

# Articles

## THE PROBLEM OF EQUALITY IN TAKINGS

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### INTRODUCTION

After decades of confusion, the Supreme Court in a recent series of decisions has begun to bring clarity to the law of regulatory takings.<sup>1</sup> In doing so, the Court is bringing to the fore a previously submerged theme in the jurisprudence—what this Article calls the equality dimension of regulatory takings law. This equality dimension paradigmatically asks whether a regu-

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<sup>1</sup> Regulatory takings law applies the Fifth Amendment’s prohibition that “nor shall private property be taken for public use without just compensation,” U.S. CONST. amend. V, to governmental actions other than the direct exercise of eminent domain.

lation has forced “some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>2</sup> Despite the seeming appeal and near-universal acceptance of this proposition, this Article argues that privileging equality in the jurisprudence of regulatory takings raises serious theoretical and doctrinal problems.

The rise of equality norms is a function of the Court’s recent moves to narrow or eliminate other long-standing aspects of the jurisprudence. For all of the elaborate apparatus of per se and multifactor ad hoc tests it has constructed, the Court has drawn on three central approaches to answer the question of which regulations go “too far” under the Takings Clause.<sup>3</sup> One approach has been to consider certain regulations functionally equivalent to the affirmative exercise of eminent domain, focusing primarily on the touchstones of tangible interference with physical property and diminution in the value of property.<sup>4</sup> The second approach has been to engage in means-ends analysis akin to substantive due process review, evaluating the balance between regulatory goals and individual harm.<sup>5</sup> And, as noted, the final approach has been grounded in equality norms, comparing the burden of the regulation on the challenging party to that imposed on similarly situated owners.<sup>6</sup>

As to the first approach, the Court has increasingly diminished the practical importance of the trope of functional equivalence, almost to the point of irrelevance. In particular, the Court has rejected conceptual severance—the idea that the impact of a regulation should be evaluated in light of the burden it places on a particular “slice” of property or stick in the proverbial bundle of rights.<sup>7</sup> In so doing, the Court has made it increasingly difficult for property owners to bring claims that general regulations operate as the functional equivalent of a direct exercise of eminent domain, as most

<sup>2</sup> *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Equality considerations have long lain beneath the surface of underdeveloped questions relating not only to a regulation’s overall “fairness,” as in *Armstrong*, but also to whether regulations are generally applicable, and to the concept of average reciprocity of advantage.

<sup>3</sup> The phrase is from Justice Holmes’s opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922): “[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Id.* at 415. Whether *Mahon* should properly be read as the foundation of modern regulatory takings has provoked debate. See, e.g., Robert Brauneis, “The Foundation of Our ‘Regulatory Takings’ Jurisprudence”: The Myth and Meaning of Justice Holmes’s Opinion in *Pennsylvania Coal Co. v. Mahon*, 106 *YALE L.J.* 613, 702 (1996); William Michael Treanor, *Jam for Justice Holmes: Reassessing the Significance of Mahon*, 86 *GEO. L.J.* 813, 861 (1998). As Brauneis points out, however, the Court regularly invokes *Mahon* as that foundation. See Brauneis, *supra*, at 616.

<sup>4</sup> See *infra* Part I.A.

<sup>5</sup> See *infra* Part I.B.

<sup>6</sup> See *infra* Part I.C.

<sup>7</sup> See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 331 (2002); see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring). For further discussion of conceptual severance and the “denominator” problem, see *infra* text accompanying notes 41–42, 157–62.

regulations leave some or significant value.<sup>8</sup> Some claims will no doubt continue to raise questions of deprivation of all economically beneficial uses of property, permanent physical occupation, and other unusual interference with property. In practice, however, such regulatory burdens are rare.

As to the second approach, the Court has even more directly excised means-ends analysis from the corpus of regulatory takings. In its recent decision in *Lingle v. Chevron U.S.A. Inc.*,<sup>9</sup> the Court held that inquiries into whether a regulation is justified by legitimate state interests have “no proper place in our takings jurisprudence.”<sup>10</sup> In so doing, the *Lingle* Court untangled regulatory takings jurisprudence from its long and unfortunate embrace with substantive due process. Together, the muting of functional equivalence and the end of means-ends analysis are bringing the third, equality-based, approach, increasingly to the fore.<sup>11</sup>

This emerging equality dimension, which has previously been submerged in practice, enjoys broad scholarly support. As David Dana and Thomas Merrill note, “[t]he equal treatment justification remains today the most widespread explanation for the compensation requirement.”<sup>12</sup> Despite

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<sup>8</sup> See *infra* Part II.A.

<sup>9</sup> 544 U.S. 528 (2005).

<sup>10</sup> *Id.* at 548. *Lingle* involved a challenge to a Hawaii rent-control statute that had been struck down under a test that asked whether a regulation “substantially advances a legitimate state interest.” *Id.* at 534. The Court first articulated this test in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), and the proposition that a regulation could be struck down under the Takings Clause on this standard spawned a quarter-century of confusion. See *infra* Part I.B.1. *Lingle* excised the *Agins* test from the law of takings, and in the course of doing so provided an unusually lucid exegesis of regulatory takings law, reaffirming the importance of judicial deference in the review of ordinary economic and social legislation. See D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 349–56 (2005); J. Peter Byrne, *Due Process Land Use Claims After Lingle*, 34 ECOLOGY L.Q. 471, 471 (2007); see also Simon Lazar & Dwight H. Merriam, *Commentary, Ding Dong the Witch is Dead: O’Connor Drops a House on the Agins Takings Test*, 57 PLAN. & ENVT. L. 3 (2005). For further discussion of *Lingle* and its larger impact on takings jurisprudence, see *infra* Part II.B.

<sup>11</sup> This jurisprudential trend is underappreciated in the literature. Although the equality dimension of regulatory takings is well recognized as a background principle, its potential elevation in the current jurisprudence has not been a focus of the post-*Lingle* commentary. See, e.g., Jane B. Baron, *Winding Toward the Heart of the Takings Muddle: Kelo, Lingle, and the Public Discourse About Private Property*, 34 FORDHAM URB. L.J. 613, 642 (2007) (noting, in passing, that *Lingle* can be read to focus regulatory takings jurisprudence on questions of “fairness and justice” as articulated in *Armstrong*); Barros, *supra* note 10, at 354 n.56; Mark Fenster, *The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights*, 9 U. PA. J. CONST. L. 667, 676–81 (2007). In one exception, as discussed below, see *infra* text accompanying notes 110–17, John Echevarria has noted that *Lingle* reinforces the importance to takings law of the generality of a regulation, one theme in the grouping of equality norms in the jurisprudence. See John D. Echeverria, *The Triumph of Justice Stevens and the Principle of Generality*, in THE SUPREME COURT AND TAKINGS: FOUR ESSAYS 22, 24 (Richard O. Brooks ed., 2006), available at <http://www.vjcl.org/books/pdf/PUBS10003.pdf>.

<sup>12</sup> DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 33–34 (2002).

this consensus, the equality dimension of regulatory takings has thin theoretical grounding and troubling doctrinal consequences.<sup>13</sup>

From a theoretical perspective, privileging norms of equality engrafts political process rationales for heightened judicial scrutiny onto a “minority” defined only by the differential burden of a regulation. In other words, identifying a group of property owners for the purpose of asserting political process failure solely by differential effects on their property interests is plain circularity. This is a kind of conceptual severance based on the distribution of burdens across a community—preempting the political process for determining such distribution—and is as unjustified as are the attempts to sever physical and temporal aspects of property that the Court has now rejected.

Equally troubling is the resulting political economy of the jurisprudence. Under an equality approach, regulatory takings claims become more salient when there is more property to protect. A robust equality dimension in regulatory takings thus provides the greatest judicial protection to the parties who least need it. Although no rigorous analysis of the distribution of regulatory takings claims has been undertaken, even a cursory glance at the plaintiffs in the leading regulatory takings cases evinces a pattern. Unlike in the many contexts where direct eminent domain has been important—where there is a history of burdening the disenfranchised<sup>14</sup>—the Tak-

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<sup>13</sup> These problems have received essentially no scholarly attention. Indeed, some scholars have argued that the equality dimension of regulatory takings deserves greater emphasis. See Baron, *supra* note 11, at 651; Paul J. Boudreaux, *The Quintessential Best Case for “Takings” Compensation—A Pragmatic Approach to Identifying the Elements of Land-Use Regulations that Present the Best Case for Government Compensation*, 34 SAN DIEGO L. REV. 193, 223–41 (1997); Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 778–92 (1999); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1049–60 (2004); see also Jeffrey M. Gaba, *Taking “Justice and Fairness” Seriously: Distributive Justice and the Takings Clause*, 40 CREIGHTON L. REV. 569, 576–83 (2007); Note, *The Principle of Equality in Takings Clause Jurisprudence*, 109 HARV. L. REV. 1030 (1996). Other scholars have also drawn on aspects of the equality dimension for discussions of particular aspects of takings. See, e.g., Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1570–84 (2006) (using burden-distribution concerns to propose a reformulation of exaction doctrine); Carlos Ball, *The Curious Intersection of Nuisance and Takings Law*, 86 B.U. L. REV. 819, 851–68 (2006) (analyzing the distribution of burdens when the government acts in a nuisance-like manner). And an earlier generation of takings scholarship laid the conceptual groundwork for equality norms in the contemporary jurisprudence. See Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967); Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 64–65 (1964) [hereinafter Sax, *Police Power*] (discussing the problem of what Sax described as governmental discrimination—the Takings Clause as a restraint against selecting otherwise similarly situated owners upon whom a generalized burden might fall). To date, however, problems posed by the contemporary emergence of equality norms in the law of takings have gone unnoted in the literature.

<sup>14</sup> See J. Peter Byrne, *Condemnation of Low Income Residential Communities Under the Takings Clause*, 23 UCLA J. ENVTL. L. & POL’Y 131, 150–57 (2005); Wendell Pritchett, *The “Public Menace” of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL’Y REV. 1 (2003).

ings Clause has often been invoked to challenge regulation by parties armed with the resources and capacity to engage in the political process.

Finally, from a doctrinal perspective, privileging equality norms threatens to warp the fabric of both takings and equal protection. An open-ended inquiry into the purported fairness of the distribution of a regulation's burdens is entirely without independent content. Any non-political-process-based theory of equality under the Takings Clause will devolve ultimately into a question of the rationality of legislative or regulatory line-drawing, an inquiry that stands at odds with the core of takings jurisprudence. Moreover, the more vigorous a freestanding equality inquiry under the Takings Clause, the more reified the legal system's accounting of any regulation's adjustment of the "benefits and burdens of economic life"<sup>15</sup> becomes, and the more challenging it becomes to respond to inequality or other genuine common exigencies.

Accordingly, this Article argues that concerns animating the equality dimension should not sound under the Takings Clause, but rather under the Equal Protection Clause, with its deferential standard for the review of ordinary economic and social regulation. Use of the Takings Clause as a vehicle to subject regulations to review that is less deferential than the general standards that have prevailed since the end of the *Lochner* era has long posed an anomaly in constitutional jurisprudence.<sup>16</sup> The *Lingle* Court explicitly rejected such heightened scrutiny in its quasi-substantive-due-process guise, but the same disparity may now return in the guise of equality.

This Article, in sum, seeks to make two contributions to the literature. As a descriptive matter, it identifies the emerging equality dimension in regulatory takings law. As a normative matter, it sounds a note of warning about this development. *Lingle* resolved a generation of confusion over the interaction between substantive due process and takings. It would be unfortunate if courts, litigants, and scholars had to suffer through another generation of similar confusion over the interaction between takings and equal protection. Situating the equality dimension of regulatory takings law within the overall domain of equal protection jurisprudence would appropriately leave the Takings Clause as a guard against only those rare regulatory actions that are the functional equivalent of direct expropriation. By so doing, the Court would return the judicial review of most regulation to its proper constitutional home and continue to clarify one of the most muddled yet important areas of constitutional law.

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<sup>15</sup> Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

<sup>16</sup> Cf. Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and Its Impact on Economic Legislation*, 76 B.U. L. REV. 605 (1996) (discussing contemporary takings jurisprudence in comparison to other avenues of federal constitutional protection of property in light of the approach of the Court in the *Lochner* era).

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The Article proceeds as follows. Part I distills three primary approaches to regulatory takings from the patchwork of tests and concerns that have animated the jurisprudence. These approaches are the following: regulatory takings as the functional equivalent of direct expropriation, means-ends analysis, and equality norms. Part II analyzes recent trends that are reordering this area of law: the increasing irrelevance of the functional equivalence theme and *Lingle*'s explicit rejection of means-ends analysis. As Part II argues, these developments are bringing the equality dimension of regulatory takings law increasingly to the fore. Part III then examines the significant theoretical and doctrinal problems posed by the rise of equality norms, proposing that such norms instead be situated in the realm of equal protection. The resulting jurisprudence of regulatory takings would be simpler, clearer, and ultimately more egalitarian.

### I. THREE THEMES IN REGULATORY TAKINGS

The literature on regulatory takings tends to vacillate between high theory and doctrinal taxonomy. From a theoretical perspective, regulatory takings can often seem to be the great blank canvas of constitutional law. This is perhaps unavoidable, given that reviewing regulation under the Takings Clause requires a body of law for which constitutional text provides essentially no guidance,<sup>17</sup> and history provides little more—except, as the Court has acknowledged, to support the proposition that the Takings Clause in its original conception was unlikely to have applied to regulatory review.<sup>18</sup> Onto this blank canvas, scholars have painted justifications for regulatory takings jurisprudence that implicate fundamental questions of efficiency, justice, and the underlying interplay between private property and the state.<sup>19</sup>

From a doctrinal perspective, the Court's approach to regulatory takings represents an uneasy accretion of convoluted tests and analytical vari-

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<sup>17</sup> See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321–22 & n.17 (2002).

<sup>18</sup> See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 783 (1995); see also John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1252 (1996).

<sup>19</sup> The Court's long-muddled regulatory takings jurisprudence has inspired scholars to propose a great many organizing principles that might fruitfully lend coherence—or at least defensible justification—to the doctrine. For some of the more influential examples, see, for example, BRUCE ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985); WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995); Michelman, *supra* note 13; Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077 (1993); Sax, *Police Power*, *supra* note 13; Joseph Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) [hereinafter Sax, *Private Property*]. See generally JESSE DUKEMINIER ET AL., *PROPERTY* 1059–65 (6th ed. 2006).

ables.<sup>20</sup> The Court has recognized a handful of claims to which some form of per se liability or heightened scrutiny clearly applies.<sup>21</sup> Outside of these “relatively narrow” categories,<sup>22</sup> as the *Lingle* Court described them, most regulatory takings claims fall under the “ad hoc,” multifactor analysis that the Court first articulated in *Penn Central Transportation Co. v. New York*.<sup>23</sup>

There is a strong meta-signal in the Court’s endorsement of *Penn Central* as the lodestar of regulatory takings jurisprudence, with its concomitant rejection of rule-based limits on the government’s ability to redefine property rights.<sup>24</sup> Privileging ad hoc, open-ended analysis commits the Court—to the consternation of some commentators<sup>25</sup>—to unfolding the doctrine in a

<sup>20</sup> See Dale A. Whitman, *Deconstructing Lingle: Implications for Takings Doctrine*, 40 J. MARSHALL L. REV. 573, 574–78 (2007) (discussing the “vexing” state of regulatory takings law).

<sup>21</sup> See Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 617–19 (2004) (identifying “claims alleging physical appropriation, physical invasion, or regulations that deprive an owner of all economically beneficial use of land” as types of takings claims subjected to heightened scrutiny). The Court has recognized two categories of purportedly “per se” liability in regulatory takings. The first involves claims against regulations that authorize a permanent physical occupation of property. *Loretto v. Teleprompter Manhattan CATV*, 458 U.S. 419, 421 (1982). The second involves claims against regulations that deprive an owner of all economically viable use of property. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). A form of heightened scrutiny likewise applies to the review of certain types of “exactions” under *Nolan v. California Coastal Commission*, 483 U.S. 825, 830 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). Exactions occur when governmental entities require concessions from property owners in exchange for certain discretionary governmental actions. See generally Ball & Reynolds, *supra* note 13 (arguing that, to be consistent with the Takings Clause, the constitutional standard applied to exactions should be changed to better account for the burden distribution); Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729 (2007) [hereinafter Fenster, *Exactions*] (examining exactions before and after a series of Supreme Court cases in 2005).

<sup>22</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005).

<sup>23</sup> 438 U.S. 104, 124 (1978). The *Penn Central* analysis involves a series of “essentially ad hoc, factual inquiries,” yielding “several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.” *Id.* These factors—two as Justice Brennan described them, but articulated now as three—are well recognized as the *Penn Central* test. See Gary Lawson, Katherine Ferguson & Guillermo A. Montero, “*Oh Lord, Please Don’t Let Me Be Misunderstood!*”: Rediscovering the Mathews v. Eldridge and Penn Central Frameworks, 81 NOTRE DAME L. REV. 1, 37–45 (2005). The *Penn Central* analysis, however, can encompass all “relevant” circumstances. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 322 (2002); see also *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O’Connor, J., concurring). As Eric Claeys has noted, *Penn Central* is less of a strict “test” and more of a frame for approaching the broad questions inherent in regulatory takings. See Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 HARV. ENVTL. L. REV. 339, 343 (2006).

<sup>24</sup> Cf. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 915–34 (2000) (analyzing the Court’s various visions of property for constitutional purposes).

<sup>25</sup> See, e.g., Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988) (arguing that “ad hocery” is particularly inappropriate in the takings area “because of the important role of investment-backed expectations”).

pragmatic common law manner.<sup>26</sup> The Court's embrace of Justice Brennan's jurisprudential shrug of the shoulders in *Penn Central* does not quite amount to Justice Stewart's famous I-know-it-when-I-see-it standard,<sup>27</sup> but it certainly comes close.<sup>28</sup>

Taking an approach, then, at a midpoint between the broad theory and the technical details of the doctrine, it is possible to distill three essential "common touchstone[s]"<sup>29</sup> that have emerged from this common-law-like jurisprudence. Broadly speaking, these themes approach the Takings Clause as a limit on regulations that are the functional equivalent of direct governmental expropriation (functional equivalence); that are not justified when public good is balanced against private harm (means-ends analysis); or that concentrate burdens too narrowly or otherwise violate norms of distributive fairness (equality).<sup>30</sup>

#### A. *Functional Equivalence to Direct Expropriation*

To begin with the oldest theme in the jurisprudence, one approach to regulatory takings is to treat certain governmental actions that do not involve the direct eminent domain power as functionally equivalent to those involving such power. This theme focuses on tangible interference with physical property as well as diminution in the value of property.

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<sup>26</sup> Cf. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 884–88 (1996) (describing constitutional interpretation grounded not in a search for an overriding authoritative source but rather in understandings that evolve over time through decisions in a common law mold). For arguments in favor of pragmatic explication of regulatory takings doctrine over comprehensive theories, see, for example, Jeanne L. Schroeder, *Never Jam To-day: On the Impossibility of Takings Jurisprudence*, 84 GEO. L.J. 1531 (1996) (grounding a defense of pragmatism in takings jurisprudence in Hegelian conceptions of freedom and property); David A. Westbrook, *Administrative Takings: A Realist Perspective on the Practice and Theory of Regulatory Takings Cases*, 74 NOTRE DAME L. REV. 717, 719–20 (1999) (suggesting that a "comprehensive view" of takings is unworkable due to the many aspects of government power implicated by the Takings Clause, and arguing for the adoption of a more pragmatic approach). See also Mark R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93 (2002) (arguing that vagueness in takings doctrine best supports pragmatic renegotiation of social conceptions of the limits of property rights).

<sup>27</sup> See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>28</sup> See John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 173 (2005) (discussing the ascendancy of *Penn Central*); Laura S. Underkuffler, *Tahoe's Requiem: The Death of the Scalian View of Property and Justice*, 21 CONST. COMMENT. 727 (2004) (discussing the collapse of rule-based, immutable approaches to regulatory takings in favor of *Penn Central*'s ad hoc approach). The Court's now-predominant approach to regulatory takings is methodologically similar to its incremental approach to federalism doctrine, another area of constitutional law where history and text provide relatively little guidance. See Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1756 (2005) (arguing in the context of the Court's federalism doctrine for courts to "proceed by moving the law in increments rather than by seeking to impose (or restore) a broad constitutional vision").

<sup>29</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–40 (2005).

<sup>30</sup> See *id.*

*I. Functional Equivalence in the Jurisprudence.*—The Takings Clause has long applied to regulations that, without actually transferring title, involve governmental actions that destroy property or physically oust an owner, or authorize similar forms of physical interference with tangible property.<sup>31</sup> This theme first emerged in late nineteenth- and early twentieth-century cases involving ouster from land through flooding and similar events.<sup>32</sup> These cases invoked the requirement of compensation on the theory that such physical interference was functionally the same to an owner as direct expropriation. Thus began the decoupling of takings law from the affirmative exercise of the government’s power of eminent domain.<sup>33</sup>

As conceptions of property began to develop in more abstract directions in the late nineteenth and early twentieth centuries, the theme of functional equivalence likewise transformed. No longer could dry formalism provide meaningful guidance in light of broad transformations in the relationship between the state and property.<sup>34</sup> As commentators have noted, many of the most difficult puzzles of contemporary takings law arose from shifts in conceptions of property that coincided with the rise of the modern regulatory state.<sup>35</sup>

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<sup>31</sup> Requiring compensation for governmental actions that destroy property or oust an owner was a relatively modest step away from the affirmative exercise of the power of eminent domain, and remains the conceptually easiest strand of the doctrine to justify.

<sup>32</sup> See, e.g., *W. Union Tel. Co. v. Penn. R.R. Co.*, 195 U.S. 540, 562 (1904) (holding that maintaining telegraph equipment on the right of way of a railroad constituted a taking); see *St. Louis v. W. Union Tel. Co.*, 148 U.S. 92, 101–02 (1893) (holding that the physical invasion of municipally owned streets by telegraph poles constituted a taking); *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1872) (“[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution.”); Treanor, *supra* note 18, at 792, 794–97 (discussing the few Supreme Court cases prior to 1870 that interpreted the Takings Clause). There was a relative dearth of cases in the nineteenth century interpreting federal eminent domain law, in part because of the state of the Court’s Fourteenth Amendment incorporation doctrine at the time and in part because of practicalities that channeled cases to the states and to Congress under the Tucker Act. See Treanor, *supra* note 18, at 794 & n.69.

<sup>33</sup> See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 148 (1992). State constitutional and common law approaches to compensation requirements had recognized this limited form of “regulatory” taking long before the Supreme Court weighed in. See Treanor, *supra* note 18, at 792.

<sup>34</sup> The formalism associated with the nineteenth-century Court’s approach to the compensation question, which Joseph Sax identified with the first Justice Harlan, see Sax, *Police Power*, *supra* note 13, at 38–40, was increasingly challenged by the rising pervasiveness of economic and social legislation at the end of that century and in the first decades of the twentieth century. *Id.* at 40–41. Justice Holmes’s ascendancy on the Court coincided with these pressures and with shifts in general conceptions of property. *Id.* at 40.

<sup>35</sup> See HORWITZ, *supra* note 33, at 146–48; Kenneth J. Vandavelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 *BUFF. L. REV.* 325, 328–30 (1980).

This transformation, along with most themes in the modern jurisprudence, is reflected in *Pennsylvania Coal v. Mahon*.<sup>36</sup> There, Justice Holmes stated that one consideration in determining when an exercise of the police power transgresses limits imposed by the Constitution's compensation requirement "is the extent of the diminution [in property value]. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act."<sup>37</sup> This statement, coupled with Justice Holmes's comment that the dividing line between permissible and impermissible regulation "is a question of degree,"<sup>38</sup> has led to a reading of *Mahon*'s "too far" admonition as a threshold test.<sup>39</sup> Under this reading, certain types of interference with property rights are sufficiently individually injurious that, standing alone, they constitute a taking.

Justice Holmes, however, was not entirely consistent in his approach in *Mahon*. Traces remained of the earlier, physicalist-oriented view of regulatory takings as the functional equivalent of direct expropriation. Thus, when Holmes asserted that requiring a coal company to keep a column of coal in place has "very nearly the same effect for constitutional purposes as appropriating or destroying it,"<sup>40</sup> he was harkening back to the flooding and similar cases grounded in tangible interference with physical property. Justice Brandeis, in dissent, chastised Holmes for ignoring the larger property interests held by the coal companies<sup>41</sup>—thus spawning the long-vexing "denominator problem"<sup>42</sup>—but the conceptual frame endured.

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<sup>36</sup> 260 U.S. 393 (1922).

<sup>37</sup> *Id.* at 415. The obverse of this observation, as noted in *Lingle* among other cases, is Justice Holmes's recognition that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (quoting *Mahon*, 260 U.S. at 413).

<sup>38</sup> *Mahon*, 260 U.S. at 416.

<sup>39</sup> See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 565–66 (1984). "Degree" could mean a taking is unjustified in light of a balancing of private harm against public benefit, but it can also be read as focusing solely (or primarily) on some threshold of economic injury beyond which compensation is required.

<sup>40</sup> *Mahon*, 260 U.S. at 414.

<sup>41</sup> *Id.* at 419 (Brandeis, J., dissenting).

<sup>42</sup> The "denominator problem" refers to the dilemma that evaluating the impact of a regulation requires delineation of the relevant "parcel" affected by that regulation. In *Mahon*, for example, Justice Holmes singled out the coal that the Kohler Act required to be kept in place, while Justice Brandeis focused on the entire interest of the coal companies in the coal removed as well as that left in place. These approaches thus involved entirely different "denominators" against which to measure the numerator of the regulation's impact.

This dilemma resurfaced in *Penn Central*, a case that involved the historic landmark designation of Grand Central Terminal. The regulation required approval for development planned above the Terminal and when proposed designs were not approved, Penn Central Transportation Company, the owner of the Terminal, challenged the denial under the Takings Clause. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 115 (1978). In rejecting the takings claim, Justice Brennan defined the denominator as

Echoes from *Mahon* reverberate in *Penn Central*'s modern reformulation of the jurisprudence, as do most themes in regulatory takings.<sup>43</sup> The functional equivalence theme returned in *Penn Central*'s "character of governmental action" inquiry, which focused on physical interference with property as an indicator of types of regulations more likely to require compensation.<sup>44</sup> Likewise, diminution in value reemerged in the first two elements of the *Penn Central* analysis: economic impact and interference with distinct investment-backed expectations.<sup>45</sup> Although Justice Brennan clearly envisioned the ad hoc analysis he was articulating to embrace more than individual harm alone, some commentators and lower courts have fixed on these elements as critical, if not determinative.<sup>46</sup>

The functional equivalence theme, finally, finds its clearest modern form in the two "per se" categories of liability. The theme resurfaced as a primary justification for the rule articulated in *Loretto v. Teleprompter Manhattan CATV Corp.* that a regulation authorizing permanent physical occupation by a private entity constitutes a per se taking.<sup>47</sup>

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the city tax block designated as the landmark site, against an argument that the denominator should have been defined as the envelope of restricted air rights. *Id.* at 129–31; *see infra* note 158.

<sup>43</sup> See Jerold S. Kayden, *Celebrating Penn Central*, PLANNING, June 2003, at 20 (discussing *Penn Central* as the touchstone of modern regulatory takings law).

<sup>44</sup> As Justice Brennan stated, a "'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124.

<sup>45</sup> *Id.*

<sup>46</sup> Some courts, for example, have found that the *Penn Central* analysis can be resolved on the basis of interference with investment-backed expectations alone. See, e.g., *Golden Pac. Bancorp v. United States*, 15 F.3d 1066, 1074 (Fed. Cir. 1994) ("[W]e need only focus upon the third of the [*Penn Central*] factors[:] . . . interference with reasonable investment-backed expectations."); *see also* *Good v. United States*, 39 Fed. Cl. 81, 108–13 & n.48 (1997) (resolving a claim primarily on the failure of expectation after cursorily considering other *Penn Central* factors); *State Dep't of Health v. The Mill*, 887 P.2d 993, 1000 (Colo. 1994) ("The 'reasonable investment-backed expectations' of the regulated party is the dispositive factor in takings analysis when the regulated party is 'on notice' of the extent of the government's regulatory authority over its property."). In *Palazzolo*, the Supreme Court rejected the proposition that notice alone can be dispositive to bar a regulatory takings claim by undermining reasonable investment-backed expectations, and suggested that this aspect of the *Penn Central* test should not be dispositive more generally. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 634 (2001) ("The [lower] court erred in elevating what it believed to be '[petitioner's] lack of reasonable investment-backed expectations' to 'dispositive' status. Investment-backed expectations, though important, are not talismanic under *Penn Central*. Evaluation of the degree of interference with investment-backed expectations instead is *one* factor that points toward the answer to the question whether the application of a particular regulation to particular property 'goes too far.'" (citations omitted)); Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations,"* 32 URB. LAW. 437, 437 (2000) ("[A] determination that there were investment-backed expectations is becoming necessary for a takings plaintiff to prevail.").

<sup>47</sup> 458 U.S. 419, 441 (1982). *Loretto* involved a challenge to a New York law that required landlords to permit the installation of cable facilities on rental property. *Id.* at 421–25.

A similar sentiment is reflected in the justification that Justice Scalia gave in *Lucas v. South Carolina Coastal Council*<sup>48</sup> for a per se approach to regulations that deny an owner all economically beneficial uses of property.<sup>49</sup> Given *Lucas*'s singular focus on the rights of property holders to the exclusion of any evaluation of governmental interest, some commentators read the case to define functional equivalence as a threshold question of individual harm.<sup>50</sup>

The physicalist strain of the functional equivalence theme underlying *Loretto* is likewise evident in cases involving interference with clearly demarcated physical property rights<sup>51</sup> or instances where a regulation imposes physical access requirements.<sup>52</sup> This strain is also what the Court seems to have been contemplating in cases finding takings where regulations have impacted specific—but constitutionally significant—“sticks” in the proverbial property-rights bundle.<sup>53</sup>

2. *Functional Equivalence in Theoretical Perspective.*—Justifications for viewing regulatory takings as the functional equivalent of traditional eminent domain reflect several important theoretical frames.<sup>54</sup> Ex-

<sup>48</sup> 505 U.S. 1003 (1992).

<sup>49</sup> See *id.* at 1017 (“Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner’s point of view, the equivalent of a physical appropriation.” (citing *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting))).

<sup>50</sup> See, e.g., Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings “Muddle,”* 90 MINN. L. REV. 826, 887 & n.296 (2006) (discussing *Lucas* as a diminution-in-value analysis devoid of consideration of governmental interests).

<sup>51</sup> For example, the government overflights that the Court found to constitute a taking in *United States v. Causby*, 328 U.S. 256, 261 (1946). See *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.”).

<sup>52</sup> For example, the navigational servitude found to constitute a taking in *Kaiser Aetna v. United States*, 444 U.S. 164, 178–80 (1979). See *id.* at 180 (“[T]he imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina.”). Moreover, although the Court’s application of regulatory takings concepts to purely fiscal deprivations has been particularly inconsistent, a physicalist notion of property seems to have been the foundation for the Court’s holding in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), that interest on lawyers’ trust account funds could be subject to the Takings Clause. *Id.* at 172.

<sup>53</sup> See, e.g., *Hodel v. Irving*, 481 U.S. 704, 717–18 (1987) (holding that a provision of the Indian Land Consolidation Act that mandated the escheat of certain fractional interests in Indian land constituted a taking); see also *Babbitt v. Youpee*, 519 U.S. 234, 244–45 (1997). The Court has at other times found complete regulation of specific use rights acceptable under the Takings Clause. See, e.g., *Andrus v. Allard*, 444 U.S. 51, 64–68 (1979) (rejecting a regulatory takings challenge to statutes that barred the sale of lawfully acquired avian artifacts).

<sup>54</sup> Certainly, on a visceral level, the kinds of permanent, tangible harms that tend to resonate in this theme are closest to the direct exercise of eminent domain. It is not surprising, then, that paradigmatic examples of regulatory takings as being equivalent to the direct exercise of eminent domain hew most closely to the original function of the Takings Clause. See generally Treanor, *supra* note 18, at 785–97.

Equivalence also reflects certain aspects of personhood perspectives on property. See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). Extreme interference with property

tending protection from uncompensated interference with property rights beyond the traditional core of actual appropriation resonates strongly with classical Lockean-liberal conceptions of the fundamentality of property.<sup>55</sup> Underlying this view are utilitarian justifications for protecting owners' expectations of the fullest extent of property possession, use, and disposition,<sup>56</sup> and also the position that uncompensated diminution in value from regulation conflicts with the labor-reward justification for property.<sup>57</sup> Eric Claeys, in a similar vein, has argued that strong protections for property found in the modern doctrine—when such protections are actually found—reflect a premodern commitment to the right to use property grounded in conceptions of inherent moral freedom.<sup>58</sup>

Functional equivalence is also important to some justifications for regulatory takings law that emphasize efficiency aspects of the compensation requirement. One common argument is that compensation—whether in direct eminent domain or for the economic impact of regulation—forces the government to internalize the costs of its actions.<sup>59</sup> Absent a vigorous regulatory takings doctrine, the argument goes, governmental actors will tend to overregulate, leading to an inefficient allocation of resources.<sup>60</sup> This

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through regulation, the argument follows, is as injurious to the function of property to enhance human development and identity as any taking of property, compounded by the additional harm from the absence of compensation. See Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1687–88 (1988) [hereinafter Radin, *Liberal Conception*].

<sup>55</sup> See Radin, *Liberal Conception*, *supra* note 54, at 1677–78 (noting that conceptual severance creates a “slippery slope” wherein “regulation of any portion of an owner’s ‘bundle of sticks[]’ is a taking of the whole of that particular portion considered separately”).

<sup>56</sup> See *id.* at 1668. The modern, libertarian articulation of this perspective is most closely associated with Richard Epstein. See EPSTEIN, *supra* note 19. Epstein’s view of regulatory takings—that any reassignment of property rights must produce net social gains and must be distributed pro rata—rejects most distinctions between compensation for regulatory action and for direct eminent domain. See *id.* at 100–04 (arguing that any regulation of the “possession, use, and disposition of private property” amounts to a taking).

<sup>57</sup> See EPSTEIN, *supra* note 19, at 15; see also James S. Burling, *Private Property Rights & the Environment After Palazzolo*, 30 B.C. ENVTL. AFF. L. REV. 1, 3–5 (2002) (“[U]nder the Lockean theory of government, which underpins our Constitution, property is an *individual* right derived from the labor of individuals.”).

<sup>58</sup> See Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1553–55 (2003). For Claeys, modern applications of *Penn Central* that reflect libertarian sentiments reflect an eighteenth- and nineteenth-century conception of property’s zone of freedom. See Claeys, *supra* note 23, at 350–53.

<sup>59</sup> See DANA & MERRILL, *supra* note 12, at 41–42.

<sup>60</sup> *Id.* at 42 (citing Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 999 (1999)). This incentive-based argument has been criticized as failing to recognize the difference between the motivation of public actors as opposed to private firms and individuals. See Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 346–48 (2000). It remains, however, influential. See DANA & MERRILL, *supra* note 12, at 41.

proposition—the so-called fiscal illusion<sup>61</sup>—reflects functional equivalence in that no distinction is drawn between the incentive structure of a governmental decision to utilize eminent domain as opposed to a decision to regulate in a way that diminishes the value of property. Compensation should be granted—or denied—on the same metric in either situation.<sup>62</sup>

### B. Means-Ends Analysis

Although now rejected by the Supreme Court in *Lingle*,<sup>63</sup> the second primary approach to regulatory takings law long reflected a strong intertwining with due process means-ends analysis. Since at least as early as Justice Holmes's opinion in *Mahon*, substantive due process and regulatory takings have been intimately linked. As Bradley Karkkainen has concluded, "it fairly may be said that every major element in the Court's modern Fifth Amendment regulatory takings jurisprudence, with the possible exception of *Loretto*, was founded in whole or in part on Fourteenth Amendment substantive due process precedents, and reflects substantive due process concepts and principles."<sup>64</sup>

1. *Tracing the Entanglement of Due Process and Takings.*—From a doctrinal perspective, the "means-ends" theme can be traced to an alternative reading of *Mahon*: that a regulation goes "too far" if the private harm involved outweighs the public interest.<sup>65</sup> That theme resonates, however, throughout much of the modern development of the jurisprudence.<sup>66</sup>

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<sup>61</sup> See ROBERT C. ELICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 149 (3d ed. 2005).

<sup>62</sup> Cf. FISCHER, *supra* note 19, at 201 (discussing economic arguments in the takings context that apply equally to direct eminent domain and regulatory takings).

<sup>63</sup> See *infra* Part II.B.

<sup>64</sup> Karkkainen, *supra* note 50, at 888; see also John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695 (1993) (arguing that the Takings Clause should apply only to physical appropriations of property and that regulations that are unduly oppressive should be challenged under Due Process).

<sup>65</sup> See Treanor, *supra* note 3, at 857 (discussing *Mahon* as a balancing test); see also FRED BOSSELMAN ET AL., *THE TAKING ISSUE* 238 (1973) ("[L]and use regulations must be tested by balancing the value of the regulation against the loss in value to each affected property owner."), quoted in Brauneis, *supra* note 3, at 617 n.17. This view of *Mahon* springs from Justice Holmes's discussion (and dismissal) of the public purposes of the Kohler Act. See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("The greatest weight is given to the judgment of the legislature, but it is always open to interested parties to contend that the legislature has gone beyond its constitutional power."); see also *id.* ("This is the case of a single private house.").

