

**ENDS AND MEANS IN TAKINGS LAW AFTER  
*LINGLE V. CHEVRON***

ALAN ROMERO\*

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I. INTRODUCTION

For twenty-five years, the Supreme Court and others said that when a land use regulation “does not substantially advance legiti-

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\* Professor of Law, University of Wyoming College of Law. B.A., Brigham Young University, 1990; J.D., Harvard Law School, 1993. Thanks to the Pacific Legal Foundation and the George Hopper Faculty Research Fund for their financial support of this Article.

mate state interests,” it is a taking requiring just compensation under the Fifth Amendment.<sup>1</sup> In 2002, the United States District Court for Hawaii applied this rule in holding that Hawaii took property without compensation when it enacted a law limiting the rent that an oil company could charge lessees of company-owned service stations.<sup>2</sup> The court found that the law would not serve the state’s purpose of lowering gasoline prices but would merely “create a premium that lessee-dealers can recognize upon selling their leases.”<sup>3</sup> The Ninth Circuit affirmed that the law did not substantially advance a legitimate state interest and was therefore a taking.<sup>4</sup>

In *Lingle v. Chevron U.S.A., Inc.*, however, the Supreme Court reversed the decision, declaring that failure to substantially advance a legitimate state interest does not make a regulation a taking.<sup>5</sup> The Court reasoned that this substantial advancement test “prescribes an inquiry in the nature of a due process, not a takings, test.”<sup>6</sup> “[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause” and therefore would be constitutionally invalid.<sup>7</sup> But that does not make the regulation a taking, which would require payment of compensation to the regulated owner. Therefore, the Court concluded, “the ‘substantially advances’ formula is not a valid takings test, and . . . it has no proper place in our takings jurisprudence.”<sup>8</sup>

In this Article, I agree with the Court that the substantial advancement test, as the Court understood it in *Lingle*, should not be applied “as a freestanding takings test.”<sup>9</sup> The Court understood the test to be a mere duplication of the requirements of substantive due process: the regulation must be a rational way to accomplish a permissible public purpose. The Court was right that the Takings Clause itself does not create such a requirement, that it

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1. *Agin v. City of Tiburon*, 447 U.S. 255, 260 (1980); *see also* *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 (1987) (“We have long recognized that land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests’ . . . .” (alteration in original) (quoting *Agin*, 447 U.S. at 260)); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978) (“[A] use restriction . . . may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose . . . .”); *infra* Parts II.A, II.B.

2. *Chevron U.S.A., Inc. v. Cayetano*, 198 F. Supp. 2d 1182 (D. Haw. 2002), *aff’d sub nom.*, *Chevron USA, Inc. v. Bronster*, 363 F.3d 846 (9th Cir. 2004), *rev’d sub nom.*, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

3. *Id.* at 1182.

4. *Chevron USA, Inc.*, 363 F.3d at 855-58.

5. 544 U.S. 528, 548 (2005).

6. *Id.* at 540.

7. *Id.* at 542.

8. *Id.* at 548.

9. *Id.* at 540.

does not directly require compensation for irrational regulations, but only for regulations that “take” property.

However, the Court’s rejection of an independent takings test of rationality should not be taken more broadly than that. The substantial advancement test could be understood as different from substantive due process. *Lingle* does not address such possible alternative meanings of the test. Even though *Lingle* may require abandoning the language of the substantial advancement test, it does not require abandoning other ideas that language might have represented. In fact, *Lingle* itself implicitly reaffirms some of the ideas that other courts and commentators have understood the substantial advancement test to represent.

Part II of this Article discusses the creation and development of the substantial advancement test, identifying the ideas underlying the verbal formulation. I then argue that two of those general ideas remain valid even after *Lingle*. In Part III, I argue that a regulation that denies substantive due process—however the requirements of substantive due process are described—requires compensation under the Takings Clause, not just invalidation under the Due Process Clause, if the regulation is actually applied to a property. The government can terminate existing private property rights in only one of two cases: either the government’s action is an exercise of the police power that qualifies or overrides those private property rights, or the government pays just compensation. Most of the time, land use regulation does not require compensation because, as Justice Holmes put it, the “seemingly absolute protection” of property rights is subject to “an implied limitation” and to some uncertain extent those rights “must yield to the police power.”<sup>10</sup> Deciding the extent to which private property is subject to police power regulation without compensation has been notoriously difficult. But a land use regulation that does not rationally advance a permissible public purpose—that violates substantive due process—is not an exercise of the police power at all. Private property rights are not implicitly subject to such invalid exