

# NO COMPETING THEORY OF CONSTITUTIONAL INTERPRETATION JUSTIFIES REGULATORY TAKINGS IDEOLOGY

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*Compensation for excessive regulation of the use of property under the Just Compensation Clause of the Fifth Amendment has gained wide acceptance. Introduced in 1922 in Pennsylvania Coal Co. v. Mahon, and gathering considerable momentum in 1978 with Penn Central Transportation Co. v. City of New York, regulatory takings constrains government regulation protecting the environment, public health, consumer safety, affordable housing, and other community interests. Upon close examination, however, the regulatory takings doctrine does not appear to be justified by any of the competing theories of constitutional interpretation: textualism, originalism, or evolutionary document. Rather, the doctrine seems to arise from a misunderstanding of the Just Compensation Clause as guaranteeing a laissez-faire political economy. The initial parts of this article rely for the most part on existing scholarship analyzing regulatory takings under the textualist and originalists theories of interpretation. The bulk of the article is devoted to an examination of regulatory takings under the evolutionary document theory, which has received less attention in the literature of takings. The argument that the regulatory takings doctrine in its entirety is unwarranted under an evolutionary document approach is*

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*founded on the absence of precedent for granting the courts a significant role in the formulation of what is essentially economic policy, and profound conflicts between regulatory takings and core values of the Constitution, such as liberty, equality, and democracy. I also respond to claims that a broad reading of the Just Compensation Clause is necessary to balance the interests of property owners against society or that regulatory takings is a practical tool for property regulation. Finally, the article recommends an alternative system for government policy-making to control the use of property that relies almost exclusively on statutes and administrative regulations adopted by the political branches of government.*

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## I. INTRODUCTION

The availability of compensation for excessive or unwise government regulation of private property under the Just Compensation Clause of the Fifth Amendment (the "Clause") is now taken for granted in our legal system. Upon close examination, however, this remedy does not appear to be justified by any of the competing theories of constitutional interpretation. Rather, the doctrine of regulatory takings seems to stem from a misunderstanding of the Clause as guaranteeing a laissez-faire political economy. The Supreme Court should accordingly consider eliminating the regulatory takings doctrine from our jurisprudence. Reliance instead on decisions by the political branches of government would promote key values of the

Constitution, protect the community's interests in the environment, health, and safety, and result in greater overall fairness and efficiency.

A recent regulatory takings decision of the United States Supreme Court, *Koontz v. St. Johns River Water Management District*,<sup>1</sup> is emblematic of the corrosive effect of a regulatory takings doctrine on society's tools to solve some of its most pressing problems. There, five justices of the Supreme Court held that the Fifth Amendment authorizes not just direct condemnation or compensation for government regulation of the use of property that is tantamount to a direct condemnation, but rather judicial second-guessing of the wisdom and efficacy of a government exaction to mitigate the loss of wetlands caused by a real estate development project. Under the Court's reading of the Clause, non-elected, essentially life-tenured judges hold the power to determine the best policy to preserve wetlands in Florida. To the contrary, the Fifth Amendment does not grant judges the authority to weigh developer profits against the public interest under any interpretive theory.

The benefits of abolishing regulatory takings from the American governmental system are manifest. The Earth faces a stiff challenge in slowing environmental degradation: global warming, sea level rise, extreme weather, drought, loss of species, dying oceans and marine life, loss of arable soil, wildfires, groundwater contamination, air pollution, pandemics, congested cities, deforestation, and loss of open space.<sup>2</sup> The United States suffers from a deficiency in affordable housing, homelessness, urban congestion, and dying cities. Dependence on non-renewable fuels has driven a United States foreign policy that has resulted in thousands of military casualties and expenditure of trillions of dollars, for little benefit.<sup>3</sup> Drought and food shortages induced by climate change and contamination of air, water, and soils in poorer areas of the World have been, and will increasingly be, a

1. 133 S. Ct. 2586 (2013) (holding that agency's ad hoc denial of permit to fill wetlands because applicant rejected monetary exaction to restore agency's wetlands offsite was subject to intermediate judicial scrutiny as a taking).

2. See, e.g., Mark New et al., *Four Degrees and Beyond: The Potential for a Global Temperature Increase of Four Degrees and Its Implications*, 369 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y A 6, 6-19 (2011); U.S. DEP'T OF DEF., 2014 CLIMATE CHANGE ADAPTATION ROADMAP, Foreword, 2, 4 (2014).

3. JOSEPH E. STIGLITZ & LINDA J. BILMES, *THE THREE TRILLION DOLLAR WAR: THE TRUE COSTS OF THE IRAQ CONFLICT* ix (2008).

catalyst for “global instability, hunger, poverty, and conflict.”<sup>4</sup> While these environmental and social problems may not wipe out civilization on Earth, a consensus in the scientific community indicates that unless developed countries change their patterns of consumption of natural resources, degradation of the Earth’s natural systems may be unavoidable.<sup>5</sup>

Because a resident of the United States uses more natural resources than those in other countries,<sup>6</sup> curbing behavior harmful to the environment will help to preserve the quality of life in the United States and beyond its borders. Technological advances driven by market forces will not, by themselves, be adequate to eliminate human-caused impacts to large, complex ecological systems.<sup>7</sup> Likewise, individual choices in a market increasingly immunized by politics and the Constitution from government regulation will likely be insufficient to reverse the current trend toward a degraded environment. Collective action through more robust government regulation is a crucial component of any

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4. U.S. DEP’T OF DEF., *supra* note 2, at Foreword.

5. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: IMPACTS, ADAPTATION, AND VULNERABILITY, SUMMARY FOR POLICYMAKERS 14-20 (2014), available at <https://www.ipcc.ch/report/ar5/wg2/>; Michel G.J. den Elzen et al., *Analyzing the Greenhouse Gas Emission Reductions of the Mitigation Actions Plans by Non-Annex I Countries by 2020*, 56 ENERGY POLICY 633, 643 (2013) (indicating that developed countries will need to reduce emissions by 40% to 65% below 1990 levels by 2020 in order to have a medium chance of averting the worst effects of climate change); Sujata Gupta et al., *Policies, Instruments and Co-operative Arrangements*, in CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE: CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 746, 748 (2007) (suggesting that to limit temperature increases to safe levels, “developed countries would need to reduce emissions in 2020 by 10-40% below 1990 levels and in 2050 by approximately 40-95%”).

6. DALE JAMIESON, REASON IN A DARK TIME: WHY THE STRUGGLE AGAINST CLIMATE CHANGE FAILED—AND WHAT IT MEANS FOR OUR FUTURE 7, 47, 131 (2014) (observing that rich Americans use more than their share of global public goods. As of 1990, the United States was responsible for 36% of worldwide carbon emissions; as of 2014, the U. S. and the other rich countries with about 7% of the world’s population generated 50% of greenhouse gas emissions); Roddy Scheer & Doug Moss, *Use It and Lose It: The Outsize Effect of U.S. Consumption on the Environment*, SCIENTIFIC AMERICAN, Sept. 14, 2012, available at <http://www.scientificamerican.com/article/american-consumption-habits/>.

7. See generally MICHAEL HUESEMANN & JOYCE HUESEMANN, TECHNO-FIX: WHY TECHNOLOGY WON’T SAVE US OR THE ENVIRONMENT (2011); MILLENNIUM ECOSYSTEM ASSESSMENT BD., LIVING BEYOND OUR MEANS: NATURAL ASSETS AND HUMAN WELL-BEING, STATEMENT OF THE BOARD 3, 21 (2005); Daniela Cusack, *An Interdisciplinary Assessment of Climate Engineering Strategies*, 12 FRONTIERS IN ECOLOGY & THE ENV’T, no. 5, 2014; Alex Rau et al., *Can Technology Really Save Us from Climate Change?*, HARV. BUS. REV., Jan.-Feb. 2010; Ian Sue Wing & Richard S. Eckaus, *The Implications of the Historical Decline in U.S. Energy Intensity for Long-Run CO2 Emission Projections*, 35 ENERGY POL’Y 5267 (2007).

strategy to reduce threats to the Earth's ecosystems. But the dramatic expansion of regulatory programs necessary to avoid environmental harms and other social problems, in addition to facing formidable political obstacles, risks running headlong into a regulatory takings doctrine.<sup>8</sup>

If the Constitution is a barrier to the decisive action necessary to protect those it governs from the effects of climate change and overconsumption of resources, it is not serving its purpose.<sup>9</sup> Insofar as courts have interpreted the Clause to hamstring government's ability to "promote the general welfare,"<sup>10</sup> I argue that that interpretation is misguided. The courts should reverse course and reject the regulatory takings doctrine in its entirety.

Invented in 1922 in *Pennsylvania Coal Co. v. Mahon*,<sup>11</sup> regulatory takings has expanded well beyond its original conception in *Mahon* to become a leading constraint on government power to regulate the use of property to protect community interests. The plain text

8. See, e.g., Jeffrey Dintzer & Nathaniel Johnson, *Legal Risks of Fracking Bans Are Real*, DAILY J., June 24, 2014, <http://www.gibsondunn.com/publications/Documents/LegalRisksFrackingBans.pdf>; Memorandum from Richard Bress & Wayne Flick, Latham & Watkins LLP, to Matt Granger, San Benito Cnty. Counsel (Dec. 1, 2014) (on file with author) (concluding that San Benito County anti-fracking ordinance "would constitute a regulatory taking"); Letter from Steven F. Coombs, President & CEO of Patriot Res., to San Benito Cnty. [Cal.] Bd. of Supervisors (Jan. 20, 2015) (on file with author) (threatening regulatory takings challenge to County's ban on hydraulic fracturing); Laurence H. Tribe & Peabody Energy Corp., Comments of Laurence H. Tribe and Peabody Energy Corp. (Dec. 1, 2014) on Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 34830 (June 18, 2014) 11-15 (contending that EPA's Clean Power Plan to cut carbon emissions from power plants would constitute a regulatory taking).

9. While most regulatory takings challenges up to this point have been rejected by the courts, the threat of regulatory takings liability has had a pronounced chilling effect on regulation necessary to protect the environment. See DANIEL POLLAK, HAVE THE U.S. SUPREME COURT'S 5TH AMENDMENT TAKINGS DECISION CHANGED LAND USE PLANNING IN CALIFORNIA? 1, 5-12 (2000); Julie A. Tappendorf & Matthew T. DiCianni, *The Big Chill?—The Likely Impact of Koontz on the Local Government/Developer Relationship*, 30 TOURO L. REV. 455, 471 (2014); see also *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2612 (2013) (Kagan, J., dissenting) (warning that the rule pronounced by the majority could "wreck land-use planning permitting throughout the country"); Timothy J. Dowling, *On History, Takings Jurisprudence, and Palazzolo: A Reply to James Burling*, 30 B.C. ENVTL. AFF. L. REV. 65, 83 (2002) (noting that the former chief lobbyist of National Association of Home Builders characterized the proposal that makes it easier to bring takings claims in federal court as a "hammer to the head" of state and local officials); John Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. (forthcoming 2015) (manuscript at 42-56) [hereinafter Echeverria, *Worst Decision*].

10. U.S. CONST. pmb1.

11. 260 U.S. 393 (1922) (holding that prohibition on mining subsurface coal to protect surface structures was equivalent to eminent domain taking of coal).

of the Constitution, which is concerned with direct takings under the power of eminent domain, fails to support a regulatory takings doctrine. Nor is an expectation that the Clause restricts government regulation of property use implied from evidence of original intent. Regulatory takings also does not seem justified under the third competing theory of constitutional interpretation: that the Constitution is an evolutionary document that provides flexibility to address contemporary problems.

Confronted with the tenuous foundation of regulatory takings under the prevailing theories of constitutional interpretation, property rights advocates assert that a robust regulatory takings doctrine is nonetheless necessary under an evolutionary document theory because it enables courts to stand as the last defense against unfair government regulation of property. Yet, the case law offers scant support for the efficacy of regulatory takings to achieve fairness.

The only conceivably valid categories of regulatory takings are *per se* takings—economic wipeouts and physical invasions—functional equivalents to eminent domain. If the whole parcel and background principles are applied correctly, however, wipeouts and physical invasions are so rare as to be largely irrelevant.<sup>12</sup> In practice, the vast body of regulatory takings jurisprudence is concerned with partial and means-ends takings, which have no legitimate basis in the Constitution. Thus, as discussed in greater depth in Section III.C.3 of this article, proponents of an expansive regulatory takings doctrine first created a standard of judicial review of property regulation designed to respond to extreme regulations—wipeouts and physical takings—that hardly ever occur, but then stretched that standard to apply to all manner of police power regulation, losing its moorings to the Constitution in the process. In doing so, the courts have forged a regulatory takings doctrine that is an incoherent, inconsistent, unworkable tangle. To achieve the greatest fairness in property regulation, which at its core is a limitation on economic profit-making rather than the exercise of fundamental constitutional rights, courts should defer to the political process.

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12. Under the whole parcel rule, “[t]aking’ jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.” *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-31 (1978). Background principles refer to state common law, such as nuisance, that precludes the proposed activity. Thus, a property right that the owner never had cannot be taken. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-17, 1028 (1992).

Section II of this article reviews the theoretical and historical background of regulatory takings. Section III explains the three competing theories of constitutional interpretation—textualism, originalism, and evolutionary document—and argues that, independent of the line of interpretation that one finds compelling or that has most currency at a given time, none of the contending lines of interpretation warrant the current expansive application of the Clause. In Sections III.A and III.B the article builds on prior scholarship assessing the validity of regulatory takings under textualist and originalists approaches to interpretation,<sup>13</sup> followed in Section III.C by an extended discussion of regulatory takings under an evolutionary document theory, the latter having received less attention in existing scholarship. The argument that justification for regulatory takings under an evolutionary document approach is absent rests on the observations that regulatory takings appears to be inconsistent with (a) precedent granting wide latitude to the legislative and executive branches of government to restrict the use of property to promote the general health, safety, and welfare, (b) core values of the Constitution, such as liberty and equality, and (c) notions of fairness and efficiency. Section IV is a postscript to the main point of this article. In that section, I propose an alternative system for government policy-making to control the use of property that relies on statutes and administrative regulations adopted through the political process.

## II. BACKGROUND OF REGULATORY TAKINGS

Regulatory takings stems from the just compensation clause of the Fifth Amendment, which reads “nor shall private property be taken, without just compensation.”<sup>14</sup> Despite substantial agreement among legal scholars and jurists that the framers intended to limit the application of the Clause to direct condemnation, since *Pennsylvania Coal Co. v. Mahon* the United States Supreme Court has interpreted the Clause to require compensation for government regulation of private property where the regulation is “functionally equivalent” to direct

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13. See generally J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOLOGY L.Q.* 89 (1995); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 *COLUM. L. REV.* 782 (1995).

14. U.S. CONST. amend. V.

condemnation.<sup>15</sup>

Confusing language in *Mahon*, *Penn Central Transportation Co. v. City of New York*,<sup>16</sup> and Supreme Court opinions since *Penn Central*, however, has provided an opening for advocates of expanded property rights to import laissez-faire economic theory and other libertarian ideological beliefs into the Constitution. The result has been occasional court decisions finding that regulation that can hardly be compared to a direct appropriation of property by the state is nonetheless a “taking” requiring compensation.

The *Mahon* Court found that if a regulation “goes too far, it will be regarded as a taking.”<sup>17</sup> Over time, however, the “goes too far” standard has been stretched to include regulation that is not necessarily tantamount to eminent domain, inviting considerable confusion and inconsistencies. Under this virtually standardless formulation, courts adjudicating takings claims have substituted their judgment for the policy making function of the legislative, executive, and administrative branches of government. The lack of clarity as to the nature of regulation that can be deemed a regulatory taking has induced more courts to award damages and attorneys’ and experts’ fees to takings claimants, resulting in a pronounced chilling effect on public regulation of the use of property.<sup>18</sup>

Examples abound of lower court decisions finding that compensation for a taking could be required where the regulation in question merely prevents the most profitable use of property.<sup>19</sup>

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15. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005); *Mahon*, 260 U.S. 393, 415-16 (1922); see also *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 199 (1985) (explaining that the court’s task is “to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession”).

16. 438 U.S. 104 (1978). *Penn Central* is responsible for the partial takings test, where the court applies three factors on an ad hoc basis to determine whether a regulation effects a taking: (1) economic impact, (2) interference with investment-backed expectations, and (3) the character of the regulation. *Id.* at 124. The Court applied the three-part test to reject a takings challenge to New York City’s historic preservation law, which blocked the construction of a high-rise office building above Grand Central Terminal. *Id.* at 134.

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

18. See *supra* note 9.

19. For example, in *Koontz v. St. Johns River Management District*, the court prescribed non-deferential judicial review of permit conditions requiring a developer to mitigate adverse impacts on wetlands, even where the developer had failed to show that regulation imposed a severe economic burden. 133 S. Ct. 2586, 2603 (2013); see also *DeCook v. Rochester Int’l Airport Joint Zoning Bd.*, 796 N.W.2d 299, 309 (Minn. 2011) (holding that

During the Supreme Court's thirty-seven-year history of adjudication of regulatory takings cases since *Penn Central*, the Court has not questioned *Mahon's* equating excessive regulation with eminent domain. The Court, however, has on occasion dismantled long-standing takings principles deemed inconsistent with contemporary social norms. In 2005, the Court overruled its own precedent in *Agin v. City of Tiburon*,<sup>20</sup> jettisoning the "substantially advances" standard as a takings test.<sup>21</sup> It is plausible that a majority of the justices of the Supreme Court will soon be forced to confront the contradictions in the regulatory takings doctrine. In *Koontz v. St. Johns River Water Management District*,<sup>22</sup> the Court ignored *Lingle v. Chevron U.S.A., Inc.*<sup>23</sup> and other precedents while pretending to follow them. Because *Koontz* so transparently attempts to force a square economic theory into a round Constitutional box, it could ultimately be a catalyst for the demise of regulatory takings.<sup>24</sup>

### III. ARE REGULATORY TAKINGS JUSTIFIED UNDER THE CONSTITUTION?

Interpretation of the Constitution is generally conducted under one of three theories: textualism, originalism, or evolutionary document. Each theory is explained below, followed by an analysis of the standing of regulatory takings under each theory.

#### A. Regulatory Takings Under Textualism

The textualist claims to enforce a literal, plain meaning of the terms of the Constitution. Also known as strict constructionism, textualism asserts that an inflexible approach to constitutional interpretation provides stability, avoids subjective decision making, and insulates judicial decisions applying the Constitution from

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a runway safety zone imposed on private property required compensation although the value of the property after regulation was only 3.5%-6.14% less than the value before regulation).

20. 447 U.S. 255, 260 (1980).

21. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548 (2005) ("Today we correct course. We hold that the 'substantially advances' formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence.").

22. 133 S. Ct. 258 (2013).

23. 544 U.S. 528 (2005).

24. See Echeverria, *Worst Decision*, *supra* note 9, at 49-50; see also *infra* notes 137, 190-98, and 273-71 and accompanying text.

shifting politics and social norms.<sup>25</sup>

The text of the Fifth Amendment does not support a regulatory takings doctrine. The Clause provides: “nor shall private property be taken for public use, without just compensation.”<sup>26</sup> Most jurists agree that the words of the Clause require compensation only for the government’s appropriation of title to property by eminent domain or physical appropriation of possession.<sup>27</sup> In *Pennsylvania Coal Co. v. Mahon*, the Supreme Court held that a public agency is also required to pay compensation for mere regulation of the use of private property that eliminates potential profit to the user.<sup>28</sup> Given the clarity of the text of the Fifth Amendment, “nor shall private property be *taken* for public use,” the notion that a regulation of the *use* of property could effect a taking is a substantial departure from the plain constitutional text and casts doubt on the ability of any theory to support it.<sup>29</sup>

25. See GOODWIN LIU ET AL., *KEEPING FAITH WITH THE CONSTITUTION* 41-45 (Geoffrey R. Stone ed., 2009). The textual/strict construction approach is not without difficulty. While the meaning of certain terms and phrases in the Constitution is clear, many are ambiguous and deliberately general, anticipating specific construction by later generations to fit the requirements of justice. A textualist approach fails to account for the transformative social and technological changes since the text of the Constitution and the Bill of Rights was drafted and ratified in the eighteenth century. See *id.* at 42-44; DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 1 (2010); see also Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 92 (1989); Samuel Issacharoff, *The Elusive Search for Constitutional Integrity: A Memorial for John Hart Ely*, 57 STAN. L. REV. 727, 727 (2004). Because amending the Constitution is so cumbersome as to be prohibitive, a textualist approach constrains society’s ability to address contemporary problems. See STRAUSS, at 1-2, 115.

26. U.S. CONST. amend V.

27. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 321-22 (2002) (“[T]he plain language [of the Clause] requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.”); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992); John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1293 (1996).

28. 260 U.S. 393, 415 (1922); see also *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 316 (1987).

29. Byrne, *supra* note 13, at 92; see also JOHN D. ECHEVERRIA, *Do Partial Regulatory Takings Exist?*, in *TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES* 223 (Thomas E. Roberts ed., 2002); Bernard Schwartz, *Takings Clause—“Poor Relation” No More?*, 47 OKLA. L. REV. 417, 418-21, 426-27 (1994); William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 711 (1985); J. Peter Byrne, *The Regulatory Takings Doctrine: A Critical Overview*, Remarks at Regulatory Takings and Resources: What Are the Constitutional Limits? (June

## B. Regulatory Takings Under Originalism

Similar to textualism, originalism adopts a fixed view of the Constitution. But originalism transcends plain text, attempting to discern the intent of the framers or the public understanding of constitutional text at the time it was ratified.<sup>30</sup> It follows that the originally intended meanings of the Constitution can be modified only by amending the Constitution.<sup>31</sup>

Regulatory takings is difficult to reconcile with the original understanding of the Clause.<sup>32</sup> The most plausible original meaning of “taking” was the narrow category of direct physical appropriation of property by the government.<sup>33</sup> Even Justice Scalia,

13, 1994), available at <http://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1002&context=regulatory-takings-and-resources>; cf. Andrew S. Gold, *Regulatory Takings and Original Intent: The Direct, Physical Takings Thesis “Goes Too Far”*, 49 AM. U. L. REV. 181, 187-90 (1999).

30. LIU ET AL., *supra* note 25, at 1-2; ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 144 (1990) (defining original meaning as “what the public of that time would have understood the words to mean”); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (Amy Gutmann ed., 1997) (suggesting that original meaning is “the intent that a reasonable person would gather from the text of the law”); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* 152-59 (1999) (arguing for a more populist interpretation of the relevant intent at the time of ratification).