<sup>66</sup> The balancing of public interest and private harm has a categorical counterpoint in the early police power cases that rejected takings claims on the rationale that legislative determinations of public harm obviated the need for compensation, even in instances of extremely significant interference with individual property rights. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (finding that a law barring a brick mill in a residential area did not constitute a taking); *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (finding that laws prohibiting the manufacture and sale of adulterated or imitation milk or butter were within the police power of the state); *Mugler v. Kansas*, 123 U.S. 623 (1887) (finding no

Whether *Mahon* is best understood as a species of substantive due process or as Justice Holmes's attempt to strike new ground under the Takings Clause remains controversial.<sup>67</sup> Regardless, precedents from the realm of substantive due process clearly played a role in *Penn Central*'s modern formulation of regulatory takings doctrine.<sup>68</sup> Drawing on two land-use cases—*Goldblatt v. Town of Hempstead*<sup>69</sup> and *Nectow v. City of Cambridge*<sup>70</sup>—Justice Brennan stated in *Penn Central* that “a use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose.”<sup>71</sup>

This means-ends analysis was not dispositive in *Penn Central*, but the Court's melding of due process and takings precedents continued to prove influential. The means-end theme is reflected, for example, in the approach to determining the strength of public purposes that has informed applications of *Penn Central*.<sup>72</sup> Some lower courts have applied the “character of governmental action” prong of the *Penn Central* analysis in particular to balance public benefit and private harm.<sup>73</sup>

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taking for a law that had the effect of shutting down a brewery). Although the Court in *Lucas* rejected a harm/benefit distinction as allowing per se nonliability for takings claims, see *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1021–26 (1992), it articulated an exception to per se liability for limitations on property that “inhere in the title.” *Id.* at 1029. This exception incorporates some version of the state's traditional power to limit property rights without compensation.

<sup>67</sup> Compare, e.g., Karkkainen, *supra* note 50, at 873–74 (“*Mahon* did not hold that a valid police power regulation was a compensable Fifth Amendment taking if it ‘went too far.’ Instead, it used a balancing test to plumb the outer bounds of the police power itself . . . , a classic substantive due process inquiry.”), with D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 507–09 (2004) (discussing *Mahon* as a Just Compensation Clause case rather than a substantive due process case).

<sup>68</sup> See Echeverria & Dennis, *supra* note 64, at 699–700. Bradley Karkkainen traces the modern view of Fifth Amendment incorporation to *Penn Central*, and the turn in the decision from due process to takings. Karkkainen, *supra* note 50, at 875–78.

<sup>69</sup> 369 U.S. 590 (1962). *Goldblatt* involved a challenge to a municipal ordinance regulating sand and gravel dredging and pit excavating. *Id.* at 590. The effect of the ordinance was to put the operators of a sand and gravel pit out of business, and the owners sued, claiming the ordinance “takes their property without due process of law in violation of the Fourteenth Amendment.” *Id.* at 591. The *Goldblatt* Court reviewed (and upheld) the ordinance under the Due Process Clause, but in passing also dismissed the suggestion that the harm suffered by the owners was potentially a taking under *Mahon*, noting that “there is 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.

<sup>70</sup> 277 U.S. 183 (1928). In *Nectow*, the Court struck down an aspect of the Cambridge, Massachusetts zoning code. See *id.* at 188–89.

<sup>71</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978).

<sup>72</sup> While Justice Brennan did not use “balancing” in describing his multifactor analysis in *Penn Central* and commentators have noted the incommensurability of the factors to be “balanced,” see, e.g., Karkkainen, *supra* note 50, at 828, it is not uncommon to see the *Penn Central* analysis described as a balancing test. See, e.g., *Hodel v. Irving*, 481 U.S. 704, 716–17 n.2 (1987).

<sup>73</sup> See, e.g., *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1176 (Fed. Cir. 1994) (describing the character prong as requiring “a reviewing court [to] consider the purpose and importance of the public interest reflected in the regulatory imposition”); see also R.S. Radford, *The “Substantial Advancement” Test and the Supreme Court’s Regulatory Takings Doctrine* (ALI-ABA Course of Study,

Two years after *Penn Central*, the Court again reached for due process precedents in *Agins v. City of Tiburon*.<sup>74</sup> In *Agins*, the Court drew on due process to articulate—in dicta—an independent frame of analysis in regulatory takings law.<sup>75</sup> Again citing *Nectow*, a classic substantive due process case,<sup>76</sup> the Court stated that the “application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests.”<sup>77</sup>

In practical terms, the *Agins* test had several consequences. First, the “substantially advances” language provided support for the exaction-review concept the Court began to expound in *Nollan v. California Coastal Commission*—the means-ends proposition that there must be some “essential nexus” between an exaction and the public purpose advanced by the exaction.<sup>78</sup> Second, the language formed the rhetorical basis for the suggestion in *Nollan* that Takings Clause-based review of the impact of regulation on property rights should be undertaken through some form of heightened scrutiny. *Nollan* cited *Agins* for the argument that the phrasing “substantially advances” implies a tighter means-ends fit than rational basis review under either the Due Process Clause or the Equal Protection Clause.<sup>79</sup>

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Apr. 22–24, 2004), WL SJ052 ALI-ABA 341, 351 n.44 (citing commentary arguing that *Penn Central*’s “character” prong gave rise to the means-ends dicta in *Agins*).

<sup>74</sup> 447 U.S. 255 (1980).

<sup>75</sup> *Agins* involved a challenge by property owners in Tiburon, a part of Marin County north of San Francisco, to a rezoning that achieved certain open-space goals that, the plaintiffs alleged, Tiburon had attempted but failed to do through direct condemnation. *Agins*, 447 U.S. at 257 & n.1.

<sup>76</sup> *Nectow* drew its standard of analysis from the case that first affirmed comprehensive zoning, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). See *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) (“The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.” (citing *Euclid*, 272 U.S. at 395)). *Euclid*, as it came before the Court, was styled as both a due process and an equal protection case. 272 U.S. at 384 (“The ordinance is assailed on the grounds that it is in derogation of [Section] 1 of the Fourteenth Amendment to the federal Constitution in that it deprives appellee of liberty and property without due process of law and denies it the equal protection of the law.”). The trial court in *Euclid* had analyzed the case in part as a takings issue. See *Ambler Realty Co. v. Vill. of Euclid*, 297 F. 307, 317 (D. Ohio 1924) (“[T]he ordinance involved . . . takes plaintiff’s property, if not for private, at least for public, use, without just compensation . . .”); *id.* at 311–12 (discussing *Mahon*). But the Supreme Court did not follow suit.

<sup>77</sup> *Agins*, 447 U.S. at 260.

<sup>78</sup> See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 (1987).

<sup>79</sup> See *id.* at 834 n.3 (“[O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation ‘substantially advance’ the ‘legitimate state interest’ sought to be achieved, not that ‘the State “could rationally have decided” that the measure adopted might achieve the State’s objective.’” (citations omitted)). Commentators appropriately saw an “invitation” in *Nollan* to begin moving towards a more general standard of heightened scrutiny for regulatory takings. See Jerold S. Kayden, *Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the Nollan Invitation (Part I)*, 23 URB. LAW. 301, 313–16 (1991). Kayden’s criticism of the role of means-ends analysis in regulatory takings challenges to land-use regulation

Finally, having a due process inquiry explicitly embodied in takings jurisprudence spawned confusion in the lower courts.<sup>80</sup> In a quarter-century of confronting the *Agins* dicta, lower courts produced a variety of approaches to the relationship between the “substantially advances” test and substantive due process.<sup>81</sup> Some courts simply ignored the glaring tension between a “substantially advances” test under the Takings Clause and means-ends analysis under substantive due process, allowing both claims to proceed essentially along similar lines.<sup>82</sup> Other courts, by contrast, held that the availability of a takings claim precluded independent review under the Due Process Clause where the challenge raised essentially the same theory, on the principle that the former’s more specific constitutional text should not be circumvented by resort to the latter’s open-ended terms.<sup>83</sup>

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largely prefigured *Lingle*. See *id.* at 320–22; see also Barros, *supra* note 67, at 518–20 & n.243 (likewise anticipating *Lingle*).

<sup>80</sup> During the pre-*Lingle* era, there were some procedural distinctions between substantive due process challenges and challenges that had roughly the equivalent substantive content under *Agins*. See Robert Ashbrook, Comment, *Land Development, the Graham Doctrine, and the Extinction of Economic Substantive Due Process*, 150 U. PA. L. REV. 1255, 1276–78 (2002).

<sup>81</sup> These cases reflected a larger debate about the interaction between substantive due process and other more specifically enumerated constitutional provisions. The debate has primarily focused on whether the Due Process Clause should apply where some other provision, generally in the Bill of Rights, appears to provide a more specific protection against the challenged governmental action. See generally Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833 (2003).

<sup>82</sup> See, e.g., *Rozman v. City of Columbia Heights*, 268 F.3d 588, 590–93 (8th Cir. 2001); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 287–88 (4th Cir. 1998); *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378–80 (2d Cir. 1995). See generally Ashbrook, *supra* note 80.

<sup>83</sup> Following the lead of the Ninth Circuit in *Armendariz v. Penman*, 75 F.3d 1311, 1318 (9th Cir. 1996), several circuits applied the so-called “Graham Doctrine” to regulatory takings, holding that substantive due process claims are subsumed into accompanying takings claims and cannot be litigated separately. See, e.g., *S. County Sand & Gravel Co. v. Town of S. Kingstown*, 160 F.3d 834, 835 (1st Cir. 1998); *Miller v. Campbell County*, 945 F.2d 348, 352–53 (10th Cir. 1991). The Seventh Circuit precluded substantive due process claims by referencing the long history of deference to legislatures in economic due process claims. See *Gosnell v. City of Troy, Ill.*, 59 F.3d 654, 657 (7th Cir. 1995); *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 465 (7th Cir. 1988). The Fifth Circuit conducted case-by-case analyses to determine whether both takings and substantive due process claims should proceed. See *John Corp. v. City of Houston*, 214 F.3d 573, 583 (5th Cir. 2000).

In application, the primary mischief that the *Agins* test wrought seems not to have involved the few outlier cases in which the test was invoked in any substantive way (and prior to *Lingle* it had never been tested directly before the Supreme Court), but rather the doctrinal confusion it sowed before the Court and in the lower courts, and the lingering doubt it cast on the nature of the regulatory takings inquiry, particularly whether the Takings Clause could serve to create a special category of governmental action subject to less deferential review than would be afforded under the Due Process Clause or nondeferential review. One open question after *Lingle* is the decision’s effect in those circuits that did not allow a due process claim that paralleled the “substantially advances” analysis. See R.S. Radford, *Just a Flesh Wound? The Impact of Lingle v. Chevron on Regulatory Takings Law*, 38 URB. LAW. 437, 445–46 (2006). For an insightful analysis of the future of claims that *Lingle* has now clarified belong under due process, see Byrne, *supra* note 10.

The closest the Supreme Court came prior to *Lingle* to explicitly grappling with the interaction between takings and substantive due process was in *Eastern Enterprises v. Apfel*.<sup>84</sup> In *Eastern Enterprises*, which involved a requirement that certain companies fund retiree health care benefits on a retroactive basis,<sup>85</sup> the Court splintered over the proper constitutional frame for review. Four Justices—Chief Justice Rehnquist, and Justices O’Connor, Scalia, and Thomas—found the Takings Clause appropriate to evaluate the constitutionality of the retroactive funding obligation.<sup>86</sup> The remaining five Justices, although splitting on the result, agreed that the more appropriate frame lay in the Due Process Clause.<sup>87</sup> This confused melding of substantive due process and regulatory takings is where things stood when the Court agreed to hear *Lingle*.<sup>88</sup>

2. *Justifying Means-Ends Analysis in the Law of Takings.*—On a theoretical level, treating regulatory takings as a question of means-ends analysis has long been justified on the view that the Takings Clause should stand as a check on arbitrary governmental action that diminishes the value of property without sufficiently offsetting gain to society.<sup>89</sup> This view posits regulatory takings law as a species of substantive due process, unshackled from the deferential apparatus the Court has erected since the end of the *Lochner* era for review of ordinary economic and social regulation under the Due Process Clause.<sup>90</sup>

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<sup>84</sup> 524 U.S. 498 (1998). *Eastern Enterprises* was something of a hound that did not bark in *Lingle*, at least until Justice Kennedy’s concurrence. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005) (Kennedy, J., concurring); see also *infra* note 181.

<sup>85</sup> See *Eastern Enters.*, 524 U.S. at 516–19 (O’Connor, J., plurality opinion).

<sup>86</sup> See *id.* at 522–37.

<sup>87</sup> Justice Kennedy, the swing vote in *Eastern Enterprises*, reasoned that while the Coal Act “imposes a staggering financial burden,” the Takings Clause was not implicated because the Act “regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest.” *Id.* at 540 (Kennedy, J., concurring). Thus, although Justice Kennedy agreed that the Takings Clause was an inappropriate constitutional framework of analysis, he joined the plurality in striking down the Coal Act as impermissibly retroactive under the Due Process Clause. *Id.* at 549–50. The remaining four Justices likewise concluded that the Takings Clause did not apply, *id.* at 554 (Breyer, J., dissenting), although they disagreed with Justice Kennedy that the law failed under a Due Process retroactivity analysis. *Id.* at 566–68.

<sup>88</sup> The relationship between substantive due process and regulatory takings was tangentially raised in *City of Monterey v. Del Monte Dunes of Monterey*, 526 U.S. 687 (1999), where the Court had the opportunity to comment on jury instructions that had included the “substantially advances” test. See *id.* at 702–07. The Court, however, declined to rule on the role of means-ends scrutiny because the challenged instructions had been drafted by the petitioner. See *id.* at 704. The Court likewise made passing reference to the “substantially advances” test in *Tahoe-Sierra*, but found that the issue was not presented. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 334 (2002).

<sup>89</sup> See Michelman, *supra* note 13, at 1193–96 & n.62 (citing Robert Kratovil & Frank J. Harrison, *Eminent Domain—Policy and Concept*, 42 CAL. L. REV. 596, 609 (1954)).

<sup>90</sup> See, e.g., R.S. Radford, *Of Course a Land Use Regulation that Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 FORDHAM ENVTL. L. REV. 353, 382–95

A more subtle approach to the role of the Takings Clause as a constraint on irrational governmental action can be found in the seminal work of Joseph Sax.<sup>91</sup> In his 1964 article, *Takings and the Police Power*, Sax argued for reframing the essential takings question towards its “real function . . . of provid[ing] a bulwark against arbitrary, unfair, or tyrannical government.”<sup>92</sup> To do so, Sax emphasized a conception of property not as the sum total of an owner’s interests, but, rather, as a fluid end result of “a process of competition among inconsistent and contending economic values.”<sup>93</sup> From this, Sax argued that a clear line could be drawn between economic loss arising from “government enhancement of its resource position in its enterprise capacity” and “losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity”—government acting to mediate disputes between competing private interests.<sup>94</sup> Sax later modified this framework,<sup>95</sup> but it remained an influential way to think about the Takings Clause as a check on arbitrary or irrational governmental action.<sup>96</sup>

There is, finally, an efficiency aspect to the means-ends analysis in regulatory takings. For some scholars, judicial review of regulation in substantive due process terms can be understood to incorporate an implicit cost-benefit analysis, balancing the benefits to the public against the costs to the individual.<sup>97</sup> When the question under the Takings Clause is whether the means that the government has chosen are “reasonable” in light of legitimate ends, then a cost-benefit analysis that weighs individual harm and social benefit can likewise inform the review of regulatory takings claims.<sup>98</sup>

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(2004) (discussing the independent value of a “substantially advances” inquiry under the Takings Clause and arguing that the Court had articulated a midlevel standard of heightened judicial review under this inquiry); Douglas W. Kmiec, *Property and Economic Liberty as Civil Rights: The Magisterial History of James W. Ely, Jr.*, 52 VAND. L. REV. 737, 744–51 (1999) (book review) (arguing that the Court has applied heightened scrutiny for regulatory takings).

<sup>91</sup> See generally Thomas W. Merrill, *Compensation and the Interconnectedness of Property*, 25 ECOLOGY L.Q. 327 (1999) (discussing Sax).

<sup>92</sup> Sax, *Police Power*, *supra* note 13, at 64.

<sup>93</sup> *Id.* at 61.

<sup>94</sup> *Id.* at 63.

<sup>95</sup> See Sax, *Private Property*, *supra* note 19, at 150–51, 155 (arguing for a vision of property as interconnected, with the consequence that what Sax called “public rights” should be granted much greater recognition in takings law). In many ways, Sax’s call for recognition of public rights would import a species of means-ends analysis, albeit one heavily steeped in what Sax appropriately saw as the under-recognition in contemporary takings jurisprudence of the importance of certain restrictions on property rights. Sax also limited his potentially open-ended call for a balancing of public and private interests by focusing on certain types of externalities, or spillover effects. *Id.* at 161–62 (arguing that in the absence of spillover effects, compensation should be paid whenever property rights are restricted).

<sup>96</sup> Justice Brennan cited Sax for this proposition in *Penn Central*. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 128 (1978) (citing Sax, *Police Power*, *supra* note 13, in a discussion of examples of takings that involve “government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions”).

<sup>97</sup> See ELLICKSON & BEEN, *supra* note 61, at 95–96.

<sup>98</sup> See *id.* at 149–51.

### C. Takings as Equality

The third primary theme in regulatory takings law involves questions of comparative burden and distributional justice. Although, as John Fee has noted, regulatory takings doctrine “is commonly understood as a defense for individuals against government actions that are extreme and unreasonable as applied to the individual,”<sup>99</sup> regulatory takings law can also be seen as protecting a right to equal treatment by the state.<sup>100</sup> The equality dimension is ubiquitous as a theoretical justification for regulatory takings law,<sup>101</sup> but has long lain dormant in the jurisprudence.

1. *Traces of Equality Norms: Armstrong, Generality, and Average Reciprocity.*—Doctrinally, the equality dimension is reflected in three related and overlapping concepts: the so-called *Armstrong* principle, generality as an analytical variable, and the question of average reciprocity of advantage.<sup>102</sup> The Court in a variety of contexts has invoked these concepts, although rarely with any clear explanation of their precise content.

In *Armstrong v. United States*,<sup>103</sup> the Court held that the Takings Clause required compensation by the federal government for the destruction of certain materialmen’s liens.<sup>104</sup> In so doing, Justice Black famously stated that

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<sup>99</sup> Fee, *supra* note 13, at 1004.

<sup>100</sup> See *id.* at 1007 (contrasting individual approaches to the Takings Clause with the Clause as “a guarantee of equal treatment among members of a community”).

<sup>101</sup> See DANA & MERRILL, *supra* note 12, at 33–34; Ball & Reynolds, *supra* note 13, at 1533–47 (tracing burden distribution analysis through the corpus takings law); see also Saul Levmore, *Just Compensation and Just Politics*, 22 CONN. L. REV. 285, 309 (1990) (“A central theme of takings law is that protection is offered against the possibility that majorities may mistreat minorities.”).

<sup>102</sup> See Note, *supra* note 13, at 1040–44 (“The Court has used concepts such as average reciprocity of advantage, generality, and [*Armstrong’s*] fair burden sharing [principle] to determine whether certain diminishments in property value should be considered takings.”). Carlos Ball and Laurie Reynolds have also drawn an explicit parallel between burden-distribution analysis in regulatory takings law and equal protection. Ball and Reynolds, drawing on *Lingle*, distinguish between themes in takings jurisprudence that focus on verticality—the burden’s severity—and horizontality—the way in which the burden is distributed among property owners. See Ball & Reynolds, *supra* note 13, at 1533. They liken the vertical burden inquiry to a substantive due process analysis and the horizontal burden inquiry to an equal protection analysis, in that the latter inquiry “compares the government’s regulation of the plaintiff to its regulation of similarly situated individuals.” *Id.* at 1533 n.99. Ball and Reynolds draw on the horizontal concern—the equality dimension—to argue that exactions review should focus on underinclusivity, balanced by considerations of reciprocity of advantage in a reformulated rough-proportionality test. *Id.* at 1570–84.

