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# The Impacts and Issues Surrounding the Regulatory Confiscation of Real Property

Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence.<sup>1</sup>

With some exceptions, the decisional law is largely characterized by confusing and incompatible results, often explained in conclusionary terminology, circular reasoning, and empty rhetoric.<sup>2</sup>

## I. INTRODUCTION

A police power regulation<sup>3</sup> which is valid in all other due process respects may nevertheless be invalid<sup>4</sup> under the fifth and fourteenth amendments<sup>5</sup> if it is "so onerous as to constitute a taking which constitutionally requires compensation."<sup>6</sup> A regulation is constitutionally

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1. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3163 (1987) (Stevens, J., dissenting).

2. Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2 (1971).

3. Throughout this comment the term "regulation" will be used generically when referring to any form of governmental "interference" with private real property, regardless of whether the actual restriction at issue is in the form of a zoning ordinance, a statutory act, a municipal order, a court order, an administrative order, etc. This comment will also refer to "regulation" in the singular with the understanding that several regulations may in fact be at issue.

4. The police power defines merely a threshold test of the legitimacy of any [real property] regulation. Although a given measure may be reasonably related to the health, safety, morals or general welfare of society, it may still violate the "takings clause" of the fifth amendment to the United States Constitution.

Comment, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1462 (1978) [hereinafter Comment, *Zoning*]. Cf. *Nollan*, 107 S. Ct. at 3147 n.4 ("the state's action, even if otherwise valid might violate either the incorporated takings clause or the equal protection clause."). See *infra* notes 287-545 and accompanying text for a discussion of when a regulation is "otherwise valid."

5. "No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The fifth amendment takings clause is applied to the states through the fourteenth amendment. See *Chicago B. & Q.R.R. v. Chicago*, 166 U.S. 226 (1897).

6. *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). The recognition that a regulation may "take" property is a fairly recent judicial development. The Court originally compartmentalized the due process clause and the just compensation clause according to the governmental power they were intended to limit. The just compensation clause was interpreted as a limitation only upon the sovereign powers of eminent domain, while the due process clause was the only proper limitation upon regulations. See *Mugler v. Kansas*, 123 U.S. 623, 668 (1887) (refusing to apply to a nuisance regulation the language or principles of *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177-78 (13 Wall. 1872) (an inverse condemnation case based upon a physical invasion)). See *infra* note 36 quoting the relevant language from *Pumpelly*.

"onerous" when it "has an *unduly harsh impact* upon the owner's use of the property"<sup>7</sup> by "forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole."<sup>8</sup> In general, "the question at bottom is upon whom the loss of the changes desired should fall."<sup>9</sup>

The contention of a "regulatory taking claim"<sup>10</sup> is that the challenged regulation unfairly demands and takes "something more and

This compartmentalization, however, did not last long. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the fountainhead of regulatory taking jurisprudence, Justice Holmes stated that "while property may be regulated to a certain extent, if a regulation *goes too far* it will be recognized as a taking." *Id.* at 415 (emphasis added). See also *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2387 (1987) (expressly affirming the language of *Pumpelly* which was denied in *Mugler* as applying to regulatory taking claims).

Some have argued that Justice Holmes' use of the word "taking" was meant in a metaphorical manner because no compensation was awarded; a regulation which "goes too far" is merely a violation of the due process clause and only requires invalidation, not compensation. See e.g., *Williamson County v. Hamilton Bank*, 473 U.S. 172, 179-200 (1985). Regardless of Justice Holmes' original meaning, the subsequent cases, in particular the recent case of *First English*, 107 S. Ct. 2378 (recession of an offensive regulation is not an adequate constitutional remedy under the just compensation clause, therefore dismissal of plaintiff's claim for compensation was improper; case remanded for trial), leaves little doubt that the Court has recognized, and will continue to recognize that a regulation may "take" property and therefore is subject to the just compensation clause, as well as the due process clause. See Berger, *The Year of the Taking Issue*, 1 B.Y.U. J. PUB. L. 261, 265-66 (1987) [hereinafter Berger].

7. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978) (emphasis added).

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

9. *Pennsylvania Coal*, 260 U.S. at 416. See e.g., *Penn Central*, 438 U.S. 104.

The question of this case is whether the cost associated with the city of New York's desire to preserve a limited number of "landmarks" within its borders must be borne by all of its taxpayers or whether it can instead be imposed entirely on the owners of the individual properties.

*Id.* at 139 (Rehnquist, J., dissenting). Cf. *Pennell v. City of San Jose*, 56 U.S.L.W. 4168, 4173 (U.S. Feb. 24, 1988) (Scalia, J., concurring in part, dissenting in part):

The traditional manner in which American Government has met the problem of those who cannot pay reasonable prices for privately sold necessities . . . has been the distribution to such persons of funds raised from the public at large through taxes. . . . Here the city . . . is using the occasion of rent regulation . . . to establish a welfare program privately funded by those landlords who happen to have 'hardship' tenants.

10. All regulations may be placed into one of three categories:

- 1) Regulations which the government may not enforce because they are a violation of the due process clause, see *infra* notes 287-345 and accompanying text
- 2) Regulations which the government may enforce only if it compensates the owner for its "unfair" effect upon the property owner, and
- 3) Regulations which the government may enforce as a proper exercise of the police power without paying compensation to the owner.

Cf. *Williamson County v. Hamilton Bank*, 473 U.S. 172, 202 (1985) (Stevens, J., concurring) (listing the forgoing as "permanent harms").

Governments would naturally like to have all of their regulations qualify for the last category, while private property holders would like to place harsh regulations into one of the first two categories. The "regulatory taking claim" is the mechanism through which property owner claims that a regulation belongs in the second category and is thereby unenforceable.

different"<sup>11</sup> from certain individual property owners in order to improve society for the rest of the public.<sup>12</sup> This inquiry requires drawing "the line which separates [permissible] regulation from confiscation"<sup>13</sup> on a case by case basis.

The Supreme Court has indicated that, other than the general principles of "justice and fairness,"<sup>14</sup> there is no "set formula"<sup>15</sup> available<sup>16</sup> for knowing when a regulation "goes too far."<sup>17</sup> The Court's re-

11. [The fifth amendment] prevents 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.

*Monongahela Navigation Co. v. United States*, 148 U.S. 312, 337 (1893) (emphasis added).

12. In theory, courts must ask whether a regulation exact[s] such a disproportionate sacrifice from individual property holders relative to their peers and to their expectations that the affected individuals may be seen as having been treated solely as a means in a process of social engineering.

Comment, *Zoning*, *supra* note 4, at 1492.

For an alternative approach to determining whether a regulation takes something more and different from individuals, see Comment, *Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation*, 54 WASH. L. REV. 315, 321-24 (1979) (identifying four elements to consider in determining when a person is being forced to bear more than his fair share; distribution, quality, quantity and reliance) [hereinafter Comment, *Balancing*].

13. *Mugler v. Kansas*, 123 U.S. 623, 678 (1887) (Field, J., dissenting). The judicial quest to establish this "line of confiscation," has been characterized as "the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer's equivalent of the physicist's hunt for the quark." C. HAAR, *LAND-USE PLANNING* 766 (3d ed. 1977).

14. The Takings Clause, therefore, preserves the governmental power to regulate, subject only to the dictates of "justice and fairness." There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.

*Andrus v. Allard*, 444 U.S. 51, 65 (1979) (citations omitted).

15. [T]his Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the Government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the Government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

*Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (citations omitted).

16. A "set formula" is not available in part because the Court, as a matter of constitutional policy, has avoided the establishment of general rules in this area.

In the realm of constitutional law, especially, this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted.

*Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926).

17. Justice Holmes himself stated, "this is a question of degree—and therefore cannot be

sulting ad hoc factual analysis has therefore been fragmented and confusing.<sup>18</sup> The Court has adopted an unpredictable "factor" approach<sup>19</sup> without any clarification of the interaction of the individual factors and without any indication of their respective importance.<sup>20</sup>

This comment is a broad overview of the language, arguments and decisions utilized by the United States Supreme Court<sup>21</sup> in its regulatory takings jurisprudence with regard to real property<sup>22</sup> regulations.<sup>23</sup>

disposed of by general propositions." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

18. See generally *Berger*, *supra* note 6, at 261; Bowden & Feldman, *Take It or Leave It: Uncertain Regulatory Taking Standards and Remedies Threaten California's Open Space Planning*, 15 U.C.D. L. REV. 371, 375 (1981) [hereinafter Bowden]; Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983) [hereinafter Costonis]; Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulations and Public Use*, 34 RUTGERS L. REV. 243 (1982) [hereinafter Humbach]; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1235-37 (1967) [hereinafter Michelman]; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 155-161 (1971) [hereinafter Sax]; Van Alstyne, *supra* note 2 at 1.

19. "Not since Justice Stewart announced his 'I know it when I see it' test of obscenity has the United States Supreme Court cast a major body of law into greater chaos than that now plaguing the law of police power land use controls." Bowden, *supra* note 18, at 371. See also *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3164 (1987) (Stevens, J., dissenting) ("land-use planners [will] still be left guessing about how the Court will react to the next case, and the one after that.").

20. See e.g., *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (expressly adopting a factor approach); *Kaiser Aetna v. United States*, 444 U.S. 164, 178 n.9 (1979) ("We do not decide, however, whether in some circumstances one of these factors by itself may be dispositive."). See generally Van Alstyne, *supra* note 2, at 29.

21. While this comment will focus exclusively upon cases determined by the United States Supreme Court, it should be remembered that state courts may interpret the Court's analysis differently. "The dual jurisdiction possessed by state and federal courts in taking cases, and the different analytical approach employed by each to determine a taking exacerbate this uncertainty." Bowden, *supra* note 18, at 375. It should also be remembered that each state's constitutional provisions, or its judicial interpretation of its constitutional provisions, may be at odds with the Supreme Court's analysis and should therefore be considered in addition to the Supreme Court cases. See generally Comment, *Zoning*, *supra* note 4, at 1463, *passim*.

22. Even though the Federal Constitution is often the basis of the regulatory taking claim, the determination of what constitutes property will be made based upon state law. "It is axiomatic, of course, that the state law is the source of those strands that constitute a property owner's bundle of property rights. 'As a general proposition[,] the law of real property is, under our Constitution, left to the individual States to develop and administer.'" *Nollan*, 107 S. Ct. at 5153 (Brennan, J., dissenting). "Reliance on state law is necessitated by the fact that '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1260 (1987) (Rehnquist, J., dissenting) (citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). Cf. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1012 (1984) ("If Congress can 'pre-empt' state property law in the manner advocated . . . then the Taking Clause has lost all vitality.").

23. Because the case law in this area is relatively recent and limited, there would be little advantage to reporting solely on the actual holdings of each case. One of the weaknesses of the Court's multi-factored approach is determining what is dicta and what is the true holding of a

Its goal is to remove some of the uncertainty and unpredictability by cataloging the judicial formulations of the "unduly harsh impacts" which may constitute a taking, and by addressing the pivotal issues identified by the Court as being critical to the formation of a successful regulatory taking claim.<sup>24</sup>

## II. THE IMPACTS OF REGULATORY CONFISCATION

The Court has stated that a regulation "goes too far," i.e., has an unduly harsh impact, when it "becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession."<sup>25</sup> The critical issue in regulatory takings is the impact upon the owner. If a regulation causes one of the unduly harsh impacts outlined in this comment, it may be considered to be a regulatory confiscation requiring just compensation. These impacts are not mutually exclusive, however, a single regulation may cause several harsh regulatory impacts each of which may amount to a taking.<sup>26</sup>

The unduly harsh impacts identified by the Court may be categorized into groups reflecting three factors the Court has identified as having particular significance in its ad hoc inquiries; "the character of the governmental action, its economic impact, and its interference with reasonable investment backed expectations."<sup>27</sup> For ease of reference, these groupings will be called forms of confiscation.

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case. In order to better identify the regulatory impacts which the Court, in general, has identified as being severe enough to constitute a taking when they occur, this comment freely utilizes the dicta which is often found in each case, as well as language from concurring and dissenting opinions. Dissenting opinions may in fact have a greater degree of significance in the Court's regulatory takings jurisprudence since the merits of the actual taking claims have seldom been addressed in the majority opinion. Most claims have been dismissed as being facial challenges, *see infra* notes 268-86 and accompanying text, or because of ripeness, *see infra* notes 233-67 and accompanying text.

24. In addition to the discussion of the merits of regulatory taking claims, this comment includes three supplementary issues which require consideration in a regulatory taking case: 1) the exceptions to the limitations of the Just Compensation Clause; whether a regulation abates a nuisance or provides an average reciprocity of advantage, *see infra* notes 181-232 and accompanying text, 2) the ripeness issue; whether the government's actions are final and have inflicted a concrete injury, *see infra* notes 233-67 and accompanying text, 3) the substantive due process analysis; whether the regulation is valid notwithstanding its compensation ramifications, *see infra* notes 267-345 and accompanying text. While each of these issues should be considered early in the analysis of a potential taking claim, they will be discussed later so that their relative roles will be more readily apparent.

25. *Williamson County v. Hamilton Bank*, 473 U.S. 172, 199 (1985).

26. *See e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (the regulation took an easement, caused a substantial diminution in value, and unduly interfered with a reasonable investment-backed expectation when it required marina owners to open the marina to the public).

27. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). These three principle factors were first identified by the Court in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (challenge to New York City's landmark preservation law).

While it will be apparent that the relevant factors of each form of confiscation may overlap,<sup>28</sup> this comment will show that the impacts are separate and distinct. Although the finding of any one impact may be dispositive of the taking claim, practitioners would be wise, because of the uncertainty surrounding the regulatory takings law, to try allege as many harsh impacts under a given regulation as possible, as well as to try formulate new impacts which concur with those identified herein.<sup>29</sup>

### A. *Confiscation by Acquisition*

Because of its similarity to physical invasions, the easiest form of confiscation to prove occurs when a regulation has effectively acquired private property for public purposes.<sup>30</sup> When a regulation prevents the owner from exercising dominion over his property in a traditional manner—i.e., it effectively prevents the owner from exercising his right to possess, use and dispose of his property,<sup>31</sup> it may be “characterized” as an appropriation of property for a governmental purpose.<sup>32</sup> The gov-

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28. Each impact may involve certain factors which are also involved in other impacts. For example, all regulation will have some economic effect upon the property owner. A “physical occupation” may reduce market value. An “undue interference with an investment-backed expectation” may also reduce the value of the property or cause economic losses of wasted efforts and expenses. The economic effect of a regulation, however, has not been critical in the Court’s analysis of physical occupation and investment-backed expectation analysis. A diminution in value is merely an incidental fact as to these impacts, but, it is a vital fact when considering an economic appropriation.

The interrelationship of the various facts in a given situation is particularly confusing when more than one form of confiscation may be alleged. In *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979), for example, the challenged regulation: 1) interfered with the investment-backed expectations of the property owner, 2) caused a substantial diminution in value, and 3) imposed an easement by creating a public right of access. The Court found a taking, but did not give any indication as to whether one of the injuries alone would constitute a taking. *See id.* at 178 n.9. *Cf. Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (the regulation did not reach the level of confiscation in any of the areas) (*see infra* notes 66-70).

29. *Cf. Pennell v. City of San Jose*, 56 U.S.L.W. 4168 (U.S. Feb. 24, 1988) (the most recent takings case, identifying private funding of social reform as a possible new formulation of a regulatory taking impact) (*See infra* notes 130-43 and accompanying text).

30. *Cf. Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (citations omitted):

A “taking” may more readily be found when the interference with a property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

31. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (property is “the group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it.”).

32. *See Penn Central*, 438 U.S. at 135. The Court’s requirement that the appropriation of resources be for some “strictly governmental purpose” reflects the Takings Clause requirement that the taking be for a “public use.” *See Keystone Bituminous Coal Ass’n v. DeBenedictis*, 107 S. Ct. 1232, 1256 (1987) (“The existence of such a public purpose is merely a prerequisite to the

ernment, rather than the individual, acquires and exercises rights of dominion over the property as if it were its own property.<sup>33</sup> There is no debate that if a government physically invades and occupies private property, it has increased its "assets" at the expense of the individual in contravention of the Takings Clause.<sup>34</sup> When a regulation has an impact upon a property owner similar to the impact of a physical seizure,<sup>35</sup> the regulation may be considered an appropriation.<sup>36</sup> The government has enhanced its "assets" by effectively acquiring dominion over the property even though it has not formally acquired title.<sup>37</sup> Such

government's exercise of its taking power.") (Rehnquist, C.J., dissenting) (citing *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 239-243, 245 (1984); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954)). The requirement, however, is redundant when addressing regulatory taking claims since a necessary due process prerequisite for the enactment of any regulation is that it be for the benefit of the public. See *infra* notes 300-314 and accompanying text. Therefore, even if the government does not use the property directly, the property has nevertheless been appropriated for the governmental purpose of promoting the health safety and welfare of the public.

*Compare* *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 652 n.18 (1981) (4-1-4 plurality opinion) (Brennan, J., dissenting) ("the city's objective was 'to have the property remain unused, undisturbed and in its natural state so open space and scenic vistas may be preserved. In this sense the property is being 'used' by the public . . .')") with *Penn Central*, 438 at 135 (there is no appropriation unless the regulation "exploits" the property for governmental purposes or "facilitates [or] arises from any entrepreneurial operations of the city.").

33. When the government steps out of its role as a neutral arbiter engaged principally in "defining standards to reconcile differences among the private interests in the community," and instead acts in an enterprise capacity seeking the "enhancement of its resource position," the use of the regulatory power is more readily seen by the judicial eye to constitute a compensable "taking" than a non-compensable "regulation."

Van Alstyne, *supra* note 18, at 24 (quoting Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36, 63 (1964)).

34. *E.g.*, *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (13 Wall. 1871) ("where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structures placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."). *Compare* *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 165-66 (1958) (taking claim denied because "the Government did not occupy, use, or in any manner take physical possession of the gold mines or of the equipment connected with them"); with *United States v. Pewee Coal Co.*, 341 U.S. 114 (1962) (government occupation of mines was a compensable taking).

35. One of the principle distinctions between a simple physical invasion and a regulatory physical invasion is that the latter case results in the invalidation of the regulation authorizing the invasion, thereby requiring the invasion to cease. The property owner is therefore able to effectively enjoin the invasion which he would not be able to do were it a simple physical invasion. See *infra* notes 42-52 and accompanying text.

36. It would be a very curious and unsatisfactory result if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use.

*Pumpelly*, 80 U.S. at 177-78 *quoted with approval* in *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2387 (1987) (emphasis found in *First English*).

37. *Chicago, Rock Island & Pacific Ry. Co. v. United States*, 284 U.S. 80, 96 (1931) ("Confiscation may result from a taking of the use of property without compensation quite as well as



regulations do not "merely adjust the benefits and burdens of economic life to promote the common good. Rather, [they are] a forced contribution to general governmental revenues."<sup>38</sup>

There are three methods by which a regulation may acquire private property. First, a regulation may cause a "permanent physical occupation."<sup>39</sup> Second, a regulation may appropriate an easement by subjecting private property to a "public right of access."<sup>40</sup> Third, a regulation may acquire property by destroying the "beneficial ownership" of that property.<sup>41</sup>

### 1. *Impact: permanent physical occupation*

A physical seizure of property is not necessary to effect an appropriation of private property,<sup>42</sup> but when the impact of a regulation is a "permanent physical occupation,"<sup>43</sup> the Court has willingly<sup>44</sup> held it to be a per se taking requiring compensation.<sup>45</sup> A permanent physical invasion appropriates the occupied space by excluding all others, including the owner.<sup>46</sup>

The leading case concerning a physical invasion caused by a regu-

from the taking of title.") *cited with approval in* *Kaiser Aetna v. United States*, 444 U.S. 164, 174 n.8. (1979).

38. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978)).

39. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982). *See infra* notes 42-52 and accompanying text.

40. *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979). *See infra* notes 53-70 and accompanying text.

41. *United States v. Causby*, 328 U.S. 256, 262 (1946). *See infra* notes 71-103 and accompanying text.

42. While the term "taken" might have been narrowly interpreted to include only physical seizures of property rights, "the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes a taking."

*Penn Central*, 438 U.S. at 143 (Rehnquist, J., dissenting) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)).

43. *Loretto*, 458 U.S. at 421.

44. The Court has been more willing to hold that physical invasions require compensation because "[s]uch an appropriation is perhaps the most serious form of invasion of an owner's property interests." *Loretto*, 458 U.S. at 435. They are also "relatively rare, and easily identifiable without making any economic analysis." *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2393 (1987) (Stevens, J., dissenting). *See also Loretto*, 458 U.S. at 437 ("whether a permanent physical occupation has occurred presents relatively few problems of proof").

45. *Loretto*, 458 U.S. at 421. *See generally* Costonis, *supra* note 18.

46. *See St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92, 98-99 (1893) ("[T]he use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive. It as effectually and permanently dispossesses the general public as if it had destroyed that amount of ground.") *quoted with approval in Loretto*, 458 U.S. at 429.

lation is *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>47</sup> The Supreme Court held unconstitutional a New York regulation requiring landlords to permit<sup>48</sup> a private cable TV company to attach its cable facilities to all rental property because it resulted in a permanent physical occupation. The Supreme Court ignored its traditional factor approach and applied a per se physical invasion rule to the regulation.<sup>49</sup>

We have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is *determinative*.<sup>50</sup>

When property has been permanently physically occupied, the impact of the regulation is unusually harsh in that "the government does not simply take a single 'strand' from the bundle of property rights: it chops through the whole bundle, taking a slice of every strand."<sup>51</sup> In essence, a permanent physical occupation "appropriates" the invaded space by depriving the owner of every fundamental property right<sup>52</sup> associated with the space except for the right of title.

47. 458 U.S. 419 (1982).

48. "This element of required acquiescence is at the heart of the concept of occupation." F.C.C. v. Florida Power Corp., 107 S. Ct. 1107, 1112 (1987) (upholding F.C.C. regulation of rates charged by utilities to cable television companies for use of utility poles).

49. The New York Court of Appeals had utilized the "factor" analysis indicated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), and upheld the regulation because it did not have an excessive economic impact upon the property owner when measured against the landlord's aggregate property, nor did it interfere with any reasonable investment-backed expectations. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 423 N.E.2d 320 (1981). In overruling the New York court, the Supreme Court explained that the *Penn Central* "opinion does not repudiate the rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432 (1982).

50. *Loretto*, 458 U.S. at 426 (emphasis added). The Court did not even consider the severity of the invasion. "[C]onstitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied. If the wire would have been a huge cable, several inches thick . . . there would have been a difference in degree, but not in principle." *Id.* at 437 & n.13. "[W]hether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox." *Id.* at 438 n.15.

51. *Id.* at 435-36 (a physical invasion deprives the owner of the right to possess, the right to exclude others from, the right to use, and the right to dispose of, the occupied space).

52. Cf. *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979) ("where an owner possesses a full 'bundle' of property rights, the destruction of *one* 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.") (citations omitted; emphasis added).

## 2. *Impact: imposition of an easement*

In *Loretto* the physical intrusion was particularly offensive because the government allowed one private party to intrude upon the premises of another private party.<sup>53</sup> An invasion by a "stranger" causes an owner to suffer "a special kind of injury."<sup>54</sup> When a regulation permits "strangers" to repeatedly enter upon private property,<sup>55</sup> the Court has held that the government has appropriated an easement or servitude for which it must pay just compensation.<sup>56</sup> The impact of such a regulation is that the government acquires the owner's right to exclude others because the government, not the individual now determines who may and who may not enter upon the property.

The leading case on the regulatory taking of an easement is *Kaiser Aetna v. United States*.<sup>57</sup> The private owner of a shallow lagoon on the island of Oahu, Hawaii spent millions of dollars to dredge and develop the pond into a private marina. After completion of the initial phases of the marina, the Army Corps of Engineers insisted that prior to further development of the marina the owner would be required to grant public access to the marina since it had now become "navigable waters" by means of the improvements.<sup>58</sup> Rejecting the government's argument that the owner voluntarily surrendered its right to exclude others,<sup>59</sup> the

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53. The City of New York put great emphasis on the fact that Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), referred to a physical invasion "by government," and argued that the same rule did not apply when a physical invasion was made by a private party. The Court disagreed, stating, "A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the state, is the occupant." *Loretto*, 458 U.S. at 432 n.9.

54. *Loretto*, 458 U.S. at 436 (citing Michelman, *supra* note 18, at 1228 & n.110): [P]roperty law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury. Furthermore, such an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

55. "Such repeated trespasses, unlike isolated trespasses, would deprive the owner of the history of exclusivity which is the factual predicate for legal actions to redress future incursions, analogously to situations where private easements are acquired by prescription." Humbach, *supra* note 18, at 265.

56. "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time." *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

57. 444 U.S. 164 (1979).

58. The Court affirmed the lower court holding that the waters were "navigable waters" and therefore subject to the jurisdiction of the Corps, but pointed out that "this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause." *Id.* at 172.

59. The Government argued that by connecting the marina with the navigable bay, "the owner ha[d] [voluntarily] lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others." *Id.* at 176. *Cf.* Ruckelshaus v.

Court held that "[i]n this case, . . . the 'right to exclude,' so universally held to be a fundamental element of the property right, *falls within this category of interests that the Government cannot take without compensation.*"<sup>60</sup> Unless Congress was willing to pay for the property owner's "fundamental right" to exclude others, the developer retained the right to exclude the public.<sup>61</sup> "[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation."<sup>62</sup>

The Court recently indicated in *Nollan v. California Coastal Commission*,<sup>63</sup> that if the easement is permanent, and requires the property owner to permit continuous access to the property, then the impact is the same as a per se taking under the "permanent physical occupation" test found in *Loretto*.<sup>64</sup>

We think that a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.<sup>65</sup>

Easements, however, may have a limited impact if they grant the owner some control over when and how his property may be invaded. Such limited easements are not takings if the government rebuts the presumption that the taking of the right to exclude is unduly severe

Monsanto, 467 U.S. 986 (1984) (the voluntary application for a government permit involving chemicals, with notice that the contents and procedures involved would become public, waived any claim to "trade secret" rights).

60. *Kaiser*, 444 U.S. at 179-80 (emphasis added).

61. *Cf. Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3145 (1987) (citations omitted). *See infra* note 64.

62. *Kaiser*, 444 U.S. at 180.

63. 107 S. Ct. 3141 (1987).

64. *See generally id.* at 3145 (citations omitted);

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute a taking of the property interest but rather, (as Justice Brennan contends) "a mere restriction on its use," is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principle uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them. . . . We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'."

65. *Id.* The Court, however, did not invalidate the regulation because it took a permanent easement from the Nollans, rather, it invalidated the regulation because it was a deprivation of property without due process. *See infra* notes 338-45 and accompanying text.

upon the property owner, as was the case in *Pruneyard Shopping Center v. Robins*.<sup>66</sup> The *Pruneyard* easement did not qualify for the per se approach presented in *Nollan* because the easement did not require the property owner to grant permanent, continuous access.<sup>67</sup> The Court held that the easement's impact upon the property owner's control was not severe enough to constitute an appropriation of property when considered alone.<sup>68</sup> Because the easement was limited and did not amount to an appropriation of control, the Court considered the other possible forms of confiscation. The easement did not have a harsh economic impact,<sup>69</sup> and did not interfere with the property owner's investment-backed expectations,<sup>70</sup> therefore the regulation, i.e., the court order, was upheld.

The more a regulatory easement restricts an owner's control and requires continuous access to his property, the more likely the impact will be considered a "taking" under the permanent physical occupation rule given in *Loretto*. Limited easements, on the other hand, such as the easement imposed in *Pruneyard*, may not qualify for the per se rule, but, they do carry the strong presumption found in *Kaiser Aetna* that the imposition of an easement is an unduly harsh impact. The presumption may be rebutted, however, if the government can prove

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66. 447 U.S. 74 (1980). In *Pruneyard*, high school students attempted to distribute pamphlets and circulate petitions within the common areas of the Pruneyard Shopping Center. This was contrary to the Center's policy of not permitting any tenant or visitor to engage in any publicly expressive activity. The Shopping Center's security guard suggested that they move outside to the public sidewalk. The students promptly left and later sought an injunction against the Center to enjoin it from denying them access based on their constitutional right of free speech under the California Constitution. The Center's owner alleged that it would be a "taking" of his property to force him to permit the students access.

67. See *Nollan*, 107 S. Ct. at 3145 n.1 ("The holding of [*Pruneyard*], is not inconsistent with this analysis, since there the owner had already opened his property to the general public, and in addition, *permanent access* was not required.") (emphasis added; citations omitted).

68. The Court held that,

there has literally been a taking of that right [to exclude] . . . But, it is well established that 'not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense.' . . . The decision of the California Supreme Court makes it clear that the Pruneyard may restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions. . . . In these circumstances, the fact that they may have 'physically invaded' appellant's property cannot be viewed as determinative.

*Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 82-84 (1980) (citations omitted).

69. The property owner "failed to demonstrate that the 'right to exclude others' is . . . essential to the use or economic value of the property." *Id.* at 84.

70. The owner expected the shopping complex to be "open to the public at large." *Id.* at 83-84. The Court distinguished the limited easement at issue in *Pruneyard* from the continuous access easement in *Kaiser Aetna* by distinguishing the expectations of the property owners in each case. The marina in *Kaiser Aetna* was always intended to be private, while the shopping Center in *Pruneyard* was intended, by its nature, to be public. See *infra* notes 152-59 and accompanying text for a discussion of the investment-backed expectation in each case.

that the partial destruction of the fundamental right of exclusion did not have a significant impact upon the property owner.

### 3. *Impact: intrusions short of physical invasion—the destruction of all beneficial use*

A regulation which causes an intrusion short of physical invasion<sup>71</sup> may still be “characterized as a physical taking”<sup>72</sup> if its impact is the destruction of the property owner’s beneficial use and enjoyment of his property.<sup>73</sup> If *most or all* beneficial use<sup>74</sup> has been appropriated or destroyed<sup>75</sup> by a regulation so as to make the property “wholly useless,”<sup>76</sup>

71. “Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.” *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (citing *United States v. Welch*, 217 U.S. 333 (1910); *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914)).

72. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (emphasis added). While a claim that a regulation deprives the owner of all beneficial use does not have the same presumptive advantages as do claims based upon a physical invasion, it nevertheless has a higher probability of success than does a claim based merely upon economic impact. *See supra* note 30.

73. “[A]ll that is beneficial in property is the use and enjoyment of it; the use is the property, and if that is taken away, it matters not that the empty husks of title and possession are left with him who was once the owner.” *Mugler v. Kansas*, 123 U.S. 623, 652 (1887) (Mr. Choate’s argument for Ziebold; Brief for the Appellant).

74. *See e.g.*, *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2388 (1987) (“‘temporary’ takings which, as here, deny a landowner *all use* of his property, are not different in kind from permanent takings.”) (emphasis added, citations omitted); *Williamson County v. Hamilton Bank*, 473 U.S. 172, 194 (1985) (a final decision is needed to “tell whether the land retain[s] *any* reasonable beneficial use”); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 653 (1981) (Brennan, J., dissenting) (it is a taking “where the effects completely deprives the owner of *all*, or most of his interest in the property.”) (emphasis added); *Penn Central*, 438 U.S. at 137 (“it is not literally accurate to say that they have been denied *all use* of [their] rights”) (emphasis in original).

75. The government does not necessarily need to make use of the property in order to “take” it. Destruction alone is a taking. *See supra* note 42 and accompanying text. In *Armstrong v. United States*, 364 U.S. 40 (1960), the destruction of materialman liens by the doctrine of sovereign immunity was a compensable taking.

Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government, for its own advantage destroyed the value of the liens . . . . Since this acquisition was for a public use, however accomplished, whether with an intent and purpose of extinguishing the liens or not, the Government’s action did destroy them and in the circumstances of this case did thereby take the property value of those liens within the meaning of the Fifth Amendment.

*Id.* at 48-49. *Cf.* *United States v. Sec. Indus. Bank*, 459 U.S. 70 (1982) (new bankruptcy law was not retroactive because retroactive application would “result in a complete destruction of the property right of the secured party” and thereby become an uncompensated taking).

76. [T]he police power may limit the height of buildings, in a city, without compensation. . . . But if it should attempt to limit the height so far as to make an ordinary building lot *wholly useless*, the rights of property would prevail over the other public

the regulation is unconstitutional.<sup>77</sup> The reason being that the regulation's impact upon the property owner<sup>78</sup> is comparable to the impact caused by a formal condemnation or physical invasion.<sup>79</sup>

The Court invalidated a governmental regulation because it destroyed the "essential use" of the property in *Curtin v. Benson*.<sup>80</sup> The Court therein invalidated an order by the Superintendent of Yosemite National Park which prevented a property owner from herding his stock to his property located within the park boundaries.<sup>81</sup> The Superintendent claimed to be exercising the powers of a sovereign over the Park. Accepting the Superintendent's power of sovereignty, *arguendo*, the Court held that the power could not be used to "destroy essential uses of private property."<sup>82</sup> The Superintendent's order prevented the grazing of cattle which was the only use to be made of the property and therefore was not a regulation of the use of the land, but "an absolute prohibition of use."<sup>83</sup>

interest, and the police power would fail. To set such a limit would need compensation and the power of eminent domain.

*Hudson Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) (emphasis added).

77. The modern prevailing view is that any substantial interference with private property . . . by which the owner's right to use or enjoyment is in any substantial degree abridged or destroyed, is in fact, and in law, a "taking" in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed.

2 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 6.09 (3rd rev. ed. 1975).

78. The Court has stated that the impact upon an owner "is resolved by focusing on the uses the regulation permit[s]," *Penn Central*, 438 U.S. at 131, rather than by focusing on whether "the regulation deprives the property owner the most profitable use of his property," *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) (citations omitted). *See also Andrus v. Allard*, 444 U.S. 51, 66 (1979) ("It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive."). It is, however, unlikely that a regulation could ever destroy *all* beneficial use.

[H]ere enjoyment and use of the land are not completely destroyed. But that does not seem to us to be controlling. The path of glide for airplanes might reduce a valuable factory site to grazing land, an orchard to a vegetable patch, a residential section to a wheat field. Some value would remain.

*United States v. Causby*, 328 U.S. 256, 262 (1946) *referred to in* *Agins v. Tiburon*, 447 U.S. 255, 262 (1980) (referring to *Causby* as a prevention of "the best use of appellant's land").

79. *See infra* note 92.

80. 222 U.S. 78 (1911). *Cf. Penn Central*, 438 U.S. at 125-27, 138 (rejecting the formulation that the regulation was a taking because it prohibited "the most beneficial use of the property," holding instead that the regulation "permit[ed] reasonable beneficial use of the landmark site").

81. The Park Superintendent refused to allow Senator Curtin to graze his cattle upon his own property within the Park boundaries because he had not complied with rules imposed by the Superintendent regarding the herding of stock over the Government lands. *Curtin*, 222 U.S. at 83.

82. *Id.* at 86.

83. *Id.* *See also* *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 296 (1981) ("the Act does not categorically prohibit surface coal mining; it merely regulates the conditions under which such operations may be conducted."). This distinction, however, may

It [was] not a prevention of a misuse or illegal use but the prevention of a legal and essential use, an attribute of its ownership, one which goes to make up its essence and value. To take it away is practically to take his property away, and to do that is beyond the power even of sovereignty, except by proper proceedings to that end.<sup>84</sup>

The best analysis and statement of the "intrusion short of physical invasion" impact is actually found in a non-regulatory case. In *United States v. Causby*,<sup>85</sup> the Court held that the Government's physical action<sup>86</sup> "took" an "easement of flight,"<sup>87</sup> over the property, but that the taking of the easement was also a taking of the surface because the use of the easement "would be a definite exercise of complete dominion over the surface of the land."<sup>88</sup> The Court held that it was immaterial that the planes never physically "touched" the property,<sup>89</sup> because "the flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it."<sup>90</sup>

The clearest statement as to why the destruction of beneficial use is an unconstitutional impact comes from Justice Brennan's dissent in *San Diego Gas & Electric Co. v. San Diego*.<sup>91</sup>

serve little purpose since "every regulation necessarily speaks as a prohibition." Goldblatt v. Hempstead, 369 U.S. 590, 592 (1962).

84. *Curtin*, 222 U.S. at 86 cited in *Penn Central*, 438 U.S. at 145 (Rehnquist, J., dissenting).

85. 328 U.S. 256 (1946) cited with approval in *Penn Central*, 438 U.S. at 128.

86. The government had leased an airport near the property owner. The safe path of glide to one of the runways passed directly over the landowner's property at 83 feet. The landowners had been operating a chicken farm on their property, but because the noise and bright lights from the frequent landings frightened the chickens into flying into the walls, which killed them, any use of the property as a commercial chicken farm was destroyed.

87. *Causby*, 328 U.S. at 261.

88. *Id.* at 262. See also *id.* at 261 ("If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.").

89. The fact that the planes never touched the surface would be as irrelevant as the absence in this day of the feudal livery of seisin on the transfer of real estate. The owner's right to possess and exploit the land—that is to say, his beneficial ownership of it—would be destroyed. . . . [T]he land is appropriated as directly and completely as if it were used for the runways themselves.

*Id.* at 262.

90. *Id.* at 264. Comparing the overflights to a hypothetical elevated railway, the Court explained that despite the lack of physical contact, the elevated railway would be a taking because "there would be an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." *Id.* at 265.

91. 450 U.S. 621 (1981) (4-1-4 plurality opinion) The merits of the taking claim against San Diego's open space zoning plan were not reached due to a lack of Supreme Court jurisdiction resulting from the absence of a final state court decision. Justice Rehnquist, the swing vote, joined with the judgment that jurisdiction was lacking in order to form a plurality, but agreed in princi-



Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. . . . It is only logical, then, that governmental action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a de facto exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.<sup>92</sup>

With the exception of *Curtin*, the Court has done little more than give lip service to this impact.<sup>93</sup> It is factually difficult to prove that all beneficial use has been destroyed.<sup>94</sup> The Court has had the opportunity to

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ple with the dissent that on the merits the impact of the regulation was a taking.

92. *Id.* at 652-53 (citing *United States v. Dickinson*, 331 U.S. 745, 748 (1947); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)).

93. Land has value because the use of land has value. Any event which impairs the usefulness or potential of a piece of land will, almost certainly, impair its value as well. This relationship between usefulness and value makes it appear that there is a fundamental inconsistency in the law of just compensation. The law purports to relieve completely against the value losses resulting from certain governmental acts, such as physical intrusions and interferences, and not at all with respect to others, most particularly, regulations of use.

Humbach, *supra* note 18, at 251-52. Compare *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982) ("[P]ermanent occupations of land . . . are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land.") with *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130 (1978) (refusing to consider a regulation's impact upon discrete physical "segments" of property).

94. *United States v. Causby*, 328 U.S. 256, 262 (1946). See *supra* note 78 and accompanying text. The lack of a Court decision based upon this test may be due to the fact that the Court has yet to encounter a factual situation like *Causby* in a regulatory setting. A hypothetical may assist in understanding how a government can destroy all beneficial use through regulation.

A desert city wishes to improve the quality of its water system. It enacts a regulation which prohibits development of any kind within one hundred feet of its major water canals, essentially restricting the regulated property to its natural state.

Property owners of vacant residential lots along the canal retain title to, and maintain possession of, and have the right to dispose of their properties. Their use of the property within the non-development zone, however, has been restricted to such uses as may be made in its natural state, which are few if any at all. In effect, the city has confiscated the adjoining property in order to expand the width of the canal zone. The city is using the restricted land as part of its water system. The only substantive difference between the widening of the canal zone by regulation and a widening of the zone by formal condemnation is that the former action avoided the payment of just compensation to the property owners.

"Justice and fairness" dictate that the public as a whole bear the burden of the improved water system since the public as a whole receives the benefit. Unless compensation is required, thereby spreading the cost of the improvement to the public, the adjoining property owners will be forced to bear the public's burden alone.

recognize the taking of some beneficial use, but as of yet,<sup>95</sup> has refused to recognize a partial taking of beneficial use as being an unduly harsh impact.

The argument was made in *Andrus v. Allard*,<sup>96</sup> a personal property case, that a federal regulation prohibiting the sale of avian artifacts, such as eagle feathers and claws, prohibited the property owners from making a profit from artifacts legally in their possession. The property owners contended that the impact of the regulation was the destruction of their theoretical right to dispose of their property for profit.<sup>97</sup> The Court refused to recognize the partial taking, stating that "the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full bundle of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety."<sup>98</sup>

With regard to partial takings in a physical sense, the Court stated in *Penn Central Transportation Co. v. New York City*,<sup>99</sup> that "[t]aking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. This Court focuses rather . . . on the extent of the interference with the rights in the property as a whole . . . ."<sup>100</sup> Contrary to its statement, the Court in *Penn Central* then proceeded to consider the regulation's impact upon three discrete segments of the property; the Terminal itself,<sup>101</sup> the air rights above the terminal within the height of their proposed building,<sup>102</sup> and the air

95. The possibility of a partial taking remains open since the cases presented to the Court, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1232 (1987) (alleged partial taking by requiring some coal to be left in the ground), and *Andrus v. Allard*, 444 U.S. 51 (1979) (alleged partial taking by destroying the right to make a profit), were facial challenges which bear a different burden of proof than does an "as applied" takings claim. See *infra* notes 268-86 and accompanying text. Cf. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (rejecting the contention of the property owner "that the ordinance attempts to restrict and control the lawful uses of appellee's land so as to confiscate and destroy a great part of its value," thereby taking part of the economic value from the property owner reflected by a diminution in market value).

96. 444 U.S. 51 (1979).

97. *Id.* at 64.

98. *Id.* at 65-66 (citations omitted). Cf. *Keystone*, 107 S. Ct. at 1250-51 (characterizing a "support estate" as a property right rather than a separate interest in land and refusing to recognize its taking as a compensable taking because it was only a partial taking of the owner's rights).

99. 438 U.S. 104 (1978).

100. *Penn Central*, 438 U.S. at 130. See also *Keystone*, 107 S. Ct. at 1248-50 (refusing, in a facial challenge, to consider separately the coal required to be left in the ground from the rest of the coal mined).

101. "[T]he New York City law does not interfere in any way with the present uses of the Terminal." *Penn Central*, 438 U.S. at 136.

102. "Appellants, moreover, exaggerate the effect of the law on their ability to make use of the air rights above the Terminal . . . . Since appellants have not sought approval for the con-

rights above the height of their proposed building,<sup>103</sup> and held that there was no unduly harsh impact to any of the segments.

Since it has proven so difficult to prove a destruction of all beneficial use, and since so few regulations cause a physical invasion, the Court has indicated a willingness to look at the economic impact of a regulation.

### B. Confiscation by Economic Impact

Much of the confusion and uncertainty in the Court's regulatory taking jurisprudence arises in its attempts to formulate an "unduly harsh economic impact" test.<sup>104</sup> One reason the law is so unsettled in this area is that in the 65 years since the Court first found a taking based on economic impact in *Pennsylvania Coal Co. v. Mahon*,<sup>105</sup> the Court has never invalidated a regulation based solely on its economic impact,<sup>106</sup> even though it has referred to it as one factor which has "particular significance" upon the Court's decisions.<sup>107</sup> A regulation may cause an immediate economic harm<sup>108</sup> to the property owner severe enough to constitute a taking in two possible ways. The first is that a regulation has deprived a property owner of all economically

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struction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the Terminal." *Id.* at 136-37.

103. [T]o the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of even those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings.

*Id.* at 137.

104. *Id.* at 127.

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

*Id.* at 123-24 (citations omitted; emphasis added).

105. 260 U.S. 393, 414 (1922) (the Kohler Act made it "commercially impracticable to mine certain coal").

106. See e.g., *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (economic impact played a key role in the Court's analysis but it was not the sole basis upon which the Court found a taking); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (the government's invasion did not have sufficient economic impact upon the owner to amount to an uncompensated taking).

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

108. As will be discussed below, the Court has treated the possibility of future economic harm, such as the loss of future profits, under the investment-backed expectation analysis rather than under its economic impact analysis. See *infra* notes 163-71 and accompanying text.

viable use of his property, and the second is that the regulation forces individual property owners to privately fund social reform.

### 1. *Impact: deprivation of all economically viable use*

In *Agins v. Tiburon*,<sup>109</sup> the Court identified the denial of "economically viable use" as one form of "regulatory taking."<sup>110</sup> If the impact of a regulation is to make it "commercially impracticable"<sup>111</sup> to use "certain"<sup>112</sup> property, it has "very nearly the same effect for constitutional purposes as appropriating or destroying it."<sup>113</sup> The Court has narrowly interpreted this economic impact.

Facial challenges that a regulation deprives an owner of all economically viable use have been uniformly unsuccessful.<sup>114</sup> If on its face a regulation would permit *any* economic exploitation of the regulated property, the mere enactment of the regulation is not an unduly harsh impact.<sup>115</sup> In order for a property owner to successfully claim an economic taking, therefore, he must offer evidence as to the economic impact of the regulation upon his particular piece of property.<sup>116</sup>

109. 447 U.S. 255 (1980).

110. *Id.* at 260 (citing *Penn Central*, 438 U.S. at 138 n.36).

111. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922). *Compare with* *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1247-48 (1987) (no evidence in the facial challenge that any mine had been unprofitable).

112. *Pennsylvania Coal*, 260 U.S. at 414. The issue remains unsettled as to whether the economic viability test applies only to the impact upon the regulated property or to the impact upon the property owner's aggregate property. This issue was raised in the briefs of the parties in *Keystone*, 107 S. Ct. 1232 (1987). The Respondent contended that the coal companies were required to make "allegations of financial ruin, impending bankruptcy or . . . short term losses." *See* Brief for the Respondent at 34. The Appellant indicated the fallacy of respondent's contention. "Under respondent's reasoning, if General Motors owned 15 plants, Pennsylvania could simply seize one of them without compensation and it would not be a taking because GM would still have sizable holdings and still remain profitable." *See* Reply Brief for Petitioners at 4. The Court provided no answer, stating that "petitioners have never claimed that their mining operations, or even any specific mines, have been unprofitable . . . Nor is there evidence that mining in any specific location affected by the 50% rule has been unprofitable." *Keystone*, 107 S. Ct. at 1248.

113. *Pennsylvania Coal*, 260 U.S. at 414.

114. *See* cases cited *infra* note 275.

115. There are two possible ways that a regulation may permit enough economic development to defeat a facial challenge. First, the regulation itself may permit limited development. *E.g.*, *Agins v. Tiburon*, 447 U.S. 255, 262-263 (1980) (The California courts found "as a matter of state law, that appellants may be permitted to build as many as five houses on their five acres of prime residential property."). Second, there may be alternative economic uses not controlled by the regulation. *See also* *Hodel v. Indiana*, 452 U.S. 314, 335 (1981) (Even if mining was completely prohibited by the regulation, the "prime farmland provisions say nothing about alternative uses to which prime farmland may be put . . . We therefore conclude that these provisions do not, on their face, deprive a property owner of economically beneficial use of his property.").

116. *E.g.*, *Pennell v. City of San Jose*, 56 U.S.L.W. 4168, 4172 (U.S. Feb. 24, 1988) (A facial takings challenge based upon the ground that "the ordinance deprives property owners of all economically viable use of their land" is "easier to establish in an 'as applied' attack.").

The most notable economic impact of regulations is that they often reduce the market value of the plaintiff's property.<sup>117</sup> Diminution of the market value of a particular parcel of property is a major factor in determining whether the owner has been deprived of "all economically viable use." The role of diminution,<sup>118</sup> however, has not been settled by the Court. In some cases, the Court refers to it as a dispositive impact,<sup>119</sup> in other cases, it is referred to only as a factor.<sup>120</sup>

One area of certainty regarding diminution of value is that a regulation does not effect a taking simply because its impact is that *some* diminution in the value of the affected property occurs. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."<sup>121</sup> To require governments to compensate property owners for every reduction in property value, no matter how insignificant, would compel them to "regulate by *purchase*."<sup>122</sup> Compensation, therefore is not required for every diminution in value caused by a regulation.<sup>123</sup>

Diminution may amount to a taking, however, if the impact is severe. "When it 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."<sup>124</sup> To date the Court has refused to define the "magni-

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117. *E.g.*, *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). For a discussion of the value diminution in these cases, *see infra* note 125. *But cf.* *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 139 (1978) (Rehnquist, J., dissenting) (diminution of property value caused by a change in zoning is abstract since the initial value prior to the diminution is determined by a prior regulation).

118. One role diminution does play is in the determination of compensation once a regulation is held to be a taking. *Cf.* *United States v. Causby*, 328 U.S. 256, 261 (1946) ("It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken. Market value fairly determined is the normal measure of the recovery.") (citations omitted). Diminution may also play a role in the substantive due process balancing test as an indicator of the harm caused to an individual. *See infra* notes 315-30 and accompanying text. *Cf.* Comment, *Zoning, supra* note 4, at 1482.

It should be noted, however, that diminution in value should not play any role in a facial challenge. Diminution reflects a regulation's impact upon particular property, which is immaterial to the issue of whether "the mere enactment" of a regulation effects a taking. *See generally infra* notes 268-86 and accompanying text. *But cf. Keystone*, 107 S. Ct. at 1246 (the Court expected evidence of diminution in a facial challenge).

119. *See infra* note 126 and accompanying text.

120. *See e.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (The Court's entire reference to diminution consisted of the following: "This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; . . .").

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

122. *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

123. *Id.* at 66 ("When we review regulation, a reduction in the value of property is not necessarily equated with a taking.")

124. *Pennsylvania Coal*, 260 U.S. at 413, *reaffirmed in dictum in Keystone Bituminous*

tude" at which time the impact upon the market value constitutes a taking, and has instead treated diminution as only a factor to be considered.<sup>125</sup>

The appeal of diminution is that it provides a method of quantifying a regulation's economic impact. The unstated rationale behind using diminution as a factor is that the market value reflects the market's collective analysis of the parcel's economic value, both present and future.<sup>126</sup> Diminution, resulting from a regulation, is an objective indication of the severity of the regulation's impact. If a property's value is reduced to a nominal sum because of a regulation, it indicates that the market does not perceive the possibility of significant economic use of the property while so restricted.<sup>127</sup> The market's analysis may accu-

*Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1246 (1987) ("[P]etitioners have also failed to make a showing of diminution of value sufficient to satisfy the test set out in *Pennsylvania Coal* . . ."). See also *Keystone*, 107 S. Ct. at 1248 ("[O]ur test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property . . ."); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958) ("[W]e have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking.") (citing *United States v. Kansas City Ins. Co.*, 339 U.S. 799 (1950); *United States v. Causby*, 328 U.S. 256 (1946)).

125. The Court stated in *Penn Central*, 438 U.S. at 131 (citations omitted), that "the decisions sustaining other land-use regulations, . . . uniformly reject the proposition that diminution in property value, standing alone, can establish a taking." This dicta, however, fails to accurately characterize the cases cited which were decided upon alternative grounds which preempted any consideration of diminution.

In *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the property owner claimed, in a facial challenge, diminution from \$10,000 per acre to only \$2,500 per acre; a 75% reduction in value. The Court expressly stated that it did not reach the issue of diminution.

What would be the effect of a restraint imposed by . . . the ordinance . . . upon the value or marketability of the lands is neither disclosed by the bill nor by the evidence, and we are afforded no basis, apart from mere speculation, upon which to rest a conclusion that it . . . would have any appreciable effect upon those matters.

*Id.* at 397.

The property owner in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), claimed a diminution from \$800,000, when used for brick-making purposes, to \$60,000, for residential purposes. The regulation, however, was exempt from the just compensation clause because of the nuisance exception. See *infra* notes 184-98 and accompanying text. The Court also pointed out that the landowner could extract the valuable clay and make the bricks elsewhere, implying that in fact there was no diminution of the value of the land, only increased operating costs in the making of the bricks. *Id.* at 411.

*Goldblatt v. Hempstead*, 369 U.S. 590 (1962), involved another nuisance regulation exempt from the just compensation clause because it was a safety measure. The Court did not even consider the issue of just compensation because "there [was] no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question." *Id.* at 594.

126. Cf. *United States v. Causby*, 328 U.S. 256, 261 (1946) ("[market] value may reflect the use to which the land could readily be converted, as well as the existing use.").

127. *Id.*

rately reflect the true economic impact, when the regulation, on its face, would permit economic development.

Using diminution as a factor permits courts, which are often ill-equipped to perform complex economic analysis,<sup>128</sup> to quantify the economic impact by adopting the market's evaluation of whether all economically viable use has been "taken."<sup>129</sup> The greater the diminution in property value, the greater the probability that the economically viable use of the property has been taken.

## 2. *Impact: privately funded social reform*

The economic viability test described above permits many economic burdens to slip through the cracks merely because the impact of the regulation is not a complete taking of the whole property. The claim may be made that the economic impact of a regulation effects a taking without destroying all economic viability because it in effect compels one to privately subsidize public reform of a social problem for which he shares no responsibility. "[I]ndividuals may be seen as having been treated solely as a means in a process of social engineering."<sup>130</sup>

Landlords in the recent case of *Pennell v. City of San Jose*,<sup>131</sup> claimed that a San Jose rent control regulation which permitted a denial of a reasonable rent increase if it would create a financial hardship for an individual tenant was an unconstitutional transfer of property. The San Jose regulation permitted a rent increase exceeding eight percent in a given year only if a tenant does not object. If a tenant objects,

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128. Cf. *Andrus v. Allard*, 444 U.S. 51, 66 (1979) ("Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform.").

129. The question remains, however, as to the magnitude of diminution required in order to find a "taking." It should be noted that it is unlikely that a regulation will ever render a parcel of real property totally valueless, see *Causby*, 328 U.S. at 262, unless there is a permanent physical occupation, see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 436 (1982) ("[E]ven though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily *empty the right of any value*, since the purchaser will also be unable to make use of the property.") (emphasis added).

Since real property is indestructible, and since no regulation is truly permanent, over-regulated land will always have a "speculative value," even if it is currently economically useless. Since a property owner who purchases property also purchases the right to challenge any offensive regulation, *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3146 n.2 (1987), someone will likely pay a relatively nominal amount with the expectation to challenge the regulation so that the property may regain some or all of its former value. Speculative value may be substantial in absolute dollars, but nevertheless be nominal in terms of the property's potential value. A parcel worth \$10,000, were it not for the regulation, would only have a speculative value in the hundreds of dollars, but, the speculative value of a parcel with a potential value of \$100,000,000 could still be in the millions, even though the regulation renders it unusable for the present.

130. Comment, *Zoning*, *supra* note 4, at 1492.

131. 56 U.S.L.W. 4168 (U.S. Feb. 24, 1988).

a mandatory hearing is held before the increase may be permitted. The Hearing Officer may consider the economic hardship that the increase would cause to an individual tenant.<sup>132</sup> If an Officer "determines that the proposed increase constitutes an unreasonably severe financial or economic burden on a particular tenant, he may order that the excess of the increase which is subject to his consideration . . . be disallowed."<sup>133</sup>

The plaintiffs claimed that any such reduction would violate the Takings Clause by effectively transferring the landlord's property, i.e., the denied portion of a reasonable rent increase, to individual hardship tenants.

The United States Supreme Court did not address the issue because it felt the facial challenge was premature.<sup>134</sup> It simply affirmed the California Supreme Court's holding that the regulation was not a facial taking.<sup>135</sup> Justice Scalia, however, argued in his dissent<sup>136</sup> that

132. A Mediation Hearing Officer considers seven factors in determining whether the proposed increase is "reasonable under the circumstance" including the potential hardship a rent increase would cause to individual tenants.

Hardship to Tenants. In the case of a rent increase . . . which exceeds the standard set [in this ordinance] then with respect to such excess and whether or not to allow same to be part of the increased allowed under this chapter, the hearing officer *shall* consider the economic and financial hardship imposed on the present tenant or tenants of the unit or units to which such increases apply. If, on balance, the hearing officer determines that the proposed increase constitutes an unreasonably severe financial or economic hardship on a particular tenant, he *may* order that the excess of the increase . . . be disallowed.

San Jose Municipal Ordinance 19696, § 5703.29 (emphasis added) *quoted in Pennell*, 56 U.S.L.W. at 4169.

133. *Id.*

134. *See infra* notes 280-86 and accompanying text.

135. The premise of the Court's refusal to reach the merits of the claim was that the facial challenge was not ripe for adjudication because there was nothing in the record to indicate that the provision had ever been applied. *Pennell*, 56 U.S.L.W. at 4170. (Traditionally, facial challenges have always been considered ripe, *see infra* note 271) Even though the Court did not determine whether the provision was a forced housing subsidy, it did present the plaintiffs' argument.