31. LIU ET AL., *supra* note 25, at 25. Like textualism, originalism suffers from seemingly insurmountable obstacles. Originalists create specific meanings and applications from general provisions of the Constitution, often informed by an inaccurate or imagined historical analysis of original intent, or by the interpreter’s political beliefs, or both. See STRAUSS, *supra* note 25, at 23, 29, 31; see also ERWIN CHEMERINSKY, *THE CONSERVATIVE ASSAULT ON THE CONSTITUTION* 252-53 (2010); E.J. DIONNE, JR., *OUR DIVIDED POLITICAL HEART* 148, 150 (2012) (noting that in *Citizens United v. Fed. Election Comm.*, 558 U.S. 310 (2010), which overturned a ban on corporate political campaign financial contributions, the majority and dissent “each read the Founders differently”); STRAUSS, *supra* note 25, at 18 (explaining that the Constitution must be applied to circumstances and technologies that the framers or the public in 1789 could not have envisioned, as it was in *Kyllo v. United States*, 553 U.S. 27 (2001)—where the court held that the Fourth Amendment right to be free of unreasonable searches and seizures protects individuals from police use of thermal imaging—and *Reno v. ACLU*, 521 U.S. 844 (1997)—where the court applied the First Amendment to overturn regulation of Internet); Charles A. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 735, 752 (1963) (arguing that originalism undermines the legitimacy and authority of the Constitution); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 784-85, 800, 802 (1983).

32. See Byrne, *supra* note 13, at 93-96; Treanor, *supra* note 13, at 804-05; John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 NW. U. L. REV. 1099, 1103 (2000); see also ECHEVERRIA, *supra* note 29, at 239-40 (noting consensus among scholars that regulatory takings doctrine has no foundation in original understanding).

33. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551-52 (1870) (“[The Clause] has

the leading champion of regulatory takings on the Supreme Court, nearly concedes that the Clause was not originally intended to encompass regulatory takings.<sup>34</sup> If that interpretation is accurate, then regulatory takings is without foundation under an originalist approach.

*Pennsylvania Coal Co. v. Mahon*, which spawned the regulatory takings doctrine, offers a poor defense of the doctrine.<sup>35</sup> The decision does not explain how the doctrine could have been intended by the framers or public understanding, where all prior jurisprudence demonstrated a contrary intent.<sup>36</sup> Indeed, when confronted with similar facts to *Mahon* in 1987 in *Keystone Bituminous Coal Ass'n. v. DeBenedictis*,<sup>37</sup> the Supreme Court reached nearly the opposite conclusion.<sup>38</sup>

Regulatory takings doctrine has frequently been invoked by developers and industries extracting natural resources to discourage government from addressing environmental and social problems due to industrialization and technological advances unimaginable in 1789, particularly the potential harm to air, water, and climate due to emissions of greenhouse gases from human activity.<sup>39</sup> As Justice Benjamin Cardozo famously said, “The final cause of law is the welfare of society.”<sup>40</sup> A theory of constitutional interpretation that would cripple the government’s ability to step

always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. I has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals . . . . [I]t is not every hardship that is unjust, much less that is unconstitutional . . . .”); *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1879) (explaining that exercises of police power, although impairing property use, “are universally held not to be a taking within the meaning of the constitutional provision”).

34. *Lucas v. S.C. Coastal Council*, 505 U.S. at 1014 (noting that prior to *Pennsylvania Coal Co. v. Mahon*, “it was generally thought that the Takings Clause reached only a ‘direct appropriation’ of property . . . or the functional equivalent of a ‘practical ouster of [the owner’s] possession”); *id.* at 1028 n.15 (“Early constitutional theorists did not believe the Takings Clause embraced regulations of property at all.”).

35. *Byrne*, *supra* note 13, at 96-102.

36. *Id.*

37. 480 U.S. 470, 496 (1987) (holding that subsurface coal mining could be restricted to protect surface estate without requiring compensation, where coal could be profitably mined despite restrictions).

38. *Id.* at 475-77 (discussing regulation restricting mining of coal to prevent subsidence); *id.* at 501-02 (finding the challenged statute not to be an unconstitutional taking); *Byrne*, *supra* note 13, at 102 (“The need to distinguish [*Mahon*] argues for the overturning of the doctrine it called into being.”).

39. *See, e.g., supra* note 8.

40. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 66 (1921).

up protections of resources vital to health and safety in the twenty-first century can hardly be deemed to have been within the understanding of the Constitution in the eighteenth century.

### C. *Regulatory Takings Under Evolutionary Theory*

In contrast with the “mechanical” theories of textualism and originalism,<sup>41</sup> the evolutionary theory proposes that the Constitution “establishes a general framework for effective governance of a nation destined to grow and change.”<sup>42</sup> Evolutionary theory aims to apply changed circumstances, new values, and knowledge gained since the Constitution was drafted more than 200 years ago to reach the morally best rule.<sup>43</sup> The

41. LIU ET AL., *supra* note 25, at 28.

42. *Id.* at 8 (remarking how the framers ensured that government would have sufficient power to deal with nation’s evolving commerce).

43. *See, e.g., id.* at 14 (giving as an example, how the Eighth Amendment prohibition on “cruel and unusual punishments” was intentionally left general and therefore open to interpretation in accordance with contemporary values); *see also* Bd. of Regents v. Roth, 408 U.S. 564, 571 (1972) (noting that the words “liberty” and “property” in the Constitution are purposefully broad to allow experience to inform meaning). The majority and dissenting opinions in *Obergefell v. Hodges*, the Supreme Court’s recent decision finding that same-sex marriage is a constitutional right, offer a lucid comparison of originalism with evolutionary document theories of interpretation. The majority point out that the institution of marriage “has evolved over time.” *Obergefell v. Hodges*, No. 14-556, slip op. at 6 (U.S. June 26, 2015). Finding that the right to marry the person of one’s choice, regardless of their gender, was compelled by the due process clause of the Fourteenth Amendment, the majority described its task as interpreting a constitutional provision that

set[s] forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present. The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all person to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution’s central protections and a received legal stricture, a claim to liberty must be addressed.

*Id.* at 10-11 (citations omitted). In sharp contrast, Chief Justice Roberts and Associate Justice Alito, in their dissenting opinions, refused to recognize contemporary views of marriage, asserting that the notion of marriage as solely between a man and a woman is “deeply rooted in this Nation’s history and tradition.” *Id.* at 14 (Roberts, C.J., dissenting); *id.* at 2 (Alito, J., dissenting) (quoting *Washington v. Glucksberg*, 521 U.S. 701, 720-721 (1997)). Justice Scalia, in a separate dissent, relied on the public understanding of the meaning of marriage at the time the due process clause was ratified in 1868, which, he argued, universally confined marriage to a man and a woman. *Id.* at 4 (Scalia, J.,

theory requires judges to interpret constitutional provisions based on the text, original intent, precedent, accurate history, practicality, and a plausible reading of the Constitution.<sup>44</sup>

While it is designed to be flexible enough to accommodate changes in culture, values, and technology, the evolutionary theory is not without standards or structure, and is respectful of precedent.<sup>45</sup> Interpretation of the Constitution as an evolving document operates within the core values embodied in the various provisions of the Constitution and the Declaration of Independence, values that tend to further “both individual dignity and collective democratic activity,”<sup>46</sup> such as liberty, equality, opportunity;<sup>47</sup> democracy and separation of and balance of powers;<sup>48</sup> and pluralism and diversity.<sup>49</sup>

Under an evolutionary document theory, the Constitution is viewed less as a fixed template and more as a biological organism that grows and adapts to contemporary problems of society.<sup>50</sup> This less rigid model preserves the legitimacy of the Constitution among a citizenry that may grow skeptical of a document that prevents government from responding to problems of the current

dissenting).

44. See LIU ET AL., *supra* note 25, at 33; Adam Schlossman, *SCOTUSblog interview: Erwin Chemerinsky's The Conservative Assault on the Constitution*, SCOTUSBLOG (Dec. 14, 2010, 10:48 AM), <http://www.scotusblog.com/2010/12/scotusblog-interview-erwin-chemerinskys-the-conservative-assault-on-the-constitution/> (“A belief in a ‘living Constitution’ rejects the notion that the meaning of a constitutional provision is the same in 2011 as when it was adopted.”).

45. STRAUSS, *supra* note 25, at 3; *id.* at 139 (“The living Constitution [is] based on . . . intellectual humility, a sense of the complexity of the problems faced by our society, a respect for the accumulated wisdom of the past, and a willingness to rethink when necessary and when consistent with those virtues.”); see also Cass R. Sunstein, *A Hand in the Matter*, LEGAL AFF., (Mar./Apr. 2003), [http://www.legalaffairs.org/issues/March-April-2003/feature\\_marapr03\\_sunstein.msp](http://www.legalaffairs.org/issues/March-April-2003/feature_marapr03_sunstein.msp) (arguing that decisions that cannot be supported by the original understanding or any plausible understanding of the Constitution, and that are closely aligned with the political convictions of the judges, are illegitimate).

46. LIU ET AL., *supra* note 25, at 15; see also AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 17 (2005).

47. LIU ET AL., *supra* note 25, at 7-8.

48. *Id.* at 8-9 (citing THE FEDERALIST NO. 51 (James Madison)).

49. *Id.* at 9; see THE FEDERALIST NO. 10 (James Madison); Joseph L. Sax, *The Legitimacy of Collective Values: The Case of the Public Lands*, 56 U. COLO. L. REV. 537, 557 (1985) (regulation should facilitate “the legitimacy of collective values”); Geoffrey Stone & William Marshall, *The Framers' Constitution*, 21 DEMOCRACY: A J. OF IDEAS (Summer 2011).

50. See generally Joseph L. Sax, *The Unfinished Agenda of Environmental Law*, 14 HASTINGS W.-NW. J ENVTL. L. & POL'Y 1 (2008) (arguing for an adaptive understanding of rights to encourage adaptation and ingenuity).

day.<sup>51</sup>

The evolutionary document theory emerged from the substantive due process era with the advent of President Franklin Delano Roosevelt's New Deal legislation. From the 1880s through the 1935 decision in *Schechter Poultry Corp. v. United States*,<sup>52</sup> the Supreme Court consistently struck down government regulation of business in reliance on various theories: a rigid interpretation of the Commerce Clause,<sup>53</sup> "freedom of contract" under the due process clauses of the Fifth and Fourteenth Amendments,<sup>54</sup> the states' rights doctrine,<sup>55</sup> and, in the majority of cases, the substantive due process doctrine.<sup>56</sup> The most notorious of these decisions was *Lochner v. New York*,<sup>57</sup> where the Court invalidated the state's law establishing maximum working hours in a single work day.<sup>58</sup> The substantive due process doctrine involved an

51. See LIU ET AL., *supra* note 25, at 34.

52. 295 U.S. 495 (1935).

53. *E.g.*, *Carter v. Carter Coal Co.*, 298 U.S. 238, 297, 309-10 (1936) (invalidating requirement that coal mining companies adhere to maximum labor hour contracts negotiated by miners and producers organization).

54. *E.g.*, *Adkins v. Children's Hosp.*, 261 U.S. 525, 545, 561-62 (1923) (striking down Washington, D.C. minimum wage law); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (invalidating state law prohibiting anti-union activity contracts).

55. *E.g.*, *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 618 (1936) (striking down a state minimum wage law).

56. *E.g.*, *Tyson & Brother-United Theatre Ticket Offices v. Banton*, 273 U.S. 418, 445 (1927) (striking down state law regulating theater ticket sales); see also JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 30 (2011) (demonstrating that between 1920 and 1926, substantive due process most often invoked by Supreme Court to safeguard property rights, rather than contracts, commerce, and takings clauses).

57. 198 U.S. 45 (1905).

58. *Id.* at 64. *Lochnerian* substantive due process had its roots in a textual construction of the constitution, but was overlaid with the concept of the primacy of individual rights, natural law, and laissez faire economic ideology, nowhere to be found in the Constitution. SHESOL, *supra* note 56, at 47 (noting that under the "natural law" view, "the facts of a case pointed to certain rules or precedents, and the judge's job was simply to declare which rule governed"). This view is similar to Chief Justice John Roberts' claim before the Senate Judiciary Committee, during his confirmation hearing in 2006, that: "[j]udges are like umpires' whose job is simply 'to call balls and strikes.'" LIU ET AL., *supra* note 25, at 28 (quoting from *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. 55, 56 (2005) (statement of John G. Roberts, Jr.)); see also SHESOL, *supra* note 56, at 30 (describing substantive due process doctrine as involving a determination whether the regulation is "just" and "reasonable" rather than "arbitrary" or "oppressive"); *id.* at 31 (summarizing the conservative jurist position that the courts ought to act as a "shield" for individual rights against unreasonable demands of society); NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* 104 (2010) (arguing that the Court imposed its own economic beliefs on the country). In his noteworthy dissent in *Lochner v. New York*, however, Chief Justice Oliver Wendell Holmes dispelled

“assess[ment] whether a challenged regulation was ‘just’ and ‘reasonable’ rather than ‘arbitrary’ or ‘oppressive.’”<sup>59</sup>

In sharp contrast, President Roosevelt adopted a pragmatic approach to the Constitution, essentially embracing the evolutionary document theory that prevailed in the Supreme Court until the Reagan Administration.<sup>60</sup> The evolutionary document theory necessarily rejects textualism and originalism, relying instead on the prerogatives of the courts to apply constitutional text to the circumstances of the day.<sup>61</sup>

these notions, writing that “a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire.” 198 U.S. at 75-76 (Holmes, C.J., dissenting). See also DIONNE, *supra* note 30, at 151-52 (suggesting that the text of the Constitution indicates an intent that the government have sufficient police powers, rather than the purpose of limiting its power).

59. SHESOL, *supra* note 56, at 30; see also *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 471-72 (1934) (Sutherland, J., dissenting) (concluding that regulation protecting farmers from losing their homes constituted paternalism); SHESOL, *supra* note 56, at 69, 124 (demonstrating that in rejecting New Deal programs as socialist, conservative justices of the Supreme Court relied on notions of survival of the fittest and Anglo-Saxon individualism).

60. SHESOL, *supra* note 56, at 517 (FDR quoted as characterizing the Constitution as “a layman’s document, not a lawyers’ contract”); *id.* at 47 (referencing FDR’s statement during a press conference that the interstate commerce clause should be viewed “in the light of present day civilization. The county was in the horse-and-buggy age when that clause was written . . . . But communities are no longer self-supporting . . . . We are interdependent . . . . And the hope has been that we could, through a period of years, interpret the interstate commerce clause of the constitution in the light of these new things.”). FDR’s view that the Constitution should be flexible, organic, and adapted to present circumstances was summed up in *Home Bldg. & Loan Ass’n v. Blaisdell*, where the Court stated: “If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation.” 290 U.S. at 442.

61. Evolutionary document theory has been criticized by conservative proponents of textualism and originalism as results-driven, lacking in standards with which to anchor the law, dismissive of precedent, and anti-democratic. See FELDMAN, *supra* note 58, at 426, 429 (discussing critique of evolutionary document theory in context of assessment of Justice Douglas’s legacy); LIU ET AL., *supra* note 25, at 46-49. The evolutionary document approach, however, is not standardless law-making. See LIU ET AL., *supra* note 25, at 40 (noting that the Framers chose “general language to anchor a set of basic values that the nation could adapt as it grew and changed in unforeseeable ways”). Rather, it is anchored by precedent. When precedents are not clear, the judge decides the case to secure the core values of the Constitution. See *id.* at 25; see also STRAUSS, *supra* note 25, at 37-38 (arguing that contemporary construction of the Constitution should build on interpretations of earlier generations). Under strict originalism, therefore, *Brown v. Board of Education*, 347 U.S. 483 (1954), *New York Times v. Sullivan*, 376 U.S. 254 (1964), and other “iconic” decisions of the Supreme Court that are now almost universally accepted would have been decided differently. STRAUSS, *supra* note 25, at 73, 78. Moreover, it is not democratic to be bound to the will of persons living long ago, particularly where that will is

While the Supreme Court's decisions in review of the constitutionality of economic regulation in the 1930s had been mixed,<sup>62</sup> with most decisions invalidating the regulation in question,<sup>63</sup> the turning point in the high court's approach to government regulation during the New Deal—and the signal of a shift in the Court's degree of deference to legislative and executive regulation—is generally understood to be the five to four decision in *West Coast Hotel Co. v. Parrish*.<sup>64</sup> The Court followed *Parrish* with a series of decisions,<sup>65</sup> culminating in *United States v. Carolene Products Co.*,<sup>66</sup> where the Court decisively repudiated the substantive due process and liberty of contract doctrines, finding that courts should defer to legislative judgment where “any state of facts either known or which could reasonably be assumed,”<sup>67</sup> supports

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so difficult to discern, tempting judges to adopt their personal political views as reflecting original intent. *See id.* at 49.

62. *Compare* *Nebbia v. New York*, 291 U.S. 502, 537 (1934) (“[A] state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.”), with *ALA Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548 (1935) (striking down wage and hour regulations placed on poultry dealers under the Commerce Clause).

63. *See supra* notes 59, 62; William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN (May 2005), <http://www.smithsonianmag.com/ist/?next=/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/>.

64. 300 U.S. 379, 391 (1937) (upholding Washington state's minimum wage law on grounds that the Constitution does not guarantee freedom of contract, but rather protects against the deprivation of liberty without due process).

65. *E.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) (upholding power of Congress to regulate labor relations nationwide).

66. 304 U.S. 144, 152 (1938).

67. *Id.* at 154; *see also id.* at n.4. Rational basis review of police power regulation of property use under the due process clause is now well-established; *see, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) (“[I]t is up to legislatures, not courts, to decide on the wisdom and utility of legislation.” (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963))); *Usury v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (finding that “legislative Acts adjusting burdens and benefits of economic life” are presumed constitutional and that the claimant bears the burden to establish that the law is arbitrary and irrational); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639-40 (1943) (“[T]he laissez-faire concept or principle of non-interference has withered at least to as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls.”); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 437 (1934) (finding that contracts among private parties must yield to police power to protect health, morals, comfort and general welfare). Judicial deference to the economic policies of the political branches of government has also been widely acknowledged in takings jurisprudence, if not always exercised. *See E. Enterprises v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in part and dissenting in part) (“[N]ormative considerations about the wisdom of government decisions . . . [are] in uneasy tension with our basic understanding of the

it.

### 1. *Regulatory takings and precedent*

Permitting a court to find that a duly adopted regulation of a public agency is a taking requiring compensation cannot claim legitimacy under an evolutionary document approach to constitutional interpretation because it conflicts with precedent. At the time regulatory takings was introduced in *Pennsylvania Coal Co. v. Mahon*, the new doctrine contradicted all common law.<sup>68</sup>

For example, in 1870, the Supreme Court stated: “[The Clause] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals.”<sup>69</sup> In 1879, the Court held: “[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision.”<sup>70</sup> Then, in 1887, the Supreme Court upheld a ban on the manufacture and sale of intoxicating liquors, declaring them to be a public nuisance, even though the ban severely reduced the value of existing breweries: “A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of the property for the public benefit.”<sup>71</sup> Finally, in 1915, the Court upheld a ban on the manufacture of bricks within the city limits that reduced the value of the claimant’s land by more than 90%, finding that although the police power cannot be used arbitrarily, it is the “least

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Takings Clause, which has not been understood to be a substantive or absolute limit on the Government’s power to act.”); *id.* at 554 (Breyer, J., dissenting) (“[A]t the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes ‘private property’ to serve the ‘public’ good.”); *Dolan v. City of Tigard*, 512 U.S. 374, 391 n.8 (1994) (“[T]he burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights.”).

68. See Byrne, *supra* note 13, at 93-96; Treanor, *supra* note 13, at 792-97.

69. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1870).

70. *Transp. Co. v. Chicago*, 99 U.S. 635, 642 (1879).

71. *Mugler v. Kansas*, 12 U.S. 623, 668-69 (1887).

limitable” powers of government.<sup>72</sup>

The *Mahon* Court failed to distinguish *Mugler v. Kansas* or *Hadacheck v. Sebastian* or identify factors that validly distinguished these precedents.<sup>73</sup> Indeed, the decision that launched the regulatory takings doctrine itself fails the evolutionary document test. Pennsylvania suffered from a history of subsidence from coal mining,<sup>74</sup> warranting a regulatory response. Not only did the *Mahon* opinion ignore the plain text and original intent of the Clause, which are the starting points for an evolutionary document analysis, but the opinion was unable to build on any historical view or rely on a plausible understanding of the Constitution.<sup>75</sup>

Following *Pennsylvania Coal Co. v. Mahon*, the Supreme Court did not issue another significant regulatory takings precedent until *Penn Central Transportation Co. v. City of New York* in 1978. In the period between *Mahon* and *Penn Central*, the Supreme Court repudiated the *Lochner* era substantive due process and contracts theories that prevailed at the time *Mahon* was decided, in favor of a deferential standard of judicial review of government economic regulation.<sup>76</sup> The absence of any precedent for *Mahon* calls into question *Penn Central* and post-*Penn Central* decisions that built on the shaky *Mahon* edifice. It is difficult to reconcile the *Penn Central* partial takings test or the heightened standard of judicial review of development exactions mandated by *Nollan v. California Coastal Commission*,<sup>77</sup> *Dolan v. City of Tigard*,<sup>78</sup> and *Koontz v. St. Johns River*

72. *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915). *Pennsylvania Coal Co. v. Mahon* also cannot be squared with authorities decided shortly after *Mahon*, such as *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395-96 (1926) (upholding zoning ordinance against substantive due process challenge that reduced property value by 75% against due process challenge), and *Miller v. Schoene*, 276 U.S. 272, 280 (1928) (upholding state’s destruction of diseased trees as valid exercise of the police power).

73. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412-16 (1922). The dissent, however, relied on *Mugler*, *Hadacheck*, and several other precedents conflicting with the majority decision. *Id.* at 418-22 (Brandeis, J., dissenting).

74. Travis Keller, Officials, Historians Talk about Mine Subsidence in Northeastern Pennsylvania, *TIMES LEADER*, April 9, 2015, [http://www.timesleader.com/news/home\\_top-local-news/152834976/](http://www.timesleader.com/news/home_top-local-news/152834976/).