<sup>103</sup> 364 U.S. 40 (1960).

<sup>104</sup> See *id.* at 48. In *Armstrong*, the federal government had contracted with a shipbuilding company for the construction of naval vessels. The contract provided that in the event of default, the government could terminate and take title to and possession of all uncompleted work, with related materials. Subcontractors furnished materials to the company, and by operation of state law, the subcontractors were granted liens in the materials and the work itself. When the contractor defaulted, the federal government terminated the contract and took title to the contractor’s materials and some partially completed hulls. The subcontractors had not been paid for their materials, and filed suit alleging that the federal government’s sovereign immunity rendered the liens unenforceable and therefore constituted a taking. The

the “Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>105</sup> This statement has the feel of a passing rhetorical flourish, and substantively it is as much of a cipher as Justice Holmes’s “too far” test in *Mahon*.<sup>106</sup>

This articulation of the purpose of the Takings Clause, however, has been embraced in a long line of modern regulatory takings cases,<sup>107</sup> receiving “a remarkable degree of assent across the spectrum of opinion.”<sup>108</sup> Indeed, citing *Armstrong*, Justice Brennan prefaced his articulation of the *Penn Central* factors with the proposition that at base the inquiry is an attempt to determine “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.”<sup>109</sup>

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Court agreed and held that because the transfer of the materials to the government rendered the liens unenforceable (although still valid), this constituted a “taking” of the materialmen’s property. *Id.* at 41, 46–49.

<sup>105</sup> *Id.* at 49.

<sup>106</sup> On the facts of *Armstrong* it was unclear why a consequential effect of the federal government’s sovereign immunity—which the Court found to have destroyed a cognizable property interest—said anything about distribution of the burden on the particular holders of liens. Is a “public burden” not borne disproportionately any time an individual cannot recover against the government because of sovereign immunity? Were these particular subcontractors uniquely so burdened? Was this a phenomenon that impacted materialmen—or some other group—through the country? The Court did not say. Nor does the case tell us much about the underlying “unfairness” of the purported singling out in the case. Indeed, *Armstrong* seems to have been more about a *Lucas*-style total deprivation of property; the Court focused heavily on the fact that the liens were “destroyed” because they could not be enforced against the federal government. See D. Benjamin Barros, *Armstrong v. United States* (unpublished manuscript, on file with the author) (analyzing the Court’s conference notes and drafts leading up to the *Armstrong* decision and noting that three justices switched their positions out of apparent concern for the “total destruction” of the liens at issue). Notwithstanding, the rhetorical flourish at the end of the Court’s discussion has endured.

<sup>107</sup> See Ball & Reynolds, *supra* note 13, at 1534 & n.104; Note, *supra* note 13, at 1044. Indeed, in *Lingle*, the Court again cited the *Armstrong* principle to describe the central purpose of regulatory takings law. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005).

<sup>108</sup> William Michael Treanor, *The Armstrong Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1153 (1997).

<sup>109</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). See also *Bowen v. Gilliard*, 483 U.S. 587, 608 (1987) (in applying *Penn Central* to reject a takings claim against certain Aid to Families with Dependent Children (AFDC) child-support attribution requirements, using the “character of the governmental action” prong to incorporate the *Armstrong* principle). The *Armstrong* principle parallels another oft-repeated admonition from the 1893 decision in *Monongahela Navigation Co. v. United States*—a just compensation case—that the Takings Clause “prevents the public from loading upon one individual more than his just share of the burdens of government,” 148 U.S. 312, 325 (1893). See, e.g., *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 n.7 (1980); see also *Lingle*, 544 U.S. at 537 (citing *Monongahela Navigation*, 148 U.S. 312). John Fee has argued that *Monongahela Navigation* can be seen as the foundation of the equality strand of regulatory takings law, and that when the Court first invoked the Fourteenth Amendment to apply takings to the states, the Court cited equal

A variation on the *Armstrong* principle is the concern with the generality of a challenged governmental action. If *Armstrong* articulates a distributional fairness rationale, generality adds a political process undergirding. As a conceptual focus, the question is whether a given regulation or governmental action “is general in character, affecting not only the claimant but others in the community as well, or whether instead the action singles out a particular owner for unique treatment.”<sup>110</sup> In the modern doctrine, the theme appeared in Justice Brennan’s discussion in *Penn Central* of restrictions on property rights that generally “adjust[] the benefits and burdens of economic life to promote the common good.”<sup>111</sup>

The importance of generality was central in the debate between Justice Scalia and Justice Stevens in *Lucas*. Citing *Armstrong* and *Monongahela Navigation Co. v. United States*,<sup>112</sup> Justice Stevens argued in dissent that the generality of the Beachfront Management Act being challenged should have been dispositive.<sup>113</sup> It did not “target particular landowners, but rather regulate[d] the use of the coastline of the entire State.”<sup>114</sup> To Justice Scalia, however, generality was no defense because the Act was “*specifically directed to land*.”<sup>115</sup> To Justice Scalia, the relevant category in assessing the generality of the statute was the very category—specific landowners—burdened by the Act, no matter how widespread that category might have been.<sup>116</sup> Justice Stevens, however, had the final (or most recent) word, invoking generality as a primary justification for rejecting per se liability for temporary development moratoria in *Tahoe-Sierra Preservation Council, Inc.*<sup>117</sup>

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protection, not due process. See Fee, *supra* note 13, at 1003 (citing *Reagan v. Farmers’ Loan & Trust Co.*, 154 U.S. 362, 399, 410 (1894)).

<sup>110</sup> Echeverria, *supra* note 11, at 24. Echeverria notes that the generality requirement has an economic element of reciprocity of advantage as well: General regulations “should be less likely to raise takings concerns . . . because they typically produce both burdens and countervailing benefits for individual property owners.” *Id.*

<sup>111</sup> *Penn Central*, 438 U.S. at 124. Justice Brennan also analyzed early harm-prevention police power cases in terms of their widespread benefits and equal application. See *id.* at 133–34 n.30 (“[T]he uses in issue in *Hadacheck*, *Miller*, and *Goldblatt* were perfectly lawful in themselves. They involved no ‘blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk-taking which induce[d] society] to shift the cost to a particular individual.’ These cases are better understood as resting not on any supposed ‘noxious’ quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.” (quoting Sax, *Police Power*, *supra* note 13, at 50)).

<sup>112</sup> 148 U.S. 312.

<sup>113</sup> *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1074 (1992) (Stevens, J., dissenting).

<sup>114</sup> *Id.* Moreover, Justice Stevens argued, the Act imposed similar burdens on owners of developed and undeveloped parcels. *Id.* at 1074–75.

<sup>115</sup> *Id.* at 1027 n.14 (majority opinion).

<sup>116</sup> *Id.* at 1027.

<sup>117</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 341 (2002); see Echeverria, *supra* note 11, at 35–36. John Echeverria has argued persuasively that the Court’s increas-

Equality norms, finally, are reflected in a concept that predated *Mahon* but that has become associated primarily with the case: “average reciprocity of advantage.”<sup>118</sup> In *Mahon*, Justice Holmes appears to have been suspicious of the regulatory requirement to leave a column of coal in place to prevent subsidence in part because he thought that the companies so burdened received nothing in return.<sup>119</sup> In other instances that Justice Holmes distinguished, similar requirements ultimately benefited the burdened parties, at least in part.<sup>120</sup> In this sense, the regulated coal companies had been singled out.<sup>121</sup>

As with most other themes from *Mahon*, reciprocity resurfaced in the modern doctrine in *Penn Central*.<sup>122</sup> Then-Justice Rehnquist argued in dissent that, unlike zoning, the historic preservation restriction challenged in *Penn Central* conferred no common benefit on restricted owners.<sup>123</sup> Justice Brennan countered that legislation “designed to promote the general welfare commonly burdens some more than others.”<sup>124</sup> Justice Brennan continued that, in any event, given the number of landmarked buildings and districts

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ing focus on generality, most evident in *Tahoe-Sierra*, reflects the ascendancy of Justice Stevens’s view of regulatory takings. See *id.* at 40.

<sup>118</sup> Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); see Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 305–19 (1990); Lynda J. Oswald, *The Role of the “Harm/Benefit” and “Average Reciprocity of Advantage” Rules in a Comprehensive Takings Analysis*, 50 VAND. L. REV. 1449, 1490–1501 (1997) (discussing the historical development of the concept of “average reciprocity of advantage”); see also Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL’Y 1, 46–47 (2004). Justice Holmes first coined the phrase, in dicta, in a case decided shortly before *Mahon*, *Jackman v. Rosenbaum*, 260 U.S. 22 (1922), which rejected a challenge to a party wall statute under the Fourteenth Amendment’s Due Process Clause, *id.* at 30. See Oswald, *supra*, at 1491.

<sup>119</sup> See Oswald, *supra* note 118, at 1504–05.

<sup>120</sup> *Id.* at 1511–12. The Kohler Act, the statute challenged in *Mahon*, had the effect of abrogating waivers of subsidence claims. *Mahon*, 260 U.S. at 412–13. Holmes saw no “average reciprocity of advantage” inuring to the restricted coal companies because the statute protected only specific dwelling owners (and owners who may have understood the risks of subsidence when they purchased) without conferring any wider benefit to the public. Other statutes promoting public safety that had been upheld, such as a statute that required coal mining companies to leave pillars of coal in place in order to protect miners’ safety, more readily could be seen as reciprocally benefiting the companies themselves. *Id.* at 413–14.

<sup>121</sup> Average reciprocity of advantage embodies two distinct concepts: the singling-out equality aspect and the notion of implicit compensation. Carol Rose has noted that the concept’s latter guise serves as an anti-redistributional limit on regulation, in that vulnerability under the Takings Clause can turn on the extent to which, in the aggregate, owners are compensated for the deprivations they incur. See Rose, *supra* note 39, at 581–82.

<sup>122</sup> See Oswald, *supra* note 118, at 1511–12.

<sup>123</sup> Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 140 (1978) (Rehnquist, J., dissenting) (arguing that “[a]ll property owners in a designated area are placed under the same restrictions, not only for the benefit of the municipality as a whole but also for the common benefit of one another,” and quoting Justice Holmes, who, “speaking for the Court in [*Mahon*], [said] there is ‘an average reciprocity of advantage’”).

<sup>124</sup> *Id.* at 133 (majority opinion).

in New York, some close to and likely benefiting Grand Central Station, the station's owner received some offsetting compensation as part of the general scheme.<sup>125</sup> Average reciprocity of advantage has continued as a theme in a number of other modern cases.<sup>126</sup>

2. *Theories of Equality in Takings.*—Equality approaches to regulatory takings have been rationalized on a number of theoretical grounds. Frank Michelman's classic analysis, for example, is centrally concerned with deciding "when government may exercise public programs while leaving associated costs disproportionately concentrated upon one or a few persons."<sup>127</sup> Michelman argued that the government should compensate property holders when "demoralization" costs—the psychological costs associated with the realization that compensation is absent and the costs of foregone production—outweigh "settlement" costs—the costs of compensation necessary to avoid demoralization and the costs of the compensation system itself.<sup>128</sup>

At the heart of Michelman's account are hypothetical perceptions of the distributional fairness of regulatory burdens. To Michelman, demoralization arises from a sense by property holders that harm to their interests by governmental action represents "capricious redistribution."<sup>129</sup> In other

<sup>125</sup> *Id.* at 134–35. Lynda Oswald reads Justice Brennan's discussion of the advantages that the owner of Grand Central Station received, as part of the scheme of historic preservation in New York City, as a form of cost-benefit analysis automatically validating "any alleged police power action which confers a substantial benefit upon society at large." Oswald, *supra* note 118, at 1522 (emphasis omitted). Justice Brennan's discussion of the comprehensive nature of the preservation regime, however, see *Penn Central*, 438 U.S. at 134–35, calls to mind a more particularized analysis.

<sup>126</sup> See Oswald, *supra* note 118, at 1512–20 (discussing cases); Schwartz, *supra* note 118, at 51–61 (same). In some sense, Justice Kennedy's decision in *Palazzolo* evinces a weak form of an equality-based inquiry in its interpretation of the *Lucas* exception to per se liability for restrictions on property rights that inhere in title. In rejecting the proposition that mere transfer of title is sufficient to transform any public-law limitation on property rights into a "background principle of state law" under *Lucas*, the Court speculated in dicta that evaluation of such principles turns on "common, shared understandings." *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001). One way to read this is to import a *collective* decision (however divined) to limit property at some point to create a formal barrier to any reasonable individual expectation of that particular use of property. Cf. Joseph L. Sax, *Why America Has a Property Rights Movement*, 2005 U. ILL. L. REV. 513, 515 ("The notion of background principles acknowledges the right of the community to set standards at the outset."). In other words, an individual's expectations in the absence of some comparative context do not provide a discernable line between a permissible exercise of the police power and unconstitutional governmental action under the Takings Clause, even in the *Lucas* total-deprivation context.

<sup>127</sup> Michelman, *supra* note 13, at 1165.

<sup>128</sup> *Id.* at 1214–15. Michelman applied this formula after crossing the threshold of efficiency in the Kaldor-Hicks sense that the benefits the prospective gainers would be willing to pay exceed the losses that the prospective losers would be willing to accept. See *id.* at 1214; see also *id.* at 1174 & n.18.

<sup>129</sup> *Id.* at 1215. Michelman argued that demoralization represented by a realization of exploitation by majority rule is likely to occur where a claimant suffers disproportionate injuries, where a loss is not likely to be offset by reciprocal benefits in the project or in future projects, or where the claimant lacks political influence to gain mitigation. See Dagan, *supra* note 13, at 764–66 (analyzing Michelman).

words, a person should regard a decision to regulate as fair if that person and others similarly situated would be better off in the long run.<sup>130</sup> As Michelman put it, given the impracticality of strict proportionality in the costs and benefits of collective action, a compensation regime should at least strive for “an acceptable level of assurance that over time the burdens associated with collectively determined improvements will have been distributed ‘evenly’ enough so that everyone will be a net gainer.”<sup>131</sup>

Other commentators have looked to equality norms for the similar potential of such norms to instantiate notions of fairness in the law of takings.<sup>132</sup> John Fee, for example, has argued for viewing regulatory takings law as an antidiscrimination or comparative principle that distinguishes between formal equality and substantive equality, with the Fifth Amendment requiring only the former.<sup>133</sup> John Costonis earlier argued for a similar

<sup>130</sup> See Michelman, *supra* note 13, at 1223 (“A decision not to compensate is not unfair as long as the disappointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision.”).

<sup>131</sup> *Id.* at 1225 (emphasis omitted). Robert Ellickson built on Michelman’s framework to argue that the compensation question should be evaluated under a “normal behavior” standard. See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 419–24 (1977) (“[W]hen a government program merely requires that all laggards come up to the standards of normal behavior, citizens do share a reciprocity of burdens, and the program does not violate—in fact it promotes—horizontal equity.” (citing Michelman, *supra* note 13, at 1235–37)); see also Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 728–33 (1973); William A. Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581, 1584 (1988). “Normal behavior,” of course, is a comparative standard.

<sup>132</sup> As noted, Joseph Sax in his early work on takings included the problem of governmental discrimination—singling out—in the irrationality that he initially felt the Takings Clause should police against. See Sax, *Police Power*, *supra* note 13, at 64–65; see also Sax, *Private Property*, *supra* note 19, at 169–70 (reiterating the necessity for a constraint against governmental decisions to select among owners upon whom a burden might fall, which Sax described as “the equal protection dimension of compensation law”).

<sup>133</sup> See Fee, *supra* note 13, at 1049–60; *id.* at 1050 (“[A] regulation . . . is not a taking if it applies to a broad community of owners and is reasonably designed for the overall benefit of that community.”). Fee compares his proposal for takings doctrine as formal equality to the Equal Protection Clause, but has in mind an independent structure of analysis. He argues, for example, that “[u]nder a formal equality standard, a land use restriction is a taking if it applies to only one owner,” because “that owner is forced to sacrifice something unique for the public benefit.” *Id.* at 1054. This does not seem to track the analysis (although might, in some instances, mirror the outcome) that a deferential rational-basis equal protection inquiry would require. The latter asks whether there is any conceivable rational basis for relevant distinctions. See, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993) (“[A] classification ‘must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’” (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993))); *Cent. State Univ. v. Am. Ass’n of Univ. Professors*, 526 U.S. 124, 127–28 (1999) (per curiam). See also Note, *supra* note 13, at 1044–47 (discussing competing conceptions of equality that might inform takings jurisprudence).

noneconomic balancing of redistributive goals in a conscious importation of a fairness inquiry.<sup>134</sup>

Some commentators have gone further, looking to equality norms as a guarantee of substantive fairness, attempting to give content to the intuitions reflected in *Armstrong's* rhetoric. Hanoch Dagan, for example, has argued for engrafting progressive distributive concerns onto the law of takings in order to recognize the importance of equality.<sup>135</sup> Dagan's approach is to reconceptualize reciprocity of advantage in terms of social responsibility—highlighting the fact that a claimant “is a member of a community” and, as such, should bear certain responsibilities (and enjoy various benefits).<sup>136</sup> Dagan similarly looks to diminution in value to instantiate egalitarian concerns, as a way to recognize the claims of those who are worse-off in the community.<sup>137</sup>

From a significantly different set of normative assumptions, there is a natural law justification for the equality dimension of regulatory takings. As David Dana and Thomas Merrill have noted, natural law theorists argue that compensation is required “to even the score when a given person has been required to give up property rights beyond his just share of the cost of government.”<sup>138</sup> This resonates strongly with the fairness rationales underlying the *Armstrong* principle.<sup>139</sup> Similarly, Hanoch Dagan has observed that there is an aspect of distributional justice in the libertarian perspective.<sup>140</sup> Dagan sees a commitment to proportionality in Richard Epstein's argument that any redistribution requires compensation. Although Dagan rejects the absolutist consequences of Epstein's approach, Dagan draws from Epstein a reminder of the importance of not forcing “disproportionate” burdens on individuals.<sup>141</sup>

Another important theoretical justification for equality-based approaches to regulatory takings can be found among public choice theorists. From this perspective, certain groups or classes of property holders are unable to compete fairly in the political process and thus merit protection from the courts from majoritarian excess.

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<sup>134</sup> See John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 488 (1983).

<sup>135</sup> See Dagan, *supra* note 13, at 742 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

<sup>136</sup> See *id.* at 771.

<sup>137</sup> See *id.* at 778–81. Dagan focuses on diminution in value, refashioning the test to take into consideration total property holdings in a community, thus incentivizing public actors to burden those relatively more able to bear such burdens. See *id.* at 782–84.

<sup>138</sup> DANA & MERRILL, *supra* note 12, at 33 (quoting William B. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 587 (1972)); see also Stoebuck, *supra*, at 583–88 (discussing natural-law just-share theories of the compensation requirement).

<sup>139</sup> See DANA & MERRILL, *supra* note 12, at 34.

<sup>140</sup> See Dagan, *supra* note 13, at 757–58.

<sup>141</sup> *Id.* at 761–62.

