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Of Course a Land Use Regulation that Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking

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**OF COURSE A LAND USE REGULATION THAT
FAILS TO SUBSTANTIALLY ADVANCE
LEGITIMATE STATE INTERESTS RESULTS IN A
REGULATORY TAKING**

R. S. Radford *

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INTRODUCTION

Over 20 years ago, in *Agins v. City of Tiburon*,¹ a case involving a facial challenge to a residential zoning ordinance, the United States Supreme Court explained the criteria for finding such measures unconstitutional under the Takings Clause of the Fifth Amendment:²

The application of a general zoning law to particular property affects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land.³

Since 1980, the Court has frequently reiterated and applied the “substantial advancement” prong of *Agins* as a test for regulatory takings, in cases involving a wide variety of both facial and as-applied challenges to legislative enactments and regulatory actions.⁴ Analysts have routinely recognized that,

1. 447 U.S. 255 (1980).

2. The Takings Clause provides, “private property shall [not] be taken for public use without just compensation.” U.S. CONST. AMEND. V.

3. *Agins*, 447 U.S. at 260.

4. See *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 202 (2001); *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 704 (1999), *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480

[i]n the years since the Supreme Court's 1980 decision in *Agins*, the two-pronged takings test has been repeatedly cited by the Supreme Court and the lower federal courts as part of its accepted regulatory takings jurisprudence.⁵

Likewise, the substantial advancement standard is recognized as a mainstream regulatory takings test by virtually all authoritative legal treatises and practice guides.⁶

U.S. 470, 485 (1987); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

5. Ronald H. Rosenberg & Nancy Stroud, *When Lochner Met Dolan: The Attempted Transformation of American Land-Use Law by Constitutional Interpretation*, 33 URB. LAW. 663, 671 (2001). The substantial advancement standard is equally well established as a regulatory takings test in the lower courts. See, e.g., Anne T. Kadlecek, *The Effect of Lucas v. South Carolina Coastal Council on the Law of Regulatory Takings*, 68 WASH. L. REV. 415, 420 (1993) ("Since 1980, most lower courts have applied the *Agins* two-part test in their own takings analyses."); James S. Burling, *Endangered Species, Wetlands, and Other Critters—Is It Against Nature to Pay for a Taking?*, 27 LAND & WATER L. REV. 309, 335 (1992) ("The most commonly articulated and accepted test for determining whether or not a governmental action has reached the threshold for a regulatory taking is Justice Powell's two-prong test in *Agins*.").

6. See, e.g., 1 RATHKOPF'S THE LAW OF ZONING AND PLANNING § 6:63.60 (4th ed. 2003) ("The Supreme Court has repeatedly stated that a regulation of land use constitutes a taking 'if the ordinance does not substantially advance legitimate state interests'... This 'substantially advance' taking test . . . has been construed by the Supreme Court as a general standard for judicial review of taking claims."); 11 MCQUILLIN MUN. CORP. § 32.28 (3rd ed.) ("A 'taking' is deemed to have occurred where the application of a zoning ordinance to a particular property does not substantially advance legitimate state interests, or where the ordinance denies an owner economically viable use of his or her land."); 8A MICH. CIV. JUR. EMINENT DOMAIN § 14: Factors for Determining Taking ("Land use regulations effect a taking in two general situations: when they do not substantially advance a legitimate state interest, or when they deny an owner economically viable use of his land."); 2 GA. JUR. PROP. § 19:53, Purposes for Which Eminent Domain May Be Exer-

Notwithstanding this impressive array of Supreme Court authority and legal commentary, a few observers have persistently maintained that the *Agins* substantial advancement prong should be redenominated as a substantive due process inquiry, not a Fifth Amendment takings test.⁷ One of the most prominent of these writers, John D. Echeverria, has gone so far as to publish an article with the provocative title, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*⁸ I say provocative because the answer to Echeverria's titular question seems straightforward—*of course* it does. After all, the Supreme Court has proclaimed this fact in eight majority opinions over nearly a quarter of a century,⁹ and has applied the substantial advancement standard to find or uphold the finding of a regulatory taking on three of those occasions.¹⁰ Thus, the substantial advancement inquiry is a well-established test for a regulatory taking, as a matter of black-letter law. But presumably, Echeverria's intention was not to have his query taken literally, but rather to get at the more interesting underlying questions of *why* the substantial advancement standard is a

cised, Generally (updated Aug. 2003); *Zoning: Proof of Inverse Condemnation from Excessive Land Use Regulation*, 31 AM. JUR. PROOF OF FACTS 563 (3rd ed. updated Aug. 2003) ("Successful regulatory takings challenges (also referred to as inverse condemnation) to zoning and land use regulations will essentially depend on proof of facts showing that the regulations (1) fail to substantially advance legitimate governmental interests..."); 138 N.J. PRAC., REAL ESTATE LAW & PRACTICE § 42.17 (2d ed. 2002).

7. See, e.g., Edward J. Sullivan, *Emperors and Clothes: The Genealogy and Operation of the Agins Tests*, 33 URB. L. 343 (2001); John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047 (2000); John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695-721 (1993); Glen E. Summers, *Private Property Without Lochner: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. PA. L. REV. 837-85 (1993).

8. 29 ENVTL. L. 853 (1999).

9. See *supra*, note 4.

10. See *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 703-07 (1999); *Dolan v. City of Tigard*, 512 U.S. 374, 384-96 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-40 (1987).

takings test, and what its significance may be in the overall context of the high court's takings jurisprudence. This article seeks to address those questions.

Part I of this article¹¹ examines the origin and scope of the *Agins* substantial advancement test. The *Agins* Court's citation to its previous use of the standard in a due process case, *Nectow v. City of Cambridge*,¹² is shown to have little independent significance in view of the historically close relationship between the Due Process and Takings Clauses, and the substantive similarity of the *Agins* takings tests to those set out just two terms earlier in *Penn Central Transportation Co. v. City of New York*.¹³ The substantial advancement test has proven to be a robust standard that has been invoked over a wide range of land-use disputes, and the Court has pointedly spurned all entreaties to reconsider its use as a takings criterion.

In Part II,¹⁴ this article will take up the Supreme Court's recent decisions in *Eastern Enterprises v. Apfel*,¹⁵ *City of Monterey v. Del Monte Dunes at Monterey*,¹⁶ and *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.¹⁷ Contrary to assertions that *Eastern Enterprises* signaled the relegation of the first *Agins* prong to a substantive due process standard, it will be shown that these three decisions taken together demonstrate the Court's uniform, continuing commitment to the substantial advancement test as a generally applicable regulatory takings guide.

Part III¹⁸ considers the standard of review for regulatory takings cases brought under *Agins*' first prong, and why it matters. After a half century of deference toward regulations affecting the rights of property owners, the Supreme Court has plainly enunciated a requirement of mid-level scrutiny in reviewing takings claims under the substantial advancement test. This development did not occur by chance, nor was it the result of "conservative judicial activism"¹⁹ in

11. *See infra*, text accompanying notes 22-80.

12. 277 U.S. 183 (1928).

13. 438 U.S. 104 (1978).

14. *See infra* text accompanying notes 81-129.

15. 524 U.S. 498 (1998).

16. 526 U.S. 687 (1999).

17. 535 U.S. 302 (2002).

18. *See infra* text accompanying notes 130-77.

19. *See, e.g.*, Douglas T. Kendall, Timothy J. Dowling, Sharon Buccino, & Elaine Weiss, *Conservative Judicial Activism and the*

any meaningful sense. Rather, it constitutes an important recognition that the modern regulatory enterprise has become a unique threat to the individual values the Constitution was designed to protect.

Finally, Part IV²⁰ places arguments against the substantial advancement test and heightened scrutiny in the larger context of generalized opposition to the doctrine of regulatory takings. Such arguments have regularly been placed before the Supreme Court in the 81 years since its seminal regulatory takings decision in *Pennsylvania Coal v. Mahon*,²¹ but the Court shows no inclination to abandon this important and consistent—if sometimes messy—doctrine.

I. THE SUPREME COURT HAS CONSISTENTLY APPLIED THE SUBSTANTIAL ADVANCEMENT TEST TO REGULATORY TAKINGS CLAIMS FOR NEARLY A QUARTER OF A CENTURY

A. *The Doctrinal Origins of the Substantial Advancement Test*

1. The *Nectow* Connection

The most straightforward argument for relegating *Agins*' substantial advancement standard to a due process inquiry rests on the textual observation that, in setting forth the first prong of its takings test, the *Agins* Court cited to *Nectow v. City of Cambridge*,²² a challenge to a zoning ordinance brought under the Fourteenth Amendment's Due Process Clause. The implicit reasoning of these critics seems to be that, because the language of "substantial advancement" was previously used in a due process case, when that case is subsequently cited in a regulatory takings decision, the cited language must remain a due process standard.²³ It has even been suggested

Environment: An Assessment of the Threat, 32 ENVTL. L. REP. 10835 (July 2002) (attributing virtually every modern decision upholding the constitutional rights of property owners to "anti-environmental" or "conservative" judicial activism).

20. See *infra* text accompanying notes 179-97.

21. 260 U.S. 393 (1922).

22. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citing *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928)).

23. See, e.g., Thomas E. Roberts, *Regulatory Takings in the Wake of Tahoe-Sierra and the IOLTA Decision*, 35 URB. LAW. 759, 778

that the test was inserted into *Agins* by mistake—apparently on the premise that the Supreme Court can't be relied on to distinguish one Constitutional provision from another.²⁴

The difficulties with this argument are manifold. Perhaps most crucially, it assumes a doctrinal fastidiousness the Court has never shown. Standards and criteria developed in cases brought under one Constitutional provision are commonly brought to bear on issues implicating completely different clauses or even Amendments, with-

(2003) (“In *Agins v. City of Tiburon*, the Court drew the substantially advance test directly from the Due Process Clause.”); Thomas E. Roberts, *Facial Takings Claims under Agins-Nectow: A Procedural Loose End*, 24 U. HAW. L. REV. 623, 640 (2002) (“[T]he *Agins* newly minted ‘substantially advance legitimate state interests’ test for takings came directly from *Nectow*, yet the Court’s opinion does not note that *Nectow* was a substantive due process case.”); Echeverria, *supra* note 8, at 865 (“[I]t is obvious from the Court’s reliance in *Penn Central* and *Agins* on *Nectow*, *Goldblatt*, and *Village of Euclid* that the purported means-end takings test was derived from, and simply restates, a due process test.”); Jerold S. Kayden, *Land-use Regulations, Rationality, and Judicial Review: The RSVP in the Nolan Invitation (Part I)*, 23 URB. LAW. 301, 314-15 (1991) (“*Agins* cited *Nectow* – a due process, not a just compensation, case—as the exclusive source of its first prong, thereby mixing due process apples with just compensation oranges.”).

24. See, e.g., Roberts, *supra* note 23, at 639-40 (“The entry of the ‘substantially advance legitimate state interests’ language into the takings lexicon can most charitably be described as a mistake, as it was drawn from *Nectow v. City of Cambridge*, a substantive due process case. . . . Since there is no acknowledgment by the *Agins* Court of the due process parentage of its substantially advance test, one can only speculate as to whether the decision to transfer the Fourteenth Amendment substantive due process test to the Fifth Amendment takings clause was done consciously or by mistake.”) (footnotes omitted); Douglas T. Kendall, Timothy J. Dowling & Andrew W. Schwartz, *TAKINGS LITIGATION HANDBOOK* 237 (2000) (“*Agins* provides no evidence that the Court desired to create an entirely new standard of takings liability.”); Echeverria, *supra* note 8, at 858 (attributing Supreme Court’s adoption of substantial advancement takings test to “an inadvertent muddling of legal doctrines.”).

out protests from analysts that these tests must remain permanently wed to the applications in which the Court first found them useful. We may learn, for example, that the Court recently decided a case by examining whether the government action was necessary to advance a compelling state interest, and was narrowly tailored to achieve that goal. Under which Constitutional provision must this case have been brought? There is no way to tell. The given test might be applied in the context of a First Amendment claim (involving either the Free Speech²⁵ or Free Exercise Clause²⁶), an Equal Protection case involving a suspect classification,²⁷ or a substantive due process claim implicating a fundamental liberty interest.²⁸ The use of evaluative standards that seem similar or even identical does not imply that the Court has confused the Free Exercise Clause with the Equal Protection Clause, or that it has chosen to use the same test for both clauses by mistake.²⁹

The migration of standards between the Takings and Due Process Clauses is especially unremarkable, given the close historical relationship between the two provisions. Indeed, we should not overlook the fact that *Agins* was a due process case, in the sense that the issue before the Court was “whether municipal zoning ordinances took appellants’ property without just compensation in violation of

25. See, e.g., *United States v. Amer. Library Ass’n*, 123 S.Ct. 2297, 2303 (2003).

26. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

27. See, e.g., *Grutter v. Bollinger*, 123 S.Ct. 2325, 2335 (2003).

28. See, e.g., *Reno v. Flores*, 507 U.S. 292, 301-02 (1993).

29. See *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 834 n.3 (1987):

There is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue, the standards for takings challenges, due process challenges, and equal protection challenges are identical, any more than there is any reason to believe that so long as the regulation of speech is at issue, the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical.

the Fifth and Fourteenth Amendments.”³⁰ On its own terms, the Takings Clause—like the rest of the Bill of Rights—applies only against the federal government.³¹ It was not until the Fifth Amendment was deemed “incorporated” into the Fourteenth Amendment’s Due Process Clause in 1897³² that it became possible to plead a cause of action against a state or local governmental entity under the Takings Clause. In the first decades following this development, the fact that nearly every takings claim also entailed a due process violation led to a substantial conflation of terminology.³³ Indeed, Justice Stevens stated in 1977 that the Court in the early years of the 20th century had “fused the two express constitutional restrictions on any state interference with private property, that property shall not be taken without due process nor for a public purpose without just compensation, into a single standard,”³⁴ and that “this principle was applied in *Nectow*.”³⁵

Thus, far from being surprised that *Nectow* was cited in *Agins*, we should be surprised if it were not cited in other regulatory takings cases—and, in fact, it has been. Even the recently proclaimed “pole-

30. *Agins v. City of Tiburon*, 447 U.S. 255, 257 (emphasis added).

31. See, e.g., *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (13 Wall.) 166, 176-77 (1872) (“[T]hough the Constitution of the United States provides that private property shall not be taken for public use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States.”).

32. See *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897).

33. This tendency was evident from the very outset. In *Chicago, B. & Q. R. Co. v. Chicago*, the first case to apply the federal Takings Clause against a state entity via the Fourteenth Amendment, the Court stated, “The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation.” *Id.* at 236.

34. *Moore v. City of East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring).

35. *Id.*

star”³⁶ of the Court’s regulatory takings jurisprudence, *Penn Central*, cites *Nectow* as authority.³⁷ Of course, the same objections can be raised to *Nectow*’s appearance in *Penn Central* as to its role in *Agins*,³⁸ but the argument threatens to slide down a slippery slope. It is one thing to cling to a formalistic insistence that each Constitutional provision has its own neatly compartmentalized set of doctrines, but it is something else again to insist that violating these largely imaginary doctrinal boundaries should be grounds for jettisoning the Supreme Court’s entire corpus of regulatory takings law.³⁹

The talismanic rejection of the substantial advancement standard because of its connection to *Nectow* seems even more dubious since even the most adamant Takings Clause doves⁴⁰ have traditionally grounded much of their own interpretation of takings law on due process cases. For example, proponents of the view that the substantial advancement test should be restricted to substantive due process claims because of its use in *Nectow* have approvingly noted the Su-

36. *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 202, 326 n.23 (2001) (quoting *Palazzolo v. State of Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring)).

37. *See Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) (citing *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928)).

38. *See Echeverria, supra* note 8, at 857-58 (“In *Penn Central*, the Court relied upon due process, not takings, precedents ...*Nectow* patently was not a takings case, but instead involved a due process claim that the ordinance ‘deprived [the owner] of his property without due process of law in contravention of the Fourteenth Amendment.’”) (footnotes omitted).

39. *See, e.g., J. Peter Byrne, Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 *ECOL. L. Q.* 89 (1995).

40. I prefer the designation “Takings Clause doves” to the more familiar “police power hawks” (*see, e.g., Gideon Kanner, Rolling the Dice With Ambrose Bierce*, 54 *LAND USE L. & ZONING DIG.* 6: 12, 12 (2002); A. Dan Tarlock, *Local Government Protection of Biodiversity: What Is Its Niche?*, 60 *U. CHI. L. REV.* 555, 593 n.194 (1993)), since those commentators who oppose an expansive application of the Takings Clause do not necessarily base their arguments on the government’s supposedly unbridled regulatory authority under the police power.

preme Court's reliance on *Hadacheck v. Sebastian*,⁴¹ a 1915 case brought under the Due Process⁴² and Equal Protection Clauses,⁴³ for the proposition that the government can inflict even extreme economic injury upon property owners without incurring takings liability.⁴⁴ Other partisans of the regulatory state have reliably rested their takings analyses on *Mugler v. Kansas*,⁴⁵ a pre-incorporation due process case,⁴⁶ and many Takings Clause doves seem eager to endorse the "state exhaustion" ripeness doctrine of *Williamson County Regional Planning Agency v. Hamilton Bank of Johnson City*,⁴⁷ despite its express derivation by analogy to a due process case, *Parratt*

41. 239 U.S. 394 (1915).

42. *See id.* at 407.

43. *See id.* at 412.

44. *See* John D. Echeverria, *The Turning of the Tide: The Tahoe-Sierra Regulatory Takings Decision*, 32 ENVTL. L. REP. 11235, 11249 (2002); *See*, John A. Humbach, *Constitutional Limits On the Power to Take Private Property: Public Purpose and Public Use*, 66 OR. L. REV. 547, 581 n.222 (1987).

45. 123 U.S. 623 (1887).

46. *See, e.g.*, Byrne, *supra* note 39, at 94-96; John A. Humbach, *Evolving Thresholds of Nuisance and the Takings Clause*, 18 COLUM. J. ENVTL. L. 1, 9-19 (1993); Douglas T. Kendall, *The Limits to Growth and the Limits to the Takings Clause*, 11 VA. ENVTL. L.J. 547, 565 n.95 (1992); John A. Humbach, *Economic Due Process and the Takings Clause*, 4 PACE ENVTL. L. REV. 311, 316-17 (1987). *But see* R. S. Radford, *Why Rent Control Is a Regulatory Taking*, 6 FORDHAM ENVTL. L.J. 755, 756 (1995) ("[N]ineteenth century cases such as *Mugler v. Kansas*, frequently cited by advocates of regulation as bearing on regulatory takings law, were in fact litigated exclusively as violations of the Due Process Clause.").

47. 473 U.S. 172, 194-98 (1985). *See, e.g.*, John D. Echeverria, *Regulatory Takings After Brown*, 33 ENVTL. L. REP. 10626, 10630 (2003) (lauding the Supreme Court's decision in *Brown v. Legal Foundation of Washington* as "bolstering" *Williamson County's* state exhaustion rule); Kendall, Dowling & Schwartz, *supra* note 24, at 59-62 (urging government attorneys to use *Williamson County* to force takings claimants into state court, "even if the claimant's theory of relief is untested or recovery is unlikely in state court.").

v. Taylor.⁴⁸ The offensiveness of importing such due process standards into takings law seems sometimes to depend largely on whether these standards would make recovery of compensation more or less likely—that is, on just whose ox is being gored.

2. *Penn Central's* Paternity

In any event, it is not necessary to go back to *Nectow* to trace the parentage of *Agins'* two-pronged takings test, since its immediate progenitor is much closer at hand. Some writers have expressed surprise that the Supreme Court would set out a wholly new takings standard in *Agins*, just two terms after having enunciated another dual-pronged takings test in *Penn Central*.⁴⁹ *Agins'* inquiry into whether a regulation substantially advances legitimate state interests or deprives the owner of economically viable use of land has been described as “quite different,”⁵⁰ “distinct,”⁵¹ and even “an about face”⁵² from *Penn Central's* focus on “the character of the governmental action”⁵³ and “the economic impact of the regulation on the claimant.”⁵⁴ Other commentators, however, have recognized that the *Agins* and *Penn Central* standards are in fact conceptually equivalent; only the terminology differs.⁵⁵

48. 451 U.S. 527 (1981), cited in *Williamson County*, 473 U.S. at 195.

49. *See Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) (“[A] use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose or perhaps if it has an unduly harsh impact upon the owner’s use of the property.”).

50. Byrne, *supra* note 39, at 104.

51. Robert Meltz, Dwight H. Merriam, & Richard M. Frank, THE TAKINGS ISSUE 136 (1999).

52. Daniel R. Mandelker & John M. Payne, PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 118 (5th ed. 2001).

53. 438 U.S. at 124.

54. *Id.*

55. *See, e.g.,* Dana Larkin, *Dramatic Decreases in Clarity: Using the Penn Central Analysis to Solve the Tahoe-Sierra Controversy*, 40 SAN DIEGO L. REV. 1597, 1620 (2003) (“In *Penn Central*, the Court rested its decision on the fact that protecting historical landmarks

The Supreme Court itself has often noted the doctrinal equivalence of *Agins* and *Penn Central*. In 1985, writing for a unanimous Court in *United States v. Riverside Bayview Homes, Inc.*,⁵⁶ Justice White made a smooth transition from *Penn Central* to *Agins*:

We have frequently suggested that governmental land-use regulation may under extreme circumstances amount to a “taking” of the affected property. See, e.g., *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). We have

was a legitimate state interest. Also, in formulating the viability prong of its test, the *Agins* Court cited to *Penn Central*'s economic impact analysis. Apparently, the Court saw this prong as ‘closely related’ to the investment-backed expectations issue and sought to combine these two points into its ‘economically viable use’ prong.”) (citations deleted); Jordan C. Kahn, *Lake Tahoe Clarity and Takings Jurisprudence: The Supreme Court Advances Land Use Planning in Tahoe-Sierra*, 26 ENVIRONS 33, 57 n.160 (Fall 2002) (“the ‘character of government action’ factor in the *Penn Central* analysis . . . includes a consideration of whether the regulation at issue does or ‘does not substantially advance legitimate state interests.’”); Victoria Sutton, *Constitutional Taking Doctrine - Did Lucas Really Make a Difference?*, 18 PACE ENVTL. L. REV. 505, 509 (2001) (characterizing *Penn Central*'s “character of the government action” test as “the progenitor of the ‘substantially advances legitimate state interests’ test articulated two years later in *Agins*.”); Roderick E. Walston, *The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings*, 2001 UTAH L. REV. 379, 400 (“[T]he *Penn Central* and *Agins* balancing tests are similar in many respects, and have often been cited interchangeably by the Supreme Court.”); George Skouras, TAKINGS LAW AND THE SUPREME COURT: JUDICIAL OVERSIGHT OF THE REGULATORY STATE'S ACQUISITION, USE AND CONTROL OF PRIVATE PROPERTY 55 (2000) (*Agins* “attempted to improve upon the tests used in *Penn Central*”); R. S. Radford, *Why Rent Control Is a Regulatory Taking*, 6 FORDHAM ENVTL. L.J. 755, 757 (1995) (“In *Agins*, the two-part *Penn Central* inquiry was recast in terms of whether the challenged measure: (1) substantially advances legitimate state interests; or (2) denies the owner economically viable use of the land.”).

56. 106 S.Ct. 455.

never precisely defined those circumstances, *see id.*, at 123-128; but our general approach was summed up in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), where we stated that the application of land-use regulations to a particular piece of property is a taking only “if the ordinance does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land.”⁵⁷

Two years later, Justice O'Connor implicitly affirmed this equivalence in her majority opinion in *Hodel v. Irving*,⁵⁸ “[t]he framework for examining the question whether a regulation of property amounts to a taking requiring just compensation is firmly established and has been regularly and recently reaffirmed.”⁵⁹ Justice Stevens expressed the same view, writing for the Court in *Keystone Bituminous Coal Assoc. v. DeBenedictis*.⁶⁰

The two factors that the Court considered relevant have become integral parts of our takings analysis. We have held that land use regulation can effect a taking if it “does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land.” *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *see also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).⁶¹

57. *Id.* at 459.

