme Court in *Plymouth Coal* is of little import. By the time the case reached the Court, the mine owner had conceded that the requirement of leaving a pillar in place was a valid exercise of the police power; rather, at this stage, it contended solely that the statutory method for calculating the width of the pillar was “so crude, uncertain, and unjust” that it resulted in a taking of private property without due process of law<sup>284</sup>—an argument which the Court had little difficulty rejecting.<sup>285</sup>

with the pillar on the other side of the line, would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.

*Mahon*, 260 U.S. at 415. Justice Holmes's private correspondence indicates that he did not regard average reciprocity of advantage as key to the decision reached in *Mahon*. See, for example, Mark D. Howe, 2 *Holmes-Pollock Letters—The Correspondence of Mr. Justice Holmes and Sir Frederick Pollock, 1874-1932*, at 109 (Belknap, 1941), where Justice Holmes wrote: “Brandeis's dissent speaks as if what I call average reciprocity of advantage were made the general ground by me. Not so. I use that only to explain a particular case.” Rather, Justice Holmes went on to state: “My ground is that the public only got on to this land by paying for it and that if they saw fit to pay only for a surface right they can't enlarge it because they need it now anymore than they could have taken the right of being there in the first place.” *Id.* See also Howe, 1 *Letters* at 462 (cited in note 70) (“If you read the document you will see that I do not, as [Brandeis] suggests, rely upon average reciprocity of advantage as a general ground, but only to explain a certain class of cases.”).

282. *Plymouth Coal*, 232 U.S. at 539.

283. *Pennsylvania v. Plymouth Coal Co.*, 81 A. 148, 149 (Penn. 1911). The volume of coal affected by the statute was substantial. As Professor Fischel, who investigated the history of the coal industry in examining the background of *Mahon* and *Plymouth Coal*, noted: “Don't think of Greek temples; the volume of pillars was about a third of the coal in the vein.” Fischel, *Regulatory Takings* at 19 (cited in note 167).

284. *Plymouth Coal*, 232 U.S. at 540.

285. The Court noted:

The objections of plaintiff in error to the method of fixing the width of the barrier pillar are based upon the supposed uncertainty and want of uniformity in the membership of the statutory tribunal, and upon the fact that the statute does not expressly provide for notice to the parties interested, that the procedure is not prescribed, and that there is no right of appeal.

*Id.* at 542. The Court rejected each claim. See *id.* at 542-44 (finding no problem with the membership of the tribunal); *id.* at 544 (finding the giving of notice implied within the statutory

The opinion of the Pennsylvania Supreme Court, on the other hand, actually addressed the average reciprocity of advantage concept, although the court did not use that precise phrase. The state supreme court acknowledged that while the statute protected the mine owners' property by preventing flooding by adjoining mines, such property protection was only "incidental[]" to the primary purposes of the statute,<sup>286</sup> which were protection of the miners' lives and protection of neighboring property owners' rights.<sup>287</sup> The court emphasized, however, that the police power would permit the regulation of private property where necessary to prevent the use of property from intruding upon the rights of others<sup>288</sup> and would permit the utter destruction of private property if needed to promote the public safety, morals, health, or general welfare.<sup>289</sup> The court set forth two alternative explanations for why no compensation was required in either case. First, the lack of compensation may be the result of the loss being regarded as *damnum absque injuria* (a loss without an injury)—an argument generally used for injury considered to be so "remote and consequential" that it must "be borne as a part of the price to be paid for the advantages of the social condition."<sup>290</sup> Alternatively, monetary compensation may not be required because the owner may be "sufficiently compensated by sharing in the general (and, in this case, also the specific) benefits" flowing from the police power act—in effect, by a balancing of reciprocal benefits and burdens.<sup>291</sup> In this instance, each mine owner was burdened by the requirement that it leave untouched a ribbon of its coal, but it was benefited by a similar requirement being imposed upon its adjoining mine owners.<sup>292</sup>

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language); *id.* at 545-46 (finding that it must be presumed that the tribunal would not interfere with the plaintiff's constitutional rights unless evidence to the contrary appears); *id.* at 547 (finding the right of appeal is discretionary with the legislature).

286. *Plymouth Coal*, 81 A. at 152.

287. *Id.* at 149-51.

288. *Id.* at 151 (quoting the maxim "*sic utere tuo ut alienum non laedas*").

289. *Id.*

290. *Lansing v. Smith*, 8 Cow. 146, 149 (N.Y. Sup. Ct. 1828).

As the California Supreme Court explained:

[*D*]amnum absque injuria . . . means merely that a person may suffer damages and be without remedy because no legal right or right established by law and possessed by him has been invaded, or the person causing the damage owes no duty known to the law to refrain from doing the act causing the damage.

*Rose v. State*, 19 Cal.2d 713, 123 P.2d 505, 515 (1942).

291. *Plymouth Coal*, 81 A. at 151 (citing 22 Am. & Eng. Encyclopedia of Law 916 (2d ed. 1897)).

292. The court stated:

*Mahon* involved a slightly different set of facts than *Plymouth Coal*. In *Mahon*, the state legislature had enacted the Kohler Act, which required mine owners to leave in place pillars of coal to prevent subsidence of overlying structures. The legal problem arose because the mine owners had, in this and other instances, specifically reserved the right to remove all of the coal and had specifically passed to the surface owner the risk that subsidence might occur as a result of that removal.<sup>293</sup> The statute "admitted[ly]" destroyed existing contract and property interests; "[t]he question," as Justice Holmes put it, was "whether the police power can be stretched so far" as to justify such destruction in the absence of compensation.<sup>294</sup>

The Court held that the Kohler Act did effect a taking, for it found that the police power could not justify such a restriction on a property owner's right to make beneficial use of its property. The damage was not considered "common or public,"<sup>295</sup> even though similar damage was inflicted upon other houses and structures in other locations. Nor did the Court find that the regulation could be justified in terms of promoting public safety for, in its view, that objective could be ensured by merely giving notice to the surface owner that the mine owner intended to mine under the house or structure (presumably so that the occupants could vacate the premises prior to collapse)—and indeed, the Act required the giving of exactly such notice.<sup>296</sup>

Justice Holmes distinguished *Mahon* from the Court's opinion in *Plymouth Coal*. Although *Plymouth Coal*, like *Mahon*, involved a state statute requiring that pillars of coal be left in place, in *Plymouth Coal* the requirement was imposed "for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws."<sup>297</sup> *Mahon*, on the other hand, involved an allocation of the risk of subsidence be-

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This rib of solid coal not to be mined into by either of the adjoining owners was to be contributed by each in equal parts for the mutual benefit of each . . . This regulation works no hardship on one for the benefit of another, but is impartial, just, and reasonable, imposing a common burden for the benefit of all such owners.