Saul Levmore, for example, has argued that takings law requires compensation to “individuals or groups that do not regularly participate in political bargains,” because it is with these categories of persons that arguments about the need for the internalization of the costs of governmental decisionmaking apply most clearly.<sup>142</sup> Glynn Lunney has argued more generally that the Takings Clause should be interpreted to require compensation when legislative conflicts over property pit a dispersed group against a concentrated group.<sup>143</sup> Daniel Farber has raised an insightful critique of some scholars’ overly deterministic views of which groups can best protect themselves through the political process.<sup>144</sup> Farber has argued instead that an equality approach to takings—what Farber describes as a focus on “horizontal equity”<sup>145</sup>—would suggest that compensation be mandatory whenever governmental action occurs that under ordinary democratic processes would yield compensation but for the “unusual political vulnerability” of the group involved.<sup>146</sup>

William Fischel’s view of takings as a check on majoritarian excess adds a distinctive federalist (actually, localist) overlay.<sup>147</sup> Fischel generally acknowledges the countermajoritarian difficulty with invoking the Takings Clause to review regulation. Fischel nonetheless has argued that property owners with immobile assets face a failure of both voice and exit as a means of disciplining the political process.<sup>148</sup> Thus, heightened judicial scrutiny is appropriate for local governmental regulation of owners who lack the ability to move.<sup>149</sup>

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<sup>142</sup> See Levmore, *supra* note 101, at 305–14.

<sup>143</sup> See Glynn S. Lunney, Jr., *A Critical Reexamination of the Takings Jurisprudence*, 90 MICH. L. REV. 1892, 1954–55 (1992).

<sup>144</sup> See Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 287–94 (1992).

<sup>145</sup> *Id.* at 308.

<sup>146</sup> *Id.* at 306; *see also id.* at 294–99, 303 (describing a theory of takings as “universalizing” the otherwise general practice of compensation).

<sup>147</sup> See FISCHEL, *supra* note 19, at 115–16, 135–40. Fischel is more generally concerned with a majoritarian model of governmental decisionmaking under which political authorities seek to maximize voters’ desires. *Id.* at 206. Fischel models a limited compensation rule that balances fiscal illusion (governmental cost internalization) against the countervailing risk of private overinvestment from a full compensation regime. *Id.* at 205.

<sup>148</sup> *See id.* at 135–36.

<sup>149</sup> *See id.* at 139, 328. Fischel applies his political process rationale for judicial supervision to certain state and federal agencies as well. *Id.* at 139, 329–31. Thus, for Fischel, the safeguards of the political process can be trusted at the federal level and (generally) at the state level, but much less often at the local level (Fischel is also suspicious of judges themselves, *id.* at 331–32). Christopher Serkin recently argued for a similar review of local governmental action, less on Fischel’s political process grounds and more on grounds of the unique distortions that local governments face in their regulatory incentives. See Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624 (2006).

William Treanor, finally, has provided what he describes as a process synthesis of takings law that is more faithful to original intent.<sup>150</sup> Treanor would hold that “[c]ompensation is due when a governmental action affects only the property interests of an individual or a small group of people and when, in the absence of compensation, there would be a lack of horizontal equity (*i.e.*, when compensation is the norm in similar circumstances).”<sup>151</sup>

These arguments highlight different potential structural failures in the political process, but all posit that differential treatment of somehow identifiable subsets of property rights holders merits judicial intervention under the Takings Clause.<sup>152</sup> In other words, these approaches treat the burden of a regulation on a subset of property owners as the same kind of political process failure that gives rise to heightened scrutiny for classic “discrete and insular minorities.”<sup>153</sup>

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This overview of the three primary themes in the regulatory takings jurisprudence provides a framework through which to understand the rise of equality norms. It is to recent developments that are ushering in a new landscape in the law of regulatory takings that we now turn.

## II. THE EMERGING JURISPRUDENCE

This Part analyzes two trends that together are bringing the equality dimension of regulatory takings to the fore. First, the Court is muting the doctrinal and practical significance of the functional equivalence theme in its various guises. At the same time, the Court in *Lingle* explicitly untangled regulatory takings from its long embrace with substantive due process. Together, these trends leave much more room for equality norms in the jurisprudence.

### A. *The Muting of Functional Equivalence*

In eroding the foundations underlying the theme of regulatory takings as functionally equivalent to the direct exercise of eminent domain, the

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<sup>150</sup> See Treanor, *supra* note 18, at 872.

<sup>151</sup> *Id.* Treanor also suggests that compensation should be mandatory in cases involving the kinds of discrete and insular minorities traditionally thought protected by heightened scrutiny under the Equal Protection Clause, for example, in environmental justice claims. See *id.* at 875.

<sup>152</sup> See *id.* at 866–72 (outlining various public-choice oriented process-based approaches).

<sup>153</sup> Cf. Karkkainen, *supra* note 50, at 912 (“If the Fifth Amendment Takings Clause does apply to the states, then it must be interpreted to stand as a safeguard against just the kinds of abuses of governmental power that led to its being appended to the Constitution in the first place—defects in the political process that lead to the arbitrary ‘singling out’ of individuals or ‘discrete and insular’ classes of property owners for harsher treatment than the rest, whether to benefit other identifiable individuals or classes, or to benefit of the public generally.”).

Court is increasingly relegating the theme to marginal importance. To begin, the Court in several recent cases—notably *Tahoe-Sierra*<sup>154</sup> and *Brown v. Legal Foundation of Washington*<sup>155</sup>—has begun to distance regulatory takings from parallelism with physical takings, an important conceptual underpinning to functional equivalence. This primarily has been a rhetorical turn, but it has provided justification for backing away from intimations of heightened scrutiny and per se liability.<sup>156</sup>

The second, and more consequential, development has been the Court's embrace of the parcel-as-a-whole rule. Margaret Radin aptly labeled the division of property rights and physical boundaries for evaluation under the Takings Clause as "conceptual severance."<sup>157</sup> Conceptual severance has arisen primarily in the physical sense of dividing a parcel into distinct slices based on a given regulatory scheme and then evaluating the impact of a regulation on an individual slice. For example, one question in *Penn Central* was whether the impact of the landmark preservation statute at issue should be evaluated in terms of the value of lost air rights (the "parcel" of property above the existing structure that was under contention).<sup>158</sup> Conceptual severance has also arisen, much more controversially, in the sense of specific rights in the hypothetical bundle, for example where a regulation has interfered with the right to exclude.<sup>159</sup>

In *Tahoe-Sierra*, the Court evaluated a temporary development moratorium as the temporal equivalent of physical severance—a slice of property

<sup>154</sup> *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321–25 (2002) (discussing a "fundamental distinction" between physical and regulatory takings).

<sup>155</sup> 538 U.S. 216, 231–34 (2003) (discussing the same distinction).

<sup>156</sup> See, e.g., *Tahoe-Sierra*, 535 U.S. at 348–49 (Rehnquist, C.J., dissenting) (arguing against the Court's rejection of equivalency from the perspective of the expectations of an owner). The Court has repeatedly retreated when confronted with the more extreme consequences of its signal functional equivalency cases. After *Loretto*, for example, the Court faced the logical argument that a rent control provision that gave tenants certain rights of occupancy was a per se taking as a permanent physical occupation. See *Yee v. Escondido*, 503 U.S. 519 (1992). The Court was not willing to apply *Loretto* to this occupation, see *id.* at 527–28, quickly closing a door that *Loretto* might have opened.

<sup>157</sup> See Radin, *Liberal Conception*, *supra* note 54, at 1676.

<sup>158</sup> In *Penn Central*, Justice Brennan stated that:

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

*Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130–31 (1978). After *Penn Central*, the Court was at times less than firm in its statements about the vitality and content of this approach. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 631–32 (2001); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016–17 n.7 (1992).

<sup>159</sup> See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 178–80 (1979). See generally Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998) (discussing the right to exclude as foundational in property).

over the dimension of time, rather than space.<sup>160</sup> In *Tahoe-Sierra*, the Court endorsed the “parcel as a whole” rule.<sup>161</sup> The Court indicated that the “relevant parcel” required consideration of property as an “aggregate . . . in its entirety.”<sup>162</sup>

This aggregation rule makes it more difficult to assert that a regulatory burden on property constitutes the functional equivalent of the direct exercise of eminent domain. This is so because, as a practical matter, most regulatory takings have only a limited impact on property rights when an interest holder’s physical property, temporal property, or specific property rights are evaluated in their entirety. Functionally, then, the theme of equivalence to direct expropriation has become a mechanism to channel certain unusual claims—claims involving particularly sharp invasions of physical property and particularly extreme diminutions in value—out of the *Penn Central* analysis.<sup>163</sup>

After *Loretto*, claims based on physical interference either give rise to per se liability in instances of permanent physical invasion, or require some other basis for evaluating whether a taking has occurred. Physical equivalence was the basis for *Penn Central*’s “character” prong, but *Loretto* carved out this aspect of the *Penn Central* analysis, making clear that permanent physical invasions represent a unique form of harm in regulatory takings law.<sup>164</sup> Courts applying *Penn Central* could still inquire as to how close to a physical invasion a challenged regulation comes. Decoupling the *Penn Central* character prong from its origins in cases of permanent occupation, however, leaves no guidance on how to evaluate instances of physical interference not rising to a *Loretto* invasion.<sup>165</sup> Thus, claims based on physical invasion in a few rare instances will be decided under *Loretto*; all other such claims must be decided under a *Penn Central* test for which gradations of physical interference standing alone reveal nothing.

Likewise, after *Lucas*, assertions based on diminution in value face a similar bifurcated treatment. Claims that involve total deprivation merit per se liability, although such instances will be exceedingly rare.<sup>166</sup> All other

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<sup>160</sup> See *Tahoe-Sierra*, 535 U.S. at 331–32.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 327 (quoting *Andrus v. Allard*, 444 U.S. 51, 66 (1979)).

<sup>163</sup> John Costonis has argued that the kinds of factors that once determined categories of takings claims—property as a “thing” versus property as a relation, for example—evolved into factors that influence the ad hoc inquiry. See Costonis, *supra* note 134, at 467. *Lingle* and other recent decisions such as *Tahoe-Sierra* have reinforced this, increasingly culling out and isolating the per se categories as special cases. See, e.g., *Tahoe-Sierra*, 535 U.S. at 322; see also *Palazzolo*, 533 U.S. at 636 (O’Connor, J., concurring) (arguing against “what amount to per se rules” in regulatory takings).

<sup>164</sup> See Steven J. Eagle, “Character” as “Worthiness”: A New Meaning for *Penn Central*’s Third Test?, 27 ZONING & PLAN. L. REP. 1, 2 (2004).

<sup>165</sup> Cf. Whitman, *supra* note 20, at 578.

<sup>166</sup> See Echeverria, *supra* note 11, at 40 (commenting that *Lucas* has been narrowed “to practical irrelevance”).

claims require some other basis for discerning when a regulatory burden has gone too far. In other words, anything short of a total deprivation must be decided under *Penn Central*, but diminution in value will reveal nothing as a freestanding element of that analysis. As was suggested in the back-and-forth between Justice Scalia and Justice Stevens in *Lucas*<sup>167</sup> and acknowledged in other cases,<sup>168</sup> for injuries to property rights that fall short of a wipeout, some other analytical tool is required.

In short, the overwhelming majority of regulatory takings claims will be resolved under *Penn Central*, but under *Penn Central*, the explanatory force of the theme of functional equivalence has been significantly diminished.<sup>169</sup>

### B. The End of Means-Ends Analysis

As noted, a number of landmark regulatory takings cases have directly or indirectly drawn on substantive due process precedents, or at least on the means-ends inquiry implicit in references to the “substantially advances” test.<sup>170</sup> In *Lingle*, the Court finally and forthrightly untangled this long embrace between regulatory takings and substantive due process.

In *Lingle*, Chevron had challenged a Hawaii statute that limited the rent the company could charge its lessee-dealer gas stations.<sup>171</sup> Chevron prevailed in the lower courts on the theory that the statute “fail[ed] to substantially advance a legitimate state interest” under *Agins*.<sup>172</sup> The District

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<sup>167</sup> In *Lucas*, Justice Stevens in dissent criticized the total wipeout rule as “wholly arbitrary,” given that a “landowner whose property is diminished 95% recovers nothing,” while an owner with only a slightly greater deprivation “recovers the land’s full value.” *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1064–65 (1992) (Stevens, J., dissenting). Justice Scalia acknowledged that “[i]t is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full,” *id.* at 1019–20 n.8 (majority opinion), although he maintained that “takings law is full of these ‘all-or-nothing’ situations.” *Id.*

<sup>168</sup> See *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 645 (1993) (“[M]ere diminution in value, however serious, is insufficient to demonstrate a taking.”); John D. Echeverria, *A Turning of the Tide: The Tahoe-Sierra Regulatory Takings Decision*, 32 ENVTL. L. REP. 11,235, 11,246 (2002); see also DANA & MERRILL, *supra* note 12, at 135 (observing that “[s]hort of 100 percent loss in value . . . the degree of diminution is just one factor to be considered [in deciding whether a taking has occurred]”).

<sup>169</sup> In other words, after *Lucas* and *Loretto*, anything short of a total diminution in value or permanent physical occupation will be decided under a version of *Penn Central* in which diminution and physical invasion are empty considerations in the absence of either means-ends analysis or an evaluation of comparative harm. As discussed below, however, any interpretation of *Penn Central* that involves a balancing of public benefit and private harm cannot be reconciled with *Lingle*’s repudiation of the *Agins* means-ends test. See *infra* Part II.B.

<sup>170</sup> See *supra* Part I.B.

<sup>171</sup> See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 532–33 (2005).

<sup>172</sup> *Id.* at 534 (quoting *Chevron U.S.A. Inc. v. Cayetano*, 57 F. Supp. 2d 1003, 1014 (D. Haw. 1998)).

Court, following Ninth Circuit precedent,<sup>173</sup> evaluated the legislation under a standard of review that did not accord the legislation any deference.<sup>174</sup> This led to a battle of the experts on the likely efficacy of the legislation, with the District Court siding with Chevron's expert.<sup>175</sup> After the Ninth Circuit affirmed this decision, the Supreme Court reversed.

Justice O'Connor's opinion for a unanimous Court directly attacked the *Agins* test as anomalous. In doing so, the Court explored the primary tests through which the Court had judged regulations under the Takings Clause: the *Loretto* permanent physical occupation, the *Lucas* deprivation of all economically beneficial uses, and, "[o]utside these two relatively narrow categories (and the special context of land-use exactions)," the *Penn Central* analysis.<sup>177</sup> Each of these inquiries, the Court stated, "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."<sup>178</sup> "Accordingly," the Court concluded, "each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights."<sup>179</sup>

With this initial framework, the Court turned to what had gone awry in *Agins*. Noting *Agins*'s reliance on *Euclid* and *Nectow*, the Court stated that "[t]here is no question that the 'substantially advances' test was derived from due process, not takings, precedents."<sup>180</sup> Thus, the test required a species of due process analysis: "a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."<sup>181</sup>

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<sup>173</sup> See *Chevron*, 57 F. Supp. 2d, at 1009 (discussing *Richardson v. City and County of Honolulu*, 124 F.3d 1150, 1158 (9th Cir. 1997)).

<sup>174</sup> *Lingle*, 544 U.S. at 535–36.

<sup>175</sup> *Id.* The District Court found Chevron's expert "more persuasive" on the likely economic effects of the legislation and accordingly found a violation of the Takings Clause under the *Agins* "substantially advances" test. *Id.* at 535.

<sup>176</sup> *Id.* at 538.

<sup>177</sup> As to *Nollan* and *Dolan*, the Court cast them as "special application[s]" of the unconstitutional conditions doctrine rather than as any kind of general application of heightened scrutiny. *Id.* at 545–48.

<sup>178</sup> *Id.* at 539. In this, the Court shifted from equality to functional equivalence without explaining the connection between these two views of the Takings Clause.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 540.

<sup>181</sup> *Id.* at 542. On this point, perhaps unable to resist an "I told you so," Justice Kennedy concurred to make clear that the Court's excision of substantive due process means-ends analysis from takings "does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process." *Id.* at 548–49 (Kennedy, J., concurring) (citing *E. Enters. v. Apfel*, 524 U.S. 498, 539 (1998) (Kennedy, J., concurring)).

*Lingle* will likely impact the issues left unresolved by the Court in *Eastern Enterprises*. See *supra* text accompanying notes 84–88. Recall that in *Eastern Enterprises*, the Court splintered not over the role of means-ends analysis as such, but over the more general question whether a forced transfer of funds that imposed retroactive liability is properly analyzed as an interference with property cognizable under the Takings Clause or is better reviewed under the general "fairness" (in the sense of rationality)

The Court noted that *Agins*'s reliance on due process reflected in part a similar comingling in *Penn Central*,<sup>182</sup> and also the practice by the Court of "referring to deprivations of property without due process of law as 'takings.'"<sup>183</sup> Despite this history, the Court noted, means-ends analysis "reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners."<sup>184</sup> The Court then concluded that the "'substantially advances' formula is not a valid takings test, and indeed . . . has no proper place in our takings jurisprudence."<sup>185</sup>

The Court emphasized that the "substantially advances" test could be read "to demand heightened means-ends review of virtually any regulation of private property."<sup>186</sup> The Court focused on the absurdity of such scrutiny in *Lingle* itself, with a relatively mundane example of economic legislation

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dictates of the Due Process Clause. That conflict reflected tensions between conceptions of regulatory takings that essentially protect only nonfungible types of property versus property as value, central to Justice Kennedy's concurrence in *Eastern Enterprises*. See Ronald J. Krotoszynski, *Expropriatory Intent: Defining the Proper Boundaries of Substantive Due Process and the Takings Clause*, 80 N.C. L. REV. 713, 744–49 (2002) (describing Justice Kennedy's due process analysis in *Eastern Enterprises* as "appropriate[]" but noting that his proposed test for regulatory takings "fails to capture the essence of a regulatory taking—expropriatory intent"). After *Lingle*, the *Eastern Enterprises* plurality's embrace of open-ended fairness review (awkwardly applying *Penn Central* to the question of legislative retroactivity) seems conceptually untenable.

<sup>182</sup> See *supra* text accompanying notes 68–71.

<sup>183</sup> *Lingle*, 544 U.S. at 541. Indeed, *Lingle* noted, when the Court decided *Agins*, it "had yet to clarify whether 'regulatory takings' claims were properly cognizable under the Takings Clause or the Due Process Clause." *Id.* at 541–542 (citing *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 197–99 (1985)).

<sup>184</sup> *Id.* at 542. In response to *Chevron*'s attempt to reframe the *Agins* test as an *Armstrong* "fairness and justice" question, the Court reiterated that a regulation's effectiveness reveals nothing about "the actual burden imposed on property rights, or how that burden is allocated." *Id.* at 542–43.

<sup>185</sup> *Id.* at 548. Given how frequently the Court had invoked *Agins*, if only rhetorically, the *Lingle* Court felt compelled to argue that its holding "does not require us to disturb any of our prior holdings." *Id.* at 543–45. The Court dismissed most of its prior citations to the "substantially advances" test by noting that the test had never served as the basis of a finding that a compensable taking had occurred, with the possible exception of *Nollan* and *Dolan*. *Id.* at 546. The Court limited the exaction doctrine, however, to "Fifth Amendment takings challenges to adjudicative land-use exactions" involving physical access to property, and recast them as a "special application" of the unconstitutional conditions doctrine. *Id.* at 547.