58. 481 U.S. 704 (1987).

59. *Id.* at 713-14.

60. 480 U.S. 470 (1987).

61. *Id.* at 485. Indeed, Justice Stevens implicitly traced the Court's two-pronged takings inquiry back to the font of its modern takings jurisprudence, *Pennsylvania Coal* 260 U.S. 393 (1922):

Justice Holmes rested on two propositions, both critical to the Court's decision. First, because it served only private interests, not health or safety, the Kohler Act could not be “sustained as an exercise of the police power.” Second, the statute made it “commercially impracticable” to mine “certain coal” in the areas affected by the Kohler Act.

Keystone, 480 U.S. at 484. That *Penn Central's* balancing test was itself derived from *Pennsylvania Coal* has seemingly been overlooked by most scholars. *But see* George Skouras, TAKINGS LAW

Justice Brennan advanced the clearest statement of the equivalence (indeed, the virtual identity) of the standards set out in the two cases in his *Nollan* dissent.

Our phraseology may differ slightly from case to case—*e.g.*, regulation must “substantially advance,” *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), or be “reasonably necessary to,” *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127, (1978), the government’s end. *These minor differences cannot, however, obscure the fact that the inquiry in each case is the same.*⁶²

More recently, Justice Scalia’s majority opinion in *Lucas* provided a further refutation of the view that *Agins*’ first prong marked a departure from the Court’s established takings jurisprudence: “[h]armful or noxious use’ analysis was, in other words, simply the progenitor of our more contemporary statements that “land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests.’”⁶³

The doctrinal equivalence of *Penn Central* and *Agins* is acknowledged by the more perceptive critics of the substantial advancement standard,⁶⁴ but this only serves to shift their objections back a step—

AND THE SUPREME COURT: JUDICIAL OVERSIGHT OF THE REGULATORY STATE’S ACQUISITION, USE AND CONTROL OF PRIVATE PROPERTY 117 (1998) (“Justice Holmes, working through balancing tests, established a set of criteria that continue unabated until this day... The criteria in *Pennsylvania Coal* were refined in *Penn Central*.”).

62. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 845 (1987) (Brennan, J. dissenting) (emphasis added).

63. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1023-24 (1992).

64. *See, e.g., Echeverria, supra* note 8, at 855 (footnotes omitted):

More than twenty years ago, in *Penn Central Transportation Co. v. New York City* (*Penn Central*), the Court stated that “a use restriction may constitute a ‘taking’ if [it is] not reasonably necessary to the effectuation of a substantial government purpose.” Two years later, in *Agins v. City of Tiburon*, the Court said essentially the same thing: a government action “effects a taking” if it “does not substantially advance legitimate state interests.”

to *Penn Central* itself,⁶⁵ or in extreme cases, all the way back to *Pennsylvania Coal*.⁶⁶ With this shift, however, their project becomes both more heroic and less plausible. If *Agins*' first prong were, as is sometimes supposed, an isolated anomaly, it is arguably not too far-fetched to suppose that the Court might be persuaded it was a doctrinal error—that the whole thing was, indeed, just a “mistake.”⁶⁷ But when we realize we are dealing with a standard that is deeply ingrained into the high court's entire corpus of regulatory

Id.

65. See, e.g., *id.* at 857-58:

In *Penn Central*, the Court relied upon due process, not takings, precedents to support the idea that “a use restriction may constitute a ‘taking’ if [it is] not reasonably necessary to the effectuation of a substantial government purpose.” Specifically, the *Penn Central* Court cited *Nectow v. City of Cambridge*, which involved a due process challenge to a zoning regulation in which the owner alleged that the restriction did “not bear a substantial relationship to the public health, safety, morals, or general welfare.” *Nectow* patently was not a takings case, but instead involved a due process claim that the ordinance “deprived [the owner] of his property without due process of law in contravention of the Fourteenth Amendment.”

See also Edward J. Sullivan & Carrie Richter, *Out of the Chaos: Towards a National System of Land-use Procedures*, 34 URB. LAW. 449, 472 (2002) (“[T]he three-part test of substantive due process found in *Lawton v. Steele* can now be found either in the three-factor test of *Penn Central* or the two-part test of *Agins*.”); John D. Echeverria, *Is the Penn Central Three-Factor Test Ready for History's Dustbin?*, 52 LAND USE L. & ZONING DIGEST 1:3 (Jan. 2000).

66. See, e.g., Edward J. Sullivan, *Return of the Platonic Guardians: Nollan and Dolan and the First Prong of Agins*, 34 URB. LAW. 39, 44-45 (2002) (“There is considerable argument as to whether *Agins* incorporated some or all of the tests of *Penn Central*, but whether this means the first two of the *Penn Central* tests, or all three, or none of them, the crucial point is that it is a test that surely stems from a natural law philosophy of property rights, which has provided the ultimate justification for the Court's takings jurisprudence since *Pennsylvania Coal*.”); Byrne, *supra* note 39.

67. See *supra*, note 24.

takings law, even the most elegant appeals for doctrinal revision begin to fade under the weight of Michael Berger's eminently practical observation that, "the Court seems content to have us all live with it."⁶⁸ This is especially true, given that the Court has quite recently been directly presented with an opportunity to reconsider the role of its substantial advancement test, and pointedly declined to do so.

B. *The Court "Just Says No" to the Solicitor General*

All of the arguments against the application of the substantial advancement test to takings claims have been regularly placed before the Supreme Court, in briefs filed by parties appearing before the Court as well as by amici curiae, but have uniformly been rebuffed.⁶⁹ The most dramatic instance occurred in the 1997 term, when the Solicitor General of the United States filed an amicus brief in *City of*

68. Michael M. Berger, *The Taking Issue: Where We Were and Where We Are Now*, ALI-ABA Continuing Legal Education Aug. 22-24, 2002: Land Use Institute: Planning, Regulation, Litigation, Eminent Domain and Compensation, SH018 433, 437 (2002).

69. *See, e.g.*, Brief for Respondents, *Palazzolo v. State of Rhode Island*, 2001 WL 22908 (Jan. 3, 2001) (No. 99-2047), at *29 n.43 (asserting that the substantial advancement test is subject to the same "rational basis" review as due process claim); Brief of the City and County of San Francisco as Amicus Curiae in Support of Respondents, *Washington Legal Foundation v. Legal Foundation of Washington*, 2002 WL 31405606 (Oct. 18, 2002) (No. 01-1325), at *10 (asserting that a "five-Justice majority in *Eastern Enterprises*" had relegated the substantial advancement standard to a due process inquiry); Brief Amicus Curiae of National Audubon Society, Natural Resources Defense Council, National Wildlife Federation and Sierra Club in Support of Respondents, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 2001 WL 1597737 (Nov. 13, 2001) (No. 00-1167), at *15 (asserting there is a "real question" whether the substantial advancement takings test even exists); Amicus Brief of the Board of County Commissioners of the County of La Plata, Colorado in Support of the Respondents *State of Rhode Island, et al., Palazzolo v. State of Rhode Island*, 2001 WL 15620 (Jan. 3, 2001) (No. 99-2047), at *4-*7 (asserting that the sole test for a regulatory taking should be "whether the regulation eliminates all reasonable use of the property").

Monterey, imploring the high court to repudiate the use of *Agins'* first prong in takings cases, and instead to relegate it to a due process inquiry.⁷⁰

The Solicitor General's challenge was unquestionably a significant test of the Court's commitment to the substantial advancement doctrine. Unlike many lower courts,⁷¹ the Supreme Court has no rule barring the raising of new issues by an amicus,⁷² and indeed, the ripeness standards enunciated in *Williamson County*⁷³ originated in an amicus brief filed with the Supreme Court by the Solicitor General.⁷⁴

70. See Brief for the United States as Amicus Curiae Supporting Petitioner in Part, *City of Monterey v. Del Monte Dunes at Monterey*, LEXIS 1997 U.S. Briefs 1235 (No. 97-1235).

71. See, e.g., *Keating v. State of Florida ex rel. Ausebel*, 157 So.2d 567, 569 (Fla. App. 1963) (an amicus "is not at liberty to inject new issues in a proceeding."); N.Y. Comp. Codes R. & Regs. tit. 22, § 500.11 ("Issues not before the courts below may not be raised for the first time by an amicus."); Ellyn J. Bullock, *Acid Rain Falls on the Just and the Unjust: Why Standing's Criteria Should Not Be Incorporated into Intervention of Right*, 1990 UNIV. ILL. L. REV. 605, 640 n.334 ("Amicus curiae cannot raise new issues.").

72. See *Davis v. United States*, 512 U.S. 452, 457 (1994) ("Although we will consider arguments raised only in an *amicus* brief, we are reluctant to do so when the issue is one of first impression involving the interpretation of a federal statute on which the Department of Justice expressly declines to take a position", citing *Teague v. Lane*, 489 U.S. 288, 300 (1989) (considering question raised only in amicus brief of Criminal Justice Legal Foundation)).

73. 473 U.S. 172 (1985).

74. See Brief of Amicus Curiae United States, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, at 12, 473 U.S. 172 (1984) (No. 84-4). See also Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. L. 307, 330 (1998) (criticizing the Solicitor General's argument.); R. Marlin Smith, *The Hamilton Bank Decision: Regulatory Inverse Condemnation Claims Encounter Some New Obstacles*, 29 WASH. U. J. URB. & CONTEMP. L. 3, 8 (1985), quoted in J. David Breemer, *Overcoming Williamson County's Troubling State Procedures Rule: How the England Reservation*,

In *City of Monterey*, the Solicitor General asked the Court to address the question, “[w]hether a land-use restriction that does not substantially advance a legitimate public purpose can be deemed, on that basis alone, to effect a taking of property requiring the payment of just compensation.”⁷⁵ Urging the Court to answer that question in the negative, the Solicitor General argued that “land-use regulation that bears no reasonable relationship to any valid governmental purpose violates principles of substantive due process, but it cannot be said (on that basis alone) to effect a compensable taking of property.”⁷⁶ The Solicitor General’s *City of Monterey* brief has been aptly described as a “defiant rejection”⁷⁷ of the Supreme Court’s reliance on *Agins* in *Nollan* and *Dolan*, as well as the Ninth Circuit’s application of those decisions in *City of Monterey*.

In what can only be regarded as a stunning setback for critics of the substantial advancement standard, the Supreme Court brusquely swept aside the Solicitor General’s arguments and reiterated the general applicability of *Agins*’ first prong to regulatory takings claims.⁷⁸ Justice Kennedy’s majority opinion referred to the trial court’s application of the test to find a taking resulting from a permit denial as “consistent with our previous general discussions of regulatory takings liability.”⁷⁹ He then cited to seven Supreme Court takings cases employing the substantial advancement standard over a span of 14 years before concluding, “we decline the suggestions of *amici* to revisit these precedents.”⁸⁰

Given the *City of Monterey* Court’s unusually forceful rebuff to the Solicitor General’s arguments, together with its ratification of the

Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims, 18 J. LAND USE & ENVTL. L. 209, 215 n.42 (2003).

75. Brief of Amicus Curiae United States, Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, at *I, 473 U.S. 172 (1984) (No. 84-4).

76. *Id.* at *28.

77. Douglas W. Kmiec, *Book Review: Property and Economic Liberty as Civil Rights: The Magisterial History of James W. Ely, Jr.*, 52 VAND. L. REV. 737, 746 (1999).

78. See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 704 (1999).

79. *Id.*

80. *Id.*

use of *Agins*' first prong on the facts of that case and its express affirmation of the use of the standard in prior decisions, the substantial advancement test seems firmly established as a core element of the Supreme Court's takings—not due process—jurisprudence.