Id. (citation omitted).

293. *Mahon*, 260 U.S. at 412 ("The deed conveys the surface, but in express terms reserves the right to remove all the coal under the same, and the grantee takes the premises with the risk, and waives all claim for damages that may arise from mining out the coal.").

294. Id. at 413.

295. Id.

296. Id. at 414. The effectiveness of the notice requirement is another issue. As Professor Fischel noted, the fact that deaths and property damage occurred as a result of subsidence undercuts Holmes's suggestion that notice alone was enough to provide for public safety. Fischel, *Regulatory Takings* at 26 (cited in note 167).

297. *Mahon*, 260 U.S. at 414.

tween the surface and subsurface owners of property. Although the state could exercise its eminent domain power to eliminate the risk of subsidence, it could not attempt to do so indirectly and without compensation through the exercise of the police power.<sup>298</sup>

Ironically, Justice Brandeis's dissent in *Mahon* focused more directly on the average reciprocity of advantage rule than did Justice Holmes's majority opinion.<sup>299</sup> Justice Brandeis contended that a regulation that prevented subsidence of surface structures was clearly justifiable as an exercise of the police power.<sup>300</sup> He criticized the majority holding as seeming to conclude that this type of police power action could rest only upon an "average reciprocity of advantage" between the regulated property owner and the rest of the community, a reciprocity that the majority found lacking in the instant case.<sup>301</sup> Rather, he argued that the harm/benefit test provides a separate justification for such acts. Justice Brandeis drew the correct and necessary distinction between police power acts based in the harm/benefit test and police power acts based in the average reciprocity of advantage rule:

Reciprocity of advantage is an important consideration, and may even be an essential, where the State's power is exercised for the purpose of conferring benefits upon the property of a neighborhood, as in drainage projects, or upon adjoining owners, as by party wall provisions. But where the police power is exercised, not to confer benefits upon property owners, but to protect the public from detriment and danger, there is, in my opinion, no room for considering reciprocity of advantage.<sup>302</sup>

Where Justice Brandeis went astray was in finding that the state's interest in preventing the harm that would ensue from subsidence justified the regulation, despite the parties' explicit contractual allocation of that risk. Justice Brandeis's overly facile dismissal of the contractual agreement reached by the parties would have been of little

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298. *Id.* at 416. The Court stated:

We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they have bought.

*Id.*

299. *Id.* at 422 (Brandeis, J., dissenting).

300. *Id.*

301. *Id.*

302. *Id.* (citing *Wurts, Fallbrook Irrigation Dist.*, and *Jackman*).

import had he not followed it up by stating that in other instances where a contested regulation was upheld as preventing harm, no reciprocal advantage was present, "unless it be the advantage of living and doing business in a civilized community,"<sup>303</sup> an advantage that Justice Brandeis concluded, was "given by the [Kohler Act] to the coal operators."<sup>304</sup> This gratuitous comment by Justice Brandeis regarding the societal aspects of the reciprocal benefits of harm-preventing regulations provided fodder for Justice Brennan half a century later,<sup>305</sup> when he constructed the "social reciprocity" version of average reciprocity of advantage—the view that appears to predominate today and the one that distorts modern application of the rule.<sup>306</sup>

### 3. Reciprocity and Zoning

The second setting in which the notion of "average reciprocity of advantage" found early application involved comprehensive zoning schemes. The average reciprocity of advantage rule should have reached its fullest flowering in this arena, yet the Supreme Court has virtually ignored the rule in this context. During the very early years of the twentieth century, communities increasingly turned to comprehensive zoning schemes as a mechanism for controlling industrial growth and the pressures of economic development.<sup>307</sup> The concept of zoning was new and hotly debated in the legal literature<sup>308</sup> and even more hotly contested in the courts. Although some early courts struck down comprehensive zoning schemes,<sup>309</sup> other courts upheld them,<sup>310</sup>

303. *Id.* (citations omitted).

304. *Id.*

305. See notes 343-45 and accompanying text (discussing Brennan's treatment of Brandeis's dissent in *Andrus v. Allard*, 444 U.S. 51 (1979)).

306. See notes 401-02 and accompanying text (discussing effects of Brennan's test).

307. See note 202 and accompanying text (citing *Euclid* for the proposition that notions of legitimate land use and regulation thereof necessarily change over time as populations increase and perceptions of appropriate land use change). See also Robert C. Ellickson and A. Dan Tarlock, *Land Use Controls: Cases and Materials* 39-41 (Little, Brown, 1981) (discussing rapid spread of zoning ordinances and zoning enabling acts in 1920s and 1930s); Scott M. Reznick, Comment, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. Chi. L. Rev. 854, 858-66 (1973) (discussing effects of urbanization on use of police power).

308. A list of the contemporary legal scholarship is provided in Thomas Reed Powell, *The Supreme Court and State Police Power, 1922-1930 - IV*, 18 Va. L. Rev. 1, 18-21 nn.37-40 (1931).

309. See, for example, *Goldman v. Crowther*, 128 A. 50, 60 (Md. Ct. App. 1925) (invalidating a zoning scheme which imposed arbitrary restrictions without logical relation to the public welfare); *City of St. Louis v. Evraiff*, 256 S.W. 489, 495 (Mo. 1923) (striking down an ordinance which prohibited the erection or use of property for the storage of scrap iron, rags, and junk in industrial districts, and permitted such use in unrestricted districts); *Ignacianas v. Risley*, 121 A. 783, 786 (N.J. 1923) (striking down a law which invoked the police power to ban a store in a residential section because it might render the highway more dangerous); *Handy v. Village of S.*

often finding that such schemes fostered what was essentially average reciprocity of advantage among those regulated, though the courts did not use that precise term.<sup>311</sup>

The Supreme Court resolved any lingering questions regarding the constitutionality of comprehensive zoning schemes in *Village of Euclid v. Ambler Realty Co.*<sup>312</sup> Euclid passed a zoning ordinance which divided the entire village into various use, height, and area districts.<sup>313</sup> The complaining property owner owned sixty-eight acres of land, all of which had been zoned for various types of residential uses. The property owner contended that its land was suited only for commercial and industrial purposes and that the ordinance thus “confiscate[d] and destroy[ed] a great part” of the value of its land.<sup>314</sup>

The district court in *Euclid* agreed with the property owner, expressly rejecting the average reciprocity of advantage rule as a justification for the ordinance.<sup>315</sup> The district court stated that the burden inflicted upon the property owner by the regulation was not offset by any benefit that the owner received from similar burdens being inflicted upon other property owners within the village.<sup>316</sup> Rather, the district court found that the decline in property values suf-

*Orange*, 118 A. 838, 839 (N.J. 1922) (overturning an ordinance which forbade the building of two-family houses in the entire village).

310. See, for example, *Boland v. Compagno*, 97 S. 661 (La. 1923) (upholding an ordinance which prohibited the establishment of any business on a particular street except for drug stores, boarding houses, apartment houses, hotels, and banks); *State ex rel. Carter v. Harper*, 196 N.W. 451, 453-55 (Wis. 1923) (upholding a law forbidding a dairy and milk pasteurizing plant in a Milwaukee district); *Cliffside Park Realty Co. v. Borough of Cliffside*, 114 A. 797, 797 (N.J. 1921) (upholding a restriction on land uses not forbidden by “regulation controlling business districts”); *Cochran v. Preston*, 70 A. 113, 114-15 (Md. 1908) (upholding a law providing that, except for churches, no building over a certain height could be erected in a certain area of Baltimore); *Lincoln Trust Co. v. Williams Bldg. Corp.*, 128 N.E. 209, 210-11 (N.Y. 1920) (upholding a resolution regulating the height and bulk of certain buildings in New York City); *Ware v. City of Wichita*, 214 P. 99, 102 (Kan. 1923) (upholding a law which prohibited the construction of a business building in a residential area); *Watertown v. Mayo*, 109 Mass. 315, 318 (1872) (upholding a law which prevented the use of a building for the purpose of slaughtering sheep, cattle, or other animals without prior consent of the mayor or selectmen).

311. See, for example, *State ex rel. Carter v. Harper*, 196 N.W. at 453 (stating that the owner “who is limited in the use of his property finds compensation therefor in the benefits accruing to him from the like limitations imposed upon his neighbor”); *Cochran*, 70 A. at 114-15 (discussing ordinance that involved the reciprocal benefit and protection of other owners of the buildings within the specified area).

312. *Euclid*, 272 U.S. at 365. See notes 72-78 and accompanying text (discussing *Euclid*).

313. *Euclid*, 272 U.S. at 380.

314. *Id.* at 384.

315. *Ambler Realty Co. v. Village of Euclid*, 297 F. 307, 315 (1924), rev'd, 272 U.S. 365 (1926).

316. *Id.*

ferred by the plaintiff and similarly situated property owners would simply be transferred to property owners in unrestricted industrial areas, either nearby or far away.<sup>317</sup> The court saw a distinction between ordinances regulating party walls, as in *Jackman*, or boundary pillars of coal, as in *Plymouth Coal*, where benefits are reciprocal, "even though unequal in individual cases,"<sup>318</sup> and the instant case, in which "the property values [were] either dissipated or transferred to unknown and more or less distant owners."<sup>319</sup> Although the court noted that some of the restrictions of the ordinance might be valid as applied to either the plaintiff's property or to other properties in the village, it found that the invalid portions of the ordinance were so "intermingled and inseparable" that the entire ordinance must be nullified.<sup>320</sup>

The United States Supreme Court reversed the district court's opinion and held that the comprehensive zoning ordinance was a legitimate exercise of the police power.<sup>321</sup> Interestingly, Justice Sutherland, writing for the majority in a 6-3 decision, did not refer to "average reciprocity of advantage" in doing so, although he talked extensively in general terms about the benefits accruing to the public as a whole from categorizing land into residential and industrial uses,<sup>322</sup> and the benefits accruing to the occupants of single-family residential districts from segregating single-family and multi-family residential uses.<sup>323</sup>

Instead of focusing directly on these benefit-conferring characteristics of the zoning ordinance, the *Euclid* Court described the ordinance as a legitimate extension of the village's police power authority

317. *Id.* at 316.

318. *Id.*

319. *Id.*

320. *Id.* at 317.

321. *Euclid*, 272 U.S. at 397.

322. *Id.* at 391. Justice Sutherland stated that such categorization results in:

promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishing of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops and factories.

*Id.* He added as final reasons the reduced street construction and repair costs engendered by "confining the greater part of the heavy traffic to the streets where business is carried on." *Id.*

323. *Id.* at 394, 395 (stating that "very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district" and that where multi-family uses concentrate in a single-family area, "apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances").

to regulate nuisances, in effect placing the ordinance squarely under the harm/benefit test.<sup>324</sup> Although the *Euclid* Court was careful not to equate the scope of the police power with the power to regulate nuisances,<sup>325</sup> it nonetheless failed to recognize expressly the key divergence between the police power and the nuisance-regulation power in the zoning context. A more complete articulation and analysis of the legitimacy of zoning ordinances in general would have been based not solely upon the state's ability to regulate land uses so as to prevent public nuisances, but would have also explicitly acknowledged that some such regulations are designed to increase property values by affording protection to similarly situated property owners by providing reciprocal benefits through land use regulation. Indeed, contemporary scholars had explicitly discussed the reciprocal benefits that flow to similarly situated property owners through a zoning ordinance, noting that such regulations may well protect and increase the value of all property regulated under them.<sup>326</sup> Similarly, in the decades before *Euclid* was decided, a number of state courts had recognized the mutual benefits and burdens flowing to property owners as a result of zoning regulations<sup>327</sup> and had acknowledged that the benefits need not

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324. *Id.* at 387-88.

325. *Euclid*, 272 U.S. at 387-88 (noting that "the law of nuisances . . . may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the [police] power").

326. See, for example, Newman F. Baker, *Zoning Legislation*, 11 Cornell L.Q. 164, 168-69 (1926) ("But, though zoning regulations are imposed under the police power and restrict the owner in the use of his property, it does not follow that the adjustment of rights between property owners takes rights without conferring them. Often zoning increases the value of the property concerned."); Bettman, 37 Harv. L. Rev. at 839 (cited in note 80) (noting that under zoning, "each piece of property pays, in the form of reasonable regulation of its use, for the protection which the plan gives to all property lying within the boundaries of the plan"); J.S. Young, *City Planning and Restrictions on the Use of Property*, 9 Minn. L. Rev. 593, 602-04 (1925) (noting that the use of the police power for zoning is analogous to "drainage, irrigation, and compulsory joint improvements" and quoting Freund, Nichols, and *Fallbrook Irrigation Dist.*).