Where *Lingle* leaves review of exactions more generally raises important questions, but is beyond the scope of this Article. *Lingle* arguably removes *Nollan* and *Dolan* from the canon of regulatory takings law altogether. Without a grounding in the "substantially advances" concept (and heightened scrutiny), recasting *Nollan* and *Dolan* as "special applications" of the unconstitutional conditions doctrine, as *Lingle* did, begs a rather obvious question. Any constitutional right that served as the quid for the pro quo of discretionary approval in an adjudicatory land-use case would seem to fit *Lingle*'s description of *Nollan* and *Dolan*. Where the "takings" aspect of that quid pro quo now fits is unclear, but for an excellent discussion of *Lingle*'s possible impact, see Fenster, *Exactions*, *supra* note 21, at 750–58.

<sup>186</sup> *Lingle*, 544 U.S. at 544.

becoming the subject of a bench trial and a battle of the experts.<sup>187</sup> Accordingly, the Court broadly endorsed deferential review.<sup>188</sup>

One interpretation of *Lingle*'s excision of means-ends analysis is that the Court's correction of this seeming doctrinal anomaly says nothing about the range of interests cognizable under *Penn Central*. R.S. Radford has argued, for example, that the "same economic analysis and empirical research that previously informed 'failure to substantially advance' takings claims can be relatively smoothly transitioned into the *Penn Central* framework."<sup>189</sup> Applications of the *Penn Central* test prior to *Lingle* certainly at times devolved into a species of means-ends testing, balancing the strength of the government's interest against the harm to the property owner.<sup>190</sup> More broadly, Steven Eagle recently argued that *Penn Central* as a whole is a due process, not a takings, test.<sup>191</sup>

These arguments ignore the significant effort the Court undertook in *Lingle* to clarify the nature of the doctrine and scope of the inquiry under *Penn Central*, no less than under *Agins*.<sup>192</sup> When the Court stated that "the

<sup>187</sup> *Id.* at 535.

<sup>188</sup> *Id.* at 545 ("The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here."). In this respect, *Lingle* undermines the rationale of earlier attempts to impose bright-line (and generally nondeferential) review under a view of the Takings Clause predicated on "property rights" as a category of fundamental rights. *Lingle*, for example, undercuts the invocation of means-ends analysis in *Lucas* as a means of distinguishing long-standing precedent involving significant reduction in property value. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1023–24 (1992) ("'Harmful or noxious use' analysis was, in other words, simply the progenitor of our more contemporary statements that 'land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'. . . .'" (quoting *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980))). It is not clear how to approach *Lucas* once the *Agins* means-ends framework is removed as the basis for distinguishing police-power cases like *Mugler* and *Hadacheck*. One distinct possibility is that the *Lucas* exception for restrictions that inhere in the title can be given a more expansive reading, reincorporating the broader propositions for which *Mugler* and its kin once stood. See *Lucas*, 505 U.S. at 1050–51 (Blackmun, J., dissenting). Regardless, *Lingle* calls into question the aspect of the *Lucas* analysis that relies on *Agins*.

<sup>189</sup> Radford, *supra* note 83, at 449–50.

<sup>190</sup> After *Loretto*, for example, some courts and commentators focused on "character" as a way to incorporate means-ends analysis in the *Penn Central* test. See Echeverria, *supra* note 168, at 11,246–47; Whitman, *supra* note 20, at 578–81; see also Steven J. Eagle, "Character of the Governmental Action" In *Takings Law: Past, Present, and Future* (ALI-ABA Course of Study, Apr. 22–24, 2004), WL SJ052 ALI-ABA 459, 463–65. See, e.g., *Maritrans, Inc. v. United States*, 51 Fed. Cl. 277, 282 (2001); *Pharm. Care Mgmt. Ass'n v. Rowe*, 307 F. Supp. 2d 164, 180 (D. Me. 2004); *Kelly v. Tahoe Reg'l Planning Agency*, 855 P.2d 1027, 1035 (Nev. 1993); cf. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485–93 (1987) (citing *Agins* to discuss the importance of the regulation at issue).

<sup>191</sup> See Steven J. Eagle, *Property Tests, Due Process Tests, and Regulatory Takings Jurisprudence*, *BYU L. REV.* 899 (2007). Eagle also asserts that the Court's purported disentangling in *Lingle* is incoherent, given what he views as a doctrine "steeped in due process." *Id.* at 901.

<sup>192</sup> See Whitman, *supra* note 20, at 582 (arguing that *Lingle* forecloses balancing governmental interests in applying *Penn Central*); cf. Byrne, *supra* note 10, at 1 ("Lingle cut off any doctrinal path for heightened judicial scrutiny of the validity of land use regulations in defense of property rights."). Moreover, this argument ignores the extent to which the Court identified the *Agins* test with the infusion

*Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests,"<sup>193</sup> it was hardly as a prelude to incorporating into *Penn Central* the very inquiry into a "regulation's underlying validity"<sup>194</sup> that the Court was repudiating.<sup>195</sup> *Lingle* thus clearly separated regulatory takings jurisprudence from its long embrace with substantive due process.<sup>196</sup>

### C. The Emergence of Equality Norms

In excising means-ends analysis, the *Lingle* Court made clear that the two questions that will now guide regulatory takings law are the "magnitude or character of the burden a particular regulation imposes on upon pri-

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of substantive due process into the body of regulatory takings law. The Court very self-consciously undertook the conceptual decoupling not only of the verbal formulation articulated in *Agins*, but also of the underlying origins of that test in substantive due process. Having done so, it is hard to imagine the Court tolerating a revival of the very same inquiry under the guise of *Penn Central*'s open-ended analysis.

John Echeverria has argued that after *Lingle*, the relative importance of a governmental purpose actually belongs at the center of the *Penn Central* test, albeit in terms of the generality of a regulation. See Echeverria, *supra* note 28, at 204–07. Echeverria notes that *Lingle* precludes reincorporating into *Penn Central* the very due process norms that *Lingle* rejected, but argues that generality and average reciprocity of advantage provide a means to weigh the benefits of governmental action against the harm to a claimant. *Id.*

<sup>193</sup> *Lingle*, 544 U.S. at 540.

<sup>194</sup> *Id.* at 543.

<sup>195</sup> See Barros, *supra* note 10, at 355 (discussing *Lingle*'s impact on *Penn Central*); Fenster, *supra* note 11, at 24. The Court, at times, has invoked the *Penn Central* "character" factor as a jurisprudential hook to strike down regulations that it viewed as interfering with property rights in some extreme or "extraordinary" fashion. See, e.g., *Hodel v. Irving*, 481 U.S. 704, 716 (1987). This approach may survive *Lingle* if viewed not as a means-ends fit test, but rather as a guard against particularly bizarre deprivations (regardless of the justification) of sufficiently specified property rights (such as the right of inheritance at issue in *Hodel*).

<sup>196</sup> See, e.g., *Gove v. Zoning Bd. of Appeals of Chatham*, 831 N.E.2d 865, 870–71 (Mass. 2005) (recognizing that *Lingle* eliminates inquiries under the Takings Clause into the relationship between a regulation and legitimate state interests, relegating such questions to traditional, deferential due process review).

Although *Lingle* excised means-ends analysis, it is not technically accurate to say that *Lingle* entirely separated the law of takings from due process. Cf. Karkkainen, *supra* note 50, at 878–82 (discussing the roots of the incorporation of the Takings Clause into the Fourteenth Amendment's Due Process Clause). The fact that the bulk of regulatory takings challenges involve state and local governments means that most jurisprudence in the area will continue to be a species of Fourteenth Amendment Due Process. As with most areas of incorporation, however, the Court has evinced no nominal distinction between the substance of Fifth Amendment Takings Clause law as applied to the federal government and Fourteenth Amendment takings law as applied to state and local government. *But cf.* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 251–56 (2004) (noting that the Court has never struck down a state or local law under *Penn Central*, but it has struck down, on more than one occasion, federal legislation under the same test). So, while *Lingle* clearly excised a means-ends test derived from due process precedents, the Fourteenth Amendment's Due Process Clause will continue to be the primary vehicle for regulatory takings.

vate property rights” and how the “regulatory burden is distributed among property owners.”<sup>197</sup> *Lingle* thus makes clear that regulatory takings claims will now center, in the terms of this Article, on functional equivalence and equality norms. The muting of the former theme, however, gives much greater room for the latter one—equality—to come to the fore.

As a doctrinal matter, then, most regulations will be evaluated under *Penn Central*, and *Penn Central* will increasingly turn on a comparative fairness inquiry into the distribution of burdens, the generality of the regulation, or the average reciprocity of advantage. The *Penn Central* analysis is steadily narrowing. Accordingly, “economic harm to the claimant,” even serious “interference with distinct investment-backed expectations”<sup>198</sup> short of an injury that gives rise to per se liability, and nonpermanent physical occupancy will increasingly be evaluated by resort to equality norms.<sup>199</sup>

This logical structure has already begun to inform the approaches of some lower courts to recent regulatory takings claims. In *Cienega Gardens v. United States*,<sup>200</sup> for example, the Court of Federal Claims recognized that after *Lingle*, “the magnitude, character, and distribution of the burdens attendant” to regulation play a critical role in evaluating claims under the Takings Clause.<sup>201</sup> The *Cienega Gardens* court found a taking in the government’s restriction of certain rights under affordable housing programs, emphasizing that the statute being challenged imposed on participants in these programs burdens that were, in the court’s view, disproportionate.<sup>202</sup>

In *Brace v. United States*,<sup>203</sup> the Court of Federal Claims rejected a challenge under the Takings Clause to an EPA enforcement action related

<sup>197</sup> *Lingle*, 544 U.S. at 542 (emphasis omitted); see Baron, *supra* note 11, at 638–44.

<sup>198</sup> *Lingle*, 544 U.S. at 538–39.

<sup>199</sup> See *supra* text accompanying notes 163–69. One response to this analysis is that after *Lingle*, if a claim falls outside of the “per se” categories or does not involve an exaction, the claim will simply fail. In other words, as a practical matter, *Penn Central* is a dead letter. Cf. Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759, 823–24 (2006) (stating that recent decisions, including *Lingle*, reinforce the pattern that if there is no per se taking then *Penn Central* analysis is unlikely to find a taking); *The Supreme Court, 2004 Term—Leading Cases: Public Use—Economic Development*, 119 HARV. L. REV. 287, 293 n.59 (2005) (noting that in practice, applications of the *Penn Central* test generally result in upholding the challenged regulation).

Claims under *Penn Central*, however, continue to succeed. See, e.g., *Rose Acre Farms, Inc. v. United States*, 75 Fed. Cl. 527, 532–37 (2007); *Omaha Pub. Power Dist. v. United States*, 69 Fed. Cl. 237, 241–243 (2005); *Pulte Land Co. v. Alpine Township*, Nos. 259759, 261199, 2006 WL 2613450, at \*3–6 (Mich. Ct. App. Sept. 12, 2006). More fundamentally, the Court has given no indication that it is ready to abandon *Penn Central* and every indication to the contrary: that it views the *Penn Central* framework as a meaningful basis on which to challenge the regulation of property.

<sup>200</sup> 67 Fed. Cl. 434 (2005).

<sup>201</sup> *Id.* at 466.

<sup>202</sup> See *id.* at 467 (“Congress’s decision to enact the preservation statutes targeting specific property owners of low-income housing who had rights to prepay and exit the program, and not all owners of rental properties or all taxpayers, raises a concern under the Takings Clause.”).

<sup>203</sup> 72 Fed. Cl. 337 (2006).

to an attempt to drain and fill wetlands.<sup>204</sup> Important to the court's conclusion was its view of the regulations at issue as "generally applicable to all similarly situated owners and in no way . . . directed at plaintiffs."<sup>205</sup> Similarly, the North Dakota Supreme Court in *Wild Rice River Estates, Inc. v. City of Fargo*<sup>206</sup> rejected a takings claim in part because of the trial court's findings that the claimant's development was not singled out by a moratorium, that other developments had been affected as well, and that no payment had been made to other developers.<sup>207</sup>

*Cienega Gardens, Brace, and Wild Rice River* involved robust equality inquiries, and these cases are not alone.<sup>208</sup> Thus, as a descriptive matter, the equality dimension of regulatory takings law is already surfacing. It is impossible to predict with any accuracy the full development of the law in an area as protean as regulatory takings, but a nascent trend is evident. Normatively, however, the trend raises significant theoretical and doctrinal problems. The same tensions that *Lingle* resolved with respect to substantive due process will inevitably arise with equal protection.

### III. THE PROBLEM OF EQUALITY

The emerging equality dimension in regulatory takings law is almost certain to garner broad support, as evidenced by both the Court's repeated invocation of the *Armstrong* test as the fundamental purpose of the regulatory takings regime<sup>209</sup> and the near-universal scholarly endorsement of this approach.<sup>210</sup> This Part argues that this embrace of the equality dimension in regulatory takings jurisprudence is fundamentally mistaken.

Privileging norms of equality in regulatory takings raises three closely related problems. First, it engrafts political process rationales for heightened scrutiny onto groups defined solely by the differential burden of a regulation. Equally troubling is the resulting inverted political economy of regulatory takings claims: the greatest judicial protection is provided to

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<sup>204</sup> *Id.* at 339, 358.

<sup>205</sup> *Id.* at 356.

<sup>206</sup> 705 N.W.2d 850 (N.D. 2005).

<sup>207</sup> *Id.* at 858.

<sup>208</sup> See, e.g., *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 632–33 (Minn. 2007) (a state takings case applying the *Penn Central* framework, citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538–39 (2005), for the proposition that "the primary focus of the inquiry is on 'the severity of the burden that government imposes upon private property rights'" and focusing the "character of the governmental action" prong on the distribution of burdens question); *CCA Assocs. v. United States*, 75 Fed. Cl. 170, 188–89 (2007) (incorporating *Armstrong* into the "character of the governmental action" inquiry under *Penn Central*); *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 462 (Mass. 2006) (focusing on singling out as a factor in the *Penn Central* analysis).

<sup>209</sup> See, e.g., *Lingle*, 544 U.S. at 536–37.

<sup>210</sup> As noted, scholars have provided justification for the primacy of equality norms from a political process perspective and out of concerns about distributional fairness. See generally *supra* Part I.C. For exceptions, see *infra* Part III.C.

those most able to protect themselves through the political system. Finally, from a doctrinal perspective, an overly robust equality doctrine housed in the Takings Clause is inherently indeterminate, with no content independent of what rationality review under the Equal Protection Clause would provide. Carving out a subset of ordinary economic and social regulation for equality-based heightened scrutiny under the Takings Clause thus threatens to warp not only the fabric of takings but also the fabric of equal protection.

This Part reviews these claims and then argues for situating the concerns addressed by the equality dimension of regulatory takings in the equal protection jurisprudence as clearly as the *Lingle* Court reconciled regulatory takings and substantive due process.

#### A. *Against Distributional Conceptual Severance*

A body of law that has traditionally focused on the *impact* of a regulation on a property owner may involve some comparative analysis, but it does not inherently reveal anything about the political process that led to the disparity.<sup>211</sup> Notwithstanding, one central theoretical justification for judicial scrutiny of the differential burdens of regulation is a public choice view of regulatory takings law. As discussed above, this justification focuses on structural failures in the political process to identify classes of property holders for heightened judicial protection under regulatory takings law.<sup>212</sup> These theories parallel Justice Stone's process-failure rationale for protecting discrete and insular minorities in *United States v. Carolene Products*'s footnote four<sup>213</sup>—a structure that still stands at the center of equal protection doctrine, despite much judicial and scholarly second-guessing.<sup>214</sup>

One difficulty with transferring this political process frame from equal protection to regulatory takings, however, is that such arguments transform uneven burden alone into the relevant trigger for judicial protection. This

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<sup>211</sup> See Fenster, *supra* note 11, at 24.

<sup>212</sup> See *supra* text accompanying notes 142–53.

<sup>213</sup> See 304 U.S. 144, 152 n.4 (1938).

<sup>214</sup> See, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (arguing for a reappraisal of *Carolene Products* in light of modern pluralist politics); Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685 (1991) (critiquing footnote four's protection of discrete and insular minorities as applied to racial distinctions); see also Felix Gilman, *The Famous Footnote Four: A History of the Carolene Products Footnote*, 46 S. TEX. L. REV. 163, 179 (2004) (arguing that *Carolene Products*'s footnote four was animated originally not by political process concerns but rather by a substantive preference for personal freedoms over economic rights). Equal protection doctrine nominally continues to draw categories of claims—some worthy of heightened scrutiny and some subject as a default matter to deferential review. That such nominal categorization is unstable in many instances does not change the endurance of the basic structure.

method of identifying a group singled out by regulation is, to coin a phrase, distributional conceptual severance.<sup>215</sup> Margaret Radin has noted that:

delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken . . . hypothetically or conceptually “severs” from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.<sup>216</sup>

Defining an interest group based on the existence of disparate burden employs the same conceptual strategy in the arena of political process. In other words, identifying a group of property owners for the purpose of asserting political process failure solely based upon differential effects on their property interests is plain circularity: it carves out the existence of regulation itself as dispositive, slicing the conceptual polity by the very regulation that is being challenged.<sup>217</sup>

To apply this rationale to takings law requires isolating structural conditions that inhere in a class of property owners that suggest that the political failure a member of the group is challenging at a given level of government cannot be corrected by the ordinary give-and-take of politics over time.<sup>218</sup> Discerning such structural conditions is a task courts are institutionally ill-suited to undertake. The search for defensible indicia of process failure in this context risks devolving into broad generalizations (logrolling can occur more easily in diverse cities than in homogenous suburbs, for example). For every instance of an identifiable and burdened group—Fischel’s inelastic suburbanites, say, or Farber’s unusually politically vulnerable owners—one can point to similarly burdened economic actors faced with similar political processes who are denied heightened scrutiny as a matter of course. The set of tools available to the judiciary is simply not capable of making the fine-grained evaluations of political process necessary to give life to this approach to equality under the Takings Clause.

Moreover, unlike some categorizations that traditionally trigger heightened scrutiny under the Equal Protection Clause, such as distinctions based on race and gender, the class of “differentially burdened property holders”

<sup>215</sup> “Conceptual severance” in takings law, as noted, *see supra* notes 157–60; *see also supra* note 42, ordinarily refers to the problem, which can be traced to *Mahon*, that assessing a regulation’s impact on property rights requires a delineation of the baseline against which such impact is to be evaluated, asking what relevant “property” interests are impacted.

<sup>216</sup> *See Radin, Liberal Conception, supra* note 54, at 1676.

<sup>217</sup> To continue the analogy to the denominator problem, one has to begin with an external referent for the structure of the political process to which a subset of participants is uniquely disadvantaged.

<sup>218</sup> *See Rose, supra* note 39, at 583–84 (“The typical logrolling legislature will pass legislation benefiting some interests now and other interests later. . . . [O]ver the long run every interest in this political market will get a slice of the pie. . . . Of course, the logrolling process may not work because . . . some particular interest may be permanently frozen out of the chance to trade.”).

is entirely malleable.<sup>219</sup> An important conceptual grounding for nondeferential judicial review on political process grounds is that certain characteristics that define membership in a group are “immutable.”<sup>220</sup> Although the proposition is assailable,<sup>221</sup> immutability and the inability to choose relevant characteristics for legislative line-drawing are generally thought to be important aspects of political vulnerability.<sup>222</sup> In the equality dimension of regulatory takings law, not only are the boundaries of the relevant classifications that give rise to group membership mutable, but such boundaries are set by the existence of the regulation itself. Owners can thus, by dint of challenging a differential burden, create a characteristic on which to lay a claim. This is a difficult grounding for judicial intervention.