II. RECENT SUPREME COURT DECISIONS HAVE AFFIRMED THE CONTINUED VITALITY OF THE SUBSTANTIAL ADVANCEMENT TAKINGS TEST

Notwithstanding the Supreme Court's repeated affirmation and application of the substantial advancement takings test, some commentators have read the Court's recent opinions as signaling a withdrawal from this standard. Such an interpretation is unwarranted, as can be seen by a review of three regulatory takings decisions handed down over the past six years: *Eastern Enterprises*,⁸¹ *City of Monterey*⁸² and *Tahoe-Sierra*.⁸³

A. *Eastern Enterprises Did Not Undermine the General Applicability of the Substantial Advancement Test to Regulatory Takings Claims*

Critics of the substantial advancement standard have most forcefully advanced *Eastern Enterprises* in support of the claim that the Court favors relegating *Agins*' first prong to a substantive due process standard.⁸⁴ However, the highly fragmented *Eastern Enterprises* decision cannot bear this much weight, both because of the unique characteristics of that case and because subsequent Supreme Court opinions do not support such an interpretation.

Eastern Enterprises involved a challenge to the Coal Industry Retiree Health Benefit Act of 1992, under both the Takings and Due Process Clauses.⁸⁵ At issue was the law's retroactive imposition of

81. *E. Enters. v. Apfel*, 524 U.S. 498 (1998).

82. 526 U.S. 687 (1999).

83. 535 U.S. 302 (2002).

84. *See, e.g., Echeverria, supra* note 8, at 866-68; *see also* Brief of Appellants, *Chevron USA, Inc., v. Cayetano*, United States Court of Appeals for the Ninth Circuit, (2004) (No. 02-15867), at 15 (finding *Eastern Enterprises* to be "dispositive" in relegating the substantial advancement test to substantive due process).

85. *See* 524 U.S. at 503-04.

liability to fund benefits under the Act. Although Eastern Enterprises had not been directly involved in coal mining operations since 1967, and had owned no mining-related subsidiaries since 1987, it would be liable under the terms of the Act for assessments of \$50-\$100 million to fund benefits to retired miners who had been employed by Eastern prior to 1966.⁸⁶

Justice O'Connor, writing for a four-Justice plurality,⁸⁷ found the statute's creation of retroactive financial liability unconstitutional under the Takings Clause. The plurality opinion did not cite to *Agins*, nor did it decide the case under the substantial advancement standard. Instead, Justice O'Connor applied a straightforward *Penn Central* analysis, finding that the Act imposed heavy economic burdens that could not reasonably have been foreseen,⁸⁸ and that the character of the regulation was such that it "singles out certain employers"⁸⁹ based on long-past activities, thereby "implicat[ing] fundamental principles of fairness underlying the Takings Clause."⁹⁰

Concurring in the result, Justice Kennedy agreed that the Coal Act was unconstitutional as applied to *Eastern Enterprises*, but stated that he would strike it down "as contrary to essential due process principles, without regard to the Takings Clause of the Fifth Amendment."⁹¹ The crux of Justice Kennedy's concern was that the Coal Act did not directly impinge upon any identifiable property interest:

[The Act] regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.⁹²

86. *See id.* at 529.

87. Chief Justice Rehnquist and Justices Scalia and Thomas joined in the plurality opinion.

88. 524 U.S. at 529-32.

89. *Id.* at 537.

90. *Id.*

91. *Id.* at 539 (Kennedy, J., concurring in the judgment and dissenting in part).

92. *Id.* at 540.

Without a direct link between the impact of the law and “a specific property right or interest”⁹³ protected by the Fifth Amendment, Justice Kennedy felt the Takings Clause was not implicated. In this context, he worried that “[t]he imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions.”⁹⁴ Of course, *Agins* did involve governmental interference with a traditional, constitutionally cognizable property interest. In any case, since the plurality had neither cited nor relied upon *Agins*, the significance of this single, passing reference to the case in Justice Kennedy’s concurrence is far from clear.

Writing in dissent for himself and three others,⁹⁵ Justice Breyer agreed with Justice Kennedy that “[t]he Constitution’s Takings Clause does not apply.”⁹⁶ Like Justice Kennedy, the dissenters were troubled by the plurality’s application of the Takings Clause to a case that “involves not an interest in physical or intellectual property, but an ordinary liability to pay money, and not to the Government, but to third parties.”⁹⁷

Also like Justice Kennedy, the dissenters worried that under these circumstances, the Takings Clause “bristles with conceptual difficulties”⁹⁸—yet Justice Breyer did not expressly criticize (or even mention) *Agins* or the substantial advancement standard. Instead, the dissent inquired whether the Coal Act’s application to Eastern violated the Due Process Clause (as Eastern had alleged), and determined that it did not.⁹⁹

The peculiar facts that gave rise to *Eastern Enterprise* resulted in a unique decision—four members of the Court found the Coal Act’s application to Eastern violated the Takings Clause, another four found it did not violate the Due Process Clause, and the ninth Justice disagreed with both sides! As a result, most courts and analysts have concluded that *Eastern Enterprises* has no precedential value at

93. *Id.* at 541.

94. *Id.* at 545.

95. Justice Breyer’s dissent was joined by Justices Stevens, Souter, and Ginsburg.

96. *Id.* at 554 (Breyer, J., dissenting).

97. *Id.*

98. *Id.* at 556.

99. *See id.* at 558-68.

all.¹⁰⁰ The case has plausibly been cited for the proposition that “a regulation must relate to a specific interest for the Takings Clause to apply,”¹⁰¹ and for the more specific understanding that regulations imposing only generalized financial liabilities are unlikely to be struck down as takings.¹⁰² However, the decision provides no support for such generalizations as “a majority of the Supreme Court has backed away from [*Agins*’ first prong] as a standard of takings

100. See, e.g., *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 658 (3rd Cir. 1999) (“The splintered nature of the Court makes it difficult to distill a guiding principle from *Eastern*.”); *Franklin County Convention Facilities Auth. v. Amer. Premiere Underwriters, Inc.*, 240 F.3d 534, 552 (6th Cir. 2001) (“*Eastern Enterprises* has no precedential effect”). See also Edward J. Sullivan & Nicholas Cropp, *Making It Up—“Original Intent” and Federal Takings Jurisprudence*, 35 URB. LAW. 203, 253 (2003) (“[B]ecause of the division of opinion among the Justices, *Eastern Enterprises* may not be authority for any particular proposition.”); Echeverria, *supra* note 7, at 1059 (“Technically, *Eastern Enterprises* has no precedential value because the Court could not agree upon a single rationale for the result.”); Barton H. Thompson, Jr., *The Allure of Consequential Fit*, 51 ALA. L. REV. 1261, 1261 n.2 (“Most lower courts have concluded that, given the failure of five Justices to agree on an approach, *Eastern Enterprises* provides no precedential value.”).

101. *Florida Rock Industries, Inc., v. United States*, 45 Fed. Cl. 21, 42 n.13 (1999).

102. See *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1329 (Fed. Cir. 2001) (under *Eastern Enterprises*, “the Takings Clause does not apply to legislation requiring the payment of money”); see also Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977, 989 (2000) (“*Eastern Enterprises* involves not specific property rights, but rather the imposition of a monetary burden that constitutes a general obligation.”); Michael M. Berger, *Property Rights and Takings Law: Y2K and Beyond*, in 2002 PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, & EMINENT DOMAIN, chap. 4, at 4-15 (“It seemed clear to this author that Justice Kennedy’s vote in *Eastern* was related to the fact that the case concerned cash, rather than land, and that he viewed land cases differently.”).

liability”¹⁰³—and subsequent high court opinions have confirmed that such an interpretation is unfounded.

B. *City of Monterey Upheld a Finding of a Regulatory Taking Under the Substantial Advancement Standard*

Justice Kennedy’s opinion in *Eastern Enterprises* cannot be construed as a general rejection of the substantial advancement takings standard. This is evident from the opinion of the Court he drafted just eleven months later in *City of Monterey*.¹⁰⁴ In *City of Monterey*, a property owner brought a regulatory takings suit based on the city’s repeated, unreasonable denials of development permits.¹⁰⁵ The case went to a jury on a strange amalgam of *Agins* and *Lucas*: the trial court instructed the panel that takings liability should be found either if the permit denials deprived the owner of *all* economically viable use of the property¹⁰⁶ or if the city’s actions did not “substantially advance a legitimate public purpose.”¹⁰⁷ As a practical matter, only the latter criterion provided a realistic basis for takings liability, since the plaintiffs had sold the regulated property for \$4.5 million.¹⁰⁸ The jury returned a general verdict of liability,¹⁰⁹ in

103. Kendall, Dowling & Schwartz, *supra* note 24, at 232.

104. 526 U.S. 687 (1999).

105. *See id.* at 695-98.

106. *See id.* at 700.

107. *Id.*

108. *See, e.g.,* Nancy E. Stroud, *Del Monte Dunes v. City of Monterey: How Far Does It Limit “Rough Proportionality” Analysis in Land Use Cases?*, 14 PROB. & PROP. 6, 8 (Sep.-Oct. 2000). The Supreme Court originally equated the “denial of economically viable use” prong of *Agins* with the ability to receive a reasonable rate of return on investment. *See Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138 n.6 (1978). On this view, *Del Monte Dunes* might have suffered a second-prong taking if the \$4.5 million it received for the property constituted less than a competitive return on its invested capital. Since *Lucas*, however, *Agins*’ second prong has generally been merged with the categorical takings standard of denial of *all* economically viable use, making a finding of takings liability on this ground extremely unlikely on the facts of *City of Monterey*. *See, e.g.,* *NJD, Ltd., v. City of San Dimas*, 110 Cal. App. 4th

effect finding a compensable taking because the city's successive denials of the plaintiff's permit applications failed to substantially advance legitimate governmental interests.¹¹⁰

In affirming the finding of a taking, Justice Kennedy's opinion for the Court repeatedly expressed its satisfaction with the jury instructions, and with the substantial advancement inquiry serving as the basis for takings liability.¹¹¹ This is especially significant because one of the questions on which the Supreme Court granted certiorari in *City of Monterey* was "whether the Court of Appeals impermissibly based its decision on a standard that allowed the jury to reweigh the reasonableness of the city's land-use decision"¹¹²—a common, albeit inaccurate, characterization of *Agins'* first prong.¹¹³ The Supreme Court's answer to the City of Monterey's question was clear: "*the trial court's instructions are consistent with our previous gen-*

1428, 1437-38 (2003) (speculating whether the *Lucas* Court meant to supersede *Agins'* second prong with a categorical test).

109. See *City of Monterey*, 526 U.S. at 701.

110. See, e.g., Daniel R. Mandelker & John M. Payne, PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS 119 (5th ed. 2001) (The *City of Monterey* trial court "essentially put the case to the jury on the first prong of *Agins*, and because it was a general verdict, it had to be presumed that the jury had decided on this theory.").

111. See *City of Monterey*, 526 U.S. at 702-07.

112. *Id.* at 702

113. See, e.g., J. Peter Byrne, *Judicial Activism in the Regulatory Takings Opinions of Justice Scalia*, 1 GEORGETOWN J. L. & PUB. POL'Y. 93, 94 (2002) (characterizing *Nollan's* heightened scrutiny requirement as "permit[ting] judicial supervision of the wisdom of legislative and administrative judgments"); S. Keith Garner, "*Novel*" Constitutional Claims: Rent Control, Means-ends Tests, and the Takings Clause, 88 CAL. L. REV. 1547, 1548 (2000) (describing California Supreme Court's rejection of the substantial advancement test, ostensibly because "the role of the courts is not to second-guess the wisdom of the legislature"). The same mischaracterization has been applied to *Penn Central's* "character of the government action" prong. See John D. Echeverria, *Do Partial Regulatory Takings Exist?*, in TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 223, 236 (Thomas E. Roberts, ed., 2002).

eral discussions of regulatory takings liability.”¹¹⁴ In other words, *Eastern Enterprises* notwithstanding, Justice Kennedy’s opinion in *City of Monterey* expressly reiterated the high court’s traditional understanding that takings liability may properly be grounded on the failure of land-use regulations to substantially advance legitimate state interests, going so far as to characterize this as “the general test for regulatory takings liability.”¹¹⁵

Most analysts, including a number of prominent Takings Clause doves, have acknowledged that *City of Monterey* reaffirms the substantial advancement test as a central element of the Supreme Court’s regulatory takings jurisprudence.¹¹⁶ The few exceptions appeared to be grasping at straws to maintain their position that the Court had turned away from the substantial advancement test:

[T]he force of the precedent set in *Eastern Enterprises* is not undermined by the Court’s 1999 decision in *City of*

114. 526 U.S. at 704 (emphasis added).