327. See, for example, *Cochran*, 70 A. at 114-15 (holding that a zoning regulation "in its very purpose involves the reciprocal benefit and protection" of regulated property owners); *Watertown v. Mayo*, 109 Mass. 315, 318 (1872) (stating that the regulated property owner "is presumed to be rewarded by the common benefits secured"); *Piper v. Ekern*, 180 Wis. 586, 194 N.W. 159, 161 (1923). In *Piper*, the court stated:

Such regulation affecting the owners of property in a certain area, to a large extent, is founded upon the mutual and reciprocal protection which owners of property derive from a general law, and, while in a sense a material diminution in value may result, nevertheless a reciprocal advantage accrues which in many instances it is impossible to estimate from a financial standpoint, but which nevertheless constitutes a thing of value and a compensating factor for the interference by the public with property rights.



be monetarily quantifiable or necessarily equal to the burdens imposed.<sup>328</sup>

Certainly, not all zoning ordinances can be validated in terms of average reciprocity of advantage. Some zoning restrictions, such as those that prohibit noisy or dangerous industrial or commercial uses in residential neighborhoods, are more properly grounded in the state's nuisance-prevention power. However, other types of zoning provisions, such as height or minimum-yard regulations, confer benefits upon similarly situated property owners by holding each of them to a uniform standard. Although each property owner may find use of his or her land restricted by the regulation, each is benefited by having similar burdens imposed upon his or her neighbors. Thus, although a property owner might be limited to a residential use, he or she is secure in the knowledge that neighboring properties are also so limited, and that a factory will not be erected in the midst of the residential area, where it would greatly diminish the value of his or her residential property. A full discussion of this benefit-conferring aspect of zoning ordinances by the *Euclid* Court might have prevented the average reciprocity of advantage rule from being so distorted by the Supreme Court in its modern cases.

*B. Modern Application of the Rule: Penn Central and Its Successors*

After *Mahon*, the Court did not refer to the average reciprocity of advantage rule again for fifty years. Although the concept of reciprocal benefits and burdens continued to arise sporadically in the courts, it typically did so in the context of comprehensive zoning regulations, where the doctrine was used to emphasize the reciprocal benefits and burdens that flowed from such regulations and to explain why such regulations were constitutional even though unaccompanied by payment of just compensation.<sup>329</sup>

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Id.

328. See, for example, *State ex rel. Carter*, 182 Wis. 148, 196 N.W. at 453 (upholding a law forbidding a dairy and milk pasteurizing plant in a district in Milwaukee).

329. See, for example, *HFH, Ltd. v. Superior Court of Los Angeles County*, 15 Cal. 3d 508, 542 P.2d 237, 246 (1975):

In this case, as in most instances, zoning is not an arbitrary action depriving someone of property for the purpose of its use by the public or transfer to another; rather it involves reciprocal benefits and burdens which the circumstances of this case well illustrate. The shopping center which plaintiffs seem at various times to have contemplated erecting, would derive its value from the existence of residential housing in the surrounding area. That residential character of the neighborhood, we may assume, results in part from the residential zoning of the area around the tract in question. Plaintiffs in this case therefore find themselves in a somewhat uncomfortable position: they wish to reap the

When the Court finally returned to this topic in *Penn Central Transportation Co. v. New York City*,<sup>330</sup> decided in 1978, the Court set forth the modern form of the average reciprocity of advantage rule, which essentially rejected the limitations established by the original articulations of the rule. *Penn Central* involved a challenge to New York City's Landmark Preservation Law brought by the owners of Penn Central Terminal, a designated historic landmark. The owners applied to the Landmark Preservation Commission to lease to a third party the right to construct a multi-story office tower above the Terminal; the Landmark Preservation Commission denied their petition for use.<sup>331</sup>

At issue was a landmark preservation regulation which sought to preserve over 400 designated landmarks (of which Penn Central Terminal was one) in addition to thirty-one historic districts.<sup>332</sup> The property owners alleged, among other things,<sup>333</sup> that the regulation effected a taking because it failed to impose similar restrictions upon all structures located in specific areas; thus, they argued, the regulation failed to create the "fair and equitable distribution of benefits and burdens of governmental action" that typified the zoning ordinances and historic-district regulation that had passed constitutional muster in the past.<sup>334</sup> The property owners contended that they were "solely burdened and unbenefited" by the regulation.<sup>335</sup> In effect, the owners were alleging that the landmark regulation failed to achieve an average reciprocity of advantage.

Justice Brennan, writing for a 6-3 majority, rejected this argument. Although his opinion did not use the phrase "average reciprocity of advantage,"<sup>336</sup> the presence of the doctrine is implicit. He noted that "[l]egislation designed to promote the general welfare commonly

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benefit in the form of higher market values of their land, of the restrictive zoning on other properties, but do not wish to bear the reciprocal burden of such zoning when it applies to their property.

330. 438 U.S. at 104. See notes 90-100 and accompanying text (discussing *Penn Central* and the nuisance exception to the harm/benefit test).

331. *Penn Central*, 438 U.S. at 116-17.

332. *Id.* at 132 n.28.

333. The owners alleged the regulation effected a taking without just compensation in violation of the Fifth and Fourteenth Amendments and deprived them of due process in violation of the Fourteenth Amendment. *Id.* at 119.

334. *Id.* at 133.

335. *Id.* at 134.

336. However, Justice Rehnquist did in his dissent. See *id.* at 147 (Rehnquist, J., dissenting) (discussed in notes 373-81 and accompanying text).

burdens some more than others."<sup>337</sup> Justice Brennan pointed to the examples of *Hadacheck*, *Miller*, and *Goldblatt*,<sup>338</sup> noting that the owners in those cases suffered disproportionately from the legislation restricting their land uses. He rejected the contention of the Terminal's owners that those cases dealt with noxious uses, stating that the cases involved lawful, nonblameworthy uses and that the restrictions at issue in each case were designed to implement a public policy "expected to produce a widespread public benefit and applicable to all similarly situated property."<sup>339</sup>

Moreover, Justice Brennan declared that where a land use regulation benefits society as a whole, the regulated land owner, as a member of society, is also benefited.<sup>340</sup> According to Justice Brennan, this indirect benefit, even in the absence of a direct benefit to the landowner in his or her status as a regulated party and even though the owner might feel "more burdened than benefited by the law,"<sup>341</sup> is sufficient to support the exercise of the police power, provided that the benefits to society outweigh the burdens to the landowner. In short, as long as the burdened property owner receives gross benefits equal to those received by every other member of the community, average reciprocity of advantage is achieved.

Justice Brennan returned to this theme of societal benefit in *Andrus v. Allard*,<sup>342</sup> decided just eighteen months after *Penn Central*. In *Andrus*, the Court upheld a regulation which severely limited the uses to which legally obtained feathers of eagles and certain other protected species of birds could be put and which prohibited outright the sale of such items. Justice Brennan, writing for a unanimous Court, quoted from Justice Brandeis's dissent in *Mahon*, stating that regulated property owners could not complain of a "burden borne to secure the advantage of living and doing business in a civilized community."<sup>343</sup> Justice Brennan's suggestion that the "social" reciprocity created by regulations was sufficient to prevent a taking was a bastardization of what Justice Brandeis actually meant. Justice Brandeis

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337. *Id.* at 133.