For the bulk of claims that might fall under a takings-equality analysis, the Equal Protection Clause would mandate review that presumes a functioning political process, generally policing against *irrational* classifications.<sup>223</sup> Only where governmental action implicates invidious discrimination or creates classifications that burden fundamental rights (but not, to be certain, some abstract right to “property”) is that presumption overcome.<sup>224</sup> Courts’ reluctance to peer into the political process when a law’s only purported vice is imperfection in line-drawing is critical in preserving the appropriate judicial role.<sup>225</sup> The Court has refused to draw arti-

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<sup>219</sup> Race, gender, and other examples of characteristics giving rise to heightened scrutiny under the Equal Protection Clause are malleable in their own ways as well, but not nearly at the same basic definitional level of group identity as groups identified by differential regulatory burdens.

<sup>220</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>221</sup> See, e.g., Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 508–09 (1994).

<sup>222</sup> See, e.g., *Frontiero*, 411 U.S. at 686 (discussing the relationship between the political marginalization of women in the political arena and the need for more judicial protection).

<sup>223</sup> In one example of the leap to forms of nondeferential review, David Westbrook has argued from an administrative law perspective that the “echoes” of equal protection rhetoric in takings jurisprudence may require compensation when the enforcement of a regulation discriminates “among parties who have equally worthy claims.” Westbrook, *supra* note 26, at 768; see also *id.* at 764–68 (discussing equal protection concerns in takings jurisprudence more generally).

<sup>224</sup> Thus, in conventional equal protection jurisprudence, only two categories are reserved for special judicial scrutiny: where legislative line-drawing infringes on the exercise of fundamental rights or where that line-drawing classifies based upon illegitimate criteria. See 3 RONALD D. ROTUNDA & JOHN E. NOWAK, *TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE* 216–19 (3d ed. 1999). To ground heightened judicial review for differential burdens on the holding of property interests would be to say that such differential burdens involve a fundamental right (presumably the fact of ownership itself) or that line-drawing based on property is inherently illegitimate.

<sup>225</sup> As Dean Treanor has pointed out, most takings process theorists “believe that courts should defer to the decisions made by the majoritarian political process about regulation and compensation, except in those cases in which reason exists to suspect process failure.” Treanor, *supra* note 108, at 1157; see also Treanor, *supra* note 18, at 877 (noting that applying an *Armstrong*-based view “puts the Court in the position that the majoritarian decisionmaker would occupy if it were not for process failure”). If that is the case, then the question becomes whether the political process failures that might attach to the regulation of property under the Takings Clause are somehow conceptually different than the types of

ficial lines to evaluate the impact of regulation on the physical and temporal aspects of property.<sup>226</sup> It makes just as little sense for the Court to create categories for heightened review based on an artificial line drawn by the comparative effect of governmental action.

*B. The Inverted Political Economy of Regulatory Takings*

Privileging the equality dimension of regulatory takings law also risks inverting the political economy of the doctrine. Prevailing political process theories for nondeferential review under the Equal Protection Clause all share one common theme: protecting groups uniquely or particularly disenfranchised by the political process.<sup>227</sup> A robust equality-based regulatory takings doctrine, however, protects very different sectors of society.

By definition, focusing on the distribution of burdens to property owners tends to elevate the claims of those with relatively greater assets to protect.<sup>228</sup> Courts can focus on the incentives facing concentrated interest groups vying against diffused interests,<sup>229</sup> or on the ability of certain groups to engage in long-term logrolling,<sup>230</sup> as ways to distinguish classes of property holders treated more or less fairly in the political process. Inevitably, however, a regulatory takings doctrine that privileges those with more resources will tend to give greater judicial solicitude to those who have the means to participate in the political process. This is not to assert across the board that wealth or assets equal political power, a proposition that is certainly not going to be true in all instances.<sup>231</sup> Notwithstanding, it is hard to deny a connection between economic resources and means other than judi-

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political process failures that the superstructure of equal protection law already guards against. The answer is surely no.

<sup>226</sup> See *supra* Part II.A (discussing the Court's rejection of conceptual severance).

<sup>227</sup> See Treanor, *supra* note 18, at 873–77 (discussing the intersection of process theory and protection for discrete and insular minorities under *Carolene Products*).

<sup>228</sup> “Burdens” here refers to the specific economic impact of a regulation on an individual's assets. In this sense, the more assets an individual has, the more likely it is that an otherwise neutral restriction on property burdens that individual. There are alternative ways, however, to consider the burden of restrictions on property. An individual with fewer total assets may face a relatively larger burden from a nominally uniform regulation as a question of total resources. A general regulation may also differentially impact an individual's subjective valuation of and connection to the property. And differential reliance may translate the effects of an otherwise general regulation into a unique harm for a given individual. These alternative conceptions of regulatory burden are important, but the kind of comparative analysis inherent in questions of regulatory generality, reciprocity of advantage, and general fairness will much more likely focus on aspects of property holding that are more easily cognizable by courts—those interests that are, essentially, fairly concrete or monetizable.

<sup>229</sup> See *supra* text accompanying note 143.

<sup>230</sup> See *supra* text accompanying note 142.

<sup>231</sup> Although it is an easier argument to see that those with greater assets will almost certainly have greater access to the *judicial* process.

cial intervention to compete fairly in the political process, and any process-based theory of equality must reflect that connection.<sup>232</sup>

No rigorous study of the regulatory takings claimants has been undertaken, although what analysis has been done tends to underscore the comparative advantages of typical plaintiffs in such cases.<sup>233</sup> Even a brief review of leading regulatory takings cases, with appropriate caution against making general empirical claims, suggests a pattern.<sup>234</sup>

Take *Lingle* as a case in point. The Hawaii rent control statute struck down by the lower courts in that case had been challenged by Chevron U.S.A. Inc., an entity that could hardly be said to lack political power at the local, state, or national level.<sup>235</sup> Similarly, the titular Tahoe-Sierra Preservation Council, Inc. was an association representing 2000 landowners seeking to protect their right to build permanent, retirement, or vacation homes in the ecologically sensitive and highly sought-after Lake Tahoe region.<sup>236</sup> Anthony Palazzolo of *Palazzolo* was an investor in a company that had been seeking to develop a subdivision of eighty lots.<sup>237</sup> David Lucas of *Lucas* was likewise extensively involved in developing South Carolina's Isle of Palms, before his building plans ran afoul of the state's Beachfront Management Act.<sup>238</sup> And even the Penn Central Transportation Company, which was experiencing significant financial difficulties at the time of *Penn Central*, nonetheless had significant assets in midtown Manhattan and

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<sup>232</sup> Relative wealth should not militate against the ability to invoke constitutional rights, of course, but potential distributional consequences of process-based theories of judicial intervention under the Takings Clause bear noting nonetheless. Antimajoritarian justifications for judicial intervention have certainly long been connected to the possibility that property holders can constitute a minority unable to compete in the political process in some instances. As noted, however, such justifications must account for the long-term ability of such interest holders to respond to short-term process failures.

<sup>233</sup> See, e.g., F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. L. & POL'Y F. 121, 141 (2003) (analyzing cases citing *Penn Central* and identifying the significant assets often involved); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1, 41–44 (1995) (describing typical takings claimants); William J. Patton, Comment, *Affirmative Relief for Temporary Regulatory Takings*, 48 U. PITT. L. REV. 1215, 1216–17 (1987) (same).

<sup>234</sup> To reiterate, this is not to assert a statistically significant claim. The data and bias problems inherent in any sample represented by reported decisions would render most attempts at such analysis near impossible. And focusing on Supreme Court cases—generally litigated by those with the most at stake—yields a somewhat skewed perspective. The point of this discussion, however, is primarily that a general pattern from those suits most vigorously pursued—those that yield leading decisions—is clear.

<sup>235</sup> Although this is not necessarily dispositive of political capital, Chevron's financial capital places it among the world's top companies. In 2006, for example, Chevron (Chevron U.S.A. Inc.'s parent) had sales and other operating revenues of \$204.9 billion, making it the second-largest integrated energy company in the United States based on market capitalization. See Chevron Fact Sheet, Mar. 2007, [http://www.chevron.com/news/media/docs/chevron\\_fact\\_sheet.pdf](http://www.chevron.com/news/media/docs/chevron_fact_sheet.pdf).

<sup>236</sup> See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 312–13 (2002).

<sup>237</sup> See *Palazzolo v. Rhode Island*, 533 U.S. 606, 613 (2001).

<sup>238</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008 (1992).

throughout the northeastern states.<sup>239</sup> Again, this is not to argue that regulatory takings claims are unavailable to or have not been availed by those with relatively little property to protect,<sup>240</sup> but given that the baseline for a viable regulatory takings claim generally requires significant property to protect, such cases are more likely to be outliers.<sup>241</sup>

The political economy of a robust equality dimension in regulatory takings law stands in sharp contrast to the patterns often seen in the direct exercise of eminent domain. It is important not to overshadow the many valuable uses of eminent domain with the history of the abuse of the power.<sup>242</sup> Such abuses, however, ring tragically down through the history of eminent domain, most notably during the urban renewal waves of the 1950s and 1960s.<sup>243</sup> The same cannot be said for the invocation of the Takings Clause to challenge ordinary economic and social regulation—laws that paradigmatically (if admittedly unevenly at times) “adjust[] the benefits and burdens of economic life to promote the common good.”<sup>244</sup>

In short, not only does distributional conceptual severance undermine any political process justification for a robust equality-based takings doc-

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<sup>239</sup> The story of the Penn Central Transportation Company, from *Penn Central*, is one of an economically and at one time politically powerful claimant, although it is a complex tale. The company, which upon its formation, from the merger of the Pennsylvania Railroad and the New York Central Railroad in 1962, had inherited 40,000 miles of track in sixteen states and the District of Columbia and Canada, went through a process of phenomenal decline. In 1970, the company collapsed, leading to the largest bankruptcy in U.S. history and the eventual federal organization of the Consolidated Railroad Company (Conrail) in 1976 to take over Penn Central and portions of six other northeastern railroad companies. See *Penn Central Transportation Company (New York Central, Pennsylvania, and Long Island Railroads): Records, 1796–1986*, at 7 (comp. Richard Salvato, New York Public Library, Humanities and Social Sciences Library, Manuscripts and Archives Division, 2006), available at <http://www.nypl.org/research/chss/spe/rbk/faids/penncentral.pdf>.

<sup>240</sup> See, e.g., *Bowen v. Gilliard*, 483 U.S. 587 (1987) (suit on behalf of children of low-income mothers).

<sup>241</sup> It could also be argued that *any* strong property protection—not just one grounded in comparative burden—inherently offers greater protection to those with greater assets to protect. That may be true, but a comparative inquiry tends to give relatively greater weight to the differential impact that an otherwise general regulation has on those with more property to protect.

<sup>242</sup> See Byrne, *supra* note 14, at 132 (discussing the importance of eminent domain to local governments). For an overview of the value of eminent domain in the contemporary redevelopment context, see Marc B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court: Kelo v. City of New London*, in *THE SUPREME COURT AND TAKINGS: FOUR ESSAYS*, *supra* note 11, at 41.

<sup>243</sup> Postwar urban renewal—with eminent domain as a central tool—often targeted disadvantaged communities under the banner of fighting blight. See generally Pritchett, *supra* note 14. In *Berman v. Parker*, 348 U.S. 26, 35–36 (1954), the Court upheld the use of eminent domain in just such a project against a public use challenge. Urban renewal at the time often proceeded with little regard for the distributional consequences of the upheavals caused by such exercises of eminent domain. Concerns about the unequal application of the power of eminent domain remain active. See David A. Dana, *The Law and Expressive Meaning of Condemning the Poor after Kelo*, 101 NW. U. L. REV. 365 (2006), 101 NW. U. L. REV. COLLOQUY 5 (2006), <http://www.law.northwestern.edu/lawreview/colloquy/2006/2/>.

<sup>244</sup> *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

trine, but the resulting political economy privileges those classes least in need of extraordinary judicial protection.

C. *Fairness and the Indeterminacy of Equality-Based Takings*

A final, and equally fundamental, problem of equality in regulatory takings is that the emerging approach threatens to inject significant incoherence into the jurisprudence.<sup>245</sup> Despite the equality dimension's common-sense appeal to basic fairness, any framework for deciding when an uneven burden transgresses the border between "fair" and "unfair" will inevitably digress into a question of the rationality of the line-drawing exercise, an inquiry ill-suited for the Takings Clause.

To begin, the Court's precedents yield precious little insight through which to infer the content of this new jurisprudence. Although equality norms have been recurring background tropes in the doctrine,<sup>246</sup> the Court has never treated the *Armstrong* principle, questions of the generality of a regulation, or average reciprocity of advantage as dispositive or even as a sufficiently significant focus of analysis to yield discernable principles.<sup>247</sup> The text of the Fifth Amendment likewise provides no guidance to give form to an equality-based conception of regulatory takings law.<sup>248</sup>

Similarly, theoretical justifications for equality approaches to regulatory takings do not yield a workable focus. Formal equality, for example, seems promising at first. It would require only that "like" property owners be treated alike<sup>249</sup>—what would seem to be the bare minimum of protection afforded by any conception of equality under law. Formal equality as a focus for challenges to restrictions on property, however, begs a number of basic questions. Determining which property holders should be the basis for comparison, for example, requires the same kind of line-drawing exercise as political process justifications for intrusive judicial review, and is likely to prove as elusive. Equally challenging is finding a neutral metric to

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<sup>245</sup> Cf. Baron, *supra* note 11, at 642–43 (noting that *Lingle's* reformulation of regulatory takings doctrine to focus on the distribution of burdens leaves such distributional questions indeterminate); Rubinfeld, *supra* note 19, at 1136–39 (discussing the incoherence of equality norms under the Compensation Clause); Underkuffler, *supra* note 28, at 747–48 (discussing the jurisprudential indeterminacy of invocations—often based on *Armstrong*—of "fairness" and "justice" in takings cases).

<sup>246</sup> See *supra* Part I.C.1.

<sup>247</sup> Perhaps the best that can be said is that Justices have invoked *Armstrong* and its variants in order to validate some ill-defined sense of general fairness. Cf. Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Underlying Moral Justification*, 78 CAL. L. REV. 53, 85–87, 161–62 (1990) (discussing the general role of moral intuitions in the law of takings).

<sup>248</sup> See Fee, *supra* note 13, at 1042.

<sup>249</sup> See Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1168 (1983) (arguing that the formal principle of equality holds only that "equals should be treated equally"). John Fee's articulation of formal and substantive equality in the takings clause distinguishes more narrowly between generality (formal equality) and equality of outcome (substantive equality). Fee, *supra* note 13, at 1050.

calculate an acceptable distribution of burdens.<sup>250</sup> Any such distribution will not be fair in terms of strict mathematical reciprocity, in the short run or the long run, and all too often the legal system evaluates regulatory harm with little or no consideration of regulatory benefit.<sup>251</sup> Formal equality thus risks becoming a tool to police arbitrary lines—a regulation burdening one person is presumptively invalid, but, under the right circumstances, perhaps not.<sup>252</sup>

The instinct to focus on equal treatment is certainly important. Simply because judicially manageable standards for formal equality are challenging to divine does not mean that there should be no avenue to seek review of the distribution of regulatory burdens. In the review of ordinary social and economic regulation, however, finding the line between appropriate and inappropriate burden distributions is a task that should be entrusted to the judiciary only with great caution. Once the question becomes how wide a gap between benefit and burden the judiciary will tolerate or how “general” a law must be to pass constitutional muster, the only justifiable metric is rationality, and there is no inherent reason to prefer judicial to regulatory or legislative institutions in drawing that line.<sup>253</sup>

Beyond formal equality, a freestanding equality inquiry in regulatory takings law might be guided by some vision of substantive equality. Justice as equality is a mainstay of the philosophical discourse of property more generally.<sup>254</sup> Perhaps ideals of strict equality or conceptions of equality of

<sup>250</sup> The question of how to measure costs and benefits accurately or sufficiently is a task that has long eluded courts in the context of regulatory takings.

<sup>251</sup> A crucial conceptual problem in considering reciprocity and the distribution of burdens is how (and whether) to account for the *benefits* of public action in the first place. Although the concept of implicit compensation for a given claimant is often incorporated into discussions of the evaluation of the impact of regulation, *see supra* notes 118–26, accounting for diffused benefits seems more often than not simply to fall out of the equation. *See WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION* 17 (Donald G. Hagman & Dean J. Misczynski eds., 1978). For a discussion of governmental interventions that increase property value, *see* Abraham Bell & Gideon Parchomovsky, *Givings*, 111 *YALE L.J.* 547 (2001). *See also* Eric Kades, *Windfalls*, 108 *YALE L.J.* 1489 (1999) (discussing the general problem of legal responses to value not attributable to “work, planning, or other productive activities”). The point here is not that the benefits of regulation immunize governmental action from judicial review based on the burdens of such regulation. Rather, the point is that “givings” (or windfalls, in certain circumstances) inexorably complicate any attempt to calculate strict reciprocity. *See* Dagan, *supra* note 13, at 771–73 (discussing long-term reciprocity and social responsibility).

<sup>252</sup> *Cf.* *Arctic King Fisheries, Inc. v. United States*, 59 Fed. Cl. 360, 372–73 (2004) (in rejecting a Takings Clause claim based on “singling out” in the failure to confer a benefit, the court noted the perils of using the Takings Clause as a means to evaluate the rationality of legislative line-drawing).

<sup>253</sup> *Cf.* Peter Westen, *The Empty Idea of Equality*, 95 *HARV. L. REV.* 537, 580–81 (1982) (discussing the fallacy of the independent norm in discussions of equality in law). It is not that equality is inherently indeterminate, but divining a line between permissible and impermissible burdens in reviewing legal rules that do not involve invidious classifications or fundamental rights is an exercise of judgment for which courts have no clear metric other than rationality.

<sup>254</sup> For an excellent canvass and synthesis of approaches to equality in the philosophy of property, *see* STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 227–53 (1990).

opportunity,<sup>255</sup> for example, might conceivably be pushed to provide some guidance. Or a just-share theory or libertarian perspective might provide a workable framework, although one that might invalidate most restrictions on property rights that did not carry explicit or implicit offsetting benefit. And, as noted, some theorists have argued for fairness in regulatory takings in progressive distributional terms.<sup>256</sup>

Whatever the substantive frame that courts would use to divine the content of the equality dimension, however, the exercise would essentially represent the privileging of property protection through regulatory takings. As Kent Greenawalt has noted, “substantive principles of equality”<sup>257</sup> turn on conceptions of the fundamentality of the comparative interests involved. Substantive equality thus yields propositions such as “racial differences should be considered irrelevant.”<sup>258</sup> Under this framework, a robust equality-based regulatory takings doctrine makes the holding of property the *substantive* ground for equality. A substantive equality principle that privileges property holding as the deciding criterion thus elevates property as such to the level of the most central aspects of free speech, liberty, human dignity, and other fundamental rights.<sup>259</sup> After *Lingle*, however, it is hard to argue that the Court views some abstract right to “property” as fundamental in the way that it views a variety of other individual rights.<sup>260</sup>

There is an additional concern raised by theories that posit the Takings Clause as a way to ensure a commitment to distributional fairness. Applying the Takings Clause to restrict the scope of governmental action risks standing as a barrier to such egalitarianism. Indeed, the more rigorous a comparative inquiry into distributional burdens regulatory takings law embodies, the more the law begins to serve as an explicit check on policies that can be perceived as redistributive.<sup>261</sup> In some sense, all public intervention into private ordering is redistributive, intentionally or not. One need not accept the more cynical implications of a view of politics as an arena for rent seeking to acknowledge that almost any policy is going to yield some winners and some losers. A zoning code that for valid reasons separates industrial from residential uses can always leave some owners with restric-

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<sup>255</sup> See *id.* at 227–41.