115. *Id.*

116. See, e.g., Richard J. Lazarus, *Restoring What’s Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 720 n.89 (2000) (“The ruling in favor of the property owner in *City of Monterey* is especially significant because it represents the first occasion that the Court has ever upheld a regulatory takings claim based just on the so-called first prong of the regulatory takings test announced in *Agins v. City of Tiburon.*); Edward H. Ziegler, *Development Exactions and Permit Decisions: The Supreme Court’s Nollan, Dolan, and Del Monte Dunes Decisions*, 34 URB. LAW. 155, 160 (2002) (“Under *Del Monte Dunes*, the substantially advance takings test would seem to be appropriately applied to any permit denial where the respective facts in context demonstrate that the denial is not reasonably related to the asserted public purposes allegedly supporting the denial.”); Robert H. Freilich, *Time, Space, and Value in Inverse Condemnation: A Unified Theory for Partial Takings Analysis*, 24 U. HAW. L. REV. 589, 595 n.33 (2002) (“The first prong of *Agins* was recently approved in *City of Monterey.*”); Mark A. Chertok & Kate Sinding, *The Federal Regulation of Wetlands, Part III: Takings Issues, Swampbuster Program, and Enforcement*, NAAG NAT’L ENVTL. ENFORCEMENT J. 3, 3 (April 2003) (“In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, the Supreme Court upheld a \$1.45 million jury award in a takings case under the substantial advancement inquiry.”).

Monterey [F]ive of the Justices in the case . . . either wrote opinions or joined in opinions reserving the question of the validity of the substantially advance test, thereby indicating that the result in *City of Monterey* should not be taken as an endorsement of this test.¹¹⁷

There is no way to square such arguments with the Court's straightforward affirmation of a finding of takings liability under this standard, or with Justice Kennedy's further reference to "[t]he jury's role in determining whether a land-use decision substantially advances legitimate public interests *within the meaning of our regulatory takings doctrine*."¹¹⁸ Given that these commentators relied on Justice Kennedy's earlier concurrence in *Eastern Enterprises* to argue that a "five-justice majority" of the Court had relegated the substantial advancement inquiry to a due process standard,¹¹⁹ his unequivocal rejection of that position in *Del Monte Dunes* would appear to be fatal to their argument.

C. Tahoe-Sierra Expressly Reaffirmed the Substantial Advancement Test as a Regulatory Taking Standard

Whatever pretense could be maintained after *City of Monterey* that the Supreme Court had rejected the substantial advancement test was laid to rest in the Court's most recent regulatory takings decision, *Tahoe-Sierra*.¹²⁰ There, the four *Eastern Enterprises* dissenters who, with Justice Kennedy, have been counted as a "majority" supposedly

117. Echeverria, *supra* note 47, at 10628 n.25. See also Kendall, Dowling & Schwartz, *supra* note 24, at 235 (*City of Monterey* "stands as the first ruling in which the Supreme Court affirmed an award of just compensation for a regulatory taking in a land use case, and yet no Member of the Court was willing to embrace the means-end theory of liability included in the jury instruction that gave rise to the award.").

118. *City of Monterey*, 526 U.S. at 721.

119. See, e.g., Kendall, Dowling & Schwartz, *supra* note 24, at 232; Echeverria, *supra* note 8, at 866-67.

120. 535 U.S. 302 (2001).

rejecting the substantial advancement test,¹²¹ expressly endorsed that standard in a majority opinion penned by Justice Stevens.¹²²

At issue in *Tahoe-Sierra* was whether a temporary development moratorium that eliminated all beneficial use of the plaintiffs' home sites for a period of years constituted a categorical taking under *Lucas*.¹²³ A majority of the Court held that it did not.¹²⁴ Nevertheless, Justice Stevens went on to explain that such a moratorium *could* give rise to liability as a regulatory taking under any of seven alternative theories, including the "[s]ixth, apart from the District Court's finding that TRPA's actions represented a proportional response to a serious risk of harm to the lake, *petitioners might have argued that the moratoria did not substantially advance a legitimate state interest, see Agins and Monterey.*"¹²⁵ By not only specifically setting out *Agins'* first prong as a takings theory applicable to development moratoria, but also citing *City of Monterey* as authority for its use, Justice Stevens appears to be deliberately driving a stake through the heart of the argument that the Court has backed away from this standard. As one commentator noted, "[i]n light of this statement, the suggestion by some commentators that *Agins'* substantial advancement test is not viable as an independent takings standard must be viewed with considerable skepticism."¹²⁶

Most of the Takings Clause doves apparently agree, or have at least fallen silent on this question since *Tahoe-Sierra*. The sole ex-

121. See Kendall, Dowling & Schwartz, *supra* note 24, at 232; Echeverria, *supra* note 8, at 866-67.

122. 535 U.S. at 305. Justice Stevens' Opinion of the Court in *Tahoe-Sierra* was joined by Justices O'Connor, Kennedy, Souter, Breyer, and Ginsburg.

123. See *id.* at 306.

124. See *id.* at 321-30.

125. *Id.* at 334 (emphasis added).

126. J. David Breemer, *Temporary Insanity: The Long Tale of Tahoe-Sierra Preservation Council and its Quiet Ending in the United States Supreme Court*, 71 FORDHAM L. REV. 1, 22 n.136 (2002). See Douglas W. Kmiec, 2 ZONING & PLAN. DESKBOOK § 7:21 (2d ed. Feb. 2004) ("As the [*Tahoe-Sierra*] majority suggests, practitioners need to remember that an as-applied partial/temporary taking is still possible for deprivation of some significant use *or failure to substantially advance its regulatory objective.*") (emphasis added).

ception appears to be John Echeverria, who continues to insist that the issue is in doubt:

Because the district court rejected the substantially advance claim, and the plaintiffs did not appeal on that issue, the Court had no reason in *Tahoe-Sierra* to address the legitimacy of this test. The Court observed that the plaintiffs “might have argued that the moratoria did not substantially advance a legitimate state interest,” but it said that this claim, too, was foreclosed by the district court findings. Again the Court has not provided much direction one way or the other, leaving the validity of this ostensible takings test for resolution in some subsequent case.¹²⁷

In terms of the realities of Supreme Court doctrine, this position is simply not tenable after *Tahoe-Sierra*. In the half-decade since the Court’s opaque and fragmented decision in *Eastern Enterprises*, every Justice has written or joined opinions applying, upholding, or expressly affirming the general applicability of the substantial advancement test to regulatory takings. Predicting the future direction of the Court from the current views of its individual members is an inexact art at best.¹²⁸ Nevertheless, as of its last major land-use takings decision, the Court is unanimous in its agreement that a land use regulation that fails to substantially advance legitimate state interests *does* result in a regulatory taking.¹²⁹

127. Echeverria, *supra* note 44, at 11250.

128. See, e.g., Richard J. Lazarus, *Counting Votes and Discounting Holdings in the Supreme Court’s Takings Cases*, 38 WM. & MARY L. REV. 1099 (1997); see also Maxwell L. Stearns, CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING (2000) (describing and seeking to explain anomalies in the Court’s jurisprudence arising from the collective decision-making process).

129. After recently reviewing the arguments for relegating the substantial advancement test to a due process standard, the Texas Supreme Court pointedly commented:

Whatever may be made of all of this, one thing is clear: the Supreme Court has never modified or retracted its statement in *Agins*. Prior decisions need not be reaffirmed periodically to retain authority. As the Supreme Court has admonished:

III. REGULATORY TAKINGS CLAIMS BROUGHT UNDER THE SUBSTANTIAL ADVANCEMENT STANDARD MUST RECEIVE A HIGHER LEVEL OF JUDICIAL REVIEW THAN SUBSTANTIVE DUE PROCESS CLAIMS—AND WHY IT MATTERS

As a corollary to their efforts to relegate the “substantial advancement” takings test to the realm of due process, some Takings Clause doves also seek to undermine the level of scrutiny required by the Supreme Court in regulatory takings cases.¹³⁰ Paralleling the argument concerning the substantial advancement test itself, it has even been asserted that the Supreme Court invoked heightened scrutiny under this standard by mistake.¹³¹ Some of these critics simply collapse their opposition to the heightened scrutiny requirement into their argument concerning the substantial advancement test itself,¹³²

“[i]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [a lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.”

Sheffield Dev. Co., Inc. v. City of Glenn Heights, 2004 WL 422594, (Mar. 5, 2004) (No. 02-0033) (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

130. See, e.g., Kendall, Dowling & Schwartz, *supra* note 24, at 8 (citing *Nollan* for the proposition that the Supreme Court applies *the same* degree of deference to takings claims as to substantive due process[!]).

131. See Echeverria, *supra* note 8, at 865-66 (contending that the Supreme Court inadvertently applied the standard of review from pre-New Deal due process cases, not realizing heightened scrutiny of due process claims had been abandoned in the 1930s).

132. See, e.g., Echeverria, *supra* note 44, at 11247 (“the most fundamental reason to reject the view that takings law authorizes a general inquiry into the fundamental fairness of government action is that this approach threatens to revive a discredited, highly intrusive type of judicial scrutiny.”); Sullivan, *supra* note 66, at 41 (complaining that the Ninth Circuit in *Chevron, USA v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000), “persisted with an analysis that, if followed, would appear to transform what would otherwise be ‘rational basis’ scrutiny under the Fourteenth Amendment into substantive review of

going so far as to claim that both were rejected in *Eastern Enterprises*.¹³³ As we have already seen, however, the position that the Supreme Court has abandoned *Agins*' first prong as a regulatory takings standard is untenable, given that every member of the Court endorsed its use in that context in either *City of Monterey* or *Tahoe-Sierra*.¹³⁴ The argument that *Eastern Enterprises* mandated deferential, rational-basis review of substantial advancement claims is even more tenuous, since it contradicts the Court's plain language in *Nollan*'s footnote 3:

[O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the contrary... [w]e have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective."¹³⁵

Obviously, substantial advancement takings claims cannot *both* be subjected to deferential review *and* be expressly distinguished from the level of scrutiny "applied [in] due process or equal protection claims."¹³⁶ As was true with respect to the substantial advancement test itself, the arguments against heightened scrutiny of regulatory takings claims have frequently been presented to the Supreme Court, but without success.¹³⁷ Despite the zealous objections of counsel for

the likely effectiveness of the regulation under the Fifth Amendment").

133. See, e.g., Amicus Curiae Brief of the City and County of San Francisco in Support of Appellants and for Reversal of the Judgment, *Chevron USA, Inc. v. Cayetano*, United States Court of Appeals for the Ninth Circuit, No. 02-15867, at 9 ("The Court's recent decisions [in *Eastern Enterprises* and *City of Monterey*] indicate that deferential review is appropriate for legislative regulations.").

134. See *supra* text and accompanying notes 104-29.

135. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 n.3 (1987) (citations omitted).

136. *Id.*

137. See, e.g., Brief Amicus Curiae of League for Coastal Protection, Planning and Conservation League, Center for Marine Conservation, Chesapeake Bay Foundation, National Trust for Historic Preservation, National Wildlife Federation, and Sierra Club in Support of Respondents, *City of Monterey v. Del Monte Dunes*, 1998

cities, counties, and states, and the Solicitor General, the Court has firmly refused to reconsider the heightened standard of review it mandated for regulatory takings claims over 15 years ago.