338. See notes 137-43 and accompanying text (discussing *Miller*) and 148-51 (discussing *Hadacheck* and *Goldblatt*).

339. *Penn Central*, 438 U.S. at 133 n.30.

340. *Id.* at 134-35 (stating that unless the Court were to reject the New York City Council's judgment that "the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole," which the Court was unwilling to do, the Court could not "conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law").

341. *Id.* at 135.

342. 444 U.S. 51 (1979).

343. *Id.* at 67 (quoting *Mahon*, 260 U.S. at 422 (Brandeis, J., dissenting)).

had argued in *Mahon* that while reciprocity of advantage was important and perhaps even essential when the state exercised its police power for the purpose of conveying benefits to property owners, no reciprocity was necessary where the police power was used to prevent the infliction of a harm upon the public.<sup>344</sup> Justice Brandeis cited several cases in which police power acts had been upheld because of their harm-preventing nature, and noted that in each instance, the owner had received no reciprocal benefit, unless the benefit was that of simply belonging to a society in which harms to the public were not tolerated.<sup>345</sup> Justice Brandeis's clear intent was to dismiss reciprocal benefits as a necessary component of harm-preventing regulation. Nothing in his opinion indicated that he intended to imply that generalized benefits to society as a whole were sufficient to offset the burdens inflicted upon a particular property owner as a result of a police power action that conveyed benefits but did not prevent harms.

Justice Brennan took his third bite at the social reciprocity apple in his dissent in *Nollan v. California Coastal Commission*,<sup>346</sup> decided in 1987. The *Nollan* Court held, in a 5-4 decision, that a state requirement that conditioned issuance of a building permit for an oceanfront house on the property owners' agreeing to grant an easement to the public to traverse their beach was a regulatory taking because the condition did not serve any public purpose related to the permit requirement.<sup>347</sup> Justice Brennan dissented. Among the arguments he raised was that of average reciprocity of advantage. Justice Brennan applied the three-part test of *Penn Central*<sup>348</sup> and found that the economic impact of this regulation did not rise to the level of a taking. Rather, he found that conditioning the issuance of the permit upon the property owners' granting public access was "a classic instance of government action that produces a 'reciprocity of advantage.'"<sup>349</sup> First, he argued, the permit would enable the property owners to greatly expand the size of the house on their lot, thus increasing the parcel's value.<sup>350</sup> In effect, he was arguing that the property own-

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344. See notes 299-304 and accompanying text (discussing Brandeis's dissent in *Mahon*).

345. *Mahon*, 260 U.S. at 422 (Brandeis, J., dissenting).

346. 483 U.S. at 842 (Brennan, J., dissenting). See notes 214-17 and accompanying text for a discussion of *Nollan* in the context of the harm/benefit test.

347. 483 U.S. at 838-42 (Brennan, J., dissenting).

348. See text accompanying note 9 for the Court's statement of the *Penn Central* test.

349. *Nollan*, 483 U.S. at 856 (Brennan, J., dissenting) (quoting *Mahon*, 260 U.S. at 415).

350. *Id.* Justice Brennan noted: "[A]ppellants make no contention that this increase is offset by any diminution in value resulting from the deed restriction, much less that the

ers were receiving a benefit (permission to build a house bigger than their existing one) that offset the burden that the regulation inflicted upon them (permitting public access to their beach).<sup>351</sup> Second, Justice Brennan contended that the regulation actually benefited the property owners "both as private landowners and as members of the public" because they were able to walk along other people's beaches as a result of other beachfront owners being required to grant similar lateral easements.<sup>352</sup>

The flaw in Justice Brennan's reasoning is two-fold. First, permitting the landowners to develop their own property, a use to which they were already entitled, can hardly be termed a benefit that offsets any loss incurred as a result of the regulation. Unless it can be shown that the state had a legitimate reason for limiting the size of the house on the lot to that of the existing structure, the regulation must fail.

Second, average reciprocity of advantage would occur only if the only persons allowed access to the property owner's beach were similarly situated oceanfront owners who had also been required to grant access in the same manner. In *Nollan*, however, the regulation was intended to grant access to the general public, even though the public had paid nothing for that privilege. Therefore, a class of persons (beachfront owners) was required to bear a burden (forced granting of access to their private beaches) in order that the public as a whole might benefit. The mere fact that the beachfront owners themselves also benefited from the regulation is not enough to wipe out the disproportionate burden that the regulation inflicted upon them.

The expansive social view of average reciprocity of advantage that Justice Brennan articulated in *Penn Central*, *Andrus*, and *Nollan* was echoed by other Justices in other opinions. In the 1980 decision in *Agins v. Tiburon*, for example, Justice Powell, writing for a unanimous Court, determined that a zoning ordinance that reduced the permitted density on the appellants' land in order to promote open space and minimize urbanization did not, on its face, effect a taking.<sup>353</sup> Justice Powell found a legitimate state interest in encouraging provision of open space and discouraging high-density development of

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restriction made the property less valuable than it would have been without the new construction." *Id.*

351. Of course, this analysis works only if one accepts the premise that the state can unilaterally and without reason restrict the size of any residence.

352. *Id.*

353. 447 U.S. at 255.

urban lands.<sup>354</sup> Although he noted that the ordinance limited the development potential (and hence the value) of appellants' land, he argued that the ordinance benefited not only the public, but also the appellants and similarly situated property owners, by providing for "careful and orderly development of residential property with provision for open-space areas."<sup>355</sup> In evaluating the constitutionality of the zoning ordinances, Justice Powell stressed that these "benefits" to the regulated property owners must be balanced against the "burdens" inflicted upon them by the zoning ordinance.<sup>356</sup>

Similarly, in *Hodel v. Irving*,<sup>357</sup> Justice O'Connor, writing for the Court, found that the generalized benefit to an Indian tribe as a whole flowing from a federal statute providing for escheat of certain property interests in Indian lands outweighed the burden that the statute imposed on the individual property owners. Over time, individual ownership of formerly communal lands had resulted in highly fractionalized parcels. Congress enacted the Indian Land Consolidation Act of 1983, which provided for escheat of certain lands to the tribe and which prohibited descent of those lands by intestacy or devise. The legislation did not provide for any compensation to disappointed heirs or devisees. Although the Court ultimately struck down the legislation on the grounds that the American legal system would not permit the "total abrogation" of inheritance rights,<sup>358</sup> Justice O'Connor noted in dicta that one factor "weighing weakly" in the statute's favor was the existence of an "average reciprocity of advantage."<sup>359</sup> Justice O'Connor reasoned that consolidation of tribal lands benefited the members of the tribe. While not all tribal members owned escheatable lands, nor were all owners of escheatable lands members of the tribe, the overlap between the two categories was "substantial."<sup>360</sup> Although owners of escheatable lands were burdened by the statute, insofar as they were members of the tribe they also benefited by the escheat of the fractional interests of others. More telling, Justice O'Connor noted that the whole benefit gained by the regulation (the consolidation of lands) was greater than the sum of

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354. Id. at 261.