75. Byrne, *supra* note 13, at 97-102.

76. See *supra* notes 64-67 and accompanying text.

77. 483 U.S. 825, 834-37 (1987) (holding that under unconstitutional conditions doctrine, exaction of public easement across private beach to connect two adjacent public beaches—which would constitute a per se physical taking if not conditioned on development approval—must have essential nexus to impacts of development project to avoid danger of public extortion of private developers).

78. 512 U.S. 374, 388-91 (1994) (holding that exaction of land for bike path and public greenway must not only have essential nexus required by *Nollan* but also rough

*Water Management District* with decisions dating from the New Deal finding that courts must defer to the judgments regarding wise and effective economic regulation imposed by legislatures and the executive and administrative branches of government.<sup>79</sup> The regulatory takings doctrine was thus established during the era in which the Supreme Court read a *laissez-faire* ideology into the Constitution, yet survives today despite the Supreme Court's rejection of the notion that the Constitution embodies *laissez-faire*.

Proponents of regulatory takings contend that the doctrine is necessary to restrain government intervention in economic activity allegedly unprecedented since the Gilded Age.<sup>80</sup> This argument stumbles, however, because the Supreme Court's ultimate reaction to the New Deal, the greatest single expansion of state regulatory apparatus in United States history, was to defer to the economic policies of the political branches of government out of respect for one person-one vote and separation of powers—fundamental constitutional values recognized in precedent.<sup>81</sup> That the regulatory state has been further expanded since the New Deal does not alter the fundamental teaching that courts defer to the political process with respect to economic and social policy making.

## 2. *Regulatory takings and core values of the Constitution*

Under the evolutionary document theory of constitutional interpretation, the Constitution embodies bedrock principles that, in addition to precedent, inform its interpretation—liberty, equality, democracy and separation of powers, federalism, judicial restraint, protection for the vulnerable and politically powerless, and the notion of fundamental rights. I argue that the regulatory takings doctrine runs counter to each of these key values. In the context in which property is now used—increasing urbanization and industrialization, rapidly advancing scientific understanding of the complexity of natural systems, and economic and social interdependence—collective action in the form of regulation by the state is necessary to preserve these core values of the Constitution and to curb the harsh effects of the business system

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proportionality to impacts of proposed development project).

79. See *supra* notes 64-67 and accompanying text.

80. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* X (1985).

81. See *supra* notes 78-80 and accompanying text.

on community interests.<sup>82</sup> Moreover, views of property have evolved since the Bill of Rights in parallel with growth in population, concentration of commerce in dense cities, technology and industry, and scientific knowledge regarding the impact of human activity on the environment, to recognize the necessity of direct government regulation of the use of property.<sup>83</sup>

Libertarian proponents of a robust regulatory takings doctrine compare the use of private property with other individual interests that have received protection from the Supreme Court, such as freedom of speech, association, privacy, and other personal liberties.<sup>84</sup> Under this view, the Constitution should be interpreted in a consistent manner—one interest expressly identified in the Constitution should enjoy the same degree of protection as other interests expressly identified.<sup>85</sup> Through the libertarian lens, the Constitutional provisions that protect citizens from deprivation of private property “without due process of law” or “without just compensation,” protect an individual’s right to *use* their property for maximum profit, or at least in accordance with their preferences, without regard to the impact of the use on the community. According to the libertarian position, the Clause should be adapted to current social and economic norms which lean toward self-reliance, meritocracy, and individual wealth.<sup>86</sup>

82. The signers of the Declaration of Independence acknowledged the bond among individuals that would comprise the new nation: “With a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.” DIONNE, *supra* note 31, at 82. The Preamble to the Constitution also indicates that unity is a primary goal of the new nation: “We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.” U.S. CONST. pmbl.; see DIONNE, *supra* note 31, at 70-71; see also MICHAEL SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 5, 214-15 (1998) (explaining that liberty and self-determination are served by citizens in a republican democracy sharing responsibility for self-government) (cited in DIONNE, *supra* note 31, at 73).

83. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926) (“[W]ith the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities . . . . Such regulations are sustained, under the complex conditions of our day . . .”).

84. E.g., EPSTEIN, *supra* note 80, at 25-29, 141; Richard A. Epstein, *Beyond Judicial Activism and Restraint*, 1 *GEO. J.L. & PUB. POL’Y* 85, 87-91 (2002).

85. Epstein, *supra* note 84.

86. See, e.g., Steven J. Eagle, *The Really New Property: A Skeptical Appraisal*, 43 *IND. L. REV.* 1229 (2010); Richard A. Epstein, *Yee v. City of Escondido: The Supreme Court Strikes*

Libertarians would interpret the Constitution to reduce government regulation of a broad range of human endeavor, from purely economic activity to the possession of firearms, without regard to the adverse impacts of such behavior on other individuals in the community.<sup>87</sup> Parallel with this trend, they may argue, is an expanding standard of fairness that dictates compensation to individuals for all losses, including those due to government interference with the use of private property.<sup>88</sup>

A focus on consistent treatment of different interests that are expressly mentioned in constitutional text, however, misses the point of the evolutionary document theory: it is not sufficient to adapt the Constitution to contemporary norms; that adaptation must also remain faithful to the core and enduring values of the Constitution, such as individual liberty, equality, and self-rule.<sup>89</sup> There is nothing in the text, original intent, core principles, or the jurisprudence of the Constitution since the New Deal (aside from regulatory takings doctrine) that places unfettered use of property or laissez-faire as fundamental rights on par with liberty, equality, or the right to engage in activity essential to participation in a democratic republic.<sup>90</sup> To the contrary, the Constitution and Declaration of Independence express a desire on the part of the framers for a government that protects and furthers the general

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*Out Again*, 26 LOY. L.A. L. REV. 3 (1992).

87. DIONNE, *supra* note 31, at 75; *see also id.* (arguing that modern libertarianism threatens to destroy social connections Tocqueville saw as moderating individualism's "more destructive potentialities" (quoting ROBERT NEELY BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* xlvi (2008))).

88. *See* LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* 5 (1994) (lamenting trend in United States toward general expectation of compensation for all losses not of the claimant's own making). I respond to the libertarian argument that while the political branches of government may choose to compensate property owners for the difference between the value of their property before and after regulation is imposed, such compensation, like the expanded compensation for torts and other losses referred to in *TOTAL JUSTICE*, is not constitutionally mandated.

89. *See* James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 45 (1995) ("Economic freedom is not a precondition for deliberative autonomy in a constitutional democracy.").

90. *See* *Morehead v. Tipaldo*, 298 U.S. 587, 633, 636 (1936) (Stone, J., dissenting) (dissenting against majority decision to strike down New York law setting a minimum wage for women: "It is difficult to imagine any grounds other than our own personal economic predilections, for saying that the contract of employment is any the less an appropriate subject of legislation than are scores of others, in dealing with which this Court has held that legislatures may curtail individual freedom in the public interest . . . . [The due process clause] has no more embedded in the Constitution our preference for some particular set of economic beliefs than it has adopted, in the name of liberty, the system of theology which we may happen to approve"); *see also* SHESOL, *supra* note 56, at 220-21.

health, safety, and welfare through the creation and implementation of laws.<sup>91</sup> There is no support in the Constitution for broad rights to use property—or compensation for restrictions on use—similar to the right of free speech or assembly, which, like several other interests expressly recognized by the Constitution, are essential to democracy.<sup>92</sup> Held up against these fundamental liberties, regulatory takings are not only unnecessary, but also threaten them.

### a. *Liberty*

The key constitutional value of individual liberty pervades the Constitution, from the Preamble to the Bill of Rights and the due process clause of the Fourteenth Amendment.<sup>93</sup> “To the framers, the great object was to limit the necessary powers of organized society so as to guarantee individual liberty.”<sup>94</sup>

91. The Preamble of the Constitution seeks to “promote the general Welfare.” U.S. CONST. pmbl.; see LIU ET AL., *supra* note 25, at 10 (noting that Article I lists congressional powers to tax and spend, regulate commerce, and “make all laws ‘necessary and proper’ for executing the enumerated legislative powers and all other powers vested in the national government”); LIU ET AL., *supra* note 25, at 17. I acknowledge that certain statements in and interpretations of the Federalist Papers support a contrary view. See, e.g., THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961) (noting that the protection of the “faculties” that give rise to man’s ability to acquire property is “the first object of government”). The text of the Constitution, however, is less ambiguous on the issue of government power to regulate private property.

92. See Fleming, *supra* note 89, at 45 (noting that while economic liberty is essential for deliberative democracy and autonomy, it is not entitled to special judicial protection where property owners can secure adequate protection in the political process). Prior to *Penn Central Transportation Co. v. City of New York*, the Supreme Court had firmly embraced the social contract theories of John Locke to distinguish between fundamental liberties, constraints on which are subject to strict judicial scrutiny, and regulation of the use of property, which is entitled to deferential review by the courts. See Sheldon Gelman, “Life” and “Liberty”: *Their Original Meaning, Historical Antecedents, and Current Significance in the Debate over Abortion Rights*, 78 MINN. L. REV. 585, 627-28 (1994) (noting that Locke rejected notion that government regulation reducing property value constituted an “appropriation”).

93. U.S. CONST. pmbl.; amends. I-X, XIV.

94. Reich, *supra* note 31, at 701. As used in the Constitution, “liberty” means restrictions on government power to compromise personal rights such as conscience, freedom of thought, freedom of association, the rights to live with one’s family, the rights to travel or relocate, the right to marry, the right to decide whether to bear or beget children, the rights to direct the education and rearing of children, and the right to exercise dominion over one’s body, including the right to bodily integrity. See Fleming, *supra* note 89, at 8 and authorities cited therein. Other courts have found that “liberty” interests in the Constitution means freedom from harm, rights to treatment in state institutions, the right to attend private schools, the right to learn foreign languages in public schools, and the right to abortion. Gelman, *supra* note 92. Liberty also includes the

The right to use property for economic gain is generally not essential to liberty, and enjoys no specific protection under the Constitution. Although government regulation of the use of property constrains individual and corporate freedom of action, because restrictions on use do not “take” property without compensation, they do not encroach on the liberty interests recognized by the framers as fundamental. In recognition of these principles, the Supreme Court has drawn a clear distinction between liberty and economic interests protected by the Constitution: restrictions on the exercise of individual rights to liberty and equality are subject to heightened scrutiny;<sup>95</sup> but courts defer to other branches on economic regulations, overturning them only where they are irrational or arbitrary.<sup>96</sup>

Treating a purely economic transaction as a liberty interest is also at odds with contrary language in the text and original intent of the Fifth Amendment.<sup>97</sup> The Constitution protects individual

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right of persons “to define and express their identity,” *Obergefell v. Hodges*, No. 14-556, slip op. at 1-21 (U.S. June 26, 2015) (finding that individual liberty protected by Constitution requires states to permit same-sex marriage), and “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992)). The Constitution protects “basic liberties that are significant preconditions for persons’ ability to deliberate about and make certain fundamental decisions affecting their destiny, identity, or way of life.” Fleming, *supra* note 89, at 2.

95. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (applying undue burden test to restrictions on abortion); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (applying strict scrutiny to ordinance limiting occupancy of dwellings to members of a single family); *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977) (applying heightened scrutiny to zoning decision excluding racial minority); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (applying strict scrutiny to restrictions on the right to travel); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (applying strict scrutiny to restrictions on the right to procreate).

96. Compare *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943) (noting that the state may promulgate any regulation justified by a rational basis under the due process clause as opposed to a more limited power when more fundamental restrictions such as those associated with speech and press are involved), with *Marsh v. Alabama*, 326 U.S. 501, 506, 509 (1946) (freedom of press and religion “occupy a preferred position” to property rights), and *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law [restricting use of contraception], however, operates directly on an intimate relation of husband and wife and their physician’s role in one aspect of that relation.”).

97. See Treanor, *supra* note 13, at 834 (noting that the drafters of the Fifth Amendment displayed “remarkably little desire for any kind of substantive protection of property rights”); see also Garrett Epps, *Stealing the Constitution*, THE NATION, Feb. 7, 2011, <http://www.thenation.com/article/157904/stealing-constitution> (arguing that there is little evidence of constitutional intent to restrain federal government from engaging in

rights. Specifically enumerated protections for economic rights do not exist in the document. Even less can be gleaned from the Constitution to protect the economic freedom of business organizations.<sup>98</sup>

In the Fifth Amendment, the framers expressly distinguished between “liberty” and “property,” affording due process protection for deprivations of both liberty and property, the remedy being invalidation, but expressly requiring compensation only for takings of property.<sup>99</sup> I contend that a requirement that the state pay compensation for direct takings under the Clause does not logically support characterizing economic activity as a liberty interest. The Clause expressly recognizes that the appropriation of private property, which typically constitutes direct interference with economic activity, does not violate a constitutional right, no less a liberty interest.<sup>100</sup> It is only the appropriation of the interest *without compensation* that is prohibited. There is no counterpart in the Constitution allowing the state to appropriate a fundamental liberty interest as long as it pays for the privilege; circumscribing a fundamental liberty interest is forbidden. It follows that if the physical appropriation of property does not deny a liberty interest, the mere regulation of the use of property cannot infringe a liberty interest. That the owner of the appropriated property is entitled to substitute monetary compensation for the property involuntarily sold to the state reinforces the notion that economic activity does not rise to the level of importance of fundamental rights such as association,

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economic policy making).

98. See, e.g., Reich, *supra* note 31, at 690; see also *supra* note 95.

99. U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”). Reich, *supra* note 31, at 691 (noting that Justice Black construed the protections of property in the due process clause as weaker than the protection of individual liberty in the same clause); see also Karena C. Anderson, *Strategic Litigating in Land Use Cases: Del Monte Dunes v. City of Monterey*, 25 *ECOLOGICAL Q.* 465, 478 (1998) (“[A] regulation that violates due process cannot be cured by payment of compensation; rather, it is necessarily invalid.”).

100. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005) (“The [Takings] Clause expressly requires compensation where government takes private property ‘for public use.’ It does not bar government from interfering with property rights, but rather requires compensation ‘in the event of otherwise proper interference amounting to a taking.’” (quoting *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 315 (1987))); see also *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188, 200 (2003) (Scalia, J., concurring) (arguing that the clause allows the government to take private property for public use if it pays just compensation).

speech, and other rights securing individual autonomy, the infringement of which cannot be sanctioned by the mere payment of monetary compensation.<sup>101</sup>

In advocating for an expansive regulatory takings doctrine, business interests have cloaked themselves in the mantle of individual liberty to deflect government regulation of economic activity. But such economic independence has little to do with the freedoms protected by the Constitution. Suggestions of this laissez-faire ideology are present in the 1789 Constitution itself, where the Southern States dependent on slavery for their wealth won protection of their property, slaves, from interference by the federal government.<sup>102</sup> Opposition to “big government” rooted in the institution of slavery in the early years of the Republic continues to influence the national debate as to the proper role of government in economic matters. Due to “a more centralized [and complex] economy and a geographically mobile people whose ties to the nation were weakening their ties to locality and state,” collective action became increasingly necessary to address social problems and to mitigate the sometimes harsh consequences

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101. Compare *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (striking down a statute prohibiting inflammatory speech as violating the First Amendment), with *First English Evangelical*, 482 U.S. at 315 (holding that monetary damages were mandatory remedy for regulatory takings). While monetary compensation may be recoverable for a violation of a fundamental liberty interest directly under the Constitution, see *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 390-97 (1971), and against a state or local agency under 42 U.S.C. § 1983, that right to compensation does not spring from the constitutional text itself. Moreover, because the word “property” appears in the Fourteenth Amendment, it does not follow that liberty and property interests should receive identical protections from government interference. While both “liberty” and “property” appear in the text of the amendment, the default level of review under the Due Process Clause is rational basis—only “fundamental” rights receive higher levels of scrutiny. See *Moore v. City of E. Cleveland*, 431 U.S. 494, 499-500 (1977). The Supreme Court has found several “fundamental” liberty interests, but has never found such a “fundamental” property interest. Compare *Moore*, 431 U.S. at 499-500 (protecting the fundamental right to live with one’s family, broadly defined), and *Roe v. Wade*, 410 U.S. 113, 152-56 (1973) (protecting the fundamental right to choose to have an abortion), and *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (protecting the fundamental right to use contraception), with *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 228-30 (1985) (Powell, J., concurring) (observing that only *fundamental* property rights would be protected by substantive due process); see also Ronald J. Krotoszynski, *Fundamental Property Rights*, 85 GEO. L.J. 555, 558 (1997) (“In the modern era, the Supreme Court has not addressed whether ‘fundamental’ property rights even exist.”). Accordingly, it is doubtful that liberty and property are entitled to identical protection from government interference under Fourteenth Amendment due process jurisprudence.

102. AMAR, *supra* note 46, at 93.

of capitalism.<sup>103</sup> Constitutional interpretation by the Supreme Court reflected these profound changes in society.<sup>104</sup> The Supreme Court eventually recognized the impropriety of equating economic and liberty interests. By the 1960s, the Supreme Court had thoroughly repudiated the liberty of contract doctrine.<sup>105</sup> Until the expansion of regulatory takings in the 1980s, economic rights following the New Deal era were generally protected by the political process rather than the courts.

Since the 1980s and the “Reagan Revolution,” as a result of a concerted campaign by business interests to marginalize government in general and government regulation of business in particular, a libertarian economic view of the Constitution has gained considerable momentum, culminating with the ascent of the Tea Party as a major force in Congress.<sup>106</sup> Since *Penn Central*, a majority of the United States Supreme Court seems to have embraced this libertarian economic philosophy in regulatory takings cases.

The Reagan Revolution and the contemporary trend toward a “radical individualism”<sup>107</sup> and their counterpart, a shrinking of government involvement in economic affairs, have closely paralleled the expansion of regulatory takings. Both rely in great

103. DIONNE, *supra* note 31, at 224-25.

104. See *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 517 (1924) (overturning state law fixing the weight of loaves of bread); *Adkins v. Children’s Hosp.*, 261 U.S. 525, 561-62 (1923) (striking down state law setting minimum wages for women on substantive due process grounds); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (striking down state law restricting “yellow dog” contracts); *Adair v. United States*, 208 U.S. 161, 179 (1908) (holding that prohibiting interstate carriers from discharging employees on account of union membership was not a legitimate function of government).

105. See *supra* notes 64-67 and accompanying text.

106. See Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827 (2011); Christopher W. Schmidt, *The Tea Party and the Constitution*, 39 HASTINGS CONST. L.Q. 193 (2011). This view has gained traction with the electorate, a substantial portion of which believes that government is incompetent, wasteful, self-serving, and most importantly, an obstacle to prosperity. See, e.g., Rebecca Riffkin, *Americans Say Federal Government Wastes 51 Cents on the Dollar*, GALLUP (Sept. 17, 2014), <http://www.gallup.com/poll/176102/americans-say-federal-gov-wastes-cents-dollar.aspx>.

107. This term was coined by E.J. Dionne, Jr. in *Our Divided Political Heart*. See, e.g., DIONNE, *supra* note 31, at 5-6 (noting radical individualism “denigrates the role of government and the importance most Americans attach to the quest for community . . . [t]his extreme individualism sees the ‘common good’ not as a worthy objective but as a manipulative slogan disguising a lust for power by government bureaucrats and the ideological ambitions of left-wing utopians”). During the past 34 years, regulatory takings doctrine has developed in parallel with this extreme individualism.

part on a distortion of and detachment from Constitutional history. Modern libertarians have relied on references to “liberty” in the Constitution as a recipe for a nation bound to an ideology of market fundamentalism.<sup>108</sup> The difficulty with this interpretation of the Constitution is the lack of any evidence in the text or the record of the original understanding to support it.<sup>109</sup> The regulatory takings doctrine fails to advance any of the values that have been identified above as fundamental to the Constitution.

Rather than treating freedom of use of private property and government regulation of that use as mutually exclusive, government regulation can protect individual freedom where the use of property may harm the interests of another.<sup>110</sup> Government regulation promotes an average reciprocity of advantage, where individuals derive an overall benefit from regulation of their property and similar regulation of the property of others.<sup>111</sup> Lacking any grounding in the text or intent of the Constitution, or in precedent, the notion that economic profit-seeking is a liberty interest subject to heightened judicial review under the Clause is

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108. THOMAS G. WEST, *THE ECONOMIC PRINCIPLES OF AMERICA'S FOUNDERS: PROPERTY RIGHTS, FREE MARKETS, AND SOUND MONEY* (The Heritage Found., 2010), available at <http://www.heritage.org/research/reports/2010/08/the-economic-principles-of-america-s-founders-property-rights-free-markets-and-sound-money>.

109. DIONNE, *supra* note 31, at 151-52. “Market fundamentalism” has been defined as “the exaggerated faith that when markets are left to operate on their own, they can solve all economic and social problems.” *Market Fundamentalism*, LONGVIEW INST., <http://www.longviewinstitute.org/index.html> (last visited June 12, 2015).

110. *See* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937) (noting the constitutional protection of liberty is effected by laws that protect against threats to health, safety, morals and welfare); *see also* Robert Kuttner, *Obama's Obama: The Contradictions of Cass Sunstein*, HARPER'S MAG., Dec. 2014, at 88 (arguing that government intervention protecting the environment, consumers, and worker safety enhances liberty); DIONNE, *supra* note 31, at 264 (arguing that “rights” are linked with “duties,” “self-fulfillment with social obligation”); JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* 190-91 (2006) (arguing that corporate polluters have long hidden behind the myth of individualism to shift costs to society).

111. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987); *see also* *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (recognizing average reciprocity of advantage as justification for regulation); *id.* at 422 (Brandeis, J., dissenting) (concluding that reciprocity of advantage should be construed to uphold regulations that generally confer “the advantage of living and doing business in a civilized community”). The reciprocity doctrine is an outgrowth of the modern reality that all property use affects others in an interdependent society. *See* Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Takings Jurisprudence*, 40 AM. U. L. REV. 297, 356 (1990) (noting that because landowners derive “a cornucopia of privileges” from public laws, acquiescing to restrictions on the harmful use of their property is “part of their duty as social participants”).

an invitation to judicial activism.

b. *Equality*

The Constitution requires equal treatment under the law.<sup>112</sup> There is little support for regulatory takings as an equalizer in American society.<sup>113</sup> Indeed, the evidence suggests that regulatory takings has heightened inequality between property users and the public.<sup>114</sup>

Following the adoption of the National Environmental Policy Act,<sup>115</sup> the Endangered Species Act,<sup>116</sup> the Clean Air Act,<sup>117</sup> the Clean Water Act,<sup>118</sup> and several other federal regulatory programs, in conjunction with new state regulatory programs designed to reign in environmental pollution in the late 1960s and early 1970s,<sup>119</sup> business interests mounted a campaign to roll back not only the environmental regulation of this era, but also regulation of business and other social programs enacted as part of the New Deal. The goal of this drive was and is to return the nation to the oligarchic economic hierarchy prevailing in the Gilded Age of the

112. See U.S. CONST. amend. XIV, § 1 (mandating states provide equal protection); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying the Equal Protection Clause of the Fourteenth Amendment to the federal government).