[T]he ordinance establishes the seven factors that a Hearing Officer is to take into account in determining the reasonable rent increase. The first six of these factors are all objective, and are related either to the landlords costs of providing an adequate rental unit, or to the condition of the rental market. Application of the six standards results in a rent that is "reasonable" by reference to what appellants' contend is the only legitimate purpose of rent control: the elimination of "excessive" rents . . . . When the Hearing Officer then takes into account hardship to a tenant . . . and reduces the rent below the objectively "reasonable" amount established by the first six factors, this additional reduction in rent increase constitutes a "taking." This taking is impermissible because it does not serve the purpose of eliminating excessive rents—that objective has already been accomplished by the first six factors—instead, it serves only the purpose of providing assistance to "hardship tenants." In short, appellants contend, the additional reduction of rent on grounds of hardship accomplishes a transfer of the landlord's property to individual hardship tenant; The ordinance forces private individuals to shoulder the "public" burden of subsidizing their poor tenants' housing.



the provision was an unconstitutional taking on its face. Rather than taking a quantitative approach to the regulation's economic impact, he focused on the qualitative impact.

Justice Scalia proposed that the harshness of the "economic" regulation be determined by considering the cause-and-effect relationship of the regulatee to the social problem being regulated. Under his analysis, if a regulation imposes an economic burden upon a property owner in order to remedy a public problem which the property owner is not responsible for, nor uniquely benefitting from, it is an unduly harsh impact.<sup>137</sup>

Applying his analysis to the situation in *Pennell*, Justice Scalia noted that the "hardship" provision is only applied to landlords who, because the statute itself controls the rent, are not the cause of the market shortage, nor are they reaping unique benefits.<sup>138</sup> Once a reasonable rent has been determined, the landlord is "innocent"<sup>139</sup> of any cause-and-effect relationship which would justify singling him out to bear the burden of remedying the housing situation.<sup>140</sup>

*Id.* at 4170.

136. It should be noted that as often is the case when a claim is characterized as unripe, or as a facial challenge, the fact that Justice Scalia's analysis appears in the dissent does not necessarily preclude the Court from adopting it in a future ripe case relating to a specific situation.

137. Traditional land-use regulations do not violate the just compensation clause, according to Justice Scalia, because "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. . . . The proposed property would otherwise be the cause of the [problem]. The same cause-and-effect relationship is properly thought to justify emergency price regulation." *Pennell*, 56 U.S.L.W. at 4173 (Scalia, J., concurring in part; dissenting in part). Even when the owners of the regulated commodities are not the direct cause of a market shortage, it is fair to single them out to relieve the social problem since they are otherwise able to "reap unique profits" from the market's inefficiency. *Id.*

138. Once the Hearing Officer considers the first six objective factors, he has calculated a reasonable rent increase. The landlord may no longer be considered a cause of high housing costs since his increase would only permit a reasonable return. Nor is he receiving any high profits which would justify the imposition of an economic burden. *Id.* at 4173.

139. *Cf. Mugler v. Kansas*, 123 U.S. 623, 669 (1887) (emphasis added):

The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. *In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.*

140. [The] problem is no more caused or exploited by the landlords than it is by 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, or the citizens of San Jose holding the higher-paying jobs from which they are excluded.

*Pennell*, 56 U.S.L.W. at 4173 (Scalia, J., concurring in part; dissenting in part).

*Cf. Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 403 (1922) (argument for the plaintiff):

In time of epidemic it is conceivable that a State might temporarily prohibit the hoarding of essential medicines and might require physicians and druggists to sell them at

Justice Scalia characterized the San Jose regulation as a departure from the traditional manner in which American government has dealt with the problem of assisting "those who cannot pay reasonable prices for privately-sold necessities;"<sup>141</sup> i.e., the distribution of funds collected from the public at large through taxation.

[T]he fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere "economic regulation," which can disproportionately burden particular individuals. Here the City is not "regulating" rents in the relevant sense of preventing rents that are excessive; rather, it is using the occasion of rent regulation (accomplished by the rest of the Ordinance) to establish a welfare program privately funded by those landlords who happen to have "hardship" tenants."<sup>142</sup>

While the concept of privately funded social reform underlies all regulatory taking claims, the cause-and-effect analysis proposed by Justice Scalia may help in identifying "the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation."<sup>143</sup> The cause-and-effect analysis fills the void left by the economic viability test as well as provide a theoretical analysis which may assist in all other areas of regulatory takings jurisprudence.

### *C. Confiscation by Undue Interference with Reasonable Investment-backed Expectations*

In addition to the acquisition and economic forms of confiscation described above, the Court has identified and recognized a third form of confiscation.<sup>144</sup> If a regulation causes an "undue interference"<sup>145</sup> with

reasonable rates. Even at such time, the druggist could not be required to dispense his medicines for nothing, or a baker his bread, and that though the people were dying or starving for want of drugs and food.

141. *Pennell*, 56 U.S.L.W. at 4173 (Scalia, J., concurring in part; dissenting in part).

142. *Id.*

143. *Id.* at 4174.

144. The Court has not expressly explained the difference between its "economic impact" analysis and its "investment-backed expectations" analysis, but the two have routinely been identified as separate and distinct claims. See e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1242 (1987) ("makes it impossible for petitioners to profitably engage in their business, or that there has been an undue interference with their investment-backed expectations.") (emphasis added); *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2573 (1986) (White, J., dissenting) ("Factual allegations of interference with reasonable investment backed expectations and denial of all economically feasible use of the property are certainly sufficient.") (emphasis added); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 n.6 (1985) ("will prevent economically viable uses of the property or frustrate reasonable investment backed expectations") (emphasis added); *Williamson County v. Hamilton Bank*, 473 U.S. 172

"distinct investment backed expectations,"<sup>146</sup> it will be considered an uncompensated taking. The Court has yet to give much guidance as to what is a "distinct investment-backed expectation."<sup>147</sup> As a minimum it requires that the expectation be "reasonable,"<sup>148</sup> and that it reach the level of being a "property" interest<sup>149</sup> rather than a mere expectation<sup>150</sup> of economic gain.<sup>151</sup> To date, the Court has only considered the impact of interferences with the "right to exclude others," and the "right to make a profit."

### 1. *Impact: the expectation of excluding others*

The most protected expectation has been the expectation of being able to exclude others from one's property.<sup>152</sup> In *Kaiser Aetna v. United States*,<sup>153</sup> the Court indicated that the consent of the Army Corps of Engineers created "a number of expectancies embodied in the concept of 'property,'—expectancies that, if sufficiently important, the government must condemn and pay for before it takes over the manage-

(1985) ("factors of particular significance are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations.").

145. *Keystone*, 107 S. Ct. at 1242.

146. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).

147. In general, the format of this form of confiscation remains a true multi-factored approach, a sort of catch all approach considering all possible factors previously mentioned in order to ensure fairness.

148. See e.g., *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 129 (1985) ("frustrate reasonable investment backed expectations"); *Williamson County v. Hamilton Bank*, 473 U.S. 172, 191 (1985). One expectation which will never be considered reasonable is the expectation that one may use his property as a nuisance. Cf. *Mugler v. Kansas*, 123 U.S. 623, 623, *passim* (1887) (landowners do not have a right to use their property to injure others). See generally *infra* notes 184-98 and accompanying text.

149. "But not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law in back of them, and only when they are so recognized may the courts compel others to forbear from interfering with them or to compensate for their invasion." *United States v. Willow River Co.*, 324 U.S. 499, 502 (1945) quoted in *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979).

150. In *Sears v. Akron*, 246 U.S. 242 (1918), the plaintiffs claimed that permission from the city to incorporate and develop a water system was "an indefeasible property right to proceed with [the] development." *Id.* at 250. The Court held, however, that all they had was a mere expectation of economic gain which meant that "the company had no property right" which could have been appropriated by the city's action. *Id.* at 247.

151. "[T]his Court has dismissed 'taking' challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Penn Central*, 438 U.S. at 124-25 (citations omitted).

152. The overlap between the different forms of confiscation is readily apparent here. The right to exclude is protected under both the acquisition analysis, see *supra* notes 53-70 and accompanying text, and under the investment-backed expectation analysis.

153. 444 U.S. 164 (1979).

ment of the land owner's property."<sup>154</sup> The investment-backed expectation at issue was the right to exclude others from the marina. This fundamental right would permit the owners to recover their development costs, and possibly make a profit, by charging their private customers an annual fee.<sup>155</sup> Since the demand of the Corps that the marina be made public would destroy, or greatly injure, their investment-backed expectation, the impact of the order was an undue interference and therefore a compensable taking.

The impact of the interference with the property owner's "right to exclude others" in *Pruneyard Shopping Center v. Robins*,<sup>156</sup> however, was not considered unduly harsh. The shopping center owner in *Pruneyard* claimed that his right to exclude people from his shopping mall had been taken by a court order requiring him to permit students to distribute pamphlets and collect signatures on his property.<sup>157</sup> Because the regulation did not have any notable economic impact,<sup>158</sup> the only real issue was interference with the property owner's expectation of control. The Court held that the interference with the owner's expectations was not undue because the owner retained the power to regulate the "time, place and manner," of the invasion of his property.<sup>159</sup>

The impact of an interference need not be economic according to the Court. In the recent case of *Nollan v. California Coastal Commission*,<sup>160</sup> Justice Brennan argued in his dissent that the impact of the forced conveyance of an easement was not unduly harsh because the Nollans did not have any reasonable expectation to exclude people from walking along their beach; first, because the state constitution did not give them the right to exclude others,<sup>161</sup> and second, because any possible expectation of excluding others was destroyed by actual notice that the right to exclude others would have to be forfeited in order to receive

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154. *Id.* at 179.

155. *Id.* at 180.

156. 447 U.S. 74 (1980).

157. *See supra* note 66.

158. The owner "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'" *Pruneyard*, 447 U.S. at 84.

159. *Id.* at 83.

160. 107 S. Ct. 3141 (1987).

161. Justice Brennan contended that in California, "the state Constitution explicitly states that no one possessing 'frontage' of any 'navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for a public purpose.'" *Id.* 3158-59 (citing CAL. CONST., art. X, § 4). His interpretation of California law, however, was deemed erroneous by the Court. As Justice Scalia pointed out in the opinion of the Court, "the right of way sought here is not . . . one to navigable water (from the street to the sea) but *along* it." *Nollan*, 107 S.Ct. at 3145 (emphasis added).

a building permit.<sup>162</sup> The Court rejected Justice Brennan's contentions and recognized the Nollan's expectations as being reasonable.<sup>163</sup>

## 2. *Impact: the expectation of profit*

Another critical expectation addressed by the Court has been the expectation of profit. According to the general statements of the Court, if a regulation destroys the profitability of a parcel of property by making it "commercially impracticable" to use the land, it constitutes an unduly harsh impact.<sup>164</sup>

Profitability, however, is a "slender reed upon which to rest a takings claim."<sup>165</sup> In *Andrus v. Allard*,<sup>166</sup> a personal property case, the plaintiffs claimed that a federal regulation which prohibited the sale of avian artifacts in their possession, e.g., eagle feathers or claws, had an unduly harsh impact because it deprived them of the opportunity to earn a profit from their personal property. The Court found that "the denial of one traditional property right does not always amount to a

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162. Justice Brennan argued that the property owners, were clearly on notice when requesting a new development permit that a condition of approval would be a provision ensuring public lateral access to the shore. Thus, they surely could have had no expectation that they could obtain approval of their new development and exercise any right of exclusion afterward. *Nollan*, 107 S.Ct. at 3159.

The Court held that Justice Brennan's reliance on *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984) (the voluntary application for a government permit involving chemicals, with notice that the contents and procedures involved would become public, waived any claim to "trade secret" rights), was a "peculiar proposition that a unilateral claim of entitlement by the government can alter property rights." *Nollan*, 107 S. Ct. at 3146 n.2. The majority stated that, "the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary 'exchange,' that we found to have occurred in *Monsanto*." *Nollan*, 107 S.Ct. at 3146 n.2 (citing *Monsanto*, 467 U.S. at 1007). Since a unilateral claim of entitlement by the government may not alter property rights, see *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), the property owners had a reasonable expectation that they would be able to exclude others from their property, despite notice that a surrender of property would be required for the permit.

The Court also indicated that even though the Nollans bought the property after the policy was implemented, their rights, and expectations, were unaffected. If the Commission was unable to deprive the prior owners of the easement without compensation, the commission was without power to deprive the Nollans because the prior owners transferred their full property rights to the Nollans. *Nollan*, 107 S. Ct. at 3146 n.2.

163. The Court did not invalidate the regulation based solely upon the finding that the regulation interfered with the investment-backed expectations of the Nollans. It instead found that the regulation was a taking of property without due process. See *infra* notes 338-445 and accompanying text.

164. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922). But cf. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1247 (1987) (mining companies failed to prove that the regulation made it "commercially impracticable for them to continue mining").

165. *Andrus v. Allard*, 444 U.S. 51, 66 (1979).

166. *Id.*

taking.”<sup>167</sup> The economic impact was not unduly harsh in the Court’s eyes because there remained a possibility that some of their economic expectations could still be fulfilled.<sup>168</sup> The Court explained that the “[p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.”<sup>169</sup>

Prior to the restrictive language in *Andrus*, the Court used the existing profitability of the property in *Penn Central* as a justification for not finding a “taking.”

[T]he New York City law does not interfere in any way with the present uses of the Terminal. . . . So the law does not interfere with what must be regarded as Penn Central’s primary expectation concerning the use of the parcel. More importantly, . . . we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but to obtain a “reasonable return” on its investment.<sup>170</sup>

In light of the language in *Penn Central*, if a parcel of property is already returning a reasonable profit, a prohibition of further development may, in some situations, not be considered an undue interference, despite an otherwise reasonable expectation of increasing future profits by developing. The *Penn Central* Court’s indication that *present* uses are the “primary expectation” emphasizes the status quo and reduces the likelihood that expectation of “future” exploitation and future profits will receive much protection under the investment-backed expectation analysis.<sup>171</sup> Since future profits are speculative, their destruction is not necessarily an unduly harsh impact.

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167. *Id.* at 65. It should be noted that although *Andrus* states that the prohibition of “the most profitable use” may not amount to a taking, it does not state that the taking of *all* profitable use may be permitted. *Id.* at 66.

168. “[I]t is not clear that appellees will be unable to derive economic benefit from the artifacts; for example, they might exhibit the artifacts for an admissions charge.” *Id.* at 66.

169. *Id.* (citations omitted).

170. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978). Had the owner’s purchased the property with the expectation of expanding, the Court’s finding may have been otherwise. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (property owners bought and developed the property with the reasonable expectation of making a profit by charging private members an annual fee).

171. The reasonableness of the common expectation that one may develop one’s land is still undecided. In *Penn Central*, the Court stated that it was “untenable” that property owners could, “establish a ‘taking’ simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development.” *Penn Central*, 438 U.S. at 130. *But see Nollan*, 107 S. Ct. at 3147 n.2 (property owners have an inherent right, and therefore reasonable expectation, to build on one’s land subject only to legitimate permitting

### 3. *Expectations viewed as vested rights*

Perhaps the best understanding of the Court's investment-backed expectation claim comes from considering the analogous doctrine of "vested rights" which is found in the land use area of the state courts.<sup>172</sup> In general, a vested right occurs when a developer has expended considerable money and effort on a project.<sup>173</sup> Once the right vests, the government may not change the rules applying to the project because the impact upon the developer is so severe. The developer is permitted to complete the project according to the rules which were in effect when he began. A majority of the state courts reason that the government is estopped from applying a new law when the owner, in reliance upon the old law, has made a substantial change in position.<sup>174</sup> A major study of the case law identified the factors considered by the state courts and consolidated them into the following rule.

A local government exercising its zoning powers will be estopped when a property owner, (1) relying in good faith, (2) upon some act or omission of the government, (3) has made a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly had acquired.<sup>175</sup>

The very statement of the investment-backed expectation test demonstrates the analogy with vested rights under an estoppel theory. "Reasonable expectation" conforms to the first element that the developer relies in good faith. The government's failure to change the law prior to the time the investment was made, is the government's omission to act.<sup>176</sup> "Investment-backed" reflects the requirement that there be a substantial change in position. "Undue interference" indicates that it would be inequitable and unjust to impose the new law upon the owner. The vested rights doctrine has much to offer to the investment-backed expectation analysis and may be utilized by the Court in the

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requirements).

172. "[T]he rationale applied by a particular court . . . might be based on rigid concepts of private property rights, theories of equitable estoppel, generalized prohibitions against retroactive application of new laws, or vague concepts of fairness." Cunningham & Kremer, *Vested Rights, Estoppel and the Land Development Process*, 29 HASTINGS L.J. 625, 626 (1978).

173. See generally *id.*

174. *Id.* at 648.

175. Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63, 66.

176. This raises the issue of investments based upon the expectation that the law will change. Such investments are not made in reliance upon the present state of the law and therefore would not qualify under the estoppel theory.

future if presented in a case where the Court reaches the merits of the claim.<sup>177</sup>

Because of its broad language and its focus on the fairness of the impact to the property owner, the distinct investment-backed analysis provides the Court with the flexibility to find a taking when the rest of its analysis has failed to do so. This latitude affords the Court the ability to consider whether in "justice and fairness" the individual or the public should bear the harsh impact of an otherwise valid regulation.

#### *D. Summary of the Impacts of Regulatory Takings*

As can be seen, the impact caused by a regulation plays an important part in the Court's analysis. A confiscation by acquisition primarily considers the impact upon the owner's dominion over the property. In particular it considers whether there has been a physical invasion, or whether the regulation has the same effect upon the property owner's use of the property as would a physical invasion.

An economic confiscation, on the other hand, hinges upon the present economic impact upon the owner. The issue is whether the value of the property has been severely reduced, or whether a property owner has been forced to provide a private economic subsidy to a social problem for which he is not responsible. A taking of an investment-backed expectation depends upon a showing that a reasonable expectation, either economic or dominion oriented, has reached the level of being a

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177. The Court has faced a "vested rights" argument at least once, *Williamson County v. Hamilton Bank*, 473 U.S. 172, 192 n.12 (1985), but it did not reach the merits of the claim. The plaintiff claimed that changes in the "cluster" zoning requirements which were imposed upon its partially completed development had an unduly harsh impact because they interfered with its "'expectation interest' in completing the development according to its original plans." *Id.* The changes would allow only 67 units to be built while the plaintiff claimed it was originally entitled to build over 476 units. At trial, an expert witness testified that this would result in a loss of over one million dollars because of the expenditures on a golf course and other community developments which were included in the development based upon the original expectation that there would be 409 more units than were now being allowed under the changes. *Id.* at 182.

Thus the evidence appears to indicate that it would not be profitable to develop 67 units because [plaintiff] had made various expenditures in the expectation that the development would contain far more units; the evidence does not appear to support the proposition, that aside from those "reliance" expenditures, development of 67 units on the property would not be economically feasible.

We express no view of the propriety of applying the 'economic viability' test when the taking claim is based upon such a theory of 'vested rights' or 'expectation interest.' It is sufficient for our purposes to note that whether the "property" taken is viewed as the land itself or respondent's expectation interest in developing the land as it wished, it is impossible to determine the extent of loss or interference until the Commission has decided whether it will grant a variance from the application of the regulations.