The import of *Nollan*'s footnote 3 has been clear to most commentators virtually since the day the decision was handed down.¹³⁸ Even

WL 297461 (U.S.) *4 (arguing that heightened scrutiny applies only to permanent physical invasions); Brief for Respondent, *Dolan v. City of Tigard*, 1994 WL 123754 (U.S.) *24 (arguing that *Nollan* did not disturb the deferential standard of review of land-use regulations); Respondent's Brief in Opposition to Petition for Certiorari, *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, No. 89-826, at 26-27 (arguing that *Nollan*'s heightened scrutiny applies only to conveyances of real property).

138. See, e.g., Jeffrey A. Wilcox, *Taking Cover: Fifth Amendment Takings Jurisprudence as a Tool for Resolving Water Disputes in the American West*, 55 HASTINGS L.J. 477, 493 (2003) ("Justice Scalia's standard [in *Nollan*] is substantially less deferential to the states than Justice Brennan's, and a far cry indeed from the indirect relationship test formerly applied by the California state courts."); Jess Hofberger, *The Growing Conflict Between the Endangered Species Act and Federal Takings Law: Who Must Pay the Price for Protection?*, 23 J. LAND RESOURCES & ENVTL. L. 295, 301 (2003) ("'Substantially advance' appears to be a term which invites an active judicial review of the regulation and may require the government to prove the legitimacy of the regulation."); Edward H. Ziegler, *Development Exactions and Permit Decisions: The Supreme Court's Nollan, Dolan, and Del Monte Dunes Decisions*, 34 URB. LAW. 155, 157-58 (2002) ("This 'substantially advance' taking test was construed by the Supreme Court as a general standard for judicial review of takings claims; it is different from and apparently more stringent than, the traditional due process 'minimum rationality' test for constitutionality."); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 374-75 ("Although there has always been some disagreement about the crux of [*Nollan* and *Dolan*] . . . the cases at least seemed to call for increased judicial scrutiny of land use conditions."); Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. ILL. U. L. REV. 513, 534 (1995) (noting that the *Dolan* "Court's analysis demonstrated a seriousness of review to

protect unjustified intrusions on property interests); Douglas T. Kendall & James E. Ryan, *"Paying" for the Change: Using Eminent Domain to Secure Exactions and Sidestep Nollan and Dolan*, 81 VA. L. REV. 1801, 1862 (1995) ("Whether a regulation substantially advances a legitimate state interest involves an inquiry that is similar, if not identical, to the substantive due process inquiry. If *Nollan's* heightened scrutiny were applied to all land-use regulations, then presumably a court would look more closely at the reasons for denying the permit under a regulatory takings inquiry than under due process."); Page Carroccia Dringman, *Regulatory Takings: The Search for a Definitive Standard*, 55 MONT. L. REV. 245, 253 (1994) (*Nollan* "signaled the United States Supreme Court's movement away from a 'rubber stamp' or superficial application of the rational basis test to a more rigorous standard of review."); William C. Leigh & Bruce W. Burton, *Predatory Governmental Zoning Practices and the Supreme Court's New Takings Clause Formulation: Timing, Value, and R.I.B.E.*, 1993 BYU L. REV. 827, 840 n.65 ("In both *Nollan* and *Lucas*, the Court made it clear that heightened judicial scrutiny will be applied when property rights are being significantly diminished by regulation or exaction."); Dwight C. Hirsh, IV., *Yee v. City of Escondido—A Rejection of the Ninth Circuit's Unique Physical Takings Theory Opens the Gates for Mobile Home Park Owners' Regulatory Takings Claims*, 24 PAC. L.J. 1681, 1693 n.82 (1993) ("[T]he *Nollan* Court applied what has traditionally been called either 'mid-level,' 'intermediate,' or 'heightened' scrutiny."); James W. Ely, Jr., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 148 (1992) ("The *Nollan* decision alarmed land use regulators because it signaled a heightened degree of judicial supervision."); Cotton C. Harness, III., *Lucas v. South Carolina Coastal Council: Its Historic Context and Shifting Constitutional Principles*, 10 PACE ENVTL. L. REV. 5, 17 (1992) ("Between the demise of *Lochner* and [the *Nollan*] decision, the Court's review of the rationality of state exercise of police power was based upon a presumption of rationality. . . . [In *Nollan*] Justice Scalia disregards this time-honored deference to legislative decision making and replaces it with a test that requires greater judicial scrutiny."); Steven J. Eagle and William H. Mellor III, *Regulatory Takings After the Supreme Court's 1991-92 Term: An Evolving Return to Property Rights*, 29 CAL. W. L. REV. 209, 237 (1992) ("*Nollan* seems totally inconsistent with the deference to the legislature that

such a dedicated Takings Clause dove as Professor Williams has acknowledged the Court's mandate of heightened scrutiny under the substantial advancement standard: "[i]n *Nollan*, the Court . . . interpret[ed] the fifth amendment's Takings Clause as requiring aggressive judicial review of police power regulations affecting fundamental rights in private property."¹³⁹

Some scholars have likened the standard of review under *Agins'* first prong to that for First Amendment violations:

[*Nollan's* footnote 3] suggests that courts should apply heightened judicial scrutiny when they review land-use ordinances and decisions for Taking Clause violations. *Echoing the judicial review standard applied to land uses claimed to violate the free speech clause*, Justice Scalia held that land-use regulations must "substantially advance" a "legitimate state interest" to avoid a violation of the Taking Clause. This test, Justice Scalia explained, is stricter than the standard of judicial review that is applied

marks the 'conceivable basis' test. As previously discussed, *Nollan's* 'sufficient nexus' holding is in itself an invocation of heightened scrutiny."); Douglas W. Kmiec, *The Original Understanding of the Takings Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1649 (1988) (noting that *Nollan* calls for "heightened intermediate scrutiny" of the government's "means").

139. Robert A. Williams, Jr., *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan*, 59 U. COLO. L. REV. 427, 463 (1988). *See also, e.g.*, Edward H. Ziegler, *Development Exactions and Permit Decisions: The Supreme Court's Nollan, Dolan, and Del Monte Dunes Decisions*, 34 URB. LAW. 155, 158-59 (2002):

A number of recent court decisions now have construed the substantially advance test to require a level of judicial scrutiny for zoning and other land-use restrictions higher than the modern "minimum rationality" due process test for constitutionality. The substantially advance test has been held to require a real examination of "the nexus between the effect of the ordinance and the legitimate state interest it is supposed to advance." The test has been applied both to legislative restrictions and permit denials.

Id.

under the substantive due process and equal protection claims.¹⁴⁰

More commonly, however, the standard is interpreted as requiring mid-level scrutiny:

To satisfy *Agins*, a law must “substantially” advance “legitimate” state interests. This heightened judicial review is opposite the standard of review employed when a court considers whether a taking is for a “public use” (i.e., a public purpose) within the Takings Clause. In *Hawaii Housing Authority v. Midkiff*, the Court stated that a minimum rationality standard is to be used to determine if a law takes for a public purpose within the meaning of the Takings Clause. What *Agins* does, therefore, is to require intermediate judicial review to see if laws being challenged under the Takings Clause are for a public purpose, while *Hawaii Housing* requires minimal rationality review to see if laws being challenged under the Takings Clause are for a public purpose.¹⁴¹

In the face of this widespread recognition of the plain language of the Supreme Court, some critics have taken the fall-back position that heightened scrutiny under *Agins*' first prong is appropriate only in as-applied challenges to the individualized, administrative appli-

140. Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 13 (1992) (emphasis added) (footnote deleted).

141. Jan G. Laitos, *The Takings Clause in America's Industrial States After Lucas*, 20 U. TOL. L. REV. 281, 299 (1993). See Bernard H. Siegan, PROPERTY AND FREEDOM: THE CONSTITUTION, THE COURTS, AND LAND-USE REGULATION 128 (1997) (“In his [*Nollan*] opinion, Scalia applied an intermediate level of scrutiny to the facts of the case, according less deference to the Constitution than would be warranted under minimal scrutiny.”); Steven J. Eagle & William H. Mellor III, *Regulatory Takings After the Supreme Court's 1991-92 Term: An Evolving Return to Property Rights*, 29 CALIF. W. L. REV. 209, 214 (1992) (noting that the Court applies essentially the same level of scrutiny to equal protection claims based on gender or legitimacy classifications).

cation of land-use regulations.¹⁴² But while this may be a plausible interpretation of the Court's current use of *Dolan's* "rough-proportionality" standard,¹⁴³ the substantial advancement test itself, with its implicit requirement of heightened scrutiny, is equally applicable to facial challenges of legislative enactments.¹⁴⁴

The Court's application of heightened scrutiny under *Agins'* first prong is not an aberration, nor is it an arbitrary or mistaken appendage to takings law. Rather, the requirement of an elevated standard of review is implied by the very existence of a cause of action for regulatory takings. As the *Tahoe-Sierra* Court noted,¹⁴⁵ regulatory takings differ in nature from physical occupations or invasions, either directly by the government¹⁴⁶ or by third parties acting under governmental authority.¹⁴⁷ It is this very difference that gives rise to the need for heightened scrutiny of regulatory takings claims. Physical invasions or occupations of private property by the state are normally obvious to a fact-finder employing even a minimal standard of review.¹⁴⁸ The only question in such cases is whether just

142. See, e.g., Kendall, Dowling & Schwartz, *supra* note 24, at 244-45 (asserting that "in typical land use cases that do not involve compelled dedications, a more deferential standard is appropriate").

143. See *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 687 (1999).

144. See *Yee v. City of Escondido*, 503 U.S. 519, 530 (1992) (indicating regulatory takings claim under *Nollan* would lie in facial challenge to mobile home park rent ordinance); *Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1158 (9th Cir. 1997) (applying substantial advancement test to enactment of condominium rent control ordinance).

145. See *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 202, 322-23 (2001).

146. See, e.g., *United States v. Causby*, 328 U.S. 256 (1946) (aircraft overflights causing a taking); *Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. (13 Wall.) 166 (flooding causing a taking).

147. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (requiring owner of apartment building to contract with cable television supplier found to be a taking).

148. See, e.g., Meltz, Merriam, & Frank, *supra* note 51, at 117 ("The permanent physical invasion of private property by the government should be the easiest to recognize. . . . When permanent, these intrusions are generally so open and obvious that none of the

compensation has been paid—again, an inquiry that can be conducted on the level of an evidentiary hearing, without need for probing review on the part of a court. The situation is completely different when the government, inadvertently or by design, accomplishes the same effect as if it had taken title to private property, but without acknowledging either the usurpation or the requirement to compensate.¹⁴⁹ As the Ninth Circuit Court of Appeal has observed, “[i]t makes considerable sense to give greater deference to the legislature where it deliberately resorts to its eminent domain power than where it may have stumbled into exercising it through actions that incidentally result in a taking.”¹⁵⁰ In the successive two-part inquiries it set out in *Pennsylvania Coal*, *Penn Central*, and *Agins*, the Supreme Court has recognized that it is necessary to examine the nature and impact of challenged regulations to determine whether they are the functional equivalent of seizures, pressing private property “into some form of public service under the guise of mitigating serious public harm,”¹⁵¹ but without payment of compensation. Such an

usual takings tests are used.”); Joshua M. Duke & Kristen A. Sentoff, *Managing Isolated Wetlands After Solid Waste and Tahoe: The Case of Delaware*, 18 J. LAND USE & ENVTL. L. 355, 369 (2003) (“Physical takings are more obvious, and the physical confiscation of property, no matter how small a part, requires compensation.”).

149. See *Tahoe-Sierra*, 535 U.S. at 322 n.17 (“When the government condemns or physically appropriates the property, the fact of a taking is typically obvious and undisputed. When, however, the owner contends a taking has occurred because a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation, the predicate of a taking is not self-evident, and the analysis is more complex.”).