113. Examples of court decisions finding that land-use regulation violated the rights of property owners to equal protection are few. Cf. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000).

114. See, e.g., *Richardson v. City & Cnty. of Honolulu*, 124 F.3d 1150, 1166 (9th Cir. 1997) (holding that rent control ordinance preserving affordable housing amid Hawaii's land oligopoly violated Fifth amendment); *Manochejian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 398 (1994) (finding rent stabilization law protecting non-profit hospital employees effected a taking); see also Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994) (directing federal agencies to "make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations . . ."); *Disparities in the Impact of Air Pollution*, AM. LUNG ASS'N, (2013), <http://www.stateoftheair.org/2013/health-risks/health-risks-disparities.html> (last visited June 12, 2015) (discussing the link between low socioeconomic status and harms from air pollution); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 799-806 (1993) (summarizing research into the relationship between low income, racial minority communities, and environmental harms generally).

115. 42 U.S.C. §§ 4321-4370(h) (2014).

116. 16 U.S.C. §§ 1531-1544 (2014).

117. 42 U.S.C. §§ 7401-7431 (2014).

118. 33 U.S.C. §§ 1251-1474 (2014).

119. E.g., California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21189.3 (West 2015); N.Y. ENVTL. CONSERV. LAW §§ 3-0301(1)(b)-(2)(m), 8-0113 (McKinney 2005).

late 19th and early 20th Centuries.<sup>120</sup> Along with weakening environmental protections in Congress and state legislatures,<sup>121</sup> constricting funding for regulatory agencies responsible for enforcing environmental laws,<sup>122</sup> and limiting citizen access to the courts to enforce environmental protections,<sup>123</sup> expansion of regulatory takings has been a key part of this corporate strategy.<sup>124</sup> The free-market movement gathered considerable momentum with the election of Ronald Reagan to the White House, the appointment of Antonin Scalia, an exponent of *laissez-faire*, to the Supreme Court, and the new constraints placed on government regulation of business by an expanding regulatory takings doctrine.<sup>125</sup> One result of this corporate strategy has been to

120. THOMAS O. MCGARITY, *FREEDOM TO HARM: THE LASTING LEGACY OF THE LAISSEZ FAIRE REVIVAL* 65-67 (2013); William Greider, *The Right's Grand Ambition: Rolling Back the 20th Century*, *THE NATION*, May 12, 2003, <http://www.thenation.com/article/rolling-back-20th-century>.

121. *See, e.g.*, Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, 117 Stat. 1887 (2003) (eliminating requirement that agencies consider less environmentally damaging alternative management strategies with respect to logging projects); National Forest Jobs and Management Act of 2014, S. 1966, 113th Cong. (2014) (limiting NEPA review of logging activities); Water Resource Reform and Development Act of 2014, H.R. 3080, 113th Cong. (2013) (reducing the time period for public comment on certain projects); *see also* MCGARITY, *supra* note 120, at 67-83 (recounting corporate efforts to weaken regulatory oversight from the Nixon Administration onward); Steven W. Watkins, Note, *Congressional Attempts to Amend the Clean Water Act: American Wetlands Under Attack*, 72 N.D. L. REV. 125 (1996) (canvassing attempts to weaken wetlands protections under the Clean Water Act, including the Comprehensive Wetlands Conservation and Management Act of 1995, H.R. 1268, 104th Cong. (1995)).

122. *See* MCGARITY, *supra* note 120, at 113, 219; Coral Davenport, *EPA Funding Reductions Have Kneecapped Environmental Enforcement*, *NAT'L J.* (Mar. 3, 2013), <http://www.nationaljournal.com/daily/epa-funding-reductions-have-kneecapped-environmental-enforcement-20130303>; Darren Goode, *House Panel Approves Bill with Deep Cuts for EPA*, *POLITICO* (Jul. 24, 2013, 5:02 AM), <http://www.politico.com/story/2013/07/epa-budget-cuts-94632.html>; Bryan Walsh, *The GOP's Hidden Debt-Deal Agenda: Gut the EPA*, *TIME* (Aug. 2, 2011), <http://content.time.com/time/health/article/0,8599,2086421,00.html>.

123. *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (holding that an environmental group lacked standing to challenge forest management regulations); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109 (1998) (finding that citizens lacked standing to sue polluter for past violations); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (holding that an environmental group lacked standing to challenge Secretary of Interior's interpretation of Endangered Species Act). *But see* *Massachusetts v. EPA*, 549 U.S. 497, 522-26 (2007) (finding that citizens had standing to challenge EPA's regulation of greenhouse gas emissions from motor vehicles).

124. MCGARITY, *supra* note 120, at 67-83.

125. DOUGLAS T. KENDALL & CHARLES P. LORD, *THE TAKINGS PROJECT: USING FEDERAL COURTS TO ATTACK COMMUNITY AND ENVIRONMENTAL PROTECTIONS* (1998), available at <http://communityrights.org/CombatsJudicialActivism/TP/TPcontents.php>.

exacerbate inequality by allowing businesses to transfer the cost of externalities of their property use to the public, increasing profits from exploitation of property and diminishing the value of public goods.<sup>126</sup>

Advocates of regulatory takings have inverted the externality argument, however. In *Armstrong v. United States*,<sup>127</sup> the Supreme Court stated that the Clause “was designed to bar . . . burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>128</sup> Proponents of regulatory takings have distorted *Armstrong’s* explication of the theoretical underpinnings of the Clause to argue that application of a broad regulatory takings doctrine is the best tool to achieve equal treatment for individual property owners subjected to burdensome government regulation.<sup>129</sup> Under the takings doctrine they envision, property owners are entitled to compensation whenever government action imposes a greater burden on them than on others.

Rather than singling out real estate developers, utilities, manufacturers, agricultural industries, and extractive industries to bear a disproportionate burden of environmental regulation, a regulatory takings doctrine that confines environmental regulation accomplishes the opposite—it confers special economic benefits on a narrow group of property owners at the expense of the larger community.<sup>130</sup> A robust regulatory takings doctrine allows this

126. For example, emitters of greenhouse gas emissions causing global warming can shift costs of that activity to others. See JAMIESON, *supra* note 6, at 230 (“Those who benefit [from climate change] do not pay its full costs; some of the costs fall on people who do not benefit and are not adequately compensated.”); see also *id.* at 230 (“Individuals, corporations, and governments can capture large economic benefits through deforestation and exploitation while the costs are externalized to everyone who will live on the planet for at least the next millennium.”).

127. 364 U.S. 40 (1960).

128. *Id.* at 49.

129. *E.g.*, *Rose Acre Farms, Inc. v. United States*, 53 Fed. Cl. 504, 518 (2002) (relying on *Armstrong v. United States*, 364 U.S. at 49, to find that USDA restriction on sale of eggs tainted with salmonella effected taking of healthy eggs from same farm); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 140, 152 (1978) (Rehnquist, J., dissenting) (citing *Armstrong*, 364 U.S. at 49, for the assertion that taxpayers should compensate property owners subject to New York City landmark preservation law for the economic burden imposed by law).

130. The vast majority of property owners in the United States are homeowners who derive little benefit from an expansion of government liability for regulatory takings. See U.S. Census Bureau, *State and County QuickFacts*, U.S. DEP’T. OF COMMERCE, <http://quickfacts.census.gov/qfd/states/00000.html> (last updated Mar. 31, 2015) (reporting that more than 132 million housing units in the United States in 2013 contained 115 million households and 87 million homeowners, as compared to 7.43

small group of property owners using property for profit to shift the externalities of their activity to the community, transferring wealth to the owners of property engaged in these for-profit activities.<sup>131</sup> The most visible effect of wealth transfers due to weak environmental policy and lax enforcement of environmental laws resulting, in part, from regulatory takings is disproportionate environmental degradation in middle class and poor communities.<sup>132</sup> In effect, regulatory takings results in a public subsidy from those not using property for profit to those who do. Thus, *Nollan v. California Coastal Commission*, *Dolan v. City of Tigard*, and *Koontz v. St. Johns River Water Management District*, insofar as they constrain government's ability to require mitigation of the externalities of real estate development projects, intensify inequality.

While it is accepted that eminent domain requires compensation because an individual property owner loses her property for the public interest and thus bears a disproportionate burden of the project, it does not follow that compensation is required or desirable whenever government limits the use of private property. All regulation imposes disparate benefits and burdens on property owners.<sup>133</sup> I suggest that American

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million private non-farm establishments).

131. See CHARLES E. LINDBLOM, *POLITICS AND MARKETS* 44 (1977) (arguing that inequality results in part from a "politically maintained inequality in individual assets, earning power, and income shares," using the example of enclosure movements in England that drove peasants off land, resulting in permanent redistribution of wealth); Byrne, *supra* note 13, at 130 ("Why should the Constitution be interpreted to socialize losses disproportionately falling on moderate and high income citizens?"); see also Abraham Bell & Gideon Parchomovsky, *Givings*, 111 *YALE L.J.* 547, 578 (2001) ("Just as it is inequitable to single out groups to bear the burden of societal needs, it is inequitable to privilege a few by permitting them to enrich themselves at the expense of the public.").

132. LINDBLOM, *supra* note 131, at 45 (arguing that granting unfettered rights to engage in any economic activity that the actor perceives is to her benefit ignores externalities imposed on others); Thomas O. McGarity, *What Obama Left Out of His Inequality Speech: Regulation*, *N.Y. TIMES OPED* (Dec. 9, 2013, 7:50 PM) (noting that the underprivileged bear a disproportionate burden of the deregulation of the past several decades, magnifying inequality); see also MCGARITY, *supra* note 120, at 99-117.

133. "Legislation designed to promote the general welfare commonly burdens some more than others." *Penn Central*, 438 U.S. at 133. In the same way, "zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account." *Id.* at 133-34; see also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 n.21 (1987) ("The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received."); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 223 (1986) (finding that inherent in police power is the requirement that private property be used to benefit others).

government properly rests on the principle of average reciprocity of advantage, where the entire system of government regulation, over time, comes as close as is feasible to equalizing takings and givings.<sup>134</sup> Awarding compensation to an individual property owner on the basis of the detriment from an individual regulation, where other property owners are also subject to the same, and many others, regulations would confer a windfall on the property owner, leading to an unequal result.

Weak regulation of the use of property that permits higher profits to the users but allows the costs of externalities to be socialized exacerbates inequality of wealth and economic opportunity. Regulatory takings, therefore, does not advance, and likely diminishes, the key constitutional value of equality.

*c. Democracy, separation of powers, and judicial restraint*

This section describes the process for policy-making set forth in the Constitution, the role of judicial review of policies adopted by the elected legislature and the executive branches of government, and finally analyzes the conflict between regulatory takings, particularly partial and means-ends takings, and fundamental elements of American democracy—one person-one vote, self rule, legislative decision-making, majoritarianism, and separation of powers.

I contend that regulatory takings improperly elevates individual property rights over principled legislative and executive decision-making. The notion that the right of unimpeded use of property for economic gain transcends the power of the collective to restrict harmful uses of property lying at the heart of the regulatory takings doctrine has no support in the Constitution.<sup>135</sup>

134. See *infra* note 137 and accompanying text; see also *San Remo Hotel v. City & Cnty. of San Francisco*, 27 Cal. 4th 643, 675-76 (2002) (“[T]he necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.”).

135. AMAR, *supra* note 46, at 17 (“Although some modern readers have tried to stress property protection rather than popular sovereignty as the Constitution’s bedrock idea, the words ‘private property’ did not appear in the Preamble, or anywhere in the document for that matter. The word ‘property’ itself surfaced only once, and this in an Article IV clause referring to *government* property. Above and beyond the Constitution’s plain text, its clear commitment to people over property shone through . . . .” (referring to the Constitution, excluding the amendments)).

The Constitution delegates policy-making powers in the economic, social, and political realms to Congress and the Executive.<sup>136</sup> Regulatory takings allows courts to declare that the exercise of the police power by the political branches of government requires compensation, with the result that such regulation will be prohibitively expensive.<sup>137</sup> This assumption of a policy making role by the courts is judicial activism<sup>138</sup> and offends notions of principled rule-making.<sup>139</sup>

In a democratic republic such as the United States, the citizens delegate policy making power to a small number of elected representatives and an executive.<sup>140</sup> The representatives assembled

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136. LIU ET AL., *supra* note 25, at 10-11; *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952) (finding that constitutional checks and balances among three branches of government were designed to curtail opportunity of one branch from overpowering another at the expense of freedom), *construed in* Reich, *supra* note 31, at 701-02.

137. Awarding equitable relief for a taking conflicts with the theoretical basis for takings, which requires compensation for a valid regulation that imposes a severe economic burden on the claimant. *See infra* notes 166-69 and accompanying text, notes 176-77 and accompanying text, note 180 and accompanying text. Equitable relief barring enforcement of a regulation, on the other hand, is an appropriate remedy for violations of due process and equal protection. *See* 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, 706-07 (1993) (discussing the Court's "melding" of remedies in the due process and takings contexts, and noting that "[t]he traditional remedy in a due process case is an injunction"). Nonetheless, the Supreme Court implied in *Koontz v. St. Johns River Water Management District* that equitable relief would constitute an appropriate remedy for an unsuccessful exaction, without addressing the apparent contradiction. Thomas W. Merrill, *Anticipatory Remedies for Takings*, 113 HARV. L. REV. 1630, 1661 (2015) (discussing *Koontz*).

138. Laurence Tribe, *EROG v. HSUB and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*, 115 HARV. L. REV. 170, 299-300 (2001) (citing *Bush v. Gore*, 531 U.S. 98 (2000) as emblematic of illegitimate judicial activism in an arena where the political branches are constitutionally charged with resolving the question); *see also* Romer v. Evans, 517 U.S. 620, 636, 652-653 (1996) (Scalia, J., dissenting) (arguing that validity of Colorado policy regarding singling out homosexuality for unfavorable treatment should be settled by "normal democratic means" rather than by the courts); Bradley C. Canon, *Defining the Dimensions of Judicial Activism*, 66 JUDICATURE 237, 240-41 (1983) (listing criteria for determination whether judicial decisions improperly encroach on policy-making function of separate branch of government).

139. It has been suggested that the Supreme Court reversed its staunch opposition to Roosevelt's New Deal policies because the Court yielded to "the popular will." SHESOL, *supra* note 56, at 264, 415. The majority view naturally should influence public policy. Where economic and social policy, rather than key values protected by the Constitution, is at stake in a democracy, allowing the popular will to prevail is preferable to the doctrines that produced *Lochner* and other cases appropriating public policy to an unelected, non-expert judiciary.

140. *See* U.S. CONST. pmbll.; art. 1, §§ 1, 2, 3, 7; art. 2, §§ 1, 2, 3; art. 4, § 4; amends. XIV, XV, XVII, XIX, XXIV.

in a legislative body and the executive exercise power by enacting and applying laws.<sup>141</sup> A democratic system allows citizens equal opportunity to influence public policy.<sup>142</sup> Each citizen possesses the right to express preferences for a decision, meaning that each citizen's vote should receive equal weight.<sup>143</sup> Policy is established by majority vote.<sup>144</sup>

Inherent in such self-governance is the separation of powers between the legislative and executive/administrative branches and the judicial branch.<sup>145</sup> The Constitution grants responsibilities to each branch of government that may not be usurped by another branch.<sup>146</sup> The separation of powers protects decisions of the legislature and executive from "lateral attack by another branch."<sup>147</sup> As the Supreme Court has consistently recognized in

141. *Id.*; see also ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 179-80 (2001) [hereinafter DAHL, AMERICAN CONSTITUTION]. A majority vote is generally required to elect representatives and to enact laws. U.S. CONST. art. I, § 7, cl. 2; ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 135 (1989) [hereinafter DAHL, DEMOCRACY]. In a republic, by electing a legislature as their legal representatives, citizens are deemed automatically to have consented to laws adopted by the legislature—even those laws that adversely affect their liberty and economic interests or that take individual property for public use. Matthew P. Harrington, "Public Use" and the Original Understanding of the So-Called "Takings Clause", 53 HASTINGS L.J. 1245, 1264-69 (2002). Likewise, the state governments enact policy through elected legislators. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican form of government . . ."); see, e.g., CAL. CONST. art. III, § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."); CAL. CONST. art. IV, § 1 ("The legislative power of this State is vested in the California legislature which consists of the Senate and the Assembly . . ."); CAL. CONST. art. IV, § 8(b) ("No bill may be passed unless . . . a majority of the membership of each house concurs.").

142. See DAHL, DEMOCRACY, *supra* note 141, at 112-13.

143. See *id.* at 109.

144. *Id.* at 141-44. James Madison recognized this virtue of majoritarian decision-making in Federalist 10. In large republics, Madison wrote, representatives chosen by a large number of citizens would not become "unduly attached" to individual interests and would be more prone to decide matters in the majority's interest. THE FEDERALIST NO. 10, at 82-83 (James Madison) (Clinton Rossiter ed., 1961). Madison expressed a similar sentiment in Federalist 52: "[A] coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good . . ." THE FEDERALIST NO. 52, at 325 (James Madison) (Clinton Rossiter ed., 1961).

145. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 865 (1984) (holding that courts must generally defer to the decisions of administrative agencies charged with implementing legislative policy).

146. See *id.* at 866 (finding that the wisdom of policy choices is for determination by the "political branches" of government, rather than by federal judges (quoting *TVA v. Hill*, 437 U.S. 153, 195 (1978))).

147. *Id.*; see also *Obergefell v. Hodges*, No. 14-556 (U.S. June 26, 2015) (Roberts, C.J., dissenting); *Goriet v. Fox*, 274 U.S. 603, 608 (1926) ("State Legislatures and city councils,

cases involving the powers of the other branches, the Constitution limits the role of the judiciary to restraining the arbitrary exercise of legislative and executive authority to regulate economic activity.<sup>148</sup>

### i. *Judicial restraint*

Out of respect for the democratic values of self-determination, majority rule, and separation of powers embodied in the Constitution, the evolutionary document theory relies heavily on the exercise of judicial restraint, where courts intervene in the decision of another branch of government only where it is in direct tension with a fundamental civil right.<sup>149</sup> A culture of judicial restraint mitigates the risk that unelected judges will subvert the legislative policy-making process regarding economic affairs.<sup>150</sup>

Allowing judges to require that government compensate businesses where regulation reduces profit runs counter to this core constitutional value.<sup>151</sup> While judicial restraint is invoked by

who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions [including the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life] require; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable.”).

148. See *supra* note 67 and accompanying text; see also *King v. Burwell*, No. 14-114, slip op. at 21 (U.S. June 25, 2015) (finding that Congress intended to provide federal health care subsidies to the citizens of each state under the Affordable Care Act, and declaring that “[i]n a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—to say what the law is.” (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803))).

149. See *Lewis v. Casey*, 518 U.S. 343, 367 (1996) (Thomas, J., concurring) (noting that respect for precedent gives effect to original intent and avoids distortion of Constitutional law from political views of judges); see also *Michigan v. Long*, 463 U.S. 1032, 1067 (1983) (Stevens, J., dissenting) (arguing that checks and balances mandate that courts exercise judicial restraint in interpreting regulation of other branches unless intervention is truly necessary); *Toilet Goods Ass’n v. Gardner*, 387 U.S. 167, 190 (1967) (Fortas, J., concurring in part and dissenting in part) (calling for judicial restraint when evaluating administrative agency actions).

150. Judicial restraint speaks to the tension between democracy and judicial review: judicial review of statutes is counter-majoritarian. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16 (1962); see also *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 397-99 (1937) (noting that judicial restraint requires courts to respect the separation of powers principle; courts must refrain from replacing the policy judgments of lawmakers and regulators with their own when considering non-fundamental constitutional rights).

151. See *Mosesian v. Cnty. of Fresno*, 28 Cal. App. 3d 493, 503-04 (1972) (“It is not in

liberal and conservative judges alike when it aligns with their ideological interests, it is a core element of contemporary conservative legal theory, and one that is in tension with another core conservative value, economic deregulation, in the takings context.<sup>152</sup> It is not surprising that the notion of judicial restraint does not factor heavily in the Supreme Court's takings jurisprudence.

Conservatives also invoke judicial restraint, however, to critique the decisions of liberal judges applying an evolutionary approach to constitutional interpretation.<sup>153</sup> But while judicial restraint is crucial to the separation of powers, in the case of fundamental civil rights it frequently does not afford adequate protection against majoritarian abuses, "where the democratic process does not function properly."<sup>154</sup> The Constitution instead contemplates an independent judiciary as the guardian of such rights.<sup>155</sup> With regard to economic and social issues, in contrast, judicial restraint has historically received greater emphasis.<sup>156</sup>

## ii. *Democracy and regulatory takings*

The doctrine of separation of powers between the legislative

the province of this court under the guise of judicial construction to carve out exceptions . . . which would abrogate a part of this legislative enactment by a coequal branch of our tripartite system of government."); *Lucas v. S.C. Coastal Council*, 505 U.S. at 1061 (Stevens, J., dissenting) ("Proper application of the doctrine of judicial restraint would avoid the premature adjudication of an important constitutional question . . . [about] the concept of 'regulatory takings'"); ECHEVERRIA, *supra* note 29, at 240-41.

152. For a general discussion of this contradiction, see Richard E. Levy, *Escaping Lochner's Shadow: Toward A Coherent Jurisprudence of Economic Rights*, 73 N.C. L. REV. 329, 332 (1995).

153. "Judicial restraint" and its analogue, "judicial activism" often depend on the ideology of the person invoking the term. LIU ET AL., *supra* note 25, at 41.

154. LIU ET AL., *supra* note 25, at 41.

155. *Id.*

156. See, e.g., *City of Columbia v. Omni Outdoor Adver.*, 499 U.S. 365, 377 (1991) ("[D]etermination of 'the public interest' in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and [Parker v. Brown, 317 U.S. 341 (1943)] was not meant to shift that judgment from elected officials to judges and juries."); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938); *Berman v. Parker*, 348 U.S. 26, 32-33 (1954) ("[The Court does] not sit to determine whether a particular housing project is or is not desirable."); *Zahn v. Bd. of Pub. Works*, 274 U.S. 325, 328 (1927) (declaring that the court will not substitute its judgment for that of legislative body charged with primary duty to determine the question); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").

and executive branches and the judicial branch applies to economic regulation that does not implicate fundamental constitutional rights.<sup>157</sup> The judiciary's function with respect to economic activity is to restrain the arbitrary or capricious exercise of legislative and executive authority.<sup>158</sup> Faithful to this principle, since the Supreme Court's repudiation of *Lochnerian* due process, and until the advent of partial and means-ends takings in *Penn Central Transportation Co. v. City of New York* and *Agins v. City of Tiburon*, the Court consistently applied the deferential "rational basis" test to economic regulation under the due process clause of the Fourteenth Amendment.<sup>159</sup> The courts must uphold regulation unless no reason can be conceived to support it.<sup>160</sup>

The Supreme Court, however, has interpreted the Fifth Amendment to allow judges to substitute their judgment regarding the wisdom, efficacy, and impact of the policies of other branches of government with regard to interests that are not fundamental to the Constitution, defeating one person-one vote and majority rule that are the bedrock of democracy.

The extent to which regulatory takings undermines these democratic principles depends on the degree of governmental interference with the use of property. In takings parlance, regulation that either causes property to lose all value or compels the property owner to submit to a physical occupation of the property are *per se* takings.<sup>161</sup> Once the basic elements of a *per se* taking are established, compensation is required, unless the regulation is part of the background principles of state law.<sup>162</sup> Because *per se* takings are conceptually similar to eminent domain, where constitutional principles require society to compensate an individual property owner to avoid placing a disproportionate burden of a public project on that owner, requiring compensation for *per se* takings does not, on its face, offend legislative and executive decision-making.<sup>163</sup> *Per se* takings,

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157. See *supra* notes 70-84 and accompanying text; *Gorieb v. Fox*, 274 U.S. 603, 608 (1926).

158. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); see also STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 94-95 (1999); see also *supra* note 67 and accompanying text.

159. See *supra* notes 64-67 and accompanying text.

160. See *supra* note 67 and accompanying text.

161. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015-17 (1992).

162. *Id.* at 1030; see *supra* note 12.

163. See *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*,

however, are the only class of takings that can logically be reconciled with that key attribute of a democratic political system. Partial and means-ends takings, in contrast, enormously enlarge potential government takings liability. The advent of partial and means-ends takings contradicts the theory underlying regulatory takings; namely, that the government is liable for a regulatory taking only where the regulation has the impact functionally equivalent to a direct condemnation. Courts have applied the partial and means-ends tests expansively, providing an opportunity for activist judges to legislate and administer policy.

(A) *Partial takings*

The partial takings test under *Penn Central* applies to non-per se takings; *i.e.*, to the vast majority of regulation. Partial takings, however, lack any mooring to the Constitution.<sup>164</sup> Several Supreme Court pronouncements before *Lingle v. Chevron U.S.A., Inc.* outlined limitations of the regulatory takings doctrine that logically should have precluded partial takings.<sup>165</sup> In *Lingle*, the district court and Court of Appeal found that Hawaii's limitation on the rent oil companies could charge dealers renting company-owned gas stations failed to substantially advance a legitimate state interest and therefore effected a taking because the law would not achieve the state legislature's goal of limiting retail gas prices. The lower courts made no finding regarding the level of economic hardship the rent control law posed for the oil companies, only that the law in question was unwise and would be ineffective. In a unanimous opinion, the Supreme Court acknowledged the historical keystone of regulatory takings—the economic impact of the regulation on the property. “[W]e must remain cognizant that ‘government regulation—by definition—involves the adjustment of rights for the public good,’ and that ‘Government hardly could

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473 U.S. 172, 199 (1985) (observing that a court's task is “to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession”).

164. See ECHEVERRIA, *supra* note 29, at 239-46.

165. *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (finding that government regulation, although limiting economic use of property, is warranted to secure general health, safety and welfare and that to require compensation for all police power regulation would “compel the government to regulate by purchase”); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 341 (2002) (upholding planning moratorium on grounds that it affords average reciprocity of advantage); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987) (arguing that regulations burdening property owners are justified because owners benefit from restrictions placed on others).

go on if to some extent values incident to property could not be diminished without paying for every such change in the general law . . . .”<sup>166</sup> In remarkably straightforward and sweeping language, the *Lingle* Court summed up several decades of regulatory takings jurisprudence, confining the variety of regulatory takings tests the Court had developed since *Pennsylvania Coal Co. v. Mahon* originated the concept to the rare set of regulations whose economic impact on the property is equivalent to a direct taking by eminent domain:

[T]he[] three inquiries reflected in *Loretto*, *Lucas*, and *Penn Central* share a common touchstone. Each 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. Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.<sup>167</sup>

Thus, *Lingle* completed the circle begun with *Mahon*. For eighty-three years following *Mahon*, the Court experimented with substantive tests for regulatory takings—*Loretto v. Teleprompter Manhattan CATV Corp.* (physical takings),<sup>168</sup> *Lucas v. South Carolina Coastal Council* (economic wipeouts),<sup>169</sup> and *Penn Central Transportation Co. v. City of New York* (partial takings)—before returning in *Lingle* to the original, limited formulation of regulatory takings that restricts compensable regulation to those cases that are the functional equivalent of eminent domain. To equate to a direct condemnation, a regulation’s economic impact must therefore deprive the property of all value, thus collapsing *Penn Central* takings into per se takings.

Inssofar as courts construe *Penn Central* to require compensation

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166. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005) (citations omitted).

167. *Id.* at 539 (emphasis added).

168. 458 U.S. 419 (1982). In *Loretto*, the Court found that a New York City law requiring landlords to allow cable TV providers to place cables and other equipment on their property effected a physical taking, denying the property owner one of the most important “strands” in the bundle of property rights—the right to exclude others from his property. *Id.* at 435-36.

169. 505 U.S. 1003 (1992). In *Lucas*, the Court found that a South Carolina law preventing Lucas from building houses on his lot to protect against damage to the houses and adjoining houses due to extreme weather denied Lucas all value, requiring that the state compensate Lucas for a taking. *Id.* at 1018.

for regulation short of a per se taking, the *Penn Central* test cannot be justified under the original understanding or *Lingle*'s narrow construction of *Penn Central*.<sup>170</sup> *Penn Central* takings defeat separation of powers by inviting courts to determine that the economic burden of regulation, where the regulation is not so severe as to be equivalent to eminent domain, nonetheless requires compensation.<sup>171</sup>

Even post-*Lingle*, several courts have failed to appropriately limit *Penn Central*.<sup>172</sup> Mere impairment of value, however, falls well short of the extreme economic impact tantamount to an eminent domain taking mandated by *Lingle*.<sup>173</sup> The notion of partial takings under *Penn Central* is antithetical to separation of powers and places the unelected, often life-tenured judges in a policy-making role, in conflict with the democratic ideal expressed in the Constitution.

170. ECHEVERRIA, *supra* note 29, at 240.

171. *E.g.*, *E. Enterprises v. Apfel*, 524 U.S. 498, 529-37 (1998) (plurality opinion) (concluding that retroactive effect of law requiring coal companies to pay for health care of former employees effected *Penn Central* taking, without analysis of economic impact of regulation on business as a whole); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1182 (Fed. Cir. 1994) (holding that government's denial of fill permit under Clean Water Act for residential development constituted regulatory taking under *Penn Central*, although the regulation left the property with at least \$12,000 in value, and thus did not constitute a denial of "all economically feasible use"); *Florida Rock Indus. v. United States*, 18 F.3d 1560, 1564-65 (Fed. Cir. 1994) (finding that Army Corps' denial of permission to fill wetlands to mine limestone might constitute a taking despite only partial reduction in value); *Yancey v. United States*, 915 F.2d 1534, 1543 (Fed. Cir. 1990) (holding that USDA's poultry quarantine that eliminated appellee's flock constituted a partial taking); *Ciampetti v. United States*, 18 Cl. Ct. 548 (1989) (holding that developer's notice of regulation before purchasing property might preclude *Penn Central* taking); *Action Apartment Ass'n v. Santa Monica Rent Control Bd.*, 94 Cal. App. 4th 587, 619-21 (2001) (holding that ordinance requiring landlords to pay interest on tenant security deposits effected a taking despite ordinance's insignificant economic impact on the rental property); *see* ECHEVERRIA, *supra* note 29, at 230-32.

172. *E.g.*, *Lockaway Storage v. Cnty. of Alameda*, 216 Cal. App. 4th 161, 185-88 (2013) (finding *Penn Central* taking without analysis of value of alternative uses consistent with regulatory restriction).

173. *See, e.g.*, *MHC Fin. Ltd. P'ship v. City of San Rafael*, 714 F.3d 1118, 1127 (9th Cir. 2013) (noting that an 81% diminution in value, from \$120 million to \$23 million, would be insufficient economic impact to justify finding of a taking); *Terminals Equip. Co. v. City & Cnty. of San Francisco*, 221 Cal. App. 3d 234, 244 (1990) (denying takings claim because no denial of all use); *Long Beach Equities, Inc. v. Cnty. of Ventura*, 231 Cal. App. 3d 1016, 1035 (1991) (finding that regulation is not a taking merely because the available "possibilities for development" under the regulation do not include "what [the landowner] desires to build").

(B) *Means-ends test*

The Constitution provides that social and economic policy shall be the exclusive function of the legislative and executive branches of government, not only to secure rights of self-government, but also because the courts are not equipped to make economic policy.<sup>174</sup> Twenty-five years before *Lingle v. Chevron U.S.A., Inc.*, in *Agins v. City of Tiburon*, the Court veered off course, holding that a public agency's decision that fails to "substantially advance [a] legitimate state interest . . ."—a means-ends test—could be a taking.<sup>175</sup> In *Lingle*, however, the Supreme Court repudiated the *Agins* means-ends test. In a unanimous opinion, the Court held that the 'substantially advances' formula is not a valid takings test, and "has no proper place in our takings jurisprudence."<sup>176</sup> As the Court explained, "The [Just Compensation] Clause expressly requires compensation where government takes private property 'for public use.' It does not bar government from interfering with property rights, but rather requires compensation 'in the event of otherwise proper interference amounting to a taking.'"<sup>177</sup> The Court emphasized that regulatory takings should be concerned with economic impact, not means and ends: "A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation."<sup>178</sup> The Court acknowledged the limited role of courts in matters of economic policy: "[The substantially advances] test would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies."<sup>179</sup> Any other reading of the Clause, the Court held, would require "courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for

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174. See *infra* notes 277-79 and 302-05 and accompanying text; *McCart v. Indianapolis Water Co.*, 302 U.S. 419, 440-41 (1938) (Black, J., dissenting) (noting that judges lack knowledge to fix rates for public utilities) (cited in Reich, *supra* note 31, at 677).

175. 447 U.S. 255, 260 (2008).

176. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548 (2005).

177. *Id.* at 543 (citing *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 315 (1987)); see also *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 240 (2003) (noting that legitimate government action is precondition of taking claim).

178. *Lingle*, 544 U.S. at 543.

179. *Id.* at 544.

which courts are not well suited.”<sup>180</sup> Instead, any review of the substantive validity of government regulation must be conducted under the rational basis test applicable to due process challenges.<sup>181</sup>

In addition to jettisoning a means-ends test from takings, the *Lingle* Court, in its unanimous ruling, reaffirmed the narrow scope of the entire regulatory takings doctrine, finding that takings turns on “the severity of the burden that government imposes upon private property rights.”<sup>182</sup> The substantially advances test, in contrast, focuses on the regulator’s conduct, not the harm to the property owner.<sup>183</sup> Rather, the *Lingle* Court noted, it is a substantive due process test under which, with appropriate deference to the government’s action, a court may consider whether the action is utterly divorced from any legitimate governmental purpose or is an ineffective means to achieve a legitimate purpose.<sup>184</sup>

While the *Lingle* Court firmly rejected the means-ends takings test created in *Agins*, it curiously held that its *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard* decisions imposing a means-ends test under the Clause were still good law,<sup>185</sup> even though *Nollan* expressly invoked the “substantially advances” test of *Agins* to allow courts to impose a means-ends scrutiny of a development exaction,<sup>186</sup> and *Dolan*, based on the foundation of *Nollan*, refined that means-ends test to require rough proportionality.<sup>187</sup> The *Lingle* Court, however, purported to distinguish *Nollan* and *Dolan* on the ground that the essential premise of *Nollan/Dolan* was the requirement that the property owner convey a possessory interest in land as a condition of development approval, where the public agencies taking possession or title would have effected a per se (physical) taking but for the condition of development approval. In all other cases, according to the *Lingle* Court, judicial review of the *validity* of a regulation must be conducted under the traditional rational basis

180. *Id.*

181. *Id.* at 542; *see supra* notes 64-67 and accompanying text.

182. *Lingle*, 544 U.S. at 539.

183. *Id.* at 542.

184. *See id.* at 540-42.

185. *Id.* at 546-48.

186. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834-37, 841 (1987).

187. *Dolan v. City of Tigard*, 512 U.S. 375, 385-86 (1994).

standard out of respect for co-equal branches of government.<sup>188</sup>

The *Lingle* Court's defense of *Nollan* and *Dolan*, at the same time it rejected the substantially advances test, contradicts *Nollan*, which expressly relied on *Agins*' "substantially advances" language,<sup>189</sup> *Dolan*, which merely built on *Nollan*'s rationale, and the logic of the *Lingle* opinion, where the Court unanimously held that judges do not decide the wisdom or efficacy of economic regulation to avoid "substitut[ing] their predictive judgments for those of elected legislatures and expert agencies." Moreover, a court applying a means-ends test to regulation encroaches on the economic policy-making prerogatives of the legislative, executive, and administrative branches of government regardless of whether the regulation exacts a physical interest in real property or merely limits the use of property. The *Nollan/Dolan* means-ends test conflicts with *Lingle*'s holding that fidelity to Constitutional text and original intent requires limiting regulatory takings to those government actions that impose a severe economic burden on property, tantamount to a direct condemnation. Under *Nollan* and *Dolan*, the economic impact of the regulation on the value of the property as a whole is irrelevant. Accordingly, the *Nollan/Dolan* test defeats the core constitutional value of legislative and executive decision making with regard to economic matters, such as land use, that do not implicate fundamental constitutional rights.

Rather than rectifying this obvious contradiction, eight years later in *Koontz v. St. Johns River Management District*, the Court doubled down on its anti-democratic interpretation of the Clause. There, the Court undercut the sole rationale for preserving *Nollan/Dolan* by finding that the *Nollan/Dolan* test could apply to a mitigation fee that did not exact a possessory interest in property.<sup>190</sup> The five-justice *Koontz* majority appears to have

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188. "Although *Nollan* and *Dolan* quoted *Agins*' language, see *Dolan*, [512 U.S.] at 385; *Nollan*, [483 U.S.] at 834, the rule those decisions established is entirely distinct from the 'substantially advances' test we address today. Whereas the 'substantially advances' inquiry before us now is unconcerned with the degree or type of burden a regulation places upon property, *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings. In neither case did the Court question whether the exaction would substantially advance *some* legitimate state interest. See *Dolan*, [512 U.S.] at 387-88; *Nollan*, [483 U.S.] at 841. Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether." *Lingle*, 544 U.S. at 548.

189. *Nollan*, 483 U.S. at 834-37, 841.

190. *Koontz v. St. Johns River Mgmt. Dist.*, 133 S. Ct. 2586, 2598-99 (2013).

distanced itself from its unanimous holdings in *Lingle* that preserved separation of powers and legislative and executive decision-making, finding that the illegitimate denial of a permit can amount to a taking, without reference to the economic impact of the regulation on the developer's property or to a physical taking.<sup>191</sup>

*Koontz* contradicts the fundamental holding of *Lingle* that, other than the narrow class of ad hoc exactions of a physical interest in land as occurred in *Nollan* and *Dolan*, the courts defer to the legislative, executive, and administrative branches of government on questions of economic policy. Without citing *Lingle* on this issue, the *Koontz* majority held that the denial of a land-use permit on the ground that the applicant refused to pay a fee to mitigate loss of wetlands could effect a taking if the failed condition was illegitimate, rather than because the denial of the land-use entitlement severely diminished the value of the property.<sup>192</sup> Indeed, the majority opinion did not discuss the value of the property or the impact of the proposed regulation on that value.<sup>193</sup> The 5-4 majority in *Koontz* thus disregarded the unanimous ruling in *Lingle* that intermediate scrutiny is reserved for the narrow class of physical takings conditioned on development approval.<sup>194</sup> The Court's finding that application of *Nollan/Dolan* intermediate judicial scrutiny to a requirement to pay money "does not implicate 'normative considerations about the wisdom of government decisions'"<sup>195</sup> is unfathomable in light of *Lingle*.

Before *Koontz*, a developer was required to show that the denial of a permit was a taking requiring compensation<sup>196</sup>; after *Koontz*, the public agency conceivably must demonstrate that denial of a permit was not a taking. By forgetting that it had decided in *Del Monte Dunes* that permit denials are not subject to the burden shifting and heightened scrutiny of *Nollan/Dolan*, *Koontz* changed the law under which all public agencies—federal, state, and

191. *Id.* at 2594-96, 2598-99.

192. *Id.* at 2595-2603.

193. *Id.*

194. See Echeverria, *Worst Decision*, *supra* note 9, at 11-12, 16, 34-36.

195. *Koontz*, 133 S. Ct. at 2600 (quoting *E. Enterprises v. Apfel*, 524 U.S. 498, 525 (1998)).

196. See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999) (holding, in a unanimous opinion, that *Nollan/Dolan* test was not applicable to permit denial).

local—have operated since the 1930s, giving the courts an expanded role in deciding the wisdom and efficacy of government regulation. It is difficult to avoid a characterization of *Koontz* as judicial activism.<sup>197</sup>

The *Koontz* Court did not attempt to explain why intermediate scrutiny is warranted despite the absence of a condition of development approval that would effect a per se taking but for the condition of approval—the only tether of *Nollan* and *Dolan* to the Clause. Nor did the *Koontz* opinion rule out the application of intermediate scrutiny to legislative exactions and conditions of development other than exactions.<sup>198</sup> A rule enabling courts to impose their subjective judgment as to the reasonableness of the denial of a permit or the imposition of a mitigation condition cannot be reconciled with *Lingle* or the core constitutional value of legislative and executive rule making.<sup>199</sup>

A recent decision of the United States District Court for Northern California, *Levin v. City and County of San Francisco*, is, with *Koontz*, apparently among the most unprincipled applications

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197. See Echeverria, *Worst Decision*, *supra* note 9, at 11-12, 16. In *Penn Central Transportation Co. v. City of New York*, the Supreme Court stated that the “character” of the challenged regulation means the degree to which the regulation approaches a physical invasion, as opposed to “some public program adjusting the benefits and burdens of economic life to promote the common good.” 438 U.S. 104, 124 (1978). The “character” factor of *Penn Central* has been misconstrued to allow courts to apply a means-ends test to the policy decisions of the political branches of government. See, e.g., *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 399 (1988). After *Lingle* ruled out means-ends testing under the Clause for those takings not subject to the *Nollan/Dolan* test, some courts have continued to misapply the character factor. See, e.g., *Lockaway Storage v. Cnty. of Alameda*, 216 Cal. App. 4th 161, 186-88.

198. Heightened scrutiny does not apply to legislative exactions in California. *San Remo Hotel v. City & Cnty. of San Francisco*, 27 Cal. 4th 643, 699 (2002); see also *Cal. Bldg. Indus. Ass'n v. City of San Jose*, No. S212072, slip op. at 31-32, 51 (Cal. June 15, 2015) (exercising deferential review of inclusionary housing ordinance on grounds that the regulation is not an exaction, but rather ordinary police power regulation of the use of property, and limiting the application of *Nollan/Dolan* to exactions).

199. In finding that courts are free to impose their judgment on economic policies of the elected branches of government, *Koontz* relies on an understanding that freedom of economic activity is a civil right guaranteed by the Constitution. The *Koontz* majority's confusion of commerce with the exercise of fundamental civil rights is in full display in Chief Justice Roberts's dissenting opinion in *Obergefell v. Hodges*, where he accused the majority of reviving *Lochner* by finding a due process right to same-sex marriage. *Obergefell v. Hodges*, No. 14-556, slip op. at 12-15 (U.S. June 26, 2015) (Roberts, C.J., dissenting). In his opinion, however, the Chief Justice fails to acknowledge that *Lochner* and other substantive due process cases of the same era were repudiated because those decisions held economic regulation up to judicial scrutiny. Economic rights, however, are not recognized as fundamental in the Constitution. See *supra* notes 94-105 and accompanying text.

of the Clause. That decision struck down an ordinance requiring owners of rental apartment buildings selling individual units to owner-occupants to pay their evicted tenants a subsidy.<sup>200</sup> The ordinance was designed to reduce the impact of displacement on the evicted tenants.<sup>201</sup> While the justification for intermediate judicial scrutiny in *Nollan*, *Dolan*, and *Koontz* was to prevent unfair leveraging of the police power in cases of ad hoc permit applications,<sup>202</sup> the *Levin* Court struck down a legislative regulation applying a formula to an entire class of property owners. The formula entailed no discretion in its application to an individual property owner, and hence no danger of leveraging of the police power.<sup>203</sup>

In enjoining the ordinance, the *Levin* Court did not consider the economic impact of the regulation on the overall value of an individual property, thus divorcing the analysis from the text and original understanding of the Clause and precedent limiting compensation to the class of cases where regulation is the functional equivalent of eminent domain. Although purporting to “defer to the City’s legislative judgment,”<sup>204</sup> the *Levin* decision showed no deference in applying a means-ends test to a duly adopted ordinance.<sup>205</sup> By finding that the ordinance was unfair because it imposed a burden of mitigation on a property owner who was not solely responsible for the social problem the ordinance was designed to address, the court assumed the role of policy-maker from the local legislature. It is precisely this second-guessing of decisions of the political branches of government on economic policy that a unanimous Supreme Court said “has no

200. See, e.g., *Levin v. City & Cnty. of San Francisco*, No. 3:14-CV-03352-CRB, 2014 WL 5355088, at \*12, \*13 (N.D. Cal. Oct. 21, 2014).