<sup>256</sup> See *supra* text accompanying notes 134–37.

<sup>257</sup> Greenawalt, *supra* note 249, at 1168.

<sup>258</sup> *Id.*

<sup>259</sup> Cf. C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986) (arguing for a distinction between constitutional protection for economic and property rights versus activities such as speech, procreation, and association, which receive stronger constitutional protection). The Court’s approach to such fundamental rights is not always consistent, uniform, or otherwise jurisprudentially coherent. Heightened scrutiny of regulation under the Takings Clause based on equality norms nonetheless has the potential to elevate the holding of property as such to the category of claims that the Court has found to merit—in a variety of ways—close judicial supervision.

<sup>260</sup> See *supra* notes 186–88 and accompanying text.

<sup>261</sup> Cf. Rose, *supra* note 39, at 581–82.

tions on their property that may seem to benefit one part of a community at the expense of another (and each part may feel the same about the other). This problem is even more acute where policies have an explicitly redistributive tinge, attempting to alleviate inequality. As Hanoch Dagan's reading of the distributional premises of the libertarian perspective suggests,<sup>262</sup> the more that the law of takings reinforces the view that the only legitimate regulation is one that provides a return equal to what is lost, the harder it becomes for society to take inequality into account.<sup>263</sup>

Moreover, the anti-egalitarianism of privileging equality in regulatory takings law has a potentially troubling cultural resonance. Returning to Frank Michelman's link between perceptions of majority misrule and demoralization,<sup>264</sup> strengthening a role for regulatory takings jurisprudence as a bulwark of reciprocity between the benefits and burdens of economic life risks reinforcing the disaffection that comes from a vision of property predicated on such accounting.<sup>265</sup> The more a legal system builds the expectation that property rules exist to reify existing entitlements, the more that expectation may become the baseline against which the validity of collective action is judged, and the harder it might become for the political system to respond to emerging exigencies.<sup>266</sup> This kind of negative feedback loop is hardly what Michelman seems to have contemplated when he identified the psychology of demoralization from the risk of public intervention in property rights.<sup>267</sup> It is a possible consequence nonetheless.

Ultimately, there is clear tension on a basic conceptual level between the kind of comparative analysis inherent in the equality dimension of regulatory takings law—whether formal or substantive—and the concerns at the core of foundational understandings of the compensation requirement under

<sup>262</sup> See *supra* text accompanying notes 140–41.

<sup>263</sup> Hanoch Dagan's subtle attempt to read progressivity into the Takings Clause, see *supra* text accompanying notes 135–37, is commendable and creative. In application, however, the grounds on which he would read a commitment to community and equality may tend toward the opposite results. A vigorous insistence on long-term reciprocity, like process-oriented approaches, requires Herculean assumptions about the nature of the interests involved and the capacity of any institution—judicial or legislative—to calibrate such lines.

<sup>264</sup> See *supra* notes 127–31 and accompanying text.

<sup>265</sup> Cf. Sax, *supra* note 126 (discussing the importance to modern property rights activism of perceptions of comparative unfairness between owners of developed and undeveloped property).

<sup>266</sup> Thus, the more the legal system bases its protection of property on a certain set of expectations—on avoiding the “special kind of suffering” that arises from a “feeling” of being the “victim[] of unprincipled exploitation,” Michelman, *supra* note 13, at 1230—the more the legal system signals to holders of property that existing entitlements are ineluctable. That such expectations are protected by compensation (that is, by liability rule protection rather than property rule protection) only alters the psychological calculus to the extent that people view their property as fungible. Put another way, if the question devolves into the cost of the perception of distributional fairness, then differential predilections become critical. To the extent that those with more property to protect feel that otherwise neutral regulations unfairly burden them, accounting for demoralization costs (and settlement costs to the extent that settlement costs are a function of avoiding demoralization) takes on a regressive cast.

<sup>267</sup> Cf. Farber, *supra* note 144, at 286.

the Takings Clause. Hewing as closely as possible to the core of traditional eminent domain—the Takings Clause as a defense against concrete, clear, tangible interference with property, even if not predicated on formal transfer of title—best cabins the potentially open-ended authority for which the Takings Clause is often invoked. The focus of the equality dimension, in its various guises, moves radically away from this core, asking not how severely a regulation interferes with property, but rather whether the interference is “fair” when compared to the burdens imposed on others.<sup>268</sup>

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Given the myriad of theoretical and doctrinal problems posed by the emerging equality dimension of regulatory takings law, the most appropriate response would be to excise the theme from the jurisprudence altogether. *Lingle* provides a model for how to do so. There, the Court held that notwithstanding decades of confusion about the interaction between substantive due process and regulatory takings, means-ends analysis should be situated within the former body of law and not within the latter.<sup>269</sup> The *Lingle* Court recognized that the Takings Clause cannot carve out some subset of regulations for heightened means-ends analysis beyond that afforded by deferential substantive due process review. Likewise there is no reason why the Takings Clause should house a parallel set of conceptual tools and judicial frames for evaluating equality norms beyond those found under the Equal Protection Clause.<sup>270</sup>

Equal protection claims have long been brought to challenge the kinds of varied impacts on property rights implicit in claims based on the distribu-

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<sup>268</sup> Another way to conceptualize the limits of an equality-based approach to regulatory takings is to consider the potentially absurd results of an explicit equality approach to direct eminent domain. If the question turned on comparative burdens or the magnitude of “singling out,” then even significant expropriation might not yield compensation, provided the expropriation were sufficiently general. *Cf.* Rubinfeld, *supra* note 19, at 1136 (arguing that distributional concerns are “simply orthogonal to Compensation Clause analysis”).

<sup>269</sup> *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005).

<sup>270</sup> This is not to argue that equal protection jurisprudence is as strong a guard against invidious discrimination as it could be (nor, indeed, itself a coherent body of law). An equality-based regulatory takings doctrine, however, is unlikely to focus on traditional suspect classifications given that the ground for differentiation is based on the treatment of *property*. If it were possible to cast a regulatory takings equality doctrine that privileged the *lack of property*, then there might be an overlap between regulatory takings and traditionally disenfranchised minorities. *Cf.* Ball, *supra* note 13, at 842–51 (arguing for a form of heightened scrutiny where governmental action constitutes a nuisance that creates a “peculiar and substantial burden,” particularly in the context of poor and minority communities). Indeed, such a doctrine might be a way to redress the Court’s unwillingness to take inequality based on economic status seriously under the Equal Protection Clause. *See* *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). As this Article argues, however, equality review under regulatory takings is more likely to provide greater protection to those with more property to protect and is therefore unlikely to provide a constitutional home for more egalitarian constitutional review.

tion of burdens.<sup>271</sup> And appropriately so, given that any governmental action can draw lines so irrational as to fail even minimal scrutiny. Clarifying that such challenges belong under the Equal Protection Clause might yield a less vigorous regulatory takings doctrine, just as *Lingle*'s rejection of a quasi-substantive due process doctrine under the Takings Clause arguably did.<sup>272</sup> *Lingle*, however, points to that direction for the doctrine.<sup>273</sup>

In short, prevailing conceptions of judicial review of ordinary regulation under the Equal Protection Clause provide the most appropriate framework through which to evaluate the distribution of regulatory burdens, the generality of governmental action, and the underlying "fairness" from a horizontal perspective in any interference with property rights that is less than perfectly equal.<sup>274</sup> In *Lingle*, the Court took a refreshingly candid approach to the Lochnerian perils that attend any attempt to use the Takings Clause as a back door to judicial second-guessing of ordinary regulation. It makes little sense to revive those perils under equality norms.<sup>275</sup>

#### D. Some Objections Considered

The argument for reconciling the equality dimension of regulatory takings jurisprudence with the Equal Protection Clause might engender several

<sup>271</sup> See, e.g., *County Concrete Corp. v. Township of Roxbury*, 442 F.3d 159, 163, 170–71 (3d Cir. 2006); *Koscielski v. City of Minneapolis*, 435 F.3d 898, 901 (8th Cir. 2006); *Patel v. City of Chicago*, 383 F.3d 569, 573 (7th Cir. 2004); see also *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000) (per curiam) (upholding a "class of one" equal protection challenge to an easement condition on the granting of a connection to a municipal water supply). For an example of an early case examining equal protection arguments along with due process and "compensation" claims, see *Powell v. Pennsylvania*, 127 U.S. 678 (1888).

<sup>272</sup> See James W. Ely Jr., "Poor Relation" *Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO S. CT. REV. 39, 52 ("*Lingle* . . . perpetuates the second class status of property rights."); see also Radford, *supra* note 83, at 449–50; cf. Eagle, *supra* note 191 (advocating for a revived due process analysis in the wake of *Lingle* to provide "meaningful scrutiny").

<sup>273</sup> See *supra* text accompanying note 260.

<sup>274</sup> A regulatory takings jurisprudence narrowed to the grounds of equivalence still gives much breadth for recognizing the legitimate concerns of property owners where state interference with an individual's property is sufficiently severe. It is in no way necessary to discern the appropriate line for making that determination to argue that that is a more appropriate inquiry than some ill-conceived comparative burden analysis.

<sup>275</sup> Cf. McUsic, *supra* note 16, at 631–40 (comparing and contrasting modern takings doctrine and Lochner-era substantive due process review of economic legislation).

Reconciling equality-based themes in takings jurisprudence with the Equal Protection Clause would have the salutary, if secondary, effect of aligning the distributional aspects of takings jurisprudence with the constitutional law of taxation, where a variety of uneven burdens—even burdens targeted at a relatively small group of property owners (as in the context of special assessments)—have been upheld by the Court. See Eduardo Moisés Peñalver, *Regulatory Takings*, 104 COLUM. L. REV. 2182, 2193–2204 (2004) (discussing the constitutional law of taxation). Peñalver argues persuasively that tension between the constitutional law of taxation and regulatory takings doctrine supports substantially scaling back the latter. *Id.* at 2240. This is consistent with a view of regulatory takings that places concerns about equality norms within the generally deferential framework of the Equal Protection Clause.

objections. One rejoinder might be that if the concern is institutional—that equality norms in regulatory takings jurisprudence imply inappropriately intrusive judicial review—then a *deferential* equality principle might still have a role to play. In other words, there is no reason why the Constitution’s protection of individual rights, including property rights, cannot be capacious enough to tolerate redundancy. After all, notions of equality underlie the prohibition against bills of attainder<sup>276</sup> and a number of other substantive and procedural constitutional protections,<sup>277</sup> so why not retain the comparative element of regulatory takings? Certainly an equality principle that paralleled the Equal Protection Clause would be less troubling than the kind of confusion and creeping heightened scrutiny that the application of the *Agins* test over its twenty-five-year existence suggests is more likely to emerge in the jurisprudence.

Privileging equality norms in regulatory takings law is still objectionable, however, because it transforms the jurisprudence into a comparative inquiry that singles out the fact of ownership—a differential burden on holding property—as the sole ground for decision. Any other basis of line-drawing is already cognizable under the Equal Protection Clause, and more appropriately belongs in that jurisprudence. Properly understood, the *Armstrong* principle gets the Takings Clause exactly wrong: transforming the Takings Clause into a tool to police against “singling out” shifts from protecting property to policing the rationality of legislative line-drawing in ordinary social and economic regulation, a task best served by the Equal Protection Clause.

This argument, moreover, could be made for an independent substantive due process inquiry under the Takings Clause. An equality-based view of regulatory takings essentially imports a type of means-ends analysis into the jurisprudence, an analysis that the Court in *Lingle* noted logically precedes the takings question.<sup>278</sup> The Court, however, appropriately rejected this kind of constitutional redundancy in its substantive due process guise.

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<sup>276</sup> See Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 CARDOZO L. REV. 1761, 1780 (2005).

<sup>277</sup> Notions of equality, for example, permeate constitutional criminal law. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 249 (1972) (Douglas, J., concurring) (discussing “the basic theme of equal protection . . . implicit in ‘cruel and unusual’ punishments”); see also Scott W. Howe, *The Troubling Influence of Equality in Constitutional Criminal Procedure: From Brown to Miranda, Furman and Beyond*, 54 VAND. L. REV. 359, 418–32 (2001) (criticizing the use of equality-based evaluations of some criminal procedure protections afforded by the Fourth, Fifth, Sixth, and Eighth Amendments). Likewise, equality permeates certain aspects of First Amendment jurisprudence. See, e.g., *City of Ladue v. Gilleo*, 512 U.S. 43, 50–51 (1994); see generally Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975) (canvassing equality norms in First Amendment jurisprudence). And there is an equality dimension to aspects of the Privileges and Immunities Clause of Article IV and the prohibition on discrimination against interstate interests in Commerce Clause jurisprudence. See ROTUNDA & NOWAK, *supra* note 224, at 205.

<sup>278</sup> See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

The logic of *Lingle* applies with the same force to such redundancy in its equality means-ends dimension.

A second objection might be that the Takings Clause is concerned solely with compensation whereas the Equal Protection Clause involves the more judicially blunt question of basic validity.<sup>279</sup> Under the Takings Clause, the argument would follow, an equality-based doctrine that paralleled (perhaps entirely) equal protection jurisprudence would serve a fundamentally different function: to divine a line between valid governmental actions that require compensation and valid governmental actions that do not. As John Echeverria recently argued, “[p]roperly interpreted, regulatory takings doctrine should focus exclusively on providing financial compensation for legitimate government actions that single out one or a few property owners for severe, disproportionate economic burdens.”<sup>280</sup>

This is an important concern. The best response that can be made is a functional one. In practice, the Takings Clause generally has been invoked to challenge regulation not to gain compensation, but rather to invalidate the governmental action at issue.<sup>281</sup> Indeed, until *First English Evangelical Lutheran Church v. County of Los Angeles*,<sup>282</sup> it was not entirely clear that the Takings Clause could be invoked to mandate compensation outside of traditional eminent domain. Crafting a regulatory takings jurisprudence that takes the fact of compensation seriously has much appeal, but mandating compensation for otherwise legitimate governmental action has not been a serious aspect of the doctrine since its outset.<sup>283</sup>

Another problem with this objection, moreover, is distributional. Generic categories of “property holders” will not parallel those minority groups recognized as unique victims of political process failure for equal protection purposes. It is true that for certain “discrete and insular minorities,” the Equal Protection Clause is underprotective, primarily because of the requirement of discriminatory purpose.<sup>284</sup> Because the Takings Clause’s

<sup>279</sup> See Boudreaux, *supra* note 13, at 219–20 (arguing that the remedial focus of the Takings Clause on just compensation obviates concerns about means-ends balancing that have driven rational-basis review under the Equal Protection Clause).

<sup>280</sup> Echeverria, *supra* note 28, at 199. John Fee reaches a similar conclusion. See Fee, *supra* note 13, at 1007 (“The proper role of the Takings Clause is to require compensation in those circumstances where the government legitimately targets merely one or a few owners to bear a unique legal burden for the benefit of the general community.”).

<sup>281</sup> See Echeverria & Dennis, *supra* note 64, at 706–07; McUsic, *supra* note 16, at 643–44.

<sup>282</sup> 482 U.S. 304 (1987).

<sup>283</sup> There are exceptions to the propensity of regulatory takings claims to involve the underlying validity of the legal rule at issue. “Temporary takings” in the context of restrictions that are no longer in effect is one example. See, e.g., *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003). Nonetheless, as *Mahon*, *Penn Central*, and numerous other cases make clear, the question of underlying validity has long been at the heart of regulatory takings jurisprudence.

<sup>284</sup> This is one argument that Treanor makes in favor of a political process takings analysis. See Treanor, *supra* note 18, at 876 (arguing that one advantage to a political process approach to takings law

focus is on preserving existing property entitlements, however, it is not the place to remedy that problem.

A final objection might be that denuding regulatory takings law of its equality dimension leaves owners vulnerable to extreme singling out or regulatory action motivated by animus.<sup>285</sup> *Lucas* provides an analogous category with its justification for nominally per se takings liability where the government obliterates all utility of ownership, however rare that might be in practice.<sup>286</sup> That same marginal boundary of extreme governmental action, however, does not justify the equality dimension of regulatory takings law. Singling out so narrow as to be fundamentally irrational—again, exceedingly unlikely to occur in practice—is more appropriately addressed (as it already is) under equal protection jurisprudence.<sup>287</sup> Likewise, claims of animus are already squarely addressed as an issue of the legitimacy of governmental action under the Equal Protection Clause.<sup>288</sup>

#### CONCLUSION

In a cautious, incremental way, the Supreme Court is moving toward a significant and beneficial clarification of regulatory takings jurisprudence. The Court currently seems to be focused on setting forth appropriate institutional roles.<sup>289</sup> With that focus, the Court has finally begun to confront the exceptionalism that has marked modern regulatory takings doctrine as a particular constitutional muddle.

In the process of bringing order to the jurisprudence, the Court is elevating the equality dimension of regulatory takings, a theme that, although previously submerged in the case law, enjoys broad theoretical support. It is no exaggeration that the *Armstrong* principle and its kindred doctrines enjoy almost universal acceptance.

This Article argues, however, that an uncritical embrace of political process and fundamental fairness rationales for focusing on the distribution of burdens in regulatory takings is unwarranted and unwise. Such concerns should sound not under the Takings Clause, but rather under the deferential standards afforded by the Equal Protection Clause for the review of ordinary economic and social regulation.

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is the ability to address “disparate impact” claims for minority groups granted heightened scrutiny under equal protection, but whose redress is limited by the discriminatory purpose requirement).

<sup>285</sup> Michelman is surely correct that a unique harm arises from capricious exploitation. See Michelman, *supra* note 13, at 1215; see also Baker, *supra* note 259, at 764–65 (discussing the harms of invidious singling out). The relevant question is whether regulatory takings doctrine is the best avenue to remedy that harm, and whether the risk of overinclusive policing of claims of invidious singling out merit the approach found under the Equal Protection Clause.

<sup>286</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

<sup>287</sup> See *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000) (per curiam).

<sup>288</sup> See, e.g., *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973).

<sup>289</sup> See Fenster, *supra* note 11, at 42–51.

Shorn of an inappropriate equality dimension, regulatory takings jurisprudence would be narrowed to something close to the historical core of the Takings Clause. The Takings Clause would protect against those rare instances where regulation constitutes the functional equivalent of direct governmental expropriation.<sup>290</sup> This is still an admittedly contested conceptual category, but a more solid grounding for the jurisprudence nonetheless. The result would be a simpler, clearer, and more egalitarian law of regulatory takings.

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<sup>290</sup> The Takings Clause would also, of course, continue to constrain the direct exercise of the power of eminent domain, its original and least disputed function.