150. *Hall v. City of Santa Barbara*, 833 F.2d 1270, 1280 n.25 (9th Cir. 1986) (overruled on other grounds); see also *Chevron USA v. Cayetano*, 224 F.3d at 1034 (explaining rationale for higher standard of review for regulatory than physical takings). Cf. *Richardson v. City and County of Honolulu*, 124 F.3d at 1158 (“We see nothing inconsistent in applying heightened scrutiny when the taking is uncompensated, and a more deferential standard when the taking is fully compensated.”).

151. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992).

inquiry, virtually by definition, requires going behind the surface of the regulatory rationale—i.e., requires an elevated level of scrutiny.

Of course, the heightened scrutiny requirement implicit in *Agins*' first prong does not flow automatically from the mere invocation of the standard; applying meaningful review of state action requires an act of judicial will. This responsibility can easily be evaded; indeed, the California Supreme Court has made it a matter of judicial policy to do just that.¹⁵² The most common way to convert the substantial advancement standard into deferential review is to characterize it as merely requiring a rational relationship between regulatory ends and means. This leads to such absurdities as the holding by a California court that, because a city's rent control ordinance was intended to control rents and in fact did so, it thereby complied with the substantial advancement test.¹⁵³ Such an outcome is predictable when the test is interpreted merely as one of ends-means scrutiny, since requiring a match between regulatory ends and means is just another way of describing rational basis review.¹⁵⁴

In *Nollan*, the Supreme Court did inquire into the relationship between regulatory ends and means.¹⁵⁵ Far more important, however, was the Court's emphasis on the need for a close *causal* nexus between the burdens imposed by the regulations, and the social costs that would otherwise be imposed by the property's unregulated use.¹⁵⁶ As Professor McUsic points out,

[The *Nollan*] Court described the "substantially advance" test as one that examines the proportionate relationship between the amount of public harm caused by the owner

152. See, e.g., *Santa Monica Beach Ltd., v. Superior Court*, 968 P.2d 993, 1001 (Cal. 1999) (interpreting the substantial advancement test as requiring nothing more than that regulations not be arbitrary or capricious).

153. See *Casella v. City of Morgan Hill*, 280 Cal. Rptr. 876, 884-85 (1991).

154. Cf. Charles K. Rowley, *Review Article: Donald Wittman's The Myth of Democratic Failure*, 92 Pub. Choice 15, 17 (1997) ("In thin-rational accounts, agents are assumed to be rational only in the sense that they employ efficiently the means available to pursue their ends.").

155. See *Nollan*, 483 U.S. at 838-42.

156. See *id.* at 838-39.

and the regulatory burden imposed: a cause-effect test. . .

The second meaning of the substantially advance requirement—the cause-effect test—focuses on whether the burden of a regulation is properly placed on a particular owner.¹⁵⁷

It is the requirement of a *cause-effect* nexus, not just an ends-means fit, that offers real protection against the imposition of unjustified or disproportionate burdens on individual property owners. This fact was emphasized by Justice Scalia in his separate opinion in *Pennell v. City of San Jose*,¹⁵⁸ in which he explained that, “a property regulation does not ‘substantially advance’ the state’s interest unless the use of the property caused the problem the state was seeking to correct, or the property owner reaped unique benefits from the problem.”¹⁵⁹

The importance of properly interpreting the substantial advancement test as including an inquiry into causal relationships to ensure meaningful judicial scrutiny has been recognized by Dean Kmiec¹⁶⁰ and other scholars.¹⁶¹ But the importance of applying heightened

157. Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591, 602-04 (1998).

158. 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part.) (“Traditional land-use regulation (short of that which totally destroys the economic value of property) does not violate this [substantial advancement] principle because there is a *cause-and-effect relationship* between the property use restricted by the regulation and the social evil that the regulation seeks to remedy.”) (emphasis added).

159. McUsic, *supra* note 157.

160. See Kmiec, *supra* note 77 at 745 (“the ‘substantially advance’ inquiry promulgated by the Court in *Agins v. City of Tiburon*, and followed without exception thereafter, is—as the Court explained in *Nollan*—an inquiry into the *causal connection* or nexus between regulatory means and ends.”) (emphasis added); Kmiec, *supra* note 138, at 1653 (“[T]he *Nollan* nexus requirement clearly is linked, not just to a facile matching of the state’s means or ends, but to whether compensation is required because the end sought to be accomplished places a disproportionate burden on a landowner.”).

161. See, e.g., Edward H. Ziegler, *Partial Taking Claims, Ownership Rights in Land and Urban Planning Practice: The Emerging*

scrutiny in conjunction with the substantial advancement test has never been more dramatically illustrated than by a pair of cases springing from a common factual setting, *Mayhew v. Town of Sunnyvale*¹⁶² and *Dews v. Town of Sunnyvale*.¹⁶³ In *Mayhew*, a proposed residential development was prohibited after years of negotiations, on the grounds that it would be inconsistent with the town's minimum lot size requirements.¹⁶⁴ The property owners sued, alleging that the town's actions failed to substantially advance legitimate state interests.¹⁶⁵ A trial court agreed, finding that the town's denial of the Mayhews' project "does not bear any factual relationship to valid planning principles or objectives."¹⁶⁶ The state supreme court reversed, applying a deferential level of scrutiny¹⁶⁷ to conclude that the permit denial advanced Sunnyvale's legitimate interest in maintaining "the overall character of the community and the unique character and lifestyle of the Town."¹⁶⁸

Dichotomy Between Uncompensated Regulation and Compensable Benefit Extraction Under the Fifth Amendment Takings Clause, 22 J. LAND RESOURCES & ENVTL. L. 1 (2002) (citing importance of causation and proportionality in modern takings jurisprudence); Steven R., McCutcheon, Jr., *Lessened Protection for Property Rights—The Conjunctive Application of the Agins v. City of Tiburon Disjunctive Test*, 27 PACIFIC L. J. 1657, 1667 (1996) ("To satisfy the first prong of *Agins* and the Just Compensation Clause, the advancement of legitimate state interests may not be speculative or imaginative as permitted under substantive due process, but must be 'substantial' and bear a nexus to the harm caused by the landowner's development of the property.") (footnote omitted) (emphasis added).

162. 964 S.W. 2d 922 (Tex. 1998).

163. 109 F.Supp.2d 526 (N.D. Tex. 2000).

164. 964 S.W. 2d at 926.

165. *Id.*

166. *Id.* at 927.

167. The Texas Supreme Court offered a perfunctory acknowledgment of *Nollan*'s heightened scrutiny requirement, *id.* at 934, but then ignored that standard in accepting at face value all of the Town's proffered justifications for the permit denial. *See id.* at 935.

168. *Id.* at 935.

Following a second permit denial, the Mayhews' successors in interest sued in federal district court on equal protection grounds.¹⁶⁹ In contrast to the Texas Supreme Court, the federal judge applied a heightened standard of review and found the town's building restrictions were racially motivated, designed primarily to prevent minorities from moving into the community.¹⁷⁰ In other words, by probing beneath the town's pretextual rationale, the federal court was able to determine that what local officials meant by preserving the "unique character and lifestyle" of the town, was keeping it White.¹⁷¹ The official rationalizations, unquestioningly accepted under the state court's deferential review, were found to have comprised merely "a facade in an unsuccessful attempt to shield [the Town] from liability for excluding both African-Americans and affordable housing from Sunnyvale."¹⁷²

This sobering example should not be taken to mean that governmental bad faith is the sole rationale for a meaningful standard of review in takings cases. The nature and effect of restrictive land use regulations must be subjected to more than bare rationality review if courts are to determine whether *any* such measure effectively takes private property for public use, no matter how well-intentioned it may be. Nevertheless, history teaches that good faith on the part of the regulatory bureaucracy can never be presumed.¹⁷³ In the earliest

169. See *Mayhew v. Town of Sunnyvale*, 109 F.Supp.2d 526, 529 (N.D. Tex. 2000).

170. See *id.* at 568-71.

171. See *id.* at 533 (The town's actual interest in denying the development applications was inelegantly described by one insider as "[keeping] 'niggers' out of Sunnyvale.").

172. *Id.* at 572. For further commentary on *Mayhew / Dews*, focusing on the Texas court's misapplication of the "reasonable investment-backed expectations" standard, see R. S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449, 523-26 (2001).

173. See, e.g., Michael M. Berger & Gideon Kanner, *Thoughts on The White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 19 LOYOLA L.A. L. REV. 685, 701 (1986) ("[I]t is past dispute that there are regulatory entities at all levels and in all states which simply refuse to recognize the constitutional rights of property own-

regulatory takings cases in California, local governments abandoned efforts to condemn private land because they realized they could exercise equally complete control over the property by regulation, without incurring the costs of acquisition.¹⁷⁴ As Justice Scalia pointed out at oral argument in *City of Monterey*, deference to local governments in such cases would amount to stripping their citizen-victims of their Fifth Amendment rights:

JUSTICE SCALIA: Now, let's talk about deference to the city's judgment. I can under—our normal rule is that we do defer and, if there's a rational basis, that's all we look to. But where you have a consistent process, as is alleged here, of turning down one plan, the next plan, the next plan, okay, I'll do this to satisfy you, isn't there some point at which, although there's a rational basis for the fifth decision, a rational basis for the fourth and the third and the second and the first, you begin to smell a rat, and at that point can't we say, despite our normal rational basis review, there's some other factor that begins to come in here, and that is, at some point you can say, this is simply unreasonable.¹⁷⁵

ers."); Norman Williams, Jr., R. Marlin Smith, Charles Siemon, Daniel R. Mandelker & Richard F. Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 242-43 (1984) (describing bad-faith tactics by land-use regulators as "ubiquitous, vicious, and devoid of any semblance of procedural due process").

174. See *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613 (1976); *Arastra Ltd. Partnership v. City of Palo Alto*, 401 F.Supp. 962 (N.D. Cal. 1975); *Agins v. City of Tiburon*, 598 P. 2d 25 (1979).

175. *City of Monterey v. Del Monte Dunes*, No. 97-1235, transcript of oral argument, 1998 WL 721087, 67 USLW 3298, 67 USLW 3482, (U.S.Oral.Arg. Oct. 07, 1998), at *17. In the view of at least one observer, *City of Monterey* "involved a tale of governmental chicanery so palpable that the questions at oral argument led some to believe that the Court would establish takings liability based on bad faith." Berger, *supra* note 68, at 440. See also Steven J. Eagle, *Del Monte Dunes, Good Faith, and Land Use Regulation*, 30 ENVTL. L. REP. 10100 (2000) ("Many of the questions at oral argument and much of the Justices' opinions [in *City of Monterey*] evince the Court's growing concern that governmental officials deal with property owners with good faith.").

In recognition of the reality of this aspect of land-use regulation, the Supreme Court in *Tahoe-Sierra* for the first time specifically identified governmental bad faith as a determinant of whether a challenged regulation substantially advances legitimate state interests.¹⁷⁶ And although the Court narrowly declined to review another bad-faith claim under this standard, the three Justices who would have granted certiorari in *Lambert v. City and County of San Francisco*¹⁷⁷ made it clear that this is an important issue in the Court's deliberations.¹⁷⁸

IV. THE *REAL* OBJECTION TO THE SUBSTANTIAL ADVANCEMENT STANDARD

The tenacity and persistence of the opposition to the substantial advancement test, especially in view of the cool reception their views have received at the Supreme Court, suggests that critics of this standard are really voicing one or the other of two underlying concerns. First, there is the formalistic conviction that the Constitution is comprised of a conglomeration of distinct provisions, each of which should have its own distinct standards, and the Court's insistence on cross-fertilizing—applying standards that were developed in the equal protection arena to free speech cases, or due process to takings—is just, well, *messy*. To this objection, the most realistic response is, “welcome to the world of constitutional law.”

The other view is at its root a protest against the Supreme Court's fundamental approach to regulatory takings analysis—and indeed, against the very concept of regulatory takings. For some Takings Clause doves, efforts to repudiate the substantial advancement test comprise merely one facet of a broader agenda to reject the Supreme Court's regulatory takings doctrine *in toto*. The argument to relegate *Agins'* first prong to a due process inquiry may seem more plausible, because it appears to be more limited, than calls for overruling *Penn*

176. See *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 202, 333 (2001).

177. 529 U.S. 1045 (2000).