355. Id. at 262.

356. Id. The Court did not use the phrase "average reciprocity of advantage" in reaching this outcome.

357. 481 U.S. 704 (1987).

358. Id. at 716.

359. Id. at 715.

360. Id.

the burdens imposed upon the individual property owners "since consolidated lands are more productive than fractionated lands."<sup>361</sup> The benefit to the tribe as a whole, therefore, was balanced against the burden to the property owner as an individual, rather than the benefits to the individual property owner being balanced against the burdens borne by that same individual.

Likewise, in *Keystone Bituminous Coal Association v. DeBenedictis*, Justice Stevens, writing for the majority in a 5-4 decision, declared that not only may the benefit accrue to society as a whole, but that it need not even necessarily flow from the specific regulation at issue.<sup>362</sup> Rather, it may simply arise from the land use regulation scheme as a whole. As noted above,<sup>363</sup> *Keystone* involved a factual pattern remarkably similar to that of *Mahon*. The plaintiff mine owners challenged the constitutionality of the Pennsylvania Bituminous Mine Subsidence and Land Conservation Act, which required that fifty percent of the coal beneath certain structures be left in place in order to prevent subsidence.<sup>364</sup>

The *Keystone* Court distinguished *Mahon*, finding that the statute at issue in *Keystone* had been passed to serve important public interests ("health, the environment, and the fiscal integrity of the area"<sup>365</sup>), while the statute at issue in *Mahon* had been enacted to benefit private parties (by protecting against damage to the homes of landowners who had contractually assumed the risk of such damage).<sup>366</sup> Justice Stevens adopted the two-part takings test first articulated in *Agins v. Tiburon*, where the Court had held that a land use regulation effects a taking if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."<sup>367</sup> Justice Stevens apparently viewed the average reciprocity of advantage rule as a subset of the first part of the *Agins* test. He argued that the Court's hesitancy to find a taking where a regulation merely restrains uses of property "that are tantamount to public nuisances" simply reflected Justice Holmes's average reciprocity of advantage theory: "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed

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361. *Id.* at 716.

362. 480 U.S. at 470.

363. See text accompanying notes 101-02 (discussing factual similarities between *Keystone* and *Mahon*).

364. *Keystone*, 480 U.S. at 476-77.

365. *Id.* at 488.

366. *Id.* at 486.

367. 447 U.S. at 260 (citations omitted).

on others.”<sup>368</sup> Justice Stevens thus seemed to equate the harm/benefit test and the average reciprocity of advantage rule.<sup>369</sup> He noted that the state, in order to protect the public welfare, must be able to restrict the use of private property.<sup>370</sup> He saw the reciprocity involved not as specific to the individual situation, but rather as generalized to society as a whole,<sup>371</sup> and he explicitly stated that the Takings Clause did not require a one-to-one equivalency between the burden inflicted upon and the benefit received by each individual property owner.<sup>372</sup>

Justice Rehnquist, on the other hand, rejected this “social reciprocity” vision of the average reciprocity of advantage rule on two occasions. He dissented in *Penn Central*, basing his dissent in large part upon the lack of reciprocity in benefits and burdens afforded by the Landmark Law.<sup>373</sup> A typical zoning ordinance may restrict the uses of property and in so doing may diminish the value of that property, but that diminution is generally at least in part offset by an increase in value that stems from similar restrictions being put upon neighboring properties.<sup>374</sup> The reciprocal restrictions operate not only for the benefit of the community as a whole (as Justice Brennan had

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368. *Keystone*, 480 U.S. at 491.

369. Justice Stevens stated: “The Court’s hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of ‘reciprocity of advantage’ that Justice Holmes referred to in *Pennsylvania Coal*.” *Id.* He went on to state:

The special status of this type of state action can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not ‘taken’ anything when it asserts its power to enjoin the nuisance-like activity.

*Id.* at 491 n.20 (citations omitted).

370. *Id.* at 491.

371. *Id.*

372. *Id.* at 491 n.21 (stating that “[t]he Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received.” The Court explained, “not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received”).

Justice Stevens also referred to “average reciprocity of advantage” in his 1994 dissent in *Dolan*, 512 U.S. at 408 (Stevens, J., dissenting), although there he seemed to use the phrase to refer to offsetting benefits and burdens to a single property owner. He argued that in determining whether the complaining property owner had indeed suffered a taking as a result of the city’s attachment of conditions to her application for a building permit to expand her commercial structure, it was necessary to weigh the benefit she received from the building permit against the burden inflicted upon her by the city’s conditions. *Id.* at 408-09 (Stevens, J., dissenting) (citing *Mahon*, 260 U.S. at 415; *Hodel*, 481 U.S. at 715).

373. 438 U.S. at 138, 140-41 (Rehnquist, J., dissenting). He was joined in his dissent by Chief Justice Burger and Justice Stevens.

374. *Id.* at 139-40 (Rehnquist, J., dissenting).



asserted), but for the mutual benefit of the similarly situated property owners.<sup>375</sup> Here, the regulation did not create a historic district, which might well result in reciprocal benefits to the subject property owners,<sup>376</sup> but rather singled out 400 buildings from a total of over one million in New York City and imposed upon the owners not mere restrictions upon land uses, but an affirmative duty to maintain and preserve the designated structures.<sup>377</sup> The benefit of such a regulation flows equally to all residents of the city, but the burden falls disproportionately upon those property owners whose properties have been so designated.<sup>378</sup> Thus, he concluded, if the property owners had been engaged in a noxious use, such as those engaged in by the property owners in *Mugler*, *Hadacheck*, *Miller*, and *Goldblatt*, no taking would have occurred, regardless of the burden imposed upon the property owners.<sup>379</sup> Even where the regulation prevents a use that is not noxious or nuisance-like, no taking arises if the regulation affects a broad spectrum of property owners and affords an offsetting benefit to burdened property owners (e.g., a zoning ordinance).<sup>380</sup> Justice Rehnquist noted: "While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another."<sup>381</sup>

Justice Rehnquist also dissented in *Keystone*,<sup>382</sup> where he rejected Justice Stevens's expansive notion of the average reciprocity of advantage rule. He again noted that while police power actions that result in reciprocity are valid under the Fifth Amendment, the Takings Clause is designed to ensure that the state does not exceed this inherent limitation and does not inflict upon a property owner a

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375. Id. at 140 (Rehnquist, J., dissenting).