*Id.* at 192 n.12 (citations omitted).



"property interest" and that the impact of a regulation's interference with that property interest would be unfair.

An attorney or court should conscientiously utilize the various facts of a given case to shape a regulatory taking claim that identifies how a regulation has in fact confiscated property by demonstrating its impact(s) upon the property, rather than merely presenting the facts as a hodgepodge of factors justifying a summary conclusion. There are, however, other issues in a regulatory taking case which require careful scrutiny.

### III. THE ISSUES OF REGULATORY CONFISCATION

There are three primary issues which should be considered when analyzing a regulatory taking claim. First, is the regulation the type of regulation excepted from the requirements of the just compensation clause,<sup>178</sup> second, is the taking claim ripe,<sup>179</sup> and third, is the regulation invalid on due process grounds.<sup>180</sup>

#### A. *Exceptions from the Just Compensation Clause*

Before ever considering the impacts of a regulation, one should first consider whether or not the challenged regulation is the type of regulation exempt from the limitations of the Just Compensation Clause. There are "two exceptions where the destruction of property does not constitute a taking."<sup>181</sup> The first exception arises when the police power is used to prohibit a nuisance, thereby preventing a property owner from using his property to injure others.<sup>182</sup> The second exception is when the government prohibits a noninjurious use, but "the

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178. See *infra* notes 181-232 and accompanying text.

179. See *infra* notes 233-86 and accompanying text.

180. See *infra* notes 287-345 and accompanying text.

181. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 144 (1978) (Rehnquist, J., dissenting). Each exception is based upon the objective of the regulation. The first exception, nuisance regulation, arises when the police power is exercised to *protect* the public from injurious uses. The second exception, "average reciprocity of advantage," applies when the police power is exercised to *confer benefits* upon the public. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting).

182. Long ago it was recognized that, 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,' and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.

*Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1245 (1987) (quoting *Mugler v. Kansas*, 123 U.S. 623, 665 (1887)) (characterizing the regulation at issue as a restriction on an "activity akin to public nuisance," but not relying upon the nuisance exception).

prohibition applies over a broad cross section of land and thereby 'secure[s] an average reciprocity of advantage.'<sup>183</sup>

### 1. *Noxious uses: the nuisance exception*

The regulation and abatement of a noxious use, i.e., a public nuisance,<sup>184</sup> is a proper exercise of the police power.<sup>185</sup> Nuisance regulations do not require compensation.<sup>186</sup> The justification for the exception is that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community."<sup>187</sup> This reasoning has remained essentially unchallenged by the Court since *Mugler v. Kansas*.<sup>188</sup>

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. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.<sup>189</sup>

183. *Penn Central*, 438 U.S. at 147 (quoting *Pennsylvania Coal*, 260 U.S. at 415).

184. The Court has applied the exception to nuisance regulations regardless of whether they are directed at a common law public nuisance, or at a statutory public nuisance. See *Goldblatt v. Town of Hempstead* 369 U.S. 590, 593 (1962) ("Nor is it of controlling significance . . . that the use prohibited is arguably not a common law nuisance."). See also *Hadacheck v. Sebastian*, 239 U.S. 394, 411 (1915) ("granting that the business was not a nuisance *per se*, it was clearly within the police power of the State to regulate it, 'and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law.'") (citation omitted); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.") (citation omitted). Cf. Comment, *Zoning*, *supra* note 4, at 1471-72 (" 'Noxiousness' thus becomes simply a conclusory label reflecting some social consensus about which property uses ought to be preferred.'").

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

186. "Courts have consistently held that a State need not provide compensation when it diminishes or destroys the value of property by stopping illegal activity or abating a public nuisance." *Keystone*, 107 S. Ct. at 1246 (citations omitted). See generally Van Alstyne, *supra* note 18, at 14-19.

187. *Mugler*, 123 U.S. at 665.

188. 123 U.S. 623 (1887). It should be noted, however, that the Court in *Mugler* denied the just compensation claim in part because it was unwilling to recognize the Just Compensation Clause as a possible limitation on the police power. See *supra* note 6.

189. *Id.* at 668-69 (note that "general welfare" is omitted from the standard purposes which justify the use of the police power). The Court explained the public policy behind its holding: The power which the States have of prohibiting such use . . . is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property,

In simplified terms, nothing is taken from a property owner when a public nuisance is abated since the property owner does not have any right to injure others.<sup>190</sup>

The traditionally<sup>191</sup> narrow<sup>192</sup> nuisance exception may be expanding. Recently, the Court considered the underlying reasoning of the nuisance exception as a factor when addressing regulations which restrict activities which are not nuisances, but which are nuisance-like

to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, . . . is very different from taking property for public use, or from depriving a person of his property without due process of law. *In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.*

*Id.* at 669 (emphasis added).

190. 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.

*Keystone*, 107 S. Ct. at 1245 n.20 (citations omitted).

Another possible theory is that there is a distinction between property "rights," which enjoy the backing of legal action against others, *see* *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979), and property "freedoms," such as the freedom to use one's property to injure others. Only the former is compensable if taken or destroyed. *See generally* Humbach, *supra* note 18.

191. Chief Justice Rehnquist argued in *Keystone* that the regulation at issue was "not the type of regulation that our precedents have held to be within the 'nuisance exception' to takings analysis." He identified two principles which have traditionally restricted the use of the nuisance exception to a very narrow set of circumstances. "First, nuisance regulations exempted from the Fifth Amendment have rested on discrete and narrow purposes." In particular, he argued, the exception should not insulate regulations based "on essentially economic concerns" by labeling them nuisance regulation. "Second, and more significantly, [the Court's] cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property." *Keystone*, 107 S. Ct. at 1256-57 (citations omitted).

192. Arguably, the nuisance exception is so narrow that it requires a regulation to employ the least restrictive means available before it may be excepted from the limitations of the Just Compensation Clause.

[W]here there is a power to abate a nuisance, the abatement must be limited by its necessity, and no wanton or unnecessary injury can be committed to the property or rights of individuals. Thus, if the nuisance consists in the use to which a building is put, the remedy is to stop such use, not to tear down or to demolish the building itself, or to destroy property found within it.

*Mugler*, 123 U.S. at 678 (Field, J., dissenting).

*Compare Keystone*, 107 S. Ct. at 1243 ("The Subsidence Act . . . is designed to accomplish a number of widely varying interests, with reference to which petitioners have not suggested *alternative methods* . . .") (emphasis added); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) ("Furthermore, [the regulation] is not justified as a protection of personal safety. That could be provided for by notice."); *Curtin*, 222 U.S. at 86 (laws only regulating the use of property rather than completely prohibiting the use of property are permissible since "[s]uch laws might be considered as strictly regulations of the use of property, of so using it that no injury could result to others."). *Cf.* Van Alstyne, *supra* note 18, at 11 ("a determination to proceed by police regulation may be invalid, as a taking or damaging of private property, *if less onerous but equally effective methods for achieving the same public objectives are available*, short of an exercise of the eminent domain power.") (emphasis added).

in nature. In *Keystone Bituminous Coal Association v. Debenedictis*,<sup>193</sup> the Court, distinguishing *Pennsylvania Coal*, alluded to the possible applicability of the nuisance exception,<sup>194</sup> indicating that the subsidence regulation resulted from a "public interest in preventing activities *similar* to public nuisances."<sup>195</sup> The Court did not rely solely upon the nuisance exception to uphold the regulation, but *Keystone* may trigger a revival and expansion of the nuisance exception as a defense for governmental action.<sup>196</sup>

In general, the nuisance exception inquiry will be "whether the forbidden use is dangerous to the safety, health, or welfare of others."<sup>197</sup> Those regulations which do not qualify for the nuisance exception may, nevertheless, be excepted from the limitations of the Just Compensation Clause due to the "average reciprocity of advantage" exception.<sup>198</sup>

## 2. *The average reciprocity of advantage exception*

Some laws which create public benefits rather than abate public nuisances may seem confiscatory but have nevertheless been held constitutional because they secure for the regulated property owners an "average reciprocity of advantage" from other regulatees.<sup>199</sup> The bur-

193. 107 S. Ct. 1232 (1987).

194. *Id.* at 1242-46. The Court, however, did not rely solely on its "activity akin to public nuisance" *id.* at 1243, analysis, but rather treated it as a factor by continuing on and discussing the economic impact of the regulation, *id.* at 1246.

195. *Id.* (emphasis added).

196. The expansion of the nuisance exception to include nuisance-like activities would allow the exception to swallow the rule. If carried to its logical extreme, the *Keystone* interpretation would eventually include most, if not all, real property regulations. Legislative bodies, in light of the broad discretion afforded them in determining what is and is not a nuisance, would likely characterize all of their regulations as nuisance abatement in order to take advantage of the exception (see cases cited *supra* note 184). Cf. Comment, *Zoning*, *supra* note 4, at 1471 (criticizing the noxious use test because "its terms are so manipulable that the protection offered can become chimerical. The notion of what is noxious or harmful to the public can be expanded by courts or legislatures almost as if at will.").

Nuisance regulation is not coterminous with the police power. See *Keystone*, 107 S. Ct. at 1256 (citing *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting); and *Curtin v. Benson*, 222 U.S. 78, 86 (1911) (nuisance exception allows the government to prevent "a misuse or illegal use" and is not intended to allow "the prevention of a legal and essential use, an attribute of its ownership.")). Cf. *Berman v. Parker*, 348 U.S. 26, 33 (1954) (describing expansive breadth of police power). If the nuisance exception were expanded until "nuisance" abatement and the police powers were coterminous, there would be no Just Compensation Clause protection against confiscatory regulations. A regulation could never go "too far."

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

198. The availability of the "average reciprocity" exception also argues against the expansion of the nuisance exception.

199. *Pennsylvania Coal*, 260 U.S. at 415, see also *id.* at 422 (Brandeis, J., dissenting).

dens imposed upon one property owner are offset by the benefits received from the same burdens being imposed by the regulation upon other property owners.<sup>200</sup>

The case originally referred to as the precedent for incorporating the "average reciprocity of advantage" exception into regulatory taking jurisprudence involved a Pennsylvania mining law which required a wall of coal to be left along the borders of adjoining coal mines. This barrier was intended to keep the mineworkers safe should an adjoining mine be abandoned and allowed to fill with water. The regulation was upheld because each property owner gave up a barrier of coal in exchange for increased safety in his own mine.<sup>201</sup>

Reciprocity is a give-and-take notion. All parties are burdened so that all parties may be benefitted.<sup>202</sup> The concept is readily apparent in the area of zoning. A property owner in a residential zone is prevented from using his property for industrial or commercial purposes. This burden, however, is offset by the fact that his neighbor also cannot use his land for those purposes. His land thereby has a greater value for residential purposes than it otherwise would have had because there is no possibility of a factory or shopping mall suddenly locating next door.<sup>203</sup>

Recently, in *Nollan v. California Coastal Commission*,<sup>204</sup> the

The possible theory behind the reciprocity exception, which has not received much attention by the Court, is that the just compensation clause has been satisfied by non-monetary compensation. "[The property owner] is *compensated* for [his loss] 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) (emphasis added). See also Van Alstyne, *supra* note 18, at 5. Cf. *Penn Central*, 438 U.S. at 137:

[T]he [transferable development] rights afforded are valuable. While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the [economic] impact of regulation.

200. "While zoning at times reduces individual property values, the burden is shared relatively evenly and it is reasonable to conclude that on a whole an individual who is harmed by one aspect of the zoning will be benefited by another." *Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting).

201. *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914) *adopted in Pennsylvania Coal*, 260 U.S. at 415.

202. An analogous contractual example of a reciprocal agreement would be an agreement between adjoining property owners to grant each other an easement across his own property in exchange for an easement across the other's property.

203. "Euclidean zoning," the type of zoning at issue in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), views the "highest" use of land as a neighborhood of single-family houses. Segmentation of residential from industrial and commercial uses is therefore necessary to promote this highest use. See generally LUBOVE, *THE URBAN COMMUNITY: HOUSING AND PLANNING IN THE PROGRESSIVE ERA* 1-22 (1967).

204. 107 S. Ct. 3141 (property owners were required to convey a lateral easement across

Court denied Justice Brennan's claim that there was a "reciprocity of advantage"<sup>205</sup> for the Nollans. Justice Brennan argued that the conveyance of the easement demanded by the Coastal Commission provided the Nollans with an advantage, an economic increase in value, which they could not have otherwise enjoyed.<sup>206</sup> His argument was misguided because it centered upon a supposed exchange<sup>207</sup> between the property owner and the government, when reciprocity requires a mutual exchange "between the owner of the property restricted and the rest of the [regulated] community."<sup>208</sup> The reciprocity exception was therefore denied.<sup>209</sup>

Regulations which provide a true reciprocity of advantage are not restricted by the Just Compensation Clause because they do not "forc[e] some people *alone* to bear public burdens."<sup>210</sup> Those individuals which receive the "public" benefit of the regulation bear a reciprocal "public" burden. While the Court has not expressly invoked the reciprocity exception in its recent cases, it has considered the concept of reciprocity as a factor. The Court's analysis, however, has been inconsistent with the ordinary meaning of the term "reciprocity."<sup>211</sup>

their beachfront in order to obtain a building permit to construct a new residence).

205. *Id.* at 3158 (Brennan, J., dissenting).

206. Justice Brennan claimed the Nollans received an advantage because the net value of their property increased, despite the conveyance of the easement. *Id.*

207. As the majority held, Justice Brennan's argument fails in part because there was no exchange; the government did not confer any benefit upon the Nollans by granting the permit. "[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'" *Id.* at 3146 n.2.

208. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting).

Justice Brennan's interpretation of the exception was particularly improper because it would allow the government to commit "an out and out plan of extortion," by imposing stringent permitting requirements and then denying permits until the property owner surrendered whatever property rights the government demanded, so long as the granting of the permit increased the value of the property. *Nollan*, 107 S. Ct. at 3148 (citations omitted).

209. An inverse form of reciprocity was also discussed in *Nollan* because it was an "exaction" case. In an exaction situation the government may impose a burden upon a developer equal to the burden he places upon society by developing. The government may require a large developer to dedicate a percentage of his property to be used for a new school or park, in order to mitigate the burden of increased infrastructure and support services. The general rule is that "an exaction is valid only if it does not exceed what is reasonably appropriate to satisfy the public need caused by the project." Van Alstyne, *supra* note 18, at 62. If the value of an exaction from a developer exceeds the increased burden caused by the development, the developer bears more of the public burden than the rest of the public. *See Nollan*, 107 S. Ct. at 3147 n.4.

If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal owners landowners, the state's action, even if otherwise valid might violate either the incorporated Takings Clause or the Equal Protection Clause.

210. *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (emphasis added).

211. "Reciprocity: . . . That which is reciprocal, especially obligation of right; equal mutual

In *Penn Central Transportation Co. v. New York City*,<sup>212</sup> the challenged regulation prohibited owners of "landmarks" from taking any action which would damage the historic nature of the landmark.<sup>213</sup> Without invoking the reciprocity exception, the Court utilized the doctrine as a factor in determining whether the regulation unfairly imposed a public burden upon the owners of the landmarks. It upheld the regulation even though it had "a more severe impact on some landowners than on others."<sup>214</sup> The Court argued that the more severe impact did not defeat the reciprocity exception since "[l]egislation designed to promote the general welfare commonly burdens some more than others."<sup>215</sup>

An examination of the Court's analysis reveals that it is inconsistent with the concept of reciprocity and should not be confused with the actual exception. Justice Rehnquist, in dissent, criticized the *Penn Central* Court for ignoring the regulation's unfair degree of impact upon the individual owners of the "landmarks."<sup>216</sup> The regulation "singled

rights and benefits granted and enjoyed; mutual equality of rights and benefits." FUNK AND WAGNALL'S NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE 2063 (19th ed. 1963).

212. 438 U.S. 104 (1978).

213. The regulation applied to various structures scattered throughout the city rather than to a historic preservation zone wherein all structures would be preserved. A historic zone would likely qualify for the reciprocity exception since each member in the zone would be similarly burdened and each would receive the benefit of the zone's preservation. See *id.* at 135 n.32, see also *id.* at 147 n.10 (Rehnquist, J., dissenting).

214. *Id.* at 133. The Court justified the "unique burden" by citing *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibition of a brick plant within the city limits was not a taking); *Miller v. Schoene*, 276 U.S. 272 (1928) (destruction of cedar trees which posed a threat to the local commercial apple orchards was not a taking); and *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (safety regulation which prohibited excavation below the water table was not a taking). *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 133-34 n.30 (1978). The regulations in each case, however, were nuisance regulations and therefore should be considered to have been exempt from the just compensation clause regardless of the severity of the burden placed upon the property owner. See *supra* notes 184-98 and accompanying text.

215. *Penn Central*, 438 U.S. at 133. The Court's argument is defective because it centers on the "subjective" rather than "objective" impact of regulations. The Court stated, "For example, the property owner in *Euclid* who wished to use its property for industrial purposes was affected far more severely by the ordinance than its neighbors who wished to use their land for residences." *Id.* at 134. The Court's statement ignores the reality that the regulation imposed the same objective burden upon each property owner within the residential zone. See *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379-83 (1926). The statement also begs the question since the very nature of a just compensation taking is that certain individuals are burdened in a manner different from the rest of the public.

216. If the cost of preserving Grand Central Terminal were spread evenly across the entire population of the city of New York, the burden per person would be in cents per year . . . . Instead, however, appellees would impose the entire cost of several million dollars per year on *Penn Central*. But it is precisely this sort of discrimination that the Fifth Amendment prohibits.

*Penn Central*, 438 U.S. at 148-49.

out”<sup>217</sup> the individual “landmark” owners and forced them to bear the total public burden of landmark preservation in New York City.<sup>218</sup> The Court justified the regulation because the landmark owners received the benefit of the regulation,<sup>219</sup> but it was clear that the intended beneficiary of the regulation was the public at large, not the individual landmark owners.<sup>220</sup>

Assuming *arguendo* that the regulation provided some benefit, albeit minimal and indirect, to the landmark owners as members of the general community, such a fact is irrelevant to the doctrine of reciprocity. Reciprocity requires “mutual equality of rights and benefits.”<sup>221</sup> The fact 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,”<sup>222</sup> may justify the regulation as being an otherwise proper use of the police power, but it does not qualify a regulation for the reciprocity exception.<sup>223</sup>

Not only were the benefits and rights unequal, they were not mutual. Reciprocity is reciprocal.<sup>224</sup> The minimal benefits received by the landmark owners did not come from those who received the benefit of their burden, the public at large. The Court claimed that the regulation did not “solely burden” the plaintiff because it applied “to vast numbers of structures in the city.”<sup>225</sup> The size of the group, however, is immaterial to determining whether reciprocity exists.<sup>226</sup> The term reci-

217. *Id.* at 140 (Rehnquist, J., dissenting).

218. [The regulation] is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other ‘landmarks’ in New York City. [The Landmarks Law has] imposed a substantial cost on less than one-tenth of one percent of the buildings in New York City for the general benefit of all its people. 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).

219. *Id.* at 134.

220. The city believed that comprehensive measures to safeguard desirable features of the existing urban fabric would benefit its citizens in a variety of ways: *e.g.*, fostering “civic pride in the beauty and noble accomplishments of the past”; protecting and enhancing “the city’s attraction to tourists and visitors”; “support[ing] and stimul[ating] business and industry”; “strengthening the economy of the city”; and “promoting the use of historic districts, landmarks, interior landmarks and scenic landmarks *for the education, pleasure and welfare of the people of the city.*”

*Id.* at 109 (citations omitted; emphasis added).

221. *See supra* note 211.

222. *Penn. Central*, 438 U.S. at 134.

223. If mutual equality of rights and benefits is not required for the exception, it would destroy the possibility of there ever being a regulatory taking. Every plaintiff, as a member of society, would always receive some benefit from any regulation imposed upon him for the benefit of society, and would thereby be foreclosed from bringing suit against the regulation.

224. *See supra* note 211.

225. *Penn. Central*, 438 U.S. at 134, 135 n.32.

226. The Court’s statement ignores the fact that a regulation may effectively take property



procuity implies that the members of a regulated group receive a reciprocal benefit from those who benefit from their burden, i.e., in order to be reciprocal, the regulation must primarily burden and benefit the members of the regulated group, not the public at large. Since reciprocity applies only to members of the group, the size of the group is irrelevant. In *Penn Central*, the landmark owners were singled out, albeit they were a large group, to bear alone the admittedly public burden of "promoting the use of historic landmarks,"<sup>227</sup> without receiving any reciprocal advantage from the public at large.

In *Keystone Bituminous Coal Association v. DeBenedictis*,<sup>228</sup> the Court recently referred to "the notion of 'reciprocity of advantage,'" without actually invoking the exception. Rather than speaking of the reciprocal advantage of the challenged regulation, the Court spoke of how each individual receives an advantage from being regulated because he then lives in a regulated society.<sup>229</sup> "While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. These restrictions are properly treated as part of the burden of common citizenship." The Court's observation, however, relates to the justification of the state's police power in general,<sup>230</sup> not to whether the challenged regulation requires compensation for unfairly burdening some individuals. Reciprocity, by definition, only exists within the regulation itself.<sup>231</sup> Burdens placed on a property owner by one regulation are not offset by benefits received from a totally unrelated regulation.<sup>232</sup>

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from a large group of property owners as well as from an individual. See generally *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (regulation requiring all landlords to permit the installation of cable TV facilities was held a taking).

227. *Penn Central*, 438 U.S. at 109. See also *id.* at 140 (Rehnquist, J., dissenting) ("Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists.").

228. 107 S. Ct. 1232, 1245 (1987).

229. *Id.* (citations omitted).

230. "It is true that appellees must bear the costs of these regulations. But within limits, that is a burden borne to secure 'the advantage of living and doing business in a civilized community.'" *Andrus v. Allard*, 444 U.S. 51, 67 (1979).

231. "[When] 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 for the common benefit of one another . . . there is 'an average reciprocity of advantage.'" *Penn Central*, 438 U.S. at 140 (Rehnquist, J., dissenting) (citations omitted; emphasis added).

232. The logical extension of the Court's *Keystone* "social reciprocity" formulation would mean the denial of all regulatory taking claims. No member of society would have standing to challenge an individual regulation because he would be a beneficial recipient of other regulations. Cf. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting) (reciprocal advantage doctrine is inappropriate when there is a nuisance regulation because there is no reciprocal advantage to regulatees of nuisance regulations "unless it be the advantage of living and doing business in a civilized community.").

In summary, the average reciprocity of advantage exception by definition requires that those who are burdened by a regulation receive a reciprocal benefit from those who receive the benefit of their burden. If reciprocity is found to exist in a regulation, then the property owner cannot claim to be unfairly burdened, because he is receiving an offsetting benefit.

### B. *The Ripeness Requirements*

Before the Supreme Court applies any of the foregoing regulatory takings tests, it requires that the claimant overcome a high threshold of ripeness which it has imposed in order to avoid the constitutional issues being raised.<sup>233</sup> The Court has refused to review governmental regulations before they inflict actual, rather than potential, constitutional injury upon the landowner.<sup>234</sup> Unless a facial challenge is being made,<sup>235</sup> a regulation which is merely "on the books" does not inflict an actual injury, i.e., it cannot have an unduly harsh impact, until there is a final administrative decision<sup>236</sup> that the regulation will be applied to particular property,<sup>237</sup> and a final decision as to how it will be applied.<sup>238</sup>

233. "Indeed, few concepts have had more faithful adherence in this Court than the imperative of avoiding constitutional resolution of issues capable of being disposed of otherwise." *Moore v. East Cleveland*, 431 U.S. 494, 526 (1977) (Burger, C.J., dissenting).

234. *Cf. id.* at 525 (Burger, C.J., dissenting):

[I]f administrative remedies are pursued, the citizen may win complete relief without needlessly invoking judicial process. This permits the parties to resolve their disputes by relatively informal means far less costly and time consuming than litigation. By requiring exhaustion of administrative processes the courts are assured of reviewing only final decisions arrived at after considered judgment. It also permits agencies an opportunity to correct their own mistakes or give discretionary relief short of judicial review.

235. *See infra* notes 268-86 and accompanying text.

236. A final administrative decision should not be confused with a final judgment by a state court. The United States Supreme Court's appellate jurisdiction is limited to "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had." 28 USC § 1257. *See e.g., San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 630-31 n.10 (1981) (appeal dismissed because state court's judgment was not final). The "final decision" is a final determination by the administrative body charged with the enforcement of the challenged regulation as to how the regulation will be applied.

237. *E.g. Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926):

[I]f ever the provisions set forth in the ordinance in tedious and minute detail, come to be concretely applied to particular premises, . . . or to particular conditions, or to be considered in connection with specific complaints, some of them, or even many of them, may be found to be clearly arbitrary and unreasonable.

238. If [the property owners] were to seek administrative relief . . . a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating the need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue decided by the district court simply is not ripe for judicial resolution.

*Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981).

Three ripeness prerequisites have been identified by the Supreme Court: 1) the plaintiff has sought and been denied just compensation,<sup>239</sup> 2) the plaintiff has applied and been denied the variances which could save the constitutionality of the regulation,<sup>240</sup> and 3) the Court is able to determine the permissible use of the property under the challenged regulation.<sup>241</sup>

### 1. *The denial of just compensation*

The clearest ripeness requirement imposed by the Court upon a just compensation "taking" claim is the necessity of a denial of just compensation.<sup>242</sup> "The Fifth Amendment does not proscribe the taking of property; it proscribes the taking without just compensation."<sup>243</sup> Until compensation is denied, there is no final constitutional injury.<sup>244</sup>

The typical form of seeking relief for "uncompensated takings" is inverse condemnation.<sup>245</sup> "[I]f a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied compensation."<sup>246</sup> A property owner may satisfy the requirement, however, if he can prove that the state does not have adequate procedures for such a claim.<sup>247</sup> Once a property owner has been denied "just compensation" for an alleged taking, his prior claim for compensation matures into a constitutional claim and may be ripe for adjudication so long as the other ripeness requirements are met.

239. See *infra* notes 242-47 and accompanying text.

240. See *infra* notes 248-65 and accompanying text.

241. See *infra* notes 257-67 and accompanying text.

242. The denial of just compensation occurs whenever a claim for compensation is denied, even if denial is based upon legal principles. See *e.g.*, *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987) (the courts' dismissal upon demurrer was the equivalent of a denial of compensation, thereby making the claim ripe for review).

243. *Williamson County v. Hamilton Bank*, 473 U.S. 172, 194 (1985).

244. "'The federal question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final until it covers both aspects of that integral problem.'" *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 633 (1981) (quoting *North Dakota Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973)).

245. Property owners may seek just compensation through inverse condemnation procedures when the government has not formally exercised its power of eminent domain to condemn their property. "We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation . . . [C]laims for just compensation are grounded in the Constitution itself." *First English*, 107 S. Ct. at 2386 (citations omitted).

246. *Williamson County*, 473 U.S. at 195.

247. *Id.* at 196-97 ("Respondent has not shown that the inverse condemnation procedure is unavailable or inadequate, and until it has utilized that procedure, its taking claim is premature.").

## 2. *The denial of variances*

Whenever a variance from a regulation is available, the mere enactment of the regulation, or the denial of a land-use proposal,<sup>248</sup> is not a final administrative decision that the regulation will be applied to a particular piece of property. The presumption is that the granting of a variance may prevent an unconstitutional taking.<sup>249</sup> While total exhaustion of administrative remedies is not required,<sup>250</sup> if the property owner fails to seek a variance, the Court will refuse to reach the merits of a taking claim unless the plaintiff properly alleges<sup>251</sup> the futility of such application.<sup>252</sup>

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248. The denial of an original proposal or permit application is not an automatic denial of the needed variances. It is only an indication that further proceedings are needed which may or may not grant the desired relief from the regulations. *Cf. id.* at 188-90 ("Thus, in the face of respondent's refusal to follow the procedures for requesting a variance, . . . respondent hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted.").

249. *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981). See *supra* note 238.

250. The property owner in *Williamson County*, 473 U.S. 172, claimed that since its claim was a 42 U.S.C. § 1983 cause of action, which does not require administrative exhaustion, it did not need to apply for variances. The Court rejected the contention:

The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts overlap, the finality requirement is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

*Williamson County v. Hamilton Bank*, 473 U.S. 172, 192-93 (1985) (citations omitted).

251. The effect of a demurrer upon allegations of futility in a complaint is unsettled. In *MacDonald, Sommer and Frates v. Yolo County*, 106 S. Ct. 2561 (1986), the property owner claimed that the denial of its subdivision plans restricted its land to economically unacceptable agricultural uses. The plaintiff alleged in capital letters that "ANY APPLICATION FOR A ZONE CHANGE, VARIANCE OR OTHER RELIEF WOULD BE FUTILE." *Id.* at 2564. The county demurred. Under California law, however, a demurrer "does not admit contentions, deductions or conclusions of fact or law alleged therein." *Id.* at 2564 n.3 (quoting from *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 713, 433 P.2d 732, 745 (1967)).

The California courts refused to accept the demurrer to the allegations of futility because they were "conclusionary"; and the United States Supreme Court, in deference to the state law, did not disturb the holding of the California courts. *McDonald*, 106 S. Ct. at 2564. Justice White, (joined in his dissent by Chief Justice Burger, and Justices Powell and Rehnquist,) argued that the allegations of futility were properly plead and did indicate that a "takings" had occurred. *Id.* at 2569-70. The Court, however, has yet to rule on the sufficiency of general allegations of futility under state law other than California.

252. *Williamson County*, 473 U.S. at 188 (accepting the feasibility of plaintiff's claim but finding that no evidence existed to support it; no indication given as to what would constitute an adequate record). Compare *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 (1981) (claims that the regulation made mining economically impossible were not reached since the mining companies did not apply for variances or waivers); with *Hodel v. Indi-*

Variances are particularly critical to determining economic viability of property<sup>253</sup> because the focus of the Court's analysis is on the permitted uses, not the denied uses.<sup>254</sup> Taking claims turn on variances because they determine the actual uses which will be allowed despite any regulatory language to the contrary.<sup>255</sup> Since variances may lessen the harshness of a regulation's potential impact by making a project economically viable, they must be denied before a taking may occur.<sup>256</sup>

### 3. *The permissible use requirement*

Another purported ripeness issue which has increased the uncertainty of the Court's taking jurisprudence<sup>257</sup> is the requirement that the

ana, 452 U.S. at 331-33 (even though there was no provision made in the regulation for variances; the regulation was upheld against a facial challenge).

One of the few explanations of when variances may not be required was indicated by Chief Justice Burger in his dissent in *Moore v. East Cleveland*, 431 U.S. 494 (1977). After arguing for judicial restraint in zoning cases, he stated that he would not require exhaustion of administrative remedies unless it was "a case where *inadequate* or *unclear* or *costly* remedies make exhaustion inappropriate, or where the Board's position relating to appellant's claim is so fixed that *further administrative review would be fruitless*." *Id.* at 529 (emphasis added).

253. The variance requirement is less important when addressing an "appropriation" if the enactment of the regulation itself is likely to have caused a universal occupation or imposition of an easement upon all regulatees. *See generally supra* notes 30-70 and accompanying text. It does, however, play the same vital role when determining if all beneficial use has been taken.

254. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 131 (1978).

255. "Absent a final decision regarding the application of *all* eight of the Commissions objections, it is impossible to tell whether the land retained any reasonable beneficial use or whether respondent's expectation interests had been destroyed." *Williamson County*, 473 U.S. at 190 n.11. "Accordingly, until the commission determines that no variances will be granted, it is impossible for the jury to find . . . whether respondent 'will be able to derive economic benefit' from the land." *Id.* at 191.

256. Arguably, this general rule applies only to claims regarding individual property. Variances are irrelevant to facial challenges, either because the constitutional harm has already occurred or because the harm is universal in nature, injuring all property holders. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926).

Variances may also be irrelevant when addressing substantive due process issues since they exacerbate rather than cure the infirmities of the regulation. *Cf. Moore*, 431 U.S. 494 (failure to apply for variance was not fatal to plaintiff's claim when regulation denied substantive due process).

Any suggestion that the variance procedure . . . assumes a special significance is without merit. . . . the matter of a variance is irrelevant . . . because the municipality is constitutionally powerless to abridge [the rights of the property owner]. Thus, the existence of the variance procedure serves to lessen neither the irrationality of the [regulation] nor the extent of its intrusion. . . . Furthermore, the very existence of the 'escape hatch' of the variance procedure only heightens the irrationality . . . since application of the ordinance then depends upon [the discretion of the authorities.]

*Id.* at 511-13 (Brennan, J., concurring) (citations omitted). *But compare id.* at 522 (Burger, C.J., dissenting) (the variance procedure is intended to accommodate any "practical difficulties and unnecessary hardships").

257. *See generally* Comment, *Land Use Takings and the Problem of Ripeness in the United States Supreme Court Cases*, 1 B.Y.U. J. PUB. L. 375 (1987) [hereinafter Comment, *Ripeness*].

Court be able to ascertain how a regulation will in fact be applied<sup>258</sup> once an initial development proposal has been denied.<sup>259</sup>

It follows from the nature of regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.<sup>260</sup>

There is no presumption that a less intensive plan would meet with disapproval. "Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."<sup>261</sup> A land owner must therefore show the type of use and the intensity of development which would be permitted on the land under the challenged regulations,<sup>262</sup> as well as the possible alternative uses which are unaffected because they are outside the scope of the challenged regulations.<sup>263</sup>

The question, in essence, as stated by the Court in *MacDonald*,

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258. The Court's requirement is impractical. A denial of a development plan gives no indication as to the type or intensity of development which would be approved. In order to know how discretionary laws will be applied, a property owner must make repeated applications until a plan is finally accepted. "Nothing in our cases, however, suggests that the decisionmaker's definitive position may be determined only from explicit denials of property-owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that decision." *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2571 (1986) (White, J., dissenting). If the developer does make repeated applications until one is approved, he may find that he has "cross[ed] the threshold of ripeness only to find himself in the realm of mootness" because he may now make some use of his property. See Comment, *Ripeness*, *supra* note 257, at 394.

259. Such proposals typically include requests for zoning changes and other discretionary decisions. The property owner's claim is that the discretionary denial of the changes effects a taking. See e.g., *MacDonald*, 106 S. Ct. 2561.

260. *Id.* at 2566.

261. *Id.* at 2569 n.9. See also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 136-37 (1978) (emphasis added):

While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal.

262. The Court failed to make a distinction between land-use regulations which permit development "as of right" and "conditional" or "discretionary" development. Zoning requirements usually place limits on property which create a developmental "envelope" which applies uniformly to all property in the zone. As long as the property owner's plans are within that envelope, he may follow his plan "as of right;" the government is bound by its regulations. If, however, a property owner wishes to exceed the envelope, the government has discretion to grant or deny permission for such development. Arguably, the Court is requiring that the plaintiff delineate the zoning envelope so that it may determine whether any economically viable use remains "as of right."

263. See *Hodel v. Indiana*, 452 U.S. 314 (1981) (the availability of alternative permissible uses defeated a facial challenge that the regulation destroyed the economic viability of mining).

*Sommer & Frates v. Yolo County*,<sup>264</sup> is not how much development will be denied but how much development will be permitted.<sup>265</sup> In applying this rule to the facts<sup>266</sup> in *MacDonald*, the Court held that "in this case, the holdings of both courts below leave open the possibility that some development will be permitted, and thus again leave us in doubt regarding the antecedent question whether appellant's property has been taken."<sup>267</sup>

#### 4. Facial challenges

Another taking issue which may be confused with the ripeness requirement is the Court's treatment of facial challenges.<sup>268</sup> A property

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264. 106 S. Ct. 2561 (1986) (landowner filed suit after denial of an intensive residential subdivision plan).

265. Cf. *Penn Central*, 438 U.S. 104. The mere denial of a development plan in *Penn Central* was not a taking when there was the possibility of less intensive development. *Penn Central* applied for, and was denied, a permit to develop a 55 story office building above its historic Grand Central Terminal. The Court held that the property owner "exaggerated" the effect of the denial of its permit on its ability to make use of its air rights above the terminal. "Since appellants have not sought approval for the construction of a smaller structure, we do not know that appellants will be denied any use of any portion of the airspace above the terminal." *Id.* at 137. The Court, however, did not find that the lack of a less intensive application invalidated the claim for a lack of ripeness, but rather, it went on to discuss the merits of the claim.

266. The property owners submitted a subdivision proposal which was rejected by the Yolo County Planning Commission. The area was zoned residential by the county, but was designated as an "Agricultural Preserve or Reserve" by the city of Davis. The property owner alleged that regardless of any modification to its plan, the County would not allow any development other than agricultural, thereby appropriating the entire economic use of the property "for the sole purpose of [providing] . . . a public, open space buffer." *MacDonald*, 106 S. Ct. at 2563-64 (citations omitted).

The Board of Supervisors of the County affirmed the Planning Commission's denial. The Board found several plausible reasons for rejecting the proposed plan. First, there was inadequate street access. Second, the plan did not provide for sewer service by any governmental agency. Third, the Board felt that the level of police protection available for the proposed subdivision would be inadequate. Finally, the proposed water system was inadequate to handle the needs of the proposed subdivision. *Id.*

267. *Id.* at 2568-69. The Court's "insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it" *id.* at 2567, stems primarily from its impact analysis. Compare *id.* at 2568 ("the holdings of both courts below leave open the possibility that some development will be permitted") with *Agins v. Tiburon*, 447 U.S. 255, 263 (1980) ("[A]ppellants may be permitted to build as many as five houses on their five acres."). The more consistent approach to the ripeness language of *MacDonald* would be to treat it as a de facto holding that the plaintiff simply failed to produce sufficient evidence to prove that he has been denied all beneficial or economically viable use of the property.