201. S.F., CAL., ADMIN. CODE § 37.9A(e)(3) (2014); S.F., Cal., Ordinance No. 54-14, p. 1 (Apr. 15, 2014).

202. *Koontz*, 133 S. Ct. at 2594; *Dolan*, 512 U.S. at 385; *Nollan*, 483 U.S. at 841.

203. *Levin*, 2014 WL 5355088, at \*7 (“[T]his case implicates the central concern of *Nollan* and *Dolan*’ as acutely and in the same way as the traditional land-use permitting context: the risk that San Francisco has used its substantial power . . . to pursue policy goals that lack essential nexus and rough proportionality to the effects of the regulated activity.” (quoting *Koontz*, 133 S. Ct. at 2600)).

204. *Levin*, 2014 WL 5355088, at \*5.

205. The *Levin* court ruled that the ordinance seeks to address the problem of high residential rents in San Francisco, rather than mitigation of the impact of tenant displacements, and because the property owner did not cause high rents, the owner could not be required to mitigate the impact of eviction on its tenants. *Id.* at \*9-12.

proper place in our takings jurisprudence.”<sup>206</sup> The judicial activism evident in *Nollan*, *Dolan*, *Koontz*, and *Levin* is thus at odds with one person-one vote, legislative and executive decision-making, and separation of powers, key features of American democracy under the Constitution.

d. *Federalism*

Federal court review of local and state regulation of property use under the Clause, particularly land use, is inconsistent with principles of federalism embodied in the federal Constitution.<sup>207</sup> A reading of the Clause to require compensation for regulatory takings federalizes and constitutionalizes local land use and economic planning, a quintessential local government responsibility.<sup>208</sup> In her dissenting opinion in *Koontz v. St. Johns River Management District*, Justice Kagan noted that federalizing local land-use matters “deprives state and local governments of the flexibility they need to enhance their communities—to ensure environmentally sound and economically productive development. It places [federal] courts smack in the middle of the most everyday local government activity.”<sup>209</sup>

An interpretation of the Clause to permit the federal courts to nullify local regulation of property improperly encroaches on a state’s prerogatives to define where private property rights begin and the state’s power ends.<sup>210</sup> It is now well-established that federal

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206. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 540 (2005) (rejecting the suggestion that in regulatory takings analysis an ordinance must “substantially advance a legitimate state interest” to be valid).

207. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X; see *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (noting that federalism secures liberties through “diffusion of sovereign power” (quoting *New York v. United States*, 505 U.S. 144, 181 (1992))).

208. *Byrne*, *supra* note 13, at 111-15.

209. 133 S. Ct. 2586, 2612 (2013) (Kagan, J., dissenting). Despite the *Koontz* majority’s expansion of the role of the federal courts in local land-use matters, the Supreme Court and many lower federal courts had previously recognized that federalism dictates that the federal government take a back seat to local arms of government on land use. See, e.g., *San Remo Hotel v. City & Cnty. of San Francisco*, 545 U.S. 323, 347 (2005) (“State courts are fully competent to adjudicate constitutional challenges to local land-use decisions. Indeed, state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.”).

210. See *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (holding that property rights are created and defined by states); *Bd. of Regents v. Roth*, 408 U.S. 564,

courts must give full faith and credit to state court decisions applying parallel constitutional protections such as state counterparts to the federal Clause. If a state court applies the state just compensation clause to a use regulation, the property owner cannot relitigate its takings claims by bringing a subsequent action in federal court under the Fifth Amendment.<sup>211</sup>

Where the boundaries of state rights are unknown, federal constitutional scrutiny is inappropriate. State courts, experienced in interpreting their sovereign law, generally should address state statutory and constitutional questions before federal courts step in, especially in matters of economic policy that do not implicate fundamental civil rights.<sup>212</sup> This federalist system provides states the opportunity to narrow the scope of the state entitlements and laws at issue and the potential to avoid federal questions.<sup>213</sup>

The Supreme Court's aggressive expansion of economic rights under the federal Clause are difficult to square with the Court's federalism-embracing interpretation of other Constitutional provisions that do not implicate fundamental rights. For example, in *Koontz*, the conservative majority of the Court rendered a local regulatory agency's authority to restrict filling of wetlands for profit a federal constitutional issue. At the same time, four of the same five Justices demonstrated a reluctance to expand more fundamental rights, like the freedom to marry, where such expansion is opposed by local interests.<sup>214</sup> Under federalism, local economic regulation should be the province of the states, and should be subject to a lower level of federal court scrutiny than the

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577-78 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law."); *see also* *Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 707 (2010) ("Generally speaking, state law defines property rights."); Byrne, *supra* note 13, at 112.

211. *San Remo Hotel*, 545 U.S. at 347.

212. The Supreme Court has consistently found abstention appropriate for cases that can be resolved on state statutory or constitutional grounds without reaching the federal constitutional question, because it obviates the constitutional problem and "intelligently mediate[s] federal constitutional concerns and state interests." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12 (1987) (quoting *Moore v. Sims*, 442 U.S. 415, 429-30 (1979)); *see also* *San Remo Hotel*, 545 U.S. at 347; *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1276 (7th Cir. 1997).

213. *See Pennzoil*, 481 U.S. at 12.

214. *See Obergefell v. Hodges*, No. 14-556, slip op. at 29 (U.S. June 26, 2015) (Roberts, C.J., dissenting); *id.* at 9 (Scalia, J., dissenting); *id.* at 18 (Thomas, J., dissenting); *id.* at 8 (Alito, J., dissenting).

right to choose one's spouse.<sup>215</sup>

Federalism concerns lie at the root of the Court's decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,<sup>216</sup> which found that regulatory takings claimants must first seek just compensation through the state constitution's just compensation clause before a federal court can entertain a takings claim, based on the text of the Clause: "nor shall private property be taken for public use, *without just compensation*."<sup>217</sup> Thus, a property owner does not have a federal claim, nor does she suffer anything more than speculative harm, until the state courts have denied compensation.<sup>218</sup>

Despite recognition in *Williamson County* and *San Remo Hotel v. City and County of San Francisco* that the Clause is not an appropriate vehicle for judicial scrutiny of local and state regulation of property, at least four justices concurring in the judgment in *San Remo Hotel* would have overruled *Williamson County* to extend the scope of federal regulatory takings, contravening federalism.<sup>219</sup> Moreover, all eight justices participating in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*<sup>220</sup> and all nine justices in *Suitum v. Tahoe Regional Planning Authority*<sup>221</sup> incorrectly characterized *Williamson County*'s state compensation requirement as prudential rather than jurisdictional, undermining the

215. An analogous doctrine of the Supreme Court is the prohibition on government regulation of billboards that favor commercial speech over non-commercial speech. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981).

216. 473 U.S. 172 (1985).

217. *Id.* at 195 (emphasis added). The text of the Clause, read in conjunction with *Roth*, requires a three-step process before a takings claim may be brought in federal court: first, the claimant must possess a property right under state law; second, the state must deprive that property right; and third, the state must deny compensation. *Id.* at 186; *Bd. of Regents v. Roth*, 408 U.S. 564, 577-78 (1972).

218. *Williamson County*, 473 U.S. at 186, 195; see also *San Remo Hotel*, 545 U.S. at 346-47; *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 471 (1945) (cautioning against the "needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes"); *Moore v. Sims*, 442 U.S. 415, 429 (1979) ("The seriousness of federal judicial interference with state civil functions has long been recognized by this Court." (quoting *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 603 (1975))).

219. *San Remo Hotel*, 545 U.S. at 348-49 (Rehnquist, J., concurring) (characterizing the decision as "mistaken" and finding it "unclear" if *Williamson County* was correct in requiring claimants to first seek compensation through the state court system before bringing a claim in federal court).

220. 560 U.S. 702, 727-29 (2010).

221. 520 U.S. 725, 733-34 (1997).

federalism in land-use decisions established in *Williamson County* and reaffirmed in *San Remo Hotel*.<sup>222</sup>

In addition to weakening the state compensation rule of *Williamson County*, *Stop the Beach Renourishment* boosted the cause of anti-federalism by recognizing “judicial takings.” A judicial taking is an interpretation by state courts of the states’ common law in a manner constituting a sudden departure from prior precedent that eliminates an “established property right.”<sup>223</sup> In *Stop the Beach Renourishment*, all eight justices participating in the decision rejected a judicial taking challenge to the decision of the Florida Supreme Court interpreting the state’s common law as to the scope of littoral owners’ property interests.<sup>224</sup> Nonetheless, a four-justice plurality accepted judicial takings as a legitimate basis for the United States Supreme Court to sit in review of a state supreme court’s interpretation of its own common law to define property rights.<sup>225</sup> A judicial takings doctrine lacks justification under federalism, and demonstrates how far members of the Court have strayed from legitimate interpretation of the Clause.<sup>226</sup>

222. See *Stop the Beach Renourishment*, 560 U.S. at 727-29; *id.* at 741-42 (Kennedy, J., concurring); *Suitum*, 520 U.S. at 733-34 & n.7; *id.* at 745 (Scalia, J., concurring). The difficulty with *Stop the Beach Renourishment* and *Suitum* lies in the very language of the Fifth Amendment, which affords compensation only where the state has denied it. Because a determination as to whether the state has denied or awarded just compensation is objective, there appears to be no room for the exercise of “prudence” to determine whether a takings claim is an Article III case or controversy. Interpreting *Williamson County*’s state compensation requirement as prudential circumvents *Williamson County* without confronting the logic of that decision.

223. *Stop the Beach Renourishment*, 560 U.S. at 578; see Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1451-54 (1990).

224. *Stop the Beach Renourishment*, 560 U.S. at 731-33 (plurality opinion); *id.* at 733 (Kennedy, J., concurring); *id.* at 742 (Breyer, J., concurring).

225. *Id.* at 713-15 (plurality opinion). The *Stop the Beach Renourishment* plurality’s willingness to disregard federalism is curious in light of its ruling on the appropriate remedy for a taking in *Koontz v. St. Johns River Management District*, 133 S. Ct. 2586 (2013), where the majority refrained from dictating to the Florida Supreme Court how to “treat[] its own procedural law.” *Id.* at 2597.

226. In his concurrence in *Stop the Beach Renourishment*, Justice Breyer bluntly stated the case against creating a judicial takings doctrine: “[I]f we were to express our views on these questions, we would invite a host of federal takings claims without the mature consideration of potential procedural or substantive legal principles that might limit federal interference in matters that are primarily the subject of state law.” 560 U.S. at 743 (Breyer, J., concurring). The acceptance of judicial takings would result in a major shift of power to define property rights from the state courts to the United States Supreme Court. In concurring in the judgment, Justice Kennedy agreed that the Florida high court had followed Florida precedent in its decision and did not eliminate an established property right. *Id.* at 733 (Kennedy, J., concurring). Justice Kennedy, however, expressed grave concerns with the United States Supreme Court inserting itself into disputes concerning

e. *Protection of politically less powerful*

A court engages in improper judicial activism where “there is no clearly threatened violation of any constitutional right that the political branches are structurally incapable of, or indisposed toward, protecting . . . .”<sup>227</sup> The Constitution contains several provisions that protect politically powerless individuals and groups and minorities against entrenched political power.<sup>228</sup> Although the Clause protects individual property owners in the limited circumstance of government expropriation of property, it is unnecessary for protection of property owners from government regulation of the use of property. Regulatory takings claims are predominately from real estate developers, manufacturers, utilities, and firms seeking to exploit natural resources. These are not politically powerless classes. Their financial resources allow them disproportionate power in the legislative and executive branches of government by virtue of their ability to finance campaigns and lobby public officials. There is no principled reason to stretch constitutional doctrine to afford business organizations special protection from environmental, health, and safety regulations.<sup>229</sup> This is particularly true after the Supreme Court significantly expanded the power of for-profit corporations to influence political decisions in 2010 in *Citizens United v. Federal Election Commission*.<sup>230</sup>

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states’ common law of property, which has traditionally been relegated to the states. *Id.* at 741-42. He therefore questioned the entire judicial takings doctrine as a valid takings test.

227. Tribe, *supra* note 138, at 300.

228. Byrne, *supra* note 13, at 129; Tribe, *supra* note 138, at 300-01; *see, e.g.*, U.S. CONST. amend. XIV.

229. During the past 25 years, United States for-profit corporations developing real property or extracting and processing natural resources donated \$2.5 billion to federal candidates, parties, and outside political action groups: real estate industry donated \$1 billion, agribusiness donated \$700 million, oil and gas donated \$440 million, electric utilities donated \$200 million, coal mining companies donated \$50 million. *See* Center for Responsive Politics, *Influence & Lobbying: Long-Term Contribution Trends*, OPENSECRETS.ORG (May 13, 2015, 9:05 AM), <https://www.opensecrets.org/industries/totals.php>. Companies with interests in agribusiness, oil and gas, and utilities regularly spend more than \$100 million per year on lobbying, and the real estate industry is not far behind. *See id.* In contrast, environmental organizations have contributed \$131 million to federal candidates, parties, and outside political groups since 1990. *See id.*

230. 558 U.S. 310 (2010). Total outside spending for elections in 2012 was triple that of 2008, before *Citizens United*. Andrew Mayersohn, *Four Years After Citizens United: The Fallout*, OPENSECRETSBLOG (May 13, 2015, 9:05 AM), <http://www.opensecrets.org/news/2014/01/four-years-after-citizens-united-the-fallout/>. Agribusiness political contributions increased by 30% from 2008 to 2012. Oil and gas spending nearly doubled from 2008 to 2012, and coal industry contributions more than quadrupled. Center for Responsive

### 3. *Regulatory takings doctrine and alleged excessive government regulation*

Proponents of regulatory takings argue that regulatory takings are justified under an evolutionary document theory because the substantive due process and equal protection tests do not provide sufficient protection of property owners against excessive government regulation.<sup>231</sup> They posit that a flexible and open-ended regulatory takings doctrine is a practical vehicle for judicial review of property regulation, one that fills the gap between the rational basis test applicable to ordinary police power regulation and strict scrutiny applicable to regulations that infringe on fundamental rights protected in the Constitution.<sup>232</sup> The essence of the claim is that the regulatory takings doctrine addresses “process failure,” achieving fairness in an arena where the power of individual property owners is inferior to the political branches of government.<sup>233</sup> In making this argument, property rights proponents would turn my own analysis of regulatory takings under the evolutionary document theory against itself: as political economy has become more complex, interpretation of the Clause must evolve in tandem, they argue, to counteract the propensity of a burgeoning state apparatus to abuse its power.

I submit that concern for unfair use of the police power to limit use of property is overblown. There is little evidence that the regulatory takings doctrine is necessary to prevent government abuse of power. The political branches of government are a superior forum for balancing profitable uses of property with community values such as environmental protection. Abandoning regulatory takings would properly limit the ability of courts to substitute their judgments on economic policy for those of legislators, executives, and bureaucracies.

A careful examination of regulatory takings decisions suggests that, although the *per se* takings test consists of relatively clear standards, there exist few of these cases. In contrast, opinions applying the partial and means-ends takings tests are relatively unprincipled, yet constitute the vast body of takings jurisprudence.

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Politics, *supra* note 229.

231. See John Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 171, 199 (2005) [hereinafter Echeverria, *Sense*].

232. See David A. Westbrook, *Administrative Takings: A Realist Perspective on the Practice and Theory of Regulatory Takings Cases*, 74 NOTRE DAME L. REV. 717, 750-53 (1999).

233. See Treanor, *supra* note 13, at 866-68.

Lacking in principle, regulatory takings is inconsistent with core constitutional values, and thus is not justified under an evolutionary document theory.

a. *Per se takings*

A review of per se takings decisions casts doubt on the claim that regulatory takings is an effective tool to protect society from imposing a disproportionate burden of public programs on individual property owners. But, I contend, the per se takings test is a solution in search of a problem. Of the many hundreds of regulatory takings decisions, only a handful find a per se taking. Moreover, in my view the finding of a per se taking in each of these decisions is open to serious question. In light of the dearth of per se takings cases and the questionable reasoning of the court in each case, I assert that the per se test is not necessary to protect property owners from majoritarian abuse and, as will be seen, has been a Trojan Horse for partial and means-ends takings that have no valid claim to constitutional legitimacy under any theory of constitutional interpretation.

i. *Wipeouts*

The 2002 Supreme Court decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*<sup>234</sup> “confined the *Lucas* test to the situation where regulation results in a ‘complete elimination of value.’ It is the rare, bordering on apocryphal, case when a regulation renders property valueless.”<sup>235</sup> My research of all federal and state case law confirmed this observation. I identified only six appellate decisions where the court found a permanent wipeout and awarded damages.<sup>236</sup> But in each of these cases, it

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234. 535 U.S. 302 (2002).

235. John D. Echeverria, *The Death of Regulatory Takings*, 34 *ECOLOGY L.Q.* 291, 293 (2007) (“[A]fter *Tahoe-Sierra* the *Lucas* rule might not even properly apply to the *Lucas* case itself and is, regardless, virtually [meaningless] in practice.”); 535 U.S. at 330 (rejecting per se taking claim, finding that a per se taking finding is warranted only in the “extraordinary circumstance when no productive or economically beneficial use of land is permitted” (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017 (1992))). The majority in *Lucas* conceded that “situations where the government has deprived a landowner of all economically beneficial uses” are “relatively rare.” 505 U.S. at 1018; see also *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm’rs of Cnty. of La Plata*, 38 P.3d 59, 66 (Colo. 2001) (noting that a wipeout is a “truly unusual case”).

236. *Lucas*, 505 U.S. at 1019-20 (coastal construction ban resulted in property being “rendered valueless”); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) (regulation made mining coal “commercially impracticable”); *Lost Tree Vill. Corp. v. United States*, 115

seems that the regulation did not deprive the whole parcel of all value.<sup>237</sup> Rather, the regulation prevented a nuisance or other threat to health and safety that, under a proper application of the background principles doctrine, was within the public agency's police power,<sup>238</sup> or the deprivation of use was only temporary.

For instance, in *Pennsylvania Coal Co. v. Mahon*, had the court applied the whole parcel rule, it would not have isolated the mineral rights from the surface rights,<sup>239</sup> and thus could not have found that the government regulation eliminated all economic value.<sup>240</sup> Moreover, the Court could have relied on precedent supporting the police power to protect public safety or common law nuisance to find that the mining of subsurface coal causing subsidence would not constitute a taking.<sup>241</sup>

In *Lucas v. South Carolina Coastal Council*, the Court imposed liability not because the property actually had no value—the regulation allowed some use and hence the property owner was not wiped out—but rather because South Carolina conceded the point, despite evidence to the contrary.<sup>242</sup> Moreover, the public's limitations on the construction of a house in a zone with a history

Fed. Cl. 219, 231 (2014) (denial of fill permit that reduced value of property by 99.4 percent a per se taking); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181-82 (Fed. Cir. 1994) (denial of a fill-permit under Clean Water Act that reduced value of a property from more than \$2.6 million to \$12,500 was “total taking of the property owner's interest”), *abrogation on other grounds recognized in* *Bass Enter. Prod. Co. v. United States*, 381 F.3d 1360, 1369-70 (Fed. Cir. 2004); *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1172 (Fed. Cir. 1991) (restriction on right to mine coal deprived owner of all economically beneficial use of property); *State ex rel. R.T.G., Inc. v. State*, 780 N.E.2d 998, 1009-10 (Ohio 2002) (applying *Lucas* and holding that a county's designation of an area as “unsuitable for mining” deprived owner of mineral rights of all economic use of the property).

237. See *infra* notes 239-43 and accompanying text.

238. See, e.g., *supra* note 90 and accompanying text; *Vulcan Materials Co. v. City of Tehuacana*, 396 F.3d 882, 888-92 (5th Cir. 2004) (holding that a ban on limestone quarrying within city limits constituted a taking even if plaintiff owned contiguous parcels outside city limits, but remanding for ruling whether background principles prohibited quarrying).

239. 260 U.S. at 414.

240. The same conclusion could be drawn with regard to the *Whitney Benefits* and *R.T.G.* cases.

241. See Treanor, *supra* note 13, at 792-97; *Mahon*, 260 U.S. at 417 (Brandeis, J., dissenting) (“[R]estriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use.”).

242. 505 U.S. at 1020; see *id.* at 1043-44 (Blackmun, J., dissenting) (arguing that majority's finding that property was valueless due to challenged regulation “is almost certainly erroneous.”).

of erosion should have been permitted under the state's police power to protect life and safety or the common law nuisance doctrine.<sup>243</sup> It appears that the outcome in *Lucas* should have been similar to the decision of the California Court of Appeal in *First English Lutheran Church of Glendale v. County of Los Angeles*<sup>244</sup> on remand from the United States Supreme Court. There, the state appellate court ruled that the County's prohibition on construction of new structures in Lutherglen was a valid exercise of the police power and did not require compensation because the property had a history of severe flooding that had caused loss of life and property in the immediate area.<sup>245</sup>

## ii. *Physical takings*

The existence of only one decision since *Penn Central Transportation Co. v. City of New York* awarding compensation for regulation on the grounds that it effects a physical taking also demonstrates that per se takings are a minor concern that do not warrant the distortion of the Constitution that has become regulatory takings. I could identify only five cases decided after *Penn Central* where a court purported to find a regulatory physical taking: *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>246</sup> *Hendler v. United States*,<sup>247</sup> *Horne v. Department of Agriculture*,<sup>248</sup> *Kaiser Aetna v. United States*,<sup>249</sup> and *McCarran International Airport v. Sisolak*<sup>250</sup> In

243. *Id.* at 1038-39 (Blackmun, J., dissenting) (noting that the South Carolina legislature was aware that the state's beaches were "critically eroding," and proposed regulation that restricted Lucas' development rights: "[d]etermining that local habitable structures were in imminent danger of collapse, the Council issued permits for two rock revetments to protect condominium developments near [Lucas'] property from erosion; one of the revetments extends more than halfway onto one of his lots"). Similar reasoning could have been applied to deny a taking in *Lost Tree Vill. Corp. v. United States*, 115 Fed. Cl. 219 (2014), and *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994).

244. 210 Cal. App. 3d 1354 (1989).

245. *Id.* at 1370-71 (finding that prohibition on new construction in summer camp to protect life and property from future flooding conferred average reciprocity of advantage on all similarly situated property owners).

246. 458 U.S. 419 (1982).

247. 175 F.3d 1374 (Fed. Cir. 1999).

248. No. 14-275 (U.S. June 22, 2015).

249. 444 U.S. 164 (1979).