376. Id. at 139 n.2 (Rehnquist, J., dissenting). Justice Rehnquist quoted from the opinion of the New York Court of Appeals: "[In historic districting, as in traditional zoning,] owners although burdened by the restrictions also benefit, to some extent, from the furtherance of a general community plan." Id. (alterations in original) (quoting *Penn Central*, 47 N.Y.2d 324, 366 N.E.2d 1271, 1274 (1977)).

377. Id. at 140 (Rehnquist, J., dissenting).

378. Id. at 148-49 (Rehnquist, J., dissenting). Justice Rehnquist stated:

Here, . . . a multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other "landmarks" in New York City. . . . It is exactly this imposition of general costs on a few individuals at which the "taking" protection is directed.

Id. at 147 (Rehnquist, J., dissenting).

379. Id. at 144-45 & n.8 (Rehnquist, J., dissenting).

380. Id. at 147 (Rehnquist, J., dissenting).

381. Id.

382. 480 U.S. at 506 (Rehnquist, C.J., dissenting).

burden that is greater than that borne by the public as a whole.<sup>383</sup> A regulation that disproportionately burdens specific property owners cannot be justified on the grounds that it benefits society as a whole, for virtually all regulations are designed to further the public weal. Such a rule would, in effect, eradicate the protections of the Takings Clause.<sup>384</sup>

The Supreme Court's next reference to the average reciprocity of advantage rule occurred in *Lucas v. South Carolina Coastal Council*. The reference was a fleeting one. Justice Scalia noted that there are two instances in which the Court has found a regulation is a taking regardless of the public interest asserted in support of the police power action.<sup>385</sup> The first is where the regulation results in a physical invasion of the property;<sup>386</sup> the second is where the regulation "denies all economically beneficial or productive use of land."<sup>387</sup> Although Justice Scalia noted that the rationale behind the second category was unclear,<sup>388</sup> in such an instance, where no economic use survives the regulation, "it is less realistic to indulge [the] usual assumption that the legislature is simply adjusting the benefits and burdens of economic life in a manner that secures an 'average reciprocity of advantage' . . ."<sup>389</sup> Rather, it is more likely in such a situation that "private property is being pressed into some form of public service under the guise of mitigating serious public harm."<sup>390</sup> Thus, Justice Scalia seemed to be mingling the average reciprocity of advantage and harm/benefit tests, although the brevity of his

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383. *Id.* at 512 (Rehnquist, C.J., dissenting) (stating that the Fifth Amendment "is designed to prevent 'the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him'") (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893)).

384. See *id.* at 513 (Rehnquist, C.J., dissenting) ("A broad exception to the operation of the Just Compensation Clause based on the exercise of multifaceted health, welfare, and safety regulations would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners, for nearly every action the government takes is intended to secure for the public an extra measure of 'health, safety, and welfare.'" (citation omitted)).

385. *Lucas*, 505 U.S. at 1015.

386. *Id.*

387. *Id.*

388. *Id.* at 1017 (noting that the explanation may be that deprivation of all economic use is the functional equivalent of a physical invasion from the property owner's point of view).

389. *Id.* at 1017-18 (quoting *Penn Central*, 438 U.S. at 124, and *Mahon*, 260 U.S. at 415).

390. *Id.* at 1018.

reference makes it difficult to determine precisely the nature of his analysis.

*Dolan v. Tigard*,<sup>391</sup> decided by the Supreme Court in 1994, implicitly raised the issue of average reciprocity of advantage. In that case, the property owner applied for a building permit that would allow her to expand her commercial business. The city attempted to condition the granting of the permit upon the property owner's dedicating to the city a portion of her property for flood control and a bicycle path. Although the property owner conceded that the city could, under certain circumstances, exact such a dedication in return for a building permit, she argued that the exaction was inappropriate in this instance. The city could point to "no special benefits" that the permit conferred upon her, nor could it point to any "special quantifiable burdens" that her expansion would inflict upon the public.<sup>392</sup> In essence, the property owner was arguing the exactions could not be justified by either the harm/benefit test (because the city could not identify any harm caused by her activities) or by the average reciprocity of advantage rule (because the city could not identify any benefits that she received that would offset the burden imposed by the regulatory action). The Court resolved the case by formulating a nexus standard that requires a "rough proportionality" between the burden imposed upon the property owner and the state interest alleged to be at stake.<sup>393</sup> Because the required nexus was lacking on the facts before the Court, the case was remanded so that the city could attempt to make the proper showing that the dedication bore the correct relationship to the stated purposes of the regulatory burden.<sup>394</sup>

In sum, modern Supreme Court application of the average reciprocity of advantage rule shows no principled adherence to its historical formulation. The rule has been permitted to evolve into a "social reciprocity" equation that bears little resemblance to the balancing of individual benefit and burden envisioned by Justice Holmes several decades ago.

### *C. Average Reciprocity of Advantage: A Summary*

Certain underlying principles of the average reciprocity of advantage rule can be divined from the Court's early opinions. First, average reciprocity of advantage does not require a one-to-one equiva-

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391. 512 U.S. at 374.

392. *Id.* at 386.

393. *Id.* at 391.

394. *Id.* at 395-96.

lency between the burden imposed by the regulation and the resulting benefit to the property owner—a rough approximation will suffice.<sup>395</sup> Second, some regulations will inevitably inflict pecuniary harm upon the regulated individuals, even though no average reciprocity of advantage is identifiable. Although Justice Holmes spoke warily of the “petty larceny of the police power,”<sup>396</sup> the Supreme Court has acknowledged that the public must tolerate a certain degree of such economic loss, lest government be unable to function.<sup>397</sup>

Nonetheless, the Supreme Court has repeatedly stated that the Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>398</sup> The average reciprocity of advantage rule, as originally envisioned and articulated by the Court, provided a useful mechanism for determining which regulations fall into the category of a burden to be borne by the public rather than the individual property owner, i.e., for making the critical distinction between exercises of the eminent domain power and exercises of the police power. For example, an ordinance requiring all development within a jurisdiction to adhere to certain setback restrictions may be based solely in aesthetics rather than in harm-preventing considerations of public health, safety, or welfare. Nonetheless, the ordinance will be a valid exercise of the police power because it conveys reciprocal benefits to all burdened property owners.<sup>399</sup> As Justice Rehnquist explained in his dissent in *Penn Central*:

Typical zoning restrictions may . . . so limit the prospective uses of a piece of property as to diminish the value of that property in the abstract because it may not be used for the forbidden purposes. But any such abstract decrease in

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395. See, for example, *Keystone*, 480 U.S. at 491 n.21 (noting that the Takings Clause does not require courts and state legislatures to calculate whether a specific individual incurs burdens in excess of benefits).

396. *Howe*, 1 *Letters* at 457 (cited in notes 70).