178. See *id.* (Scalia, J., dissenting from denial of certiorari) (noting that “the record belies” San Francisco's claim that it did not withhold a development permit because applicant would not agree to pay the city \$600,000).

*Central*¹⁷⁹ and *Pennsylvania Coal*,¹⁸⁰ or for the outright elimination of regulatory takings as a viable constitutional claim.¹⁸¹ Nevertheless, since the substantial advancement test or its conceptual equivalent has been an element of the Supreme Court's takings jurisprudence since its inception, arguments to eliminate this standard fit easily within the broader assault on regulatory takings *per se*.¹⁸² The

179. See, e.g., Echeverria, *supra* note 65.

180. See, e.g., Byrne, *supra* note 39, at 97-107.

181. See, e.g., *id.*; Williams, Jr., et. al., *supra* note 173; Fred Bosselman, David Callies & John Banta, *THE TAKING ISSUE: A STUDY OF THE CONSTITUTIONAL LIMITS OF GOVERNMENTAL AUTHORITY TO REGULATE THE USE OF PRIVATELY-OWNED LAND WITHOUT PAYING COMPENSATION TO THE OWNERS* 238 (1973) (urging the Supreme Court to overrule *Pennsylvania Coal* and hold that "a regulation of the use of land, if reasonably related to a valid public purpose, can never constitute a taking"); Charles M. Haar & Michael Allan Wolf, *Euclid Lives: the Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2168 (2002) (urging the Court to avoid "opprobrium" and "ignominy" by abandoning its regulatory takings jurisprudence and reverting exclusively to deferential, due process review).

182. Commenting on the Solicitor General's brief attacking the substantial advancement standard in *City of Monterey*, Dean Kmiec recognized that "[t]he object, of course, was to eliminate any meaningful judicial review of land-use decisions." Douglas W. Kmiec, *The "Substantially Advance" Quandary: How Closely Should Courts Examine the Regulatory Means and Ends of Legislative Applications?*, in *TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES* 371, 372 (Thomas E. Roberts, ed., 2002). The outright elimination of the Supreme Court's regulatory takings doctrine has occasionally been identified explicitly as the ultimate goal of the Takings Clause doves. See, e.g., Bosselman, Callies & Banta, *supra* note 181, at 238-55 (endorsing Justice Brandeis' dissent in *Pennsylvania Coal* and urging the Supreme Court to repudiate its regulatory takings doctrine); Williams, Jr., et. al., *supra* note 173, at 194 ("We now state without equivocation that as a general proposition neither the Constitution, constitutional jurisprudence nor any decision of the United States Supreme Court commands or justifies the payment of compensation as a remedy when a land use regulation is found to be a constitutionally impermissible taking.");

underlying theme is that courts should not apply the Takings Clause in any situation not involving outright physical appropriations:

What is wrong with a simple reading of the Takings Clause that would apply it to occasions when the government actually physically takes and uses the land in question? What limitations could there then be on the government's overreaching by regulation? What should a court do when the government goes too far? If 'goes too far' means the same thing as interfering with due process rights in property, then the more consistent, predictable, and traditional result would be to strike down the regulation as an unconstitutional denial of due process.¹⁸³

Of course, what's "wrong" with eliminating the doctrine of regulatory takings was spelled out by Justice Brennan in his dissent in *San Diego Gas & Electric v. City of San Diego*,¹⁸⁴ the first opinion to employ the term, "regulatory taking." There, the City of San Diego had down-zoned 233 acres of the plaintiff's land to open space, an action the trial court "unequivocally" found to amount to a taking under the Fifth Amendment.¹⁸⁵ This finding was upheld on appeal, but the California Supreme Court reversed, adopting the rule proposed by the passage above: a land use regulation can *never* violate the Takings Clause, but at worst may be invalidated as a violation of due process.¹⁸⁶ As Justice Brennan pointed out, invalidation is hardly an adequate remedy for a plaintiff who (in that case) was deprived of the use of its property for seven years.¹⁸⁷ At least equally important, the unavailability of a regulatory taking claim encourages

Byrne, *supra* note 39 (arguing that *Pennsylvania Coal* should be overruled and the entire regulatory takings doctrine be abolished); John D. Echeverria, *The Once and Future Penn Central Test*, 54 LAND USE L. & ZONING DIGEST 6:19 (2002) (urging the Supreme Court to overrule Penn Central and entertain only categorical takings claims); Echeverria, *supra* note 113 (same).

183. Kenneth Salzberg, *Rights with Responsibilities Land Use Law Symposium: "Takings" as Due Process, or Due Process as "Takings"?*, 36 VAL. U. L. REV. 413, 418 (2002).

184. 450 U.S. 621 (1981).

185. *Id.* at 644 (Brennan, J., dissenting).

186. *See id.* at 621.

187. *See id.* at 644 (Brennan, J., dissenting).

government agencies to promptly adopt new regulations whenever one is struck down on due process grounds, to maintain oppressive and unconstitutional restrictions indefinitely. Justice Brennan brought this point home by quoting extensively, in his *San Diego Gas* dissent, from a tract circulated by a California city attorney, light-heartedly urging his colleagues to do just that.¹⁸⁸

A few of the staunchest Takings Clause doves have directly repudiated Justice Brennan's reasoning, insisting that compensation under the Takings Clause should *never* be required for land use regulations, no matter how draconian or basely motivated.¹⁸⁹ More commonly, however, the imposition of regulatory takings liability is rejected on more abstract grounds: close judicial review of legislative or administrative actions is said to undermine the separation of powers,¹⁹⁰ threaten the principle of democratic self-government,¹⁹¹ be

188. *See id* at 655-57:

At the 1974 annual conference of the National Institute of Municipal Law Officers in California, a California City Attorney gave fellow City Attorneys the following advice:

"IF ALL ELSE FAILS, MERELY AMEND THE REGULATION AND START OVER AGAIN.

"If legal preventive maintenance does not work, and you still receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. One of the extra 'goodies' contained in the recent [California] Supreme Court case of *Selby v. City of San Buenaventura*, 10 C.3d 110, [109 Cal. Rptr. 799, 514 P.2d 111] appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again.

189. *See Williams, Jr., et. al., supra* note 173, at 193-97.

190. *See, e.g., id.* at 233-34; *Echeverria, supra* note 113, at 240.

191. *See, e.g.,* Brief of Appellants, *Chevron USA, Inc., v. Cayetano*, *supra* note 84, at 40 (arguing that validity of an allegedly unconstitutional regulation "should be decided by the people through their elected representatives, and not by judges").

contrary to the plain language of the Drafters,¹⁹² or signal a return to “Lochnerism.”¹⁹³ At this level of generality, however, these argu-

192. See, e.g., J. Peter Byrne, *Regulatory Takings and Judicial Supremacy*, 51 ALA. L. REV. 949, 955 (2000); Kendall, Dowling & Schwartz, *supra* note 24, at 4-6; J. Byrne, *supra* note 39, at 91-96; Echeverria, *supra* note 8, at 859-61. But see Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571, 588 (2003) (“the plain language of the Takings Clause . . . refers to neither eminent domain, physical appropriation, nor regulatory takings”). A variation on the “plain language” argument is the claim that the original intent of the Drafters did not encompass regulatory takings. See, e.g., William Michael Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L. J. 694 (1985). Taking this claim seriously as grounds for repudiating modern takings jurisprudence would, as Prof. Kanner has pointed out, justify “a wholesale overruling of everything from desegregation cases, the *Miranda* rule, and the reapportionment cases, to *Roe v. Wade*.” Gideon Kanner, *Theories Du Jour: Regulators’ Responses to the Just Compensation Clause of the Fifth Amendment*, ALI-ABA COURSE OF STUDY: INVERSE CONDEMNATION AND RELATED GOVERNMENT LIABILITY 97, 112 (Sept. 1999). Ultimately, however, like the “plain language” argument, the original-intent claim fails on its own terms:

There is, in fact, little direct evidence about the Framers’ reasons for adopting the Takings Clause...The truth is that no one who participated in the drafting and ratification of the Takings Clause—including James Madison, who bears the most responsibility for the Clause—had given any sustained thought to the purposes of eminent domain and the compensation requirement. The understanding of these purposes remained to be worked out over time.

David A. Dana & Thomas W. Merrill, PROPERTY: TAKINGS 9, 25 (2002).

193. See, e.g., Williams, Jr., *supra* note 139, at 462-73. The prose on this topic has seldom surpassed the deep purple of Professor Williams, who sees decisions under the substantial advancement standard as “deny[ing] the priority of the public interest forwarded by

ments run aground on the commonplace observation that the Constitution was *intended* to check majoritarian excesses,¹⁹⁴ and interpreting the document's proper application to the other two branches of government has been an essential attribute of the judiciary since *Marbury v. Madison*.¹⁹⁵ As for the bogeyman of *Lochner*, no supra-textual normative charter is required for courts to administer the straightforward protections of property owners that animate the Fifth and Fourteenth Amendments. The proper role of a court applying the substantial advancement test to takings claims has seldom been expressed more clearly than by Chief Judge Loren Smith of the Court of Federal Claims:

In takings claims the judge does not sit as super legislator or executive, intent on preventing regulation that "goes too far," as a facile reading of Justice Holmes might imply. The job of the court is to deal with a concrete claim, by an aggrieved person or persons, that their Constitutional rights under the Fifth Amendment have been violated by some governmental action. The court must proceed to analyze this claim, as any other legal claim, regardless of the consequences to government policy.¹⁹⁶

the vessel of the regulatory state over the interests of private capital." *Id.* at 429.

194. *See, e.g.*, Alexander M. Bickel, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (2d ed. 1986) (discussing the "countermajoritarian" aspects of judicial review of the constitutionality of statutes); John Hart Ely, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135-79 (1980) (outlining importance of effective judicial review in protecting rights of minorities against majoritarian excesses).

195. 5 U.S. (1 Cranch) 137 (1803). *See also* Bickel, *supra* note 194, at 1-14 (critiquing the argument for judicial review flowing from *Marbury*).

196. *Hage v. United States*, 35 Fed. Cl. 147, 150-51 (1996). Application of the substantial advancement test has been described as a straightforward two stage inquiry, (1) Is the governmental objective within the ambit of the police power?; and (2) If so, does the proposed solution violate the constitutional rights of some citizens? Berger & Kanner, *supra* note 173, at 730. *See also* Douglas W. Kmiec, 2 *ZONING & PLAN. DESKBOOK* § 7:18 (2d ed. updated Feb. 2004) ("In *Nollan* . . . the Court made it abundantly clear that it had

In the final analysis, arguments against the substantial advancement test, heightened scrutiny of takings claims, and the regulatory takings doctrine itself all share a common origin: an anachronistic yearning for expansive governmental authority over individuals and their property, untrammelled by meaningful constitutional restraints. In the United States, this worldview passed from the scene with the New Deal, and no amount of quibbling over the wording of Supreme Court decisions is likely to resurrect it. As one veteran of the takings wars has put it, “[i]f real people were not at stake, this might be an intriguing intellectual matter.”¹⁹⁷ It is in recognition of the fact that real people *are* burdened by oppressive and sometimes malevolent regulations that the Supreme Court crafted its regulatory takings jurisprudence and—messy though it is—real people still require its protection from the excesses of the modern regulatory state.

no desire to resurrect the so-called *Lochner* era and the discredited practice of judicial disagreement with legislatively chosen policy objectives. By contrast, the ‘substantially advance’ inquiry . . . [is] a heightened inquiry into the causal connection or nexus between regulatory means and ends.”); John A. Humbach, “*Taking*” the *Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. U. L. REV. 771, 785 (1993) (“The two-pronged *Agins* test of regulatory taking sets boundaries on legislative power based on criteria unconcerned with the reviewing court’s view of the merit, wisdom or correctness of balance embodied in the particular legislation in question.”). The Supreme Court made the same point in *City of Monterey*, 526 U.S. at 705-07.

197. Berger, *supra* note 102, at 4-15.