268. Most claims which are characterized by the Court as economic taking claims have also been characterized as "facial challenges" and thereby been unsuccessful. *E.g.*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232 (1987) (claim that subsidence regulation requiring coal to be left in the ground made it commercially impracticable to mine coal failed as a facial challenge); *Agins v. Tiburon*, 447 U.S. 255 (1980) (claim that zoning regulation destroyed all economic use failed as a facial challenge). Most cases, however, where the Court has reached the merits have been characterized as acquisition claims. *E.g.*, *Loretto v. Teleprompter Manhattan*

owner may claim that a regulation is unconstitutional on its face because "the mere enactment" of it effects a "taking."<sup>269</sup> Facial challenges have typically been unsuccessful,<sup>270</sup> not because they are improper,<sup>271</sup> but because the unique<sup>272</sup> burden of proof<sup>273</sup> placed upon plaintiffs is so heavy<sup>274</sup> that plaintiffs are seldom able to satisfy it.<sup>275</sup>

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CATV Corp., 458 U.S. 419 (1982) (permanent physical occupation imposed by regulation was a taking); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (imposition of limited easement was not a taking); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (imposition of easement was a taking). *Cf. Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987) (imposition of easement was a deprivation of property without due process). Even if the Court is willing to characterize a claim as an appropriation, it will still avoid the claim if it can by characterizing it as a facial challenge. *See Pennell v. City of San Jose*, 56 U.S.L.W. 4168 (U.S. Feb. 24, 1988) (claim that rent control was a transfer of landlord's property to individual hardship tenants was not considered ripe because it was a facial challenge).

269. *See e.g., Keystone*, 107 S. Ct. at 1246 ("[T]he only question before the court is whether the mere enactment of the statutes and regulations constitutes a taking.") (quoting the District Court, 581 F. Supp. 511, 513 (1984)) (emphasis found in *Keystone*).

270. One of the few cases wherein a regulation was found to be unconstitutional on its face was *Pennsylvania Coal*. It should be noted however, that "the statute [was] admitted to destroy previously existing rights of property." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

An unsuccessful facial challenge does not bar future claims that the regulation "as applied" effects a taking. *See e.g. Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 297 n.40 (1981):

Although we conclude that "mere enactment" of the Act did not effect a taking of private property, this holding does not preclude appellees or other coal mine operators from attempting to show that as applied to particular parcels of land, the act and the Secretary's regulations effect a taking.

271. Traditionally, facial challenges have not been affected by the doctrine of ripeness since the regulation has been enacted and is therefore final.

It is entirely clear from [the] cases that a facial takings challenge is not premature even if it rests upon the ground that the ordinance deprives property owners of all economically viable use of their land—a ground that is, as we have said, easier to establish in an 'as-applied' attack.

*Pennell*, 56 U.S.L.W. at 4172 (Scalia, J., concurring in part; dissenting in part). *See also Euclid*, 359 U.S. at 386 (a motion made in the lower court to dismiss plaintiff's claim because plaintiff had made no effort to obtain a building permit, i.e., because it was a facial challenge to the regulation, was properly overruled). *But compare Pennell*, 56 U.S.L.W. at 4170.

272. The posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation.

*Keystone*, 107 S. Ct. at 1247.

273. "Petitioners . . . face an uphill battle in making a facial attack on [any] Act as a taking." *Id.* *See also Hodel v. Virginia*, 452 U.S. at 296 (if a regulation merely regulates, and does not prohibit, a particular use of property, there would be "no reason to suppose that 'mere enactment' of [an] act has deprived [property owners] of economically viable use of their property."); *Agins v. Tiburon*, 447 U.S. 255 (1980) (any possibility of making economic use of the land under regulation prevents a finding that a regulation, on its face, is a taking).

274. Extremely hesitant to encourage facial challenges, the Court has given various reasons why facial challenges carry a high burden. *Hodel v. Virginia*, 452 U.S. at 296-97 (economic viability cannot be determined on the face of the regulation); *Agins*, 447 U.S. at 262 (there is no



The Court will "not disregard the posture in which the case comes before [it]."<sup>276</sup> The high burden imposed is a result of the Court's "oft-repeated admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary."<sup>277</sup> In general,<sup>278</sup> the Court has held that without land to which the regulation is applied, there is no "concrete controversy"<sup>279</sup> to be decided.

The most recent takings case decided by the Court raises some question as to the continued validity of facial challenges. In *Pennell v. City of San Jose*,<sup>280</sup> the Court encountered a facial challenge that a rent control regulation effected a transfer of the landlord's property to individual "hardship tenants."<sup>281</sup> After taking great pains to explain that

interference with a property owner's investment backed expectations until application is made and denied). Cf. *Pennell*, 56 U.S.L.W. at 4170 (there was no evidence that the regulation had ever been used).

275. The following cases were characterized as facial challenges and were unsuccessful. *Pennell v. City of San Jose*, 56 U.S.L.W. 4168 (U.S. Feb. 24, 1988); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232 (1987); *Hodel v. Indiana*, 452 U.S. 314 (1981); *Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981); *Agins v. Tiburon*, 447 U.S. 255 (1980); *Andrus v. Allard*, 444 U.S. 51 (1979); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Mugler v. Kansas*, 123 U.S. 623 (1887). The one successful facial challenge was *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), but the facial challenge portion of *Pennsylvania Coal* has arguably been overruled by *Keystone*, 107 S. Ct. at 1241 (referring to the facial portion of the *Pennsylvania Coal* opinion as an "uncharacteristically . . . advisory opinion").

276. *Keystone*, 107 S. Ct. at 1246.

277. *Hodel v. Virginia*, 452 U.S. at 294-95 ("Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property.")

278. The possible exception would be if a regulation inflicted irreparable harm. Cf. *Moore v. East Cleveland*, 431 U.S. 494, 528 n.3 (1977) (Burger, C.J., dissenting) (there may be no need to seek administrative remedies if doing so would cause irreparable injury) (citing First Amendment cases wherein the application for a permit was not required prior to bringing a claim because such application would render the claim moot if granted). See e.g., *Agins*, 447 U.S. at 261 ("their enactment inflicted no irreparable injury upon the landowner.") (citing *Euclid*, 272 U.S. at 395-97).

279. *Hodel v. Virginia*, 452 U.S. at 295.

We conclude that the District Court's ruling on the "taking" issue suffers from a fatal deficiency: neither appellees nor the Court identified any property in which appellees have an interest that has allegedly been taken by operation of the Act.

These "ad hoc, factual inquiries" must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.

*Id.* at 294-95.

280. 56 U.S.L.W. 4168 (U.S. Feb. 24, 1988).

281. The San Jose rent control ordinance requires a hearing if a tenant objected to a rent increase in excess of eight percent. A provision of the regulation requires a "Mediation Hearing Officer" to consider "the hardship to the tenant" in determining whether the increase is reasonable. See *supra* note 132, quoting the ordinance. The plaintiffs claimed that the possible denial of a rent increase based upon the individual financial circumstances of a tenant amounted to a housing subsidy provided by the individual landlord. The landlords contended that since landlords could be forced individually to bear the public burden of subsidized housing, the regulation was unconstitu-

the plaintiffs had standing,<sup>282</sup> the Court, citing ripeness as a reason, refused to reach the merits of their facial taking claim.

The Court thought it would be "premature to consider [the plaintiff's] contention on the present record."<sup>283</sup> It reasoned that "there simply [was] no evidence that the 'tenant hardship clause' has in fact ever been relied upon by a Hearing Officer to reduce a rent . . . ."<sup>284</sup> Because of the "'essentially ad hoc, factual inquiry' involved in the takings analysis," the Court held that the case "[did] not present a sufficiently factual setting for the adjudication of the takings claim appellants raise[d] here."<sup>285</sup>

In his dissent, Justice Scalia criticized the Court for not reaching the merits of the facial challenge. He argued that any additional factual evidence would not contribute to the Court's ability to decide the case.

Knowing the nature and character of the particular property in question, or the degree of its economic impairment, will in no way assist this inquiry. Such factors are irrelevant to the present claim as we have said they are to the claim that a law effects a taking by authorizing a permanent physical invasion of property.<sup>286</sup>

It is uncertain how *Pennell* will affect the relationship between facial challenges and the ripeness issue. Either facial challenges will no longer be considered ripe, thereby effectively rendering them invalid

tional on its face. *Id.* at 4170.

282. When standing is challenged on the basis of the pleadings, we accept as true all material allegations of the complaint . . . . Here, appellants specifically alleged in their complaint that appellant's properties are "subject to the terms of" the Ordinance, and they stated at oral argument that the Association represents "most of the residential unit owners in the city and [has] many hardship tenants." Accepting the truth of these statements, which appellees do not contest, it is not "unadorned speculation" to conclude that the Ordinance will be enforced against members of the Association. The likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced below what he or she would otherwise be able to obtain in the absence of the Ordinance, is a sufficient threat of actual injury to satisfy Art. III's requirement that "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement."

*Id.* at 4169.

283. *Id.* at 4170.

284. *Id.* But cf. *Curtin v. Benson*, 222 U.S. 78, 87 (1911) ("It is no answer to say that the power would not be arbitrarily or unreasonably exercised. It must be judged by what can be done under it, not by what may [in the future] be done under it."). The Court placed great emphasis on the fact that the Hearing Officer's power to reduce a rent increase based upon the potential hardship to the tenant was discretionary. The Hearing Officer "shall consider the economic hardship imposed," but, "he may order that the excess increase be disallowed." *Pennell*, 56 U.S.L.W. at 4170 (citations omitted).

285. *Id.* at 4170.

286. *Id.* at 4172 (Scalia, J., concurring in part; dissenting in part) (citing *Loretto*, 458 U.S. 419) See *supra* note 50 and accompanying text.

since traditional ripeness requires an "as applied" factual situation, or *Pennell* will be interpreted as impliedly holding, because of its affirmation of the California Supreme Court's holding, that the government did not effect a taking by the "mere enactment" of the regulation. In either case, facial challenges should be avoided if possible because of their heavy burden and uncertain nature.

### C. Substantive Due Process

Substantive due process analysis<sup>287</sup> has not been widely used by the Court,<sup>288</sup> but it has often been intertwined with "regulatory takings" claims<sup>289</sup> thereby influencing, and sometimes confusing, the Court's treatment of those claims.<sup>290</sup> The question of due process and

287. Equally fundamental with the private right is that of the public to regulate it in the common interest. . . . [T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained.

*Nebbia v. New York*, 291 U.S. 502, 523, 525 (1934) *quoted favorably in* *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 84-85 (1980).

288. *Compare* *Moore v. East Cleveland*, 431 U.S. 494 (1977) ("Substantive due process has at times been a treacherous field for this Court. . . . [Its] history counsels caution and restraint. But it does not counsel abandonment."); *with* *Hodel v. Indiana*, 452 U.S. 314, 333 (1981) ("[B]y invalidating the challenged provisions of the Act under the rubric of 'substantive due process,' the District Court essentially acted as a superlegislature, passing on the wisdom of congressional policy determination. In so doing, the court exceeded its proper role.") (citations omitted).

289. *E.g.* *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 395 (1922) (Brief for appellant) ("the Kohler Act takes the property of the Coal Company without due process of law," and "there is no justification for the uncompensated transfer of the beneficial use of the supporting coal from defendant to plaintiff."); *Goldblatt v. Hempstead*, 369 U.S. 590, 591 (1962) (plaintiff alleged that regulation which prohibited excavation below the water table prevented plaintiff from continuing its business, and was therefore a "taking" of property without due process).

Another contributing factor to the confusion is the interchangeability of the claims. *E.g.*, *An-drus v. Allard*, 444 U.S. 51, 64 n.21 (1979) (the plaintiffs' appeared to cast their argument in terms of economic substantive due process at the District Court level, but used the terminology of the Takings Clause before the Supreme Court).

290. The early Court did little to distinguish between the two Fifth Amendment claims. In *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), the Court "fused" one standard for both claims. *See Moore*, 431 U.S. at 514 (Stevens, J., concurring).

In some modern cases the Court has been more conscientious about the distinction between a Fifth Amendment due process claim and a Fifth Amendment just compensation claim. *Cf. Pennell*, 56 U.S.L.W. 4168 (separate treatment of the three facial challenges found in the claim: just compensation clause, due process, and equal protection); *Loretto*, 458 U.S. at 425-26 (even if the regulation served a legitimate public purpose, "[i]t is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid."); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980) ("There is little merit to appellant's argument that they have been denied their property without due process of law."); *Kaiser Aetna*, 444 U.S. at 174 (the power of Congress to acquire an easement is separate from the issue of whether Congress must then pay for that easement).

But, in other modern cases the distinction remains unclear. *Cf. Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3146 (1987) ("We have long recognized that land use regulation *does*

the question of just compensation, however, are separate and distinct inquiries.<sup>291</sup>

Before ever addressing the issue of just compensation, practitioners should determine whether the regulation is a proper exercise of the police power.<sup>292</sup> If a regulation is not a proper exercise of the police power,<sup>293</sup> there is no need to consider the just compensation issue; the regulation is invalid and unenforceable.<sup>294</sup>

As in the area of just compensation, the inquiry is factual.<sup>295</sup> The Court, however, has identified three prongs which must be satisfied by a real property regulation in order to provide substantive due process.<sup>296</sup> First, the regulation must have a public purpose,<sup>297</sup> second, the

not effect a taking if it 'substantially advance[s] legitimate state interests' . . . ." (emphasis added) (citations omitted); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . ." (emphasis added) (citations omitted); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978) ("a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, . . . ." (emphasis added) (citations omitted).

291.

The just-compensation clause addresses the question of whether a particular valid government act has resulted in a taking which requires compensation; the more general substantive due process question is whether the act is a valid exercise of government power at all, irrespective of whether any property is taken or only freedom (liberty) is affected. Confusion of the two serves no purpose and suggests that the government may exceed its constitutional powers as long as it pays a price to those who would complain.

Humbach, *supra* note 18, at 275.

292. "The issue of compensation cannot even arise until the question of justification has been disposed of." R. EPSTEIN, *TAKINGS*, 199 (1985), quoted in *Keystone Bituminous Coal Association v. DeBenedictis*, 107 S. Ct. 1232, 1246 n.22 (1987). See generally Kolis, *Citadels of Privilege: Exclusionary Land Use Regulations and the Presumption of Constitutional Validity*, 8 *HASTINGS CONST. L.Q.* 585 (1981).

293. The following discussion is not intended to be an exhaustive analysis of the Court's police power/due process analysis. It is simply intended to make the reader aware of the possible role of substantive due process analysis in a regulatory taking claim. A companion issue which will not be discussed in this comment, but which should also be considered, is whether a regulation unfairly discriminates among similarly situated landowners in violation of the Equal Protection Clause. See generally Karst, *The Fifth Amendment Guarantee of Equal Protection*, 55 *N.C.L. REV.* 540 (1977).

294. For example, laws regulating the use of property based on one's political or religious views are unenforceable, even if the government is willing to compensate the owner. *Williamson County v. Hamilton Bank*, 473 U.S. 172, 202 n.1 (1985). Cf. *Nollan*, 107 S. Ct. at 3145 (the Court indicated that the imposition of the easement was a "taking" of property which would require just compensation if that issue was addressed separately, but it was the imposition of an easement without due process which rendered the government's regulation invalid).

295. "The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

296. Cf. *Lawton v. Steele*, 152 U.S. 133, 137 (1894) *reaffirmed in* *Goldblatt v. Hempstead*, 369 U.S. 590, 594-95 (1962):

To justify the State in . . . interposing its authority in behalf of the public, it must

regulation must be efficient,<sup>298</sup> and third, the regulation must substantially advance a legitimate state interest.<sup>299</sup>

### 1. *Proper governmental purpose*

Unless a government's intent in enacting a regulation was to deprive a property owner of his constitutionally protected rights,<sup>300</sup> the purpose of most regulations will be considered proper. The main limitation is that the police power may only be used to promote community objectives, rather than purely private<sup>301</sup> objectives.<sup>302</sup> A lack of public purpose was the downfall of the Kohler Act in *Pennsylvania Coal Co. v. Mahon*.<sup>303</sup> Since *Pennsylvania Coal*, however, the Court has given

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 [third, the means are] not unduly oppressive upon individuals.

297. See *infra* notes 300-14 and accompanying text.

298. See *infra* notes 315-330 and accompanying text.

299. See *infra* notes 331-345 and accompanying text.

300. Cf. *Mugler v. Kansas*, 123 U.S. 623, 669 (1887) (It is a violation of due process if the government's "real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty or property, without due process of law." See e.g., *Bydlon v. United States*, 175 F. Supp. 891 (Ct. Cl. 1959) (government was prohibited by statute from condemning plaintiff's resort land, so in an effort to compel evacuation of the property, it banned flights below 4,000 feet over plaintiff's resort, thereby preventing access by air of customers and supplies, the order was invalidated).

One suspect area would be government exactions demanded from developers. See generally Van Alstyne, *supra* note 18, at 61 ("An arbitrarily conceived exaction will be nullified as a disguised attempt to take private property for public use without resource to eminent domain"). Cf. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987) (the lack of a proper nexus for a dedication of property made the regulation "an out-and-out plan of extortion").

301. One example of an improper private purpose would be the practical creation of a monopoly which "enhance[s] the private economic position of existing businesses rather than the public welfare." Van Alstyne *supra* note 18, at 19 (citing *In re White*, 195 Cal. 516, 234 P. 396 (1925)).

302. Incidental private gains are not sufficient to invalidate a regulation if its primary purpose is to promote a public interest. See *Berman v. Parker*, 348 U.S. 26 (1954) (redevelopment plan was constitutional even though it created the potential of large private gains to developers because it also created the public benefit of slum clearance); *Pennell v. City of San Jose*, 56 U.S.L.W. 4168, 4171 (U.S. Feb. 24, 1988) ("Indeed, a primary goal of rent control is the protection of tenants.").

303. 260 U.S. 393 (1922). The Kohler Act prohibited underground coal mining if it would cause the subsidence of privately owned surface structures. This regulation was enacted despite the fact that the mining companies owned the support estate which, under Pennsylvania law, gave them the right to cause such subsidence. Since the regulation exempted land where the support estate and the surface estate were owned by one owner, the Court held that there was no "public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights." *Id.* at 414.

broad deference<sup>304</sup> to legislative determinations that a regulation performs a public purpose.<sup>305</sup>

In *Keystone Bituminous Coal Association v. DeBenedictis*,<sup>306</sup> the public purpose issue was resurrected in a challenge to a subsidence act similar to the act which was invalidated in *Pennsylvania Coal*. In *Keystone*, however, the Court willingly found a public purpose sufficient to distinguish the *Keystone* case from *Pennsylvania Coal*, despite the fact that the effective purposes of both acts were the same.<sup>307</sup>

In *Pennell v. City of San Jose*,<sup>308</sup> the plaintiffs complained that the primary objective of the challenged regulation was private. The rent control regulation permitted a Hearing Officer when determining the reasonableness of a proposed rent increase, by an individual landlord, to consider the economic impact that the increase may have upon an individual tenant.<sup>309</sup> The plaintiffs claimed that the regulation "serves only the purpose of providing assistance to 'hardship tenants,'"<sup>310</sup> and that "[t]he objective of alleviating individual tenant hardship is . . . not a 'policy the legislature is free to adopt in a rent control ordinance.'"<sup>311</sup> In rejecting the plaintiff's contentions, the Court summarily held<sup>312</sup> that

304. The Court's deference stems in part from a reluctance to limit the exercise of the police power, *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915) ("It is to be remembered that we are dealing with one of the most essential powers of government, one that is least limitable."), and in part from a recognition that courts are ill-equipped to second guess the legitimacy of local governmental action. "State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require . . ." *Gorieb v. Fox*, 274 U.S. 603, 608 (1927) (zoning setback lines do not amount to a taking of property without substantive due process).