397. See, for example, *Bowles v. Willingham*, 321 U.S. 503, 518 (1944) (stating that a certain degree of economic loss has never been a barrier to the use of the police power). The Supreme Court has explained such minimal loss by noting that the owner “is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure.” *L’Hote v. New Orleans*, 177 U.S. 587, 599 (1900) (quoting Dillon, 1 *Municipal Corporations* § 141 (cited in note 256)).

398. The quote originally appeared in *Armstrong v. United States*, 364 U.S. 40, 49 (1960), and has been repeated by the Court on numerous occasions since. See, for example, *Dolan*, 512 U.S. at 384; *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 647 (1993); *Pennell*, 485 U.S. at 9, 19; *Nollan*, 483 U.S. at 835-36 n.4.

399. Oswald, 70 *Wash. L. Rev.* at 141-42 (cited in note 3).

value will more than likely be at least partially offset by an increase in value which flows from similar restrictions as to use on neighboring properties. All property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another.<sup>400</sup>

The problem with the modern formulation of the average reciprocity of advantage rule, as espoused by Justice Brennan in *Penn Central* and as adopted by later Courts, is that it ignores both the need for reciprocity and the need to balance the burdens imposed on the individual landowner against the benefits received by *that same landowner* from the regulation at issue.

In stating that a regulation could be justified as a valid police power act provided that the benefits to society outweighed the burdens on the regulated property owner, Justice Brennan essentially wiped out the average reciprocity of advantage rule's ability to distinguish between valid police power actions and invalid regulatory takings. The effect of Justice Brennan's formulation of the rule is to validate automatically *any* alleged police power action which confers a substantial benefit upon society at large.<sup>401</sup> Thus, the modern formulation of the rule permits the state to achieve through a back-door exercise of the police power what it could not accomplish directly; in other words, it permits the state to confiscate an individual's property interest without compensation in order to confer a public benefit.<sup>402</sup>

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400. *Penn Central*, 438 U.S. at 139-40 (Rehnquist, J., dissenting).

401. This precise result has been urged by at least one commentator, who stated:

Reciprocity demands should be deemed to be met, and the regulation therefore deemed to be a legitimate exercise of the police power, in any case where the land use restrictions affirmatively enhance the community's welfare. Therefore, rather than requiring that direct individualized benefits accrue to the burdened individual, reciprocity defenses would focus on the benefits gained by the community at large. Individuals' use of property could legally be restricted even where their properties received no reciprocal, or offsetting, enhanced value; insofar as the individual landowners, in their role as members of society, could be characterized as sharing in the restriction's benefit, they would be denied legal redress. In short, the concept of "average reciprocity of advantage" could be utilized to provide broad justification for land use regulation and thereby substantially limit the accessibility of inverse condemnation actions.

Coletta, 40 Am. U. L. Rev. at 303 (cited in note 218).

402. Lower courts have applied this broad, societal-benefit interpretation of average reciprocity of advantage. In *Moskow v. Commissioner of Dept. of Env. Management*, 427 N.E.2d 750 (Mass. 1981), for example, the Massachusetts Supreme Court rejected a takings claim stemming from a wetlands regulation, finding that "[a]s a citizen, the plaintiff benefits from the [wetlands regulation] because it helps society avoid the relief expenditures connected with flooding and pollution control." *Id.* at 754 n.4.

## V. CONCLUSION

Although a full discussion of police power analysis is beyond the scope of this Article, the issue is central to resolution of the takings dilemma. The harm/benefit test and the average reciprocity of advantage rule are essential tools in effectuating the two-step analytical scheme I have proposed: first, identification of the government power at work, and second, evaluation of the validity of the government's exercise of that power.

In their original formulations, the harm/benefit test and the average reciprocity of advantage rule were used to distinguish between exercises of the police power and exercises of the eminent domain power. As discussed earlier,<sup>403</sup> while all exercises of the eminent domain power by definition confer benefits upon the public, exercises of the police power may either prevent a harm or confer a benefit. To the extent that a regulation prevents a harm to the public, it is a noncompensable exercise of the police power. If a regulation confers a benefit upon the public, however, further analysis is required to determine whether the regulation is a taking for which compensation is constitutionally mandated or an exercise of the police power for which no compensation is required.

Certainly, the harm/benefit and average reciprocity of advantage rules will not resolve all takings challenges that arise. The search for such a definitive rule is likely not only to be fruitless, but to entangle the searcher in increasingly narrow, formalistic expositions of takings law that bear increasingly less resemblance to reality. Recent legal scholarship has recognized that grand unifying theories may simply not exist in many areas of constitutional law.<sup>404</sup> As Professor Schauer noted:

Perhaps some constitutional problems are irredeemably intractable, and are so precisely because they replicate the deepest, hardest, and therefore least solvable problems of constitutional government. And perhaps some constitutional problems appear intractable because we are looking for coherent principles and usable doctrines in areas of policy where questions of degree predominate, and where seemingly arbitrary lines are necessary to settle

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403. See text accompanying note 27.

404. See, for example, Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution* 24-30 (Harvard U., 1991) (arguing that the search for unifying principles in constitutional law is an attempt at "hyper-integration" that ultimately must fail); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 Minn. L. Rev. 1331, 1334 (1988) (describing the trend away from grand theories in constitutional law).

temporarily, but not to resolve in any deeper sense, intrinsically competing policy objectives.<sup>405</sup>

A few takings challenges undoubtedly fall into this category of difficult or indeed, virtually intractable, cases. By seeking *the* answer to regulatory takings, we miss that there is *an* answer which goes a long way toward resolving most disputes. We should not let the difficulty of choosing between red cedars and apple trees blind us to the fact that most takings challenges can be decided easily and quickly under the basic rules developed by the Court decades ago.

The American legal system (and American society itself) is at a transition point in how it views property and harms to property. The cases that arise before the Court are the difficult ones, ones not susceptible to easy solutions. The mere fact that such difficult cases arise does not mean that the basic rules are not working, however. As Professor Epstein has noted, whenever we create a legal rule, "some uncertainty must be tolerated at the edges; sound social institutions will never stand or fall on the marginal classification issues that test every legal doctrine."<sup>406</sup> A clear definition of the police and eminent domain powers and a careful application of the harm/benefit and average reciprocity of advantage rules will minimize the number of cases at the edges.

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405. Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 *Denv. U. L. Rev.* 989, 990 (1995).

406. Epstein, *Takings* at 114 (cited in note 152). See also *id.* at 118 ("So long as we are sure that the vast bulk of the cases falls clearly on one side of the line or the other, we can easily tolerate some ambiguity at the margins: litigation exerts powerful forces to select the most difficult cases for adjudication, no matter what the underlying standard.").