250. 137 P.3d 1110 (Nev. 2006). While *Nollan* and *Dolan* are premised on a finding that the property interest exacted from the owner would have effected a per se taking had the government acquired the interest outright rather than as a condition of development approval, they are not pure per se takings cases. The essential character of the cases is the

*Loretto* and *Hendler*, however, although the court found that a regulation effected a physical taking, it also held that the invasion enhanced the value of the property and denied compensation.<sup>251</sup> *Horne* involved similar facts. There, the Supreme Court recently held that a long-standing federal program restricting the supply of raisins to maintain stability in raisin prices effected a physical taking. The program required raisin growers to set aside a certain percentage of their annual raisin harvest for sale by the federal government in noncompetitive markets, called “reserve” raisins. The proceeds of the government’s sale of the reserve raisins were returned to the growers after deducting the government’s expenses. The growers were free to sell their remaining raisins on the open market.<sup>252</sup> In 2002, the Hornes refused to turn their reserve raisins over to the government and instead sold them on the competitive market. In response, the government imposed a fine on the Hornes. The Court found that the government’s taking custody of the reserve raisins constituted a physical taking and relieved the Hornes of the fine.

*Horne* also fails to make a persuasive case for the regulatory takings doctrine. The government’s physical custody of the raisins was incidental to the program, which curtailed the supply of raisins to maintain prices that favored growers over the long term.<sup>253</sup> Even the majority suggested that the government would not have been liable for a per se taking if it had merely barred the sale of the

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application of the now invalid “substantially advances” test of *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). The owners in those cases had a choice between permission to develop in conjunction with the dedication, or simply continuation of the status quo. In *Tulare Lake Basin Water Storage District v. United States*, 49 Fed. Cl. 313 (2001), *Tulare Lake Basin Water Storage District v. United States*, 59 Fed. Cl. 246 (2003), and *Tulare Lake Basin Water Storage District v. United States*, 61 Fed. Cl. 624 (2004) (finding the restriction on contractual right to divert water from public waterway to protect fish to be physical taking), and *Casitas Municipal Water District v. United States*, 543 F.3d 1276, 1291-92 (Fed. Cir. 2008) (same), the courts erroneously characterized a regulation restricting the use of water as a physical taking, where the property owner never had a right to physical possession of the water and the government did not acquire physical possession of the water for its own use. See *Allegretti & Co. v. Cnty. of Imperial*, 138 Cal. App. 4th 1261, 1272-75 (2006).

251. *Hendler*, 175 F.3d at 1383 (denying compensation where government ground water wells placed on property to monitor contamination from Superfund site effected a physical taking, but nonetheless enhanced value of the property); *Loretto*, 458 U.S. at 434-35; see *id.* at 424 (holding that compensation due a landlord for requirement that she allow cable television facilities on her property was \$1 because the facilities do not devalue the property).

252. *Horne v. Dep’t of Agric.*, No. 14-275, slip op. 1-2 (U.S. June 22, 2015).

253. *Id.* at 6 (Sotomayor, J., dissenting).

reserve raisins, rather than taking possession of the reserve raisins and selling them for the growers' accounts, which was plainly preferable to destruction of the raisins.<sup>254</sup> The objective of the government's price stabilization program is to provide long term economic benefits to growers like the Hornes that eclipse the long term revenue an individual grower could obtain if they were to sell their entire crop each year.<sup>255</sup> Like *Loretto* and *Handler*, a per se takings doctrine that awards compensation to property owners where the government regulation actually increases the overall value of the owner's property is not in the interest of justice and is not mandated by the Clause. The anomalous results in *Loretto*, *Hendler*, and *Horne* undermine the necessity of a per se takings test.

*Kaiser Aetna*, although characterized by the Court as a physical takings case, did not involve a taking of property under the Clause and accordingly does not provide a justification for per se takings. A physical regulatory taking assumes that the government is authorized to impose the regulation, but must pay compensation for interference with the owner's right to exclude others.<sup>256</sup> In *Kaiser Aetna*, before the Army Corps of Engineers allowed any member of the public to occupy the private marina in question, the Corps requested declaratory relief contending that the public already owned rights to use the marina under a navigational servitude.<sup>257</sup> The Supreme Court held that Army Corp's claim of a navigational servitude was invalid and the public had no rights in the marina.<sup>258</sup> Because nothing was taken from the property owner and the regulation was held invalid, *Kaiser Aetna* fails to support the need for per se physical takings.

The final of the five physical takings opinions I identified, *McCarran International Airport v. Sisolak*, was the only case in which a court awarded compensation for a physical taking. This case, however, hardly stands as a clear vindication of the per se takings test. The *McCarran* Court's finding that the County's allowing

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254. *Id.* at 11.

255. *See id.* at 5-7 (Breyer, J., concurring in part and dissenting in part). The government's raisin program is a prime example of a regulation that confers an average reciprocity of advantage, where the same restrictions imposed on each grower results in a net benefit for all growers. *See supra* notes 111 and 134 and accompanying text; *see also infra* notes 285 and 289 and accompanying text.

256. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 543 (2005) (citing *First English Evangelical Lutheran Church v. Cnty. of Los Angeles*, 482 U.S. 304, 315 (1987)).

257. *Kaiser Aetna*, 444 U.S. at 168-69.

258. *Id.* at 179-80.

commercial airplanes using the Airport to enter the airspace above the plaintiff's property effected a permanent physical taking is open to question where the owner's predecessor in interest had previously conveyed a perpetual aviation easement to the County. The court interpreted the easement as not granting overflight rights below 500 feet, without any apparent rationale.<sup>259</sup> The court went on to reach the conclusion that plane flights below 500 feet interfered with the owner's use of his airspace, although the opinion reflects no evidence that the owner was prevented by overflights from developing or using his property for any likely purpose.<sup>260</sup> *McCarran* is another example of a physical taking, like *Loretto* and *Hendler*, where the owner suffered no actual damage.

My research indicates that, post *Penn Central*, in every case where a government agency acquires a possessory interest in property or requires an owner to submit to occupation of the property by the public that has diminished the value or utility of the property to the owner, it has used eminent domain and paid just compensation.<sup>261</sup> Because instances of physical regulatory takings and wipeouts are practically nonexistent—and because when a wipeout does occur, the regulation is typically justified, and when a physical invasion occurs there is typically no loss of property value—per se regulatory takings are not essential to protect property owners. It is a testament to the fairness of our political system, complete with its checks and balances, that cases of government regulation rising to the level of a per se taking are practically non-existent.

An obvious response is that per se takings are necessary to deter wipeouts or physical regulatory takings, and the scarcity of court decisions finding such takings proves that the tests have

259. *McCarran Int'l Airport*, 137 P.3d at 1119-21.

260. *Id.* at 1123-26.

261. *Loretto v. Teleprompter Manhattan CATV Corp.* cites several instances of regulatory physical takings prior to 1930 and expropriation of important industrial facilities during wartime emergencies where the court invoked the Fourteenth Amendment's prohibition on takings without due process of law, rather than the Fifth Amendment just compensation clause. 458 U.S. at 431 (citing cases where the court invoked the Fourteenth Amendment's prohibition on takings without due process of law, rather than the Clause). The void of modern cases finding a similar physical regulatory taking demonstrates that these precedents successfully deterred such takings by alerting government agencies that they must use direct condemnation for physical takings, rather than regulation. *E.g.*, *United States v. Pewee Coal Co.*, 341 U.S. 114, 117-18 (1951) (holding that government seizure and operation of coal mine to prevent minor strike required use of eminent domain).

preempted excessive government regulation. The facts do not support this argument: I was unable to find examples of regulations wiping out property value or resulting in physical occupation prior to *Mahon* or in *Mahon* itself.

b. *Partial and means-ends takings*

As argued in the previous section, per se takings, as the functional equivalent of eminent domain, have, at best, a tenuous claim to constitutional legitimacy. Nonetheless, the per se test is unnecessary—and accordingly not warranted under an evolutionary document theory—because it offers a solution to a virtually nonexistent problem of alleged government abuse of power. In contrast, partial and means-ends takings, lacking even functional equivalency, have no claim to legitimacy. The partial and means-ends tests stretch the Clause beyond any plausible reading of the Constitution, and they conflict with core constitutional values. Ironically, while per se takings are unnecessary because they address a problem that hardly ever occurs, a vast body of partial and means-ends takings law with no tether to the Constitution has been developed to restrict categories of government regulation that frequently occurs.<sup>262</sup> Because partial

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262. Cases applying the partial and means-ends takings tests number in the hundreds, if not thousands. Examples of partial takings cases include: *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 342 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606, 624 (2001); *E. Enters. v. Apfel*, 524 U.S. 498, 529-37 (1998); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 176 (1998); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491-502 (1987); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-14 (1984); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124-38 (1978); *1256 Hertel Ave. Assocs., LLC v. Calloway*, 761 F.3d 252, 264-67 (2d Cir. 2014); *A&D Auto Sales, Inc. v. United States*, 748 F.3d 1142, 1153-59 (Fed. Cir. 2014); *CCA Assocs. v. United States*, 667 F.3d 1239, 1244-48 (Fed. Cir. 2011); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1118-22 (9th Cir. 2010); *Cienega Gardens v. United States*, 331 F.3d 1319, 1336-53 (Fed. Cir. 2003); *Walcek v. United States*, 303 F.3d 1349, 1355-57 (Fed. Cir. 2002); *Good v. United States*, 189 F.3d 1355, 1360-63 (Fed. Cir. 1999); *Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 667-69 (3d Cir. 1991); *Lockaway Storage v. County of Alameda*, 216 Cal. App. 4th 161, 186-89 (2013); *Twain Harte Assocs. Ltd. v. Cnty. of Tuolumne*, 217 Cal. App. 3d 71, 80-88 (1990); *Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs*, 38 P.3d 59, 66-69 (Colo. 2001) (en banc); *Potomac Dev. Corp. v. Dist. of Columbia*, 28 A.3d 531, 538-42, 548-50 (D.C. 2011); *LaSalle Nat'l Bank v. City of Highland Park*, 799 N.E.2d 781, 797-98 (Ill. App. Ct. 2003); *Frick v. City of Salina*, 235 P.3d 1211, 1223-26 (Kan. 2010). Examples of means-ends takings cases include: *Koontz v. St. Johns River Mgmt. Dist.*, 133 S. Ct. 2586, 2594-2600 (2013); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 531-48 (2005); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-07 (1999); *Dolan v. City of Tigard*, 512 U.S. 375, 384-96 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-42 (1987); *Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1135 (9th Cir. 2014), cert. granted sub nom. *Horne v. U.S. Dep't of Agric.*, 83 U.S.L.W. 3127 (U.S. Jan. 16, 2015) (No. 14-275); *Gameau v. City of Seattle*, 147 F.3d 802, 809-12 (9th Cir.

and means-ends takings have no constitutional legitimacy, the only conceivable reason to retain these tests would be policy-related, based on the claim that they are the only available method of achieving fair results in practice.

As I contend in Section III.C.2, the availability of compensation for a partial or means-ends taking frustrates core constitutional values. Moreover, the partial and means-ends tests lack clear standards or principles and thus chill sound land-use planning and other necessary government regulation to protect community interests,<sup>263</sup> as legislators and planners are deterred from imposing necessary regulation for fear of takings litigation and liability.<sup>264</sup> It is difficult to defend partial and means-ends regulatory takings as a fair and effective system of property use regulation under an evolutionary theory of constitutional interpretation.

Concern that a means-ends takings test is necessary to prevent government “extortion” of real estate developers and others using property for profit overstates the facts. The *Nollan/Dolan* intermediate scrutiny test, for example, is intended to prevent the government from unfairly leveraging the police power to exact public benefits from private development permit applicants.<sup>265</sup> While government extortion makes for an appealing narrative, the meager evidence of such abuse fails to justify *Nollan/Dolan* intermediate scrutiny.

*Nollan v. California Coastal Commission* offers a prime example of the inability of regulatory takings to address society’s social and

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1998); *Richardson v. City & Cnty. of Honolulu*, 124 F.3d 1150, 1157-59 (9th Cir. 1997); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1577-81 (10th Cir. 1995); *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991); *Home Builders Ass’n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 999-1000 (Ariz. 1997) (en banc); *San Remo Hotel LL.P. v. City & Cnty. of San Francisco*, 27 Cal. 4th 643, 761 (2002); *Landgate, Inc. v. Cal. Coastal Comm’n*, 17 Cal. 4th 1006, 1022-1025 (1998); *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 869-901 (1996); *Home Builders Ass’n of N. Cal. v. City of Napa*, 90 Cal. App. 4th 188, 903-06 (2001); *152 Valparaiso Assocs. v. City of Cotati*, 56 Cal. App. 4th 378, 383-88 (1997); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695-98 (Colo. 2001) (en banc); *No. Ill. Home Builders Ass’n, Inc. v. Cnty. of Du Page*, 649 N.E.2d 384, 388-91 (Ill. 1995); *Home Builders Ass’n of Dayton & the Miami Valley v. Beavercreek*, 729 N.E.2d 349, 355-58 (Ohio 2000); *Town of Flower Mound v. Stafford Estates Ltd. P’ship*, 135 S.W.3d 620, 640-45 (Tex. 2004); *Wis. Builders Ass’n v. Wis. Dep’t of Transp.*, 702 N.W.2d 433, 447-48 (Wis. 2005). This volume of appellate partial and means-ends takings decisions dwarfs the miniscule number of wipeout and physical regulatory takings cases. See *supra* notes 235-36 and 246-60 and accompanying text; KATZMANN, *infra* note 302, at 76-88.

263. See *supra* note 9.

264. *Id.*

265. *Nollan*, 483 U.S. at 838; *Dolan*, 512 U.S. at 386-87.

economic challenges. Rather than maintain the status quo, Nollan exacerbated over-development of California's coast by significantly enlarging the beach-front house on his property,<sup>266</sup> increasing his adverse impacts on, and reducing the public's visual access to and enjoyment of, the coast.<sup>267</sup> Where Nollan's existing house was modest in size, the larger house would likely reduce the value of the public beach areas in close proximity.<sup>268</sup> The Supreme Court adopted a narrow and unrealistic definition of appropriate mitigation of the project's impacts. In practice, the detrimental impact of Nollan's expansion of his use of the coast on the public domain is hard to measure in terms of money or land area, and is subjective.<sup>269</sup> On the other hand, Nollan offered no evidence that the proposed regulation imposed a severe economic burden on his property. The California Coastal Commission should have been allowed the flexibility to strike a balance between private and public rights to coastal resources to achieve an average reciprocity of advantage.<sup>270</sup>

Similarly, in *Dolan v. City of Tigard*, the majority did not question the logic of requiring a developer to mitigate the public impacts of the development by dedicating land for a bike path, public floodplain, and open space. Instead, the majority required the regulatory agency to quantify the demand for bicycle transportation, floodplain, and open space created by the project,<sup>271</sup> which are abstract concepts and not easily measurable.<sup>272</sup> Moreover, the property owner presented no

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266. *Nollan*, 483 U.S. at 827-28 (describing how Nollan sought permission to replace a 504 square foot bungalow with a three-bedroom house).

267. Nathaniel S. Lawrence, *Means, Motives, and Takings: The Nexus Test of Nollan v. California Coastal Commission*, 12 HARV. ENVTL. L. REV. 231, 243 (1988) (calling the majority's application of the nexus test "nothing more than an exercise in characterization" and noting that "there was nonetheless a relationship between [the permit conditions and the proposed development] sufficient to survive heightened scrutiny").

268. The majority opinion acknowledged that the proposed development could affect the public's ability to enjoy the public beaches adjacent to Nollan's property. *Nollan*, 483 U.S. at 836.

269. *Id.* at 842 (Brennan, J., dissenting) (noting that the majority's opinion demands a "degree of exactitude that is inconsistent with" the Court's traditional rational basis review).

270. *See* Lawrence, *supra* note 267, at 244 ("Not only would the condition have partially addressed loss of visual access, but a less intrusive, more remedial condition is difficult to imagine.").

271. 512 U.S. 375, 392-97 (1994).

272. *Id.* at 403-05 (Stevens, J., dissenting) (chiding the majority for requiring

evidence that the dedications would diminish the value of the property as a whole. Rather than presenting a picture of government abuse, the regulation at issue in *Dolan* is an illustration of a political system functioning properly to ensure that land development preserves important community interests, at the same time allowing profit making from use of private property.

*Koontz v. St. Johns River Management District* is perhaps the leading illustration of the inability of the means-ends takings test to properly balance the interests of developers against environmental preservation. Despite invoking the regulatory takings doctrine, the *Koontz* majority agreed with the four dissenting justices that nothing had been taken from the developer.<sup>273</sup> The regulation in question was a routine protection of the most sensitive portion of the developer's land from destruction.<sup>274</sup> The developer in *Koontz* did not attempt an argument that the mitigation would have had a devastating economic impact that would be functionally equivalent to eminent domain. Under these facts, the agency's proposed regulation cannot be fairly characterized as abusive.

The absence of justification for applying a means-ends test to ad hoc permitting, however, has not stopped takings advocates from attempting to extend the means-ends takings test to legislative regulation, where the political system functions even more effectively to mediate between the interests of private property owners and the community than it does in the ad hoc permitting process. In *Levin v. City and County of San Francisco*, the court applied its subjective judgment to rule that a legislative regulation is unwise and ineffective.<sup>275</sup> The court essentially decided that the agency could not require a property owner to mitigate the impact of its intended use of the property on the community unless the property owner was the sole, and entire, cause of the problem the regulation sought to address. By substituting its judgment as to the nature of the problem and its solutions, the *Levin* court failed to establish any principled rules to

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"individualized determination[s]" of rough proportionality and observing that where these abstract concepts are concerned, "[p]redictions . . . are inherently nothing more than estimates").

273. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2597 (2013); *id.* at 2603 (Kagan, J., dissenting).

274. *Id.* at 2592-93 (majority opinion).

275. *Levin v. City & Cnty. of San Francisco*, No. 3:14-CV-03352-CRB, 2014 WL 5355088, at \*1 (N.D. Cal. Oct. 21, 2014).

limit judicial second-guessing of the decisions of elected legislatures to address social problems.<sup>276</sup>

Partial and means-ends takings also suffer from a lack of practicality or efficiency in restraining alleged unfair government regulation.<sup>277</sup> Establishing a fair and workable formula for partial and means-ends regulatory takings is not feasible. Not only are “courts. . . not well equipped to engage in the kind of balancing that current case law requires in regulatory takings claims,”<sup>278</sup> but they have not been provided with coherent or consistent rules to conduct such “balancing.” In *Lucas v. South Carolina Coastal Council*, the Supreme Court appeared to be inclined to establish firm, easy-to-apply, one-size-fits-all standards for regulatory takings such as the per se takings tests—wipeouts and physical takings.<sup>279</sup> In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, however, the Court appeared to retreat from such “hard and fast rules,”<sup>280</sup> favoring an ad hoc analysis of takings claims under *Penn Central*.<sup>281</sup> It has been suggested that the Court could clarify and expand on the three *Penn Central* factors to bring greater uniformity and fairness to judicial review of government regulation under the regulatory takings doctrine.<sup>282</sup> Following

276. The Supreme Court has also struggled with the distinction between “harm-preventing” regulation and “benefit-conferring” regulation and is more likely to impose takings liability for the latter. But the difference between the two has been elusive in practice, and further contributed to the incoherence of takings. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026 (1992) (distinguishing between harm-preventing and benefit-conferring regulation subject to personal values) (cited in Echeverria, *Sense, supra* note 231, at 194).

277. A doctrine of regulatory takings removes a large component of the economic and social policy making function from the legislative and administrative branches of government yet “would yield no coherent remedy.” Tribe, *supra* note 138, at 300; see also Byrne, *supra* note 13, at 102 (regulatory takings doctrine inconsistent and open-ended); *id.* at 102-06; Thompson, *supra* note 223, at 1449 n.1 (“Outside the context of traditional exercises of eminent domain, what constitutes a ‘taking’ is an exceptionally cloudy and complex question.”).

278. Treanor, *supra* note 13, at 885; see also *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 865 (1984); AMAR, *supra* note 46, at 64 (“Separation of powers also facilitated a certain degree of specialization of labor, enabling each branch to concentrate on a different function and thereby operate more efficiently.”).

279. 505 U.S. at 1030-31.

280. Echeverria, *Sense, supra* note 231, at 173.

281. *Id.* (“‘Our polestar . . . remains the principles set forth in *Penn Central* itself,’ which call for a careful examination and weighing of all the relevant circumstances.”) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 326 n.23 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring))).

282. Echeverria, *Sense, supra* note 231, at 174-75 (arguing that there is considerable

*Tahoe-Sierra* and *Lingle*, the Court has rejected opportunities to do so.<sup>283</sup> Clarification of the court's role in such economic policy, however, may not be possible unless the courts are willing to overrule the political branches of government on questions of social and economic policy.

Several commentators have advanced methodologies that would apply the partial and means-ends takings test to net out the givings and takings of individual regulations on individual properties.<sup>284</sup> But to parse out the economic losses to every property owner affected by government regulation has proved in practice to be an impossible task, analogous to counting the number of grains of sand on the beach.<sup>285</sup> Because there are so many properties affected by government regulation and innumerable government regulations affecting such property, and because real property is unique, the economic effects of countless regulations would have to be determined in individual court cases.<sup>286</sup> To award compensation for government regulation by ad

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uncertainty about the meaning of *Penn Central*); see also *id.* at 178-210 (suggesting ways to construe *Penn Central* factors to inject predictability and consistency in applying *Penn Central* to government regulation).

283. See *Guggenheim v. City of Goleta*, 638 F.3d 1111 (9th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 2455 (2011) (rejecting the invitation of former Solicitor General Ted Olson to refine the *Penn Central* test in the context of rent control, which has been a regulatory takings *cause célèbre* of the property rights movement); *Henry v. Jefferson Cnty. Comm'n*, 637 F.3d 269, 276-77 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 399 (2011) (rejecting *Penn Central* taking where county approved housing project at density significantly below number of units requested in development application).

284. See, e.g., Echeverria, *Sense*, *supra* note 231, at 204, n.130; Lynda J. Oswald, *The Role of the "Harm/Benefit" and "Average Reciprocity of Advantage" Rules in a Comprehensive Takings Analysis*, 50 VAN. L. REV. 1447 (1997); Marie K. Truesdell et al., *Regulatory Takings and the Diminution in Value: An Empirical Analysis of Takings and Givings*, 38 J. AGRIC. AND APPLIED ECON. 585 (2006); William A. Fischel, *Public Goods and Property Rights: Of Coase, Tiebout, and Just Compensation*, 13-14 (August 7, 2000) (unpublished manuscript), available at <http://www.dartmouth.edu/~wfischel/Papers/00-19.pdf>.

285. See Echeverria, *Sense*, *supra* note 231, at 205 (noting that it is impossible to calculate net loss from regulation where regulated party receives countervailing benefits); see also Kuttner, *supra* note 110, at 92 (noting that a determination of benefits and costs of environmental protections is infeasible where social costs of environmental harms are impossible to measure; that estimates of the social cost of carbon, for example, range from \$4.70-\$64.90/ton; that the poor will be less willing or able to pay to reduce risks; and that benefit-cost analysis understates benefits of environmental and consumer regulation). By the same token, the rough proportionality test of *Dolan* is unworkable where the impacts of land development cannot be readily measured for mitigation in terms of acreage or dollars.

286. See Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. OF ENVTL. L. & POL'Y 1, 68-74 (2003) (discussing difficulty of netting out value of givings and takings).

hoc litigation, however, will reward only those litigants with the resources to litigate. Even if the courts could be multiplied in number to process such an overwhelming number of takings cases and all property owners had the means to hire counsel and undergo lengthy litigation, the results of these cases would inevitably be subjective and inconsistent.

Moreover, a “before and after” market value test would be inherently misleading. Due to the unique nature of property and the complex effects of government takings and givings on property,<sup>287</sup> the degree of diminution of value resulting from regulation is difficult to discern and highly subjective.<sup>288</sup> The myriad benefits and detriments of regulation on each property cannot be isolated and valued by standard market comparisons.<sup>289</sup> A policy of requiring compensation for government regulation, taken to its logical conclusion that any government-caused diminution in the value of property requires compensation from the public treasury, collapses under its own weight.<sup>290</sup>

An evolutionary theory of constitutional interpretation does not support regulatory takings, but rather weighs against the doctrine. As a result of political polarization and anti-government attitudes, the political branches of government have been unable or unwilling to adopt and enforce economic rules. Legislatures increasingly anticipate judicial policy-making and craft ambiguous or unfinished legislation requiring judicial completion through, among other things, review of police power regulation as “takings.” Rather than reflecting a true constitutional evolution, the regulatory takings doctrine has produced an unprincipled, haphazard decision-making process. The Supreme Court should not enable this distortion of core constitutional values and should abolish regulatory takings.

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287. See C. Ford Runge, *The Congressional Budget Office's Regulatory Takings and Proposals for Change: One-Sided and Uninformed*, 7 ENVTL. L. & PRAC. 5, 7 (1999).

288. Echeverria, *Sense, supra* note 231, at 179 (noting the difficulty of determining whether the net economic effect of a regulation is positive or negative).

289. Externalities are not traded in efficient markets and their magnitude can be estimated using only “crude analogies.” While legislators and administrative agencies are ill-equipped to make these complex calculations, courts are even less qualified. Byrne, *supra* note 13, at 128. *But see* Bell & Parchomovsky, *supra* note 131, at 604-09 (suggesting conceptual model for monetizing takings and givings).

290. See Echeverria, *Sense, supra* note 231, at 180 (“The ‘with and without’ approach systematically *overstates* the actual impact of a restriction because it calculates the effect of lifting the regulation as to the claimant’s property while implicitly assuming the regulation will continue to apply to other property in the community.”).

## IV. WHAT IF REGULATORY TAKINGS HAS NO CONSTITUTIONAL BASIS?

In Section III, I presented my core thesis that under any competing theory of constitutional interpretation, regulatory takings is not a legitimate application of the Clause. I acknowledge that eliminating regulatory takings would invite the question as to what system of regulation of property would strike an efficient and equitable balance between the interests of private property owners and the public, and at the same time be faithful to the Constitution. In this Section, I offer a sketch of such regime by integrating my ideas with those of other critics of regulatory takings.<sup>291</sup>

I am mindful that a restructuring of economic policy making by abolishing regulatory takings would require an assumption of greater responsibility by the political arms of government. Regulatory takings, which delegates to the courts a significant role in formulating economic policy, is a symptom of structural weakness and paralysis in the legislative and executive branches of American government.<sup>292</sup> Conflicts in economic policy that in other countries “would be solved by quiet consultations between interested parties through the bureaucracy are fought out through formal litigation in the American court system . . . [where] policy is made piecemeal in a highly specialized and therefore nontransparent process by judges who are often unelected and serve with lifetime tenure.”<sup>293</sup> As a result, policy decisions on issues such as land use, where the courts have been particularly active since *Penn Central Transportation Co. v. City of New York*, have been inconsistent and contradictory, and lacking in focus on the larger picture. As one commentator observed with regard to the ineffectiveness of American political branches of government:

The solution to this problem is not necessarily the one ad-

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291. Abolishing regulatory takings entirely is not as far-fetched as it may appear. Elimination of regulatory takings would not require a constitutional amendment. The necessary reform can be accomplished through the common law. As in *Lingle v. Chevron U.S.A., Inc.*, rejection of the regulatory takings doctrine could be characterized as a “correct[ion] [in] course.” 544 U.S. 528, 548 (2005).

292. FRANCES FUKUYAMA, *POLITICAL ORDER AND POLITICAL DECAY: FROM THE INDUSTRIAL REVOLUTION TO THE GLOBALIZATION OF DEMOCRACY* 473-76 (2014); see also Echeverria, *Sense*, *supra* note 231, at 199 (noting that the Supreme Court has relied on the takings doctrine as a “catch-all constitutional remedy for alleged wrongs by government actors affecting property”).

293. FUKUYAMA, *supra* note 292, at 474.

vocated by many American conservatives and libertarians, which is to simply eliminate regulation and close down bureaucracies. The ends that government is serving, like regulation of toxic wastes or environmental protection, are important ones that private markets will not pursue if left to their own devices. Conservatives often fail to see that it is the very distrust of government that leads the American system into a far less efficient court-based approach to regulation than that of democracies with stronger executive branches.<sup>294</sup>

Because regulatory takings encroaches on the powers delegated by the Constitution to the political branches of government, the doctrine should be eliminated in favor of judicial deference founded on the principle of average reciprocity of advantage. That principle assumes that, over the long term, each person benefits from the cumulative regulations that burden others, with the result that each individual derives a net benefit from the sum total of government regulation. Under this system, fair distribution of the benefits and burdens of regulation—takings and givings—is achieved by the political branches of government, rather than the courts, through statute, state common law, and in cases of arbitrary regulation, application of the due process and equal protection clauses.

Under the American system of government, the police power exercised by co-equal branches of government is generally beyond the purview of the courts, with the exceptions of restrictions of fundamental constitutional rights, irrational and arbitrary regulation, corruption, or interpretation of statutes. Instead of encouraging judicial policy making in matters of commerce, the constitutional and political traditions in the United States prior to *Penn Central* reflected a system of average reciprocity of advantage. There is no place for a regulatory takings jurisprudence in such a scheme.

A legislation-based scheme for regulation of economic activity rejects the discredited view of the Constitution that allows unfettered use of property.<sup>295</sup> Regulation of personal property

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294. *Id.* at 475.

295. Reich, *supra* note 31, at 728-29 (“[P]rivate property is no longer a wall against government; government today has vast powers to regulate private property in the interest of the nation or the local community. The very structure of society, based as it is on organization, encourages the growth of central power just as frontier isolation once restrained it.”).

used in commerce has been established for more than a century. These regulatory schemes and the administrative apparatus accompanying them have become inseparable from commercial activity itself<sup>296</sup> and are understood to be outside the purview of the courts.<sup>297</sup> For instance, Congress long ago adopted anti-trust laws, price controls, and banking regulations to protect consumers and foster economic diversity.<sup>298</sup> Public protection from adverse effects of land development is not appreciably different from these systems of personal property regulation and does not warrant special treatment under the guise of constitutional rights.

The imperative to protect the environment from threats such as climate change and depletion of nonrenewable resources suggests that sound government regulation of economic activity is necessary.<sup>299</sup> Changing community values, scientific advances, and changing physical conditions should be permitted to influence property regulation.<sup>300</sup> Statutes, rather than immutable

296. See generally DAVID GRAEBER, *THE UTOPIA OF RULES: ON TECHNOLOGY, STUPIDITY, AND THE SECRET JOYS OF BUREAUCRACY* (2015).

297. See, e.g., *Yee v. City of Escondido*, 503 U.S. 519, 528-29 (1992) (affirming that states have broad economic powers to regulate housing conditions and the landlord-tenant relationship); *FCC v. Fla. Power Corp.*, 480 U.S. 245, 253 (1987) (upholding regulation of the rates utility companies may charge cable television systems); *FPC v. Texaco, Inc.*, 417 U.S. 380, 400 (1974) (noting that it is not the courts' role to overturn congressional assumptions embedded in the price control regulations established by the Natural Gas Act); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 768-69 (1968) (noting that the Constitution allows price controls on commercial activities); *Nebbia v. New York*, 291 U.S. 502, 512 (1934) (noting that there is no constitutional guarantee of an unrestricted right to conduct business or set prices for goods and services).

298. See, e.g., *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. 111-203, 124 Stat. 1376 (2010) (regulating the financial services industry); *Banking Act of 1933 (Glass-Steagall Act)*, Pub. L. No. 73-66, 48 Stat. 162 (1933) (regulating the banking industry); *Sherman Antitrust Act of 1890*, ch. 647, 26 Stat. 209 (prohibiting harmful monopolies); *Clayton Antitrust Act of 1914*, Pub. L. 63-212, 38 Stat. 730 (expanding upon the antitrust prohibitions of the Sherman Act); *Natural Gas Act*, Pub. L. No. 75-688, 52 Stat. 821 (1938) (prohibiting natural gas companies from charging rates that are unreasonable or unjust).

299. See STIGLITZ, *supra* note 110, at 190-91; see also FUKUYAMA, *supra* note 292, at 475.

300. Decisions from the United States Supreme Court demonstrate a tendency to respond to public opinion. Noteworthy are the Supreme Court's evolving views of the Roosevelt Administration's New Deal policies during the 1930s and early 1940s. A conservative court initially struck down laws expanding the power of unions, setting minimum wages, and regulating industry. See *supra* notes 52-56 and accompanying text. Perhaps perceiving that public opinion had swung in favor of such measures to combat the depression, the court reversed course and consistently upheld Roosevelt's social and economic programs. Schwartz, *supra* note 286, at 17 n.82; see SHESOL, *supra* note 56, at 522-23. Some commentators viewed the court's about-face as a response to Roosevelt's attempt to pack the court. SHESOL, *supra* note 56, at 522-23. The court packing plan failed,

constitutional doctrine, provide such flexibility to government and lead to more predictable outcomes.<sup>301</sup>

Moreover, legislatures are better equipped to make economic and social policy than courts. The legislative process is multi-layered and deliberative, with public hearings where constituents, agency staff, and members of the legislature may submit evidence for and against a legislative measure.<sup>302</sup> Where economic regulation is formulated by statute, legislatures and executives may implement the prevailing economic ideology.<sup>303</sup> Land-use laws made by legislatures also have the benefit of retaining local control, where the decision-maker is typically more familiar with local conditions and values, and where policies can more easily be modified to allow experimentation and innovation.<sup>304</sup> While statutes apply to classes of property owners, they can be tailored to address the needs of individuals within that class. Statutory law allows policy-makers to fit regulations that affect individual property owners into the larger context of all economic and social programs in the jurisdiction to achieve the greatest overall welfare.<sup>305</sup>

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however, before the court adopted more progressive policies. Accordingly, the court-packing scheme likely was not responsible for the court's decisive move toward greater deference to government regulation of business.

301. See FUKUYAMA, *supra* note 292, at 474-75. Statutes are also preferable to common law nuisance as a vehicle for regulation of land use. Judges issuing decisions in individual nuisance cases between private parties lack access to evidence of the impact of a particular land use on the community as a whole. The evidence-gathering ability and broader perspective of legislatures avoids the distortions from basing generally applicable rules on extreme or outlying fact patterns. See *supra* notes 235-37 and accompanying text (arguing that regulatory takings rules developed in reaction to extreme facts are a poor fit with most regulatory takings cases). Moreover, the Supreme Court has limited the use of nuisance doctrine as a justification for regulation of property. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031-32 (1992) (holding that a regulation depriving landowner of all economically beneficial use is a taking unless background principles of nuisance and property law already prohibit the use).

302. ROBERT KATZMANN, *JUDGING STATUTES* 22 (2014); see also *supra* notes 278-79 and 302-305 and accompanying text.

303. For purposes of this argument, statutes encompass legislative and quasi-legislative regulation, as well as quasi-adjudicatory decisions of elected officials or commissions. See *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 865 (1984).

304. *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (federalism permits "a single courageous State . . . [to] serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting))).

305. "Over the past two centuries, the centrality of statutes to our system of governance has, unsurprisingly, become ever apparent. Statutes affect all manner of life,

Statutory mechanisms are more likely to provide fair results in the realm of land-use regulation.<sup>306</sup> Professor Joseph Sax explains that notions of fairness in land-use regulation do not require that every property owner be compensated for each impact of each regulation: “It would be fairer if the benefits of development, and thus the costs of protecting ambient resources, were shared more equitably among all owners.”<sup>307</sup> The American model of strong private property rights and autonomous land owners has “produced a situation of late-stage public governance” where “an undue portion of the burden of programs like open space, coastal, and biodiversity protection [fall] on the relatively few landowners who still have undeveloped or pristine land available.”<sup>308</sup> Democratic decision making provides the view of the big picture and the flexibility to adjust statutory relief as necessary to address modern societal needs, such as the equitable sharing of the burden of environmental conservation.<sup>309</sup>

As an illustration of the superiority of a politically based scheme for controlling excessive regulation of land use over a constitutionally based system, in 1987 California’s legislature

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including the most pressing public policy issues of the day . . . . How statutes are drafted—tightly or loosely—can give executive branch agencies more or less discretion to make policy . . . . Legislation is the basis for the administrative state as we know it.” KATZMANN, *supra* note 302, at 7 (2014). *See also* *Obergefell v. Hodges*, No. 14-556, slip op. at 27 (U.S. June 26, 2015) (Roberts, C.J., dissenting) (noting that courts “do not have the flexibility of legislatures to address concerns of parties not before the court”).

306. In ruling that a temporary moratorium on development while permanent land-use controls were under study does not effect a taking, the Supreme Court acknowledged that legislatures are properly vested with authority to tailor regulatory programs to local conditions. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 341-42 (2002).

307. Joseph L. Sax, *Why America has a Property Rights Movement*, 2005 U. ILL. L. REV. 513, 517 (2005).

308. Joseph L. Sax, *Land Use Regulation: Time to Think About Fairness*, 50 NAT. RESOURCES J. 455, 469 (2010).

309. *Nollan* offers a prime example of the poverty of regulatory takings to address society’s social and economic challenges. Rather than maintain the status quo, *Nollan* sought to exacerbate the problem of over-development of California’s coast by enlarging his house, increasing his adverse impacts on the coast and reducing the public’s visual access to and enjoyment of the coast. Where *Nollan*’s existing house was modest in size, the larger house would reduce the value of the public beach areas in close proximity. The detrimental impact of *Nollan*’s expansion of his use of the coast on the public domain is impossible to measure in pure monetary terms. The California Coastal Commission should have been allowed the flexibility to manage the coast to strike a balance between private and public rights to the coast under the principle of reciprocity of advantage. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 831-42 (1987).

adopted the Mitigation Fee Act (“MFA”).<sup>310</sup> This law requires public agencies to “[d]etermine how there is a reasonable relationship between the fee’s use and the type of development project on which the fee is imposed” and to “[d]etermine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.”<sup>311</sup> By placing the burden on the agency to defend its exaction, and by requiring a nexus and proportionality, the MFA accomplishes the same general end as *Nollan/Dolan*. But the MFA is a superior tool to *Nollan/Dolan* because the Legislature imposed the regulation after study and debate of the social and environmental problems addressed by exactions in California, with input from the constituents affected by the proposed regulation and evidence from experts in the disciplines relevant to the proposed policy. The *Nollan/Dolan* test, by contrast, was imposed by judges with no connection to the groups affected and based on evidence presented in two lawsuits between litigants representing their own interests, rather than all affected developers, local agencies, and community members.

The partial takings doctrine responds to concerns that developers will be caught in a downzoning or other change in the law that diminishes the value of an investment made in reliance on the state of the law at the time of the investment.<sup>312</sup> Expanded use of development agreements authorized by state law would also provide developers greater certainty in land-use controls. A bargained-for set of controls would also be preferable to the unpredictable and expensive system of regulatory takings.<sup>313</sup>

*Levin v. City and County of San Francisco* provides another illustration of the superiority of statutory regulation of economic affairs over regulatory takings. Two decades before the *Levin* decision, residential landlords faced with local regulations restricting tenant evictions persuaded the California State

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310. 1987 Cal. Legis. Serv. 927, ch. 5, § 1 (West) (codified as amended at CAL. GOV’T CODE §§ 66000-03 (West 2015)).

311. *Id.* § 66001(a)(3)-(4).

312. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 104 (1978) (noting that takings test based in part on interference with “investment-backed expectations”); *see also* Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring).

313. *See, e.g.*, CAL. GOV’T CODE §§ 65865-69.5 (West 2015); *see also* David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. REV. 663 (2001).

Legislature to adopt the Ellis Act, which allows landlords to evict all tenants in a rental apartment building and withdraw from the landlord business.<sup>314</sup> In response to the adverse impact on tenants of increased Ellis Act evictions in 2013 and 2014, San Francisco adopted an ordinance requiring landlords evicting tenants under the Act to subsidize the rent of the evicted tenant for two years, in some cases requiring payment of substantial sums.<sup>315</sup>

The landlord in *Levin* claimed that the San Francisco ordinance impermissibly burdened his right to withdraw from the rental housing business and, therefore, was preempted by the Ellis Act.<sup>316</sup> He also asserted that the ordinance effected a *Nollan/Dolan* taking. In violation of the well-established principle that courts should avoid adjudicating constitutional questions where the case can be decided on statutory grounds,<sup>317</sup> the trial court held that the ordinance constituted a facial taking and issued a judgment for the landlord, without first determining whether the ordinance was preempted under state law.<sup>318</sup> A single federal judge thus removed the policy regarding mitigation of displacement of tenants due to evictions from the state's democratic process and decided the case himself under a federal constitutional provision, where the application of constitutional law may have been unnecessary.<sup>319</sup> State and local legislatures are better-equipped than federal judges to address unique local and state economic problems. *Levin* demonstrates that statutes can obviate regulatory takings as a scheme for making economic policy.<sup>320</sup>

In cases of extreme regulation that is either the product of corruption or is so arbitrary or irrational that it shocks the conscience (such as arbitrary conditions of development

314. CAL. GOV'T CODE §§ 7060-60.7 (West 2015); see *Levin v. City & Cnty. of San Francisco*, No. 3:14-CV-03352-CRB, 2014 WL 5355088, at \*4 (N.D. Cal. Oct. 21, 2014).

315. S.F., CAL., ADMIN. CODE § 37.9A(e)(3)(E).

316. Complaint for Violation of Federal Civil Rights under 42 U.S.C. § 1983 and California State Law (CAL. GOV'T CODE § 7060-60.7) at 17, 23 (N.D. Cal. July 24, 2014); *Levin*, 2014 WL 5355088, at \*23.

317. *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 12 (1987); *Moore v. Sims*, 442 U.S. 415, 429-30 (1979).

318. *Levin*, 2014 WL 5355088, at \*23-24.

319. In fact, in a separate challenge to the same ordinance heard after the federal district court ruled in *Levin*, a state trial judge found that the ordinance is preempted by the Ellis Act. *Jacoby v. City & Cnty. of San Francisco*, No. CGC-14-540709, minute order at 2 (Cal. Super. Ct., Feb. 19, 2015).

320. Regardless of one's feelings about the fairness of the ordinance at issue in *Levin*, the regulatory takings doctrine is not the appropriate vehicle for judicial review.

approval), the due process and equal protection doctrines are sufficient to protect individual property owners.<sup>321</sup> In his concurring opinion in *Lingle*, Justice Kennedy concluded that substantive due process is still an effective remedy in cases of corruption or irrational laws that fail to reasonably advance the public interest.<sup>322</sup> And in *Eastern Enterprises v. Apfel*, Justice Kennedy and the four dissenting justices found that the due process clause applied to a retroactive law requiring coal companies to fund health care for their former employees.<sup>323</sup> The Due Process and Equal Protection Clauses, likewise, would be appropriate in adjudicating unconstitutional conditions such as exactions, which involve a means-ends test. Unlike the takings rubric the Court imposed in *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the due process and equal protection tests for regulations affecting non-fundamental rights have a solid grounding in the Constitution.<sup>324</sup>

## V. CONCLUSION

Regulatory takings cannot be justified under any of the competing theories of constitutional interpretation: textualism, originalism, or evolutionary document theory. The popularity of the doctrine stems from a free-market ideology prevailing in contemporary politics, rather than from the core values of the Constitution, such as liberty and equality. Regulatory takings cannot be justified on the alternative ground that it is effective or fair in practice. To the contrary, the doctrine is incoherent and leads to unfair results.

Prudence dictates that the courts revisit the rationale for regulatory takings. A Constitution that inhibits a collective response to the harsh effects of capitalism—particularly threats to

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321. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (holding that property owner alleging that public agency required excessive easement to connect water main to owner's house stated a claim for violation of equal protection); *see also* J. Peter Byrne, *Due Process Land Use Claims After Lingle*, 34 *ECOLOGY L.Q.* 471, 480-92 (2007) (arguing that states are more likely to expand substantive due process review of local land-use regulation).

322. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 548 (2005) (Kennedy, J., concurring); Byrne, *supra* note 13, at 131.

323. 524 U.S. 498, 539, 549 (1998) (Kennedy, J., concurring in part and dissenting in part); *id.* at 556 (Breyer, J., dissenting).

324. *Nollan* and *Dolan* are based on the "substantially advances test," a means-ends test which the Supreme Court found is a due process test, not a takings test. *Lingle*, 544 U.S. at 540.

the environment such as poor urban planning, loss of affordable housing, and climate change—could not have been contemplated by the framers or the public understanding of the Constitution at the time of its adoption. Under the evolutionary document theory, however, it is not necessary to interpret the Constitution in a self-destructive manner. Regulatory takings should be replaced by a system based on average reciprocity of advantage that is truly grounded in the democratic values of the Constitution.