305. See e.g., *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984) (Hawaii permitted to divest major landowners of part of their property in order to distribute the land to others); *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("When the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

306. 107 S. Ct. 1232 (1987).

307. One of the critical distinctions made by the Court in *Keystone* was that the regulation in *Pennsylvania Coal* did not cover land where the surface and the mineral estate were owned by one party; whereas the regulation at issue in *Keystone* did not automatically exempt such property. The effect of the two regulations, however, were the same since the regulation in *Keystone* had a provision allowing a waiver by the surface owner. The waiver would obviously be exercised if all three estates were jointly held. See Brief for the Petitioners at 21 n.23, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232 (1987).

308. 56 U.S.L.W. 4168 (U.S. Feb. 24, 1988).

309. If the Officer "determines that the proposed increase constitutes an unreasonably severe financial or economic hardship on a particular tenant, he may order that the . . . increase . . . be disallowed." *Id.* at 4169 (quoting San Jose Municipal Ordinance 19696, § 5703.29).

310. *Id.* at 4170. See *supra* note 135 and accompanying text.

311. *Id.* at 4171 (quoting Reply Brief for Appellants 16).

312. "[T]o the extent that the appellants' due process argument is based on the claim that the ordinance forces individual landlords to subsidize individual tenants, that claim is premature and not presented by the facts before us." *Id.* at 4171 n.7.

the regulation served a legitimate state interest since "a primary purpose of rent control is the protection of tenants."<sup>313</sup>

In general, if public-oriented reasons are offered as justification for a regulation and they are "sufficiently cogent,"<sup>314</sup> deference will be given to the government as to whether the regulation serves a public rather than private objective.

## 2. Social efficiency

A regulation violates the Due Process Clause if its "provisions are clearly arbitrary and unreasonable."<sup>315</sup> One method utilized by the Court in determining whether a regulation is unreasonable is to determine whether the regulation is "socially efficient."<sup>316</sup> A regulation is "socially efficient" if, in light of its benefits to society and its harms to the individual, it improves society on the whole.<sup>317</sup> This requires a balancing analysis. The harm imposed by the regulation upon the individual property owner, is balanced against the increased benefits to society.<sup>318</sup> If the harm to the property owner exceeds the general benefit of the regulation,<sup>319</sup> the regulation is socially inefficient.<sup>320</sup>

The important factors of this balancing test were identified in *Goldblatt v. Hempstead*.<sup>321</sup> The plaintiff challenged the constitutional-

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313. *Id.* An additional public purpose identified by the Court was the prevention of the social cost of dislocation of low-income tenants in the event a landlord charges rents they could not afford. *Id.* at 4171 n.8.

314. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

315. *Id.*

316. *Cf.* Comment, *Zoning*, *supra* note 4, at 1482.

317. "If the gain to the public is small . . . and the hardship to the landowner is great, no valid reason exists for the exercise of such police power." *Langguth v. Village of Mount Prospect*, 5 Ill. 2d. 69, 124 N.E.2d. 879, 880 (1955). See generally Comment, *Balancing*, *supra* note 12, at 332.

318. Under a purely utilitarian approach, a property owner's harm may seldom be severe enough to outweigh the benefits to society, but the constitutional protections of property provided in the Fifth Amendment increase the weight given to any harm to the individual.

319. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922), the Court applied this balancing test and held that "[t]he statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights." It should be noted, however, that the Court only applied the balancing test to the first half of the Court's decision which was an analysis of the substantive due process provided by the regulation.

This balancing test does not apply to the issue of just compensation which was discussed in the second portion of the *Pennsylvania Coal* decision. The Court assumed in the second section that the subsidence of the public streets, unlike the subsidence of the private house, constituted an "emergency . . . that would warrant the exercise of eminent domain." *Id.* at 416.

320. Another term which may be used is "unsuitable." See generally Van Alstyne, *supra* note 18, at 29-32. A property owner "may conceivably persuade a court that enforcement of declared zoning policy with respect to the particular parcel would make little or no sense." *Id.* at 30.

321. 369 U.S. 590 (1962). See also *Agins v. Tiburon*, 447 U.S. 255, 262 (1980) ("In assessing the fairness of the zoning ordinance, these [general] benefits must be considered along with any

ity of a safety regulation which prohibited excavation of a sand and gravel pit below the level of the water table.<sup>322</sup> Focusing solely<sup>323</sup> on the reasonableness<sup>324</sup> of the regulation, the Court stated that it would "need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance."<sup>325</sup>

Even though great deference has typically been given as to the reasonableness of a regulation, this due process balancing test is critical to a discussion of regulatory takings.<sup>326</sup> This balancing test has the potential to cause considerable confusion. When addressing "regulatory taking" claims,<sup>327</sup> courts are tempted to hold that a regulation does not require compensation when there is a great public need for the regulation.<sup>328</sup> But, as Justice Holmes warned; "We are in danger of forget-

diminution in market value that the appellants might suffer.").

322. By the end of the first year the excavation had reached the water table which was located near the surface. Further excavation created a 20 acre lake with an average depth of 25 feet. The property owners claimed that since they were required to stop operations before all of the sand and gravel were excavated, the safety regulation was a "taking" of their property without due process. *Goldblatt*, 369 U.S. at 591.

323. The Court did not address the issue of just compensation because there was no evidence in the record to support a finding that the regulation went "too far." *Id.* at 594.

324. The Court indicated that "[e]xcept for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria" for identifying an invalid use of the police power. *Id.* at 594-95 (citing *Lawton v. Steele*, 152 U.S. 133, 137 (1894)). See *supra* note 296).

325. *Goldblatt*, 369 U.S. at 595. The challenger to a regulation has the burden to prove the regulation unreasonable, and in this case, he failed to do so. *Id.* at 596. Cf. Michelman, *supra* note 18, *passim* ("Net Efficiency Gains" are balanced against "Demoralization Costs" and "Settlement Costs").

326. In general, when a regulation's reasonableness is debatable, the regulation is reasonable. "In such circumstances, the settled rule of this Court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question." *Moore v. East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring) (citations omitted).

327. Part of the confusion no doubt comes from similar factors found in each test. Just compensation analysis considers the "unduly harsh impact upon the owner's use of the property" *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978), while the substantive due process analysis considers whether the regulation is "unduly oppressive upon the individual." *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

328. Compare *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 423 N.E.2d 320 (1981) *rev'd* 458 U.S. 418 (1982) (applying the balancing test to justify a physical occupation of private property without the payment of just compensation) with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425-26 (1982). The Supreme Court did not question the New York Court of Appeals' determination that the statute served the legitimate public purpose of "rapid development of and maximum penetration by a means of communication which has important educational and community aspects." The Court held that, "It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid." The Court concluded "that a permanent physical occupation authorized



ting 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>329</sup> It should be remembered that the balancing of public gain and private harm applies only to Due Process Clause analysis of whether a regulation is unreasonable or arbitrary.<sup>330</sup> It does not justify a regulatory taking of private property without just compensation.

### 3. "Substantially advances" ends-means nexus

The third substantive due process prong utilized by the Court is the requirement that there be a proper ends-means nexus.<sup>331</sup> Whereas the previous prong looked to the efficiency of the regulation, this prong looks to its effectiveness. The proper inquiry has repeatedly been identified as whether the regulation "substantially advances" a legitimate state interest.<sup>332</sup> Despite the frequent reiteration of the test, however, the Court has yet to define its terms.<sup>333</sup> Only two real property regulations have been invalidated by the Supreme Court for failing to sub-

by government is a taking *without regard to the public interests that it may serve.*" *Id.* (emphasis added).

329. *Penn Central*, 438 U.S. at 416.

330. *But cf.* Van Alstyne, *supra* note 2, at 6, *passim* (utilizing the various "taking" factors as elements to determine "whether the private losses imposed by regulatory measures are reasonably proportionate to the benefits secured thereby.").

331. *See* *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) ("If therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real substantial relation to those objects, . . . it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.").

332. *See e.g.* *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (a regulation "effects a taking if the ordinance does not substantially advance legitimate state interests"); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980) ("[T]he guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the objective sought to be obtained.") (quoting *Nebbia v. New York*, 291 U.S. 502, 523, 525 (1934)); *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928) ("such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare."); *Gorieb v. Fox*, 274 U.S. 603, 610 (1927) (set-back requirements were not "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.") (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)); *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) ("no real or substantial relation to those objects"). *But see Penn Central*, 438 U.S. at 127 ("reasonably necessary to the effectuation of a substantial public purpose").

333. "Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." *Nollan*, 107 S. Ct. at 3147.

stantially advance a legitimate state interest; *Nectow v. Cambridge*,<sup>334</sup> and *Nollan v. California Coastal Commission*.<sup>335</sup>

In *Nectow*, zoning boundaries divided an individual parcel of property into two different land-uses; residential and industrial. The majority of the parcel was zoned industrial, but a strip, 100 feet wide, was zoned residential.<sup>336</sup> Based upon the finding of the court appointed master that "the health, safety, convenience and general welfare of the inhabitants of the part of the city affected *will not be promoted* by the disposition [of the boundaries] made by the ordinance,"<sup>337</sup> the Court held that the regulation did not bear a substantial relation to the objectives sought and was therefore unconstitutional under the Fourteenth Amendment.

In *Nollan*, the California Coastal Commission forced the plaintiffs to convey a public easement across their beachfront in order to obtain a building permit.<sup>338</sup> The Coastal commission claimed that its "power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end."<sup>339</sup>

The Court agreed that a government could impose a less restrictive condition so long as the condition advanced the same purpose as would a complete prohibition.<sup>340</sup> It then held that the permit condition at issue lacked such a nexus.<sup>341</sup> The condition did not, and could not, serve the

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334. 277 U.S. 183 (1928).

335. 107 S. Ct. 3141 (1987).

336. Justice Sutherland pointed out that the Court saw no reason why all of the plaintiff's property was not included in the industrial zone. "There does not appear to be any reason why this should not be done. Nevertheless, if that were all, we should not be warranted in substituting our judgment for that of the zoning authorities primarily charged with the duty and responsibility of determining the question." *Nectow*, 277 U.S. at 188.

337. *Id.* (emphasis added).

338. The Commission claimed that "a permit condition that serves the same legitimate public purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." *Nollan*, 107 S. Ct. at 3147.

339. *Id.* at 3148.

340. As an example of a less restrictive condition which would not advance the same end as a complete prohibition, the Court used the familiar prohibition against shouting "fire" in a crowded auditorium. While a government clearly has the power to restrict dangerous speech in such a situation, a government could not allow the shouting of fire upon the payment of a \$100 tax; even though such a condition would be less restrictive than an outright ban on such speech. A monetary contribution would not, and could not, prevent the harm which justifies the government in prohibiting the shouting of fire, therefore there is no nexus between the condition and the purpose of the ban. *Id.*

341. "We can accept, for purposes of discussion, the Commission's proposed test as to how close a 'fit' between the condition and the burden is required, because we find that this case does not even meet the most untailored standards." *Id.*

limited public interest which justified the initial imposition of the permit requirement.<sup>342</sup> The lack of a nexus between the limited public interest and the condition imposed upon the Nollans made the regulation "*an out and out plan of extortion.*"<sup>343</sup> *Nollan* may be an indication that the present Court is willing to apply substantive due process analysis with some bite.<sup>344</sup> While the issues regarding the proper ends-means nexus are far from decided,<sup>345</sup> it is likely that *Nollan* will be the catalyst for many more constitutional challenges to the ends-means relationship of real property regulations.

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342. In essence, the Coastal Commission was unable to impose the condition because its powers were limited to providing greater access to the sea, not *along* the sea, *id.* at 3145; but, California is still free to pursue a public easement along the beachfront if it does so by eminent domain. *Id.* at 3150.

343. *Id.* at 3148. Since the condition did not advance the original purpose of the permit requirement, the Court indicated that the purpose of the condition became corrupt and was no longer a legitimate state interest.

The lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of 'legitimate state interests' in the takings and land use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use, but *an out and out plan of extortion.*

*Id.* (emphasis added). *Cf. Mugler*, 123 U.S. at 669 (a regulation is invalid when the "real object" of a police power regulation is the deprivation of constitutional rights).

344. In the past, the Court has given little more than lip service to this "substantial advancement" test. *Agins*, 447 U.S. 255, is a typical example. The Court summarily accepted the government's claim that the ordinance substantially advanced the state's legitimate interests. In reality, all the Court did was state that there was a legitimate interest.

In this case, the zoning ordinances substantially advance legitimate governmental goals. The State of California has determined that the development of local open-space plans will discourage the "premature and unnecessary conversion of open-space land to urban uses." The specific zoning regulations at issue are exercises of the city's police powers to protect the residents of Tiburon from the ill-effects of urbanization. Such governmental purposes long have been recognized as legitimate.

*Id.* at 261. *Cf. Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) (a regulation is a taking if it is not "reasonably necessary to the effectuation of a substantial public purpose.").

Even if the Court is willing to apply the test, the plaintiff carries the burden of proving that the regulation does not substantially advance a legitimate state interest. *See Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980) ("Appellants have failed to provide sufficient justification for concluding that this test is not satisfied.").

345. For example, whether the ends-means standard for a facial due process challenge differs from an "as applied" due process challenge. *Cf. Pennell v. City of San Jose*, 56 U.S.L.W. 4168, 4171 (U.S. Feb. 24, 1988) (holding that the facial challenge to the regulation failed because the regulation "represents a rational attempt to accommodate the conflicting interests," rather than utilizing the "substantially advancing language").

## IV. CONCLUSION

Although the Supreme Court's decisions may seem random and confusing, the impacts and issues discussed in this comment are emerging as the critical factors which must be addressed in any regulatory taking claim. One may approach the Court's current formulations of unduly harsh impacts, along with the issues identified, in a hierarchical order, addressing the most dispositive issues and impacts first.

First, one should examine the substantive due process issues to determine whether the regulation serves a public objective,<sup>346</sup> is socially efficient,<sup>347</sup> and substantially advances a legitimate state interest.<sup>348</sup> If a regulation lacks substantive due process it is invalidated and the question of just compensation becomes moot.

The next issue to address is whether the regulation qualifies for the exceptions to the just compensation clause. If a regulation abates a nuisance<sup>349</sup> or provides an average reciprocity of advantage,<sup>350</sup> the regulation and its impacts are outside the control of the fifth amendment and the taking claim will necessarily fail.

Once it is determined that the just compensation clause limits the challenged regulation, one must consider the ripeness of the property owner's taking claim. Unless the claim is a facial challenge,<sup>351</sup> it is necessary to determine how the regulation has been applied to the plaintiff's property. A property owner must show that the regulation has actually been applied to his property because all possible variances have been denied.<sup>352</sup> He must also show what permissible uses remain so that the Court may determine the effect of the regulation's application to the property.<sup>353</sup> In addition to showing how a regulation has been applied to the property, a property owner must also show that he has been denied just compensation.<sup>354</sup> Unless the forgoing conditions are met, a taking claim is not ripe for adjudication because it has not yet caused a constitutional injury to the property owner.

If all of the foregoing issues are decided in favor of the property owner, one may then properly consider the merits of the taking claim. It is only at this point that the impacts of a regulation become directly relevant. It remains to be seen which regulatory impacts identified by

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346. See *supra* notes 300-14 and accompanying text.

347. See *supra* notes 315-30 and accompanying text.

348. See *supra* notes 331-45 and accompanying text.

349. See *supra* notes 184-98 and accompanying text.

350. See *supra* notes 199-232 and accompanying text.

351. See *supra* notes 268-86 and accompanying text.

352. See *supra* notes 248-56 and accompanying text.

353. See *supra* notes 257-267 and accompanying text.

354. See *supra* notes 242-247 and accompanying text.

the Court will develop into significant tests of regulatory confiscation. Since the impacts are not mutually exclusive, and since there is no certainty as to which form of confiscation the Court may use to analyze a given fact situation, all impacts should be addressed.

The "permanent physical occupation"<sup>355</sup> and "easement"<sup>356</sup> impacts have been employed with enough regularity, and reflect enough of the traditional notions of inverse condemnation, that they may be relied upon. If either of these impacts are indicated by the facts of a given case, the probability of a successful takings claim are high.

The "use" impacts, i.e., the destruction of all beneficial use<sup>357</sup> and the deprivation of all economically viable use,<sup>358</sup> have received much lip service from the Court because of their theoretical similarity to formal condemnation. These impacts have not played a significant role in the Court's past decisions. They may, however, increase in importance as the Court addresses fewer facial challenges and hears more "as applied" cases since the "use" impacts contribute little or nothing to the adjudication of facial challenges, but may contribute more when a regulation is applied to specific property and the Court has a record of injuries to which it may apply its analysis.

The impact of an "undue interference with investment-backed expectations"<sup>359</sup> is firmly established upon the principles of justice and fairness, but, because it is truly an ad hoc factual inquiry, many more cases are needed in order to define its terms. The Court has not explained what it means by "investment-backed," and has said little as to what is a "reasonable expectation." Because of this lack of preciseness, this impact is presently a weak, albeit valid, basis upon which to allege a taking claim. As the Court's formulation of this impact is refined, as it will be over time, its importance and usefulness may increase.

The impact of "privately funded social reform,"<sup>360</sup> as recently proposed by Justice Scalia in *Pennell v. City of San Jose*,<sup>361</sup> has not been previously considered by the Court and therefore has little precedential value and is currently the weakest impact to allege. Justice Scalia's "cause-and-effect" formulation, however, accurately reflects the Court's pronouncements that the Fifth Amendment is designed to prevent government from "forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a

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355. See *supra* notes 44-54 and accompanying text.

356. See *supra* notes 55-72 and accompanying text.

357. See *supra* notes 73-105 and accompanying text.

358. See *supra* notes 111-31 and accompanying text.

359. See *supra* notes 146-79 and accompanying text.

360. See *supra* notes 132-45 and accompanying text.

361. 56 U.S.L.W. 4168 (U.S. Feb. 24, 1988).

whole.”<sup>362</sup> The “privately funded social reform” impact may develop into the most predictable and helpful impact of all.

The Supreme Court’s regulatory takings jurisprudence is far from being settled, but it is developing rapidly. In the past, practitioners and courts have had little guidance from the Supreme Court as to the proper analysis of regulatory takings claims under the fifth and fourteenth amendments. As the issues and impacts discussed in this comment are incorporated into the preparation of regulatory takings claims, the Court will have an opportunity to refine its formulations and define its tests. The only thing that is certain is that as long as there are real property regulations, the judicial quest to draw the line of regulatory confiscation will continue.

*Douglas Short*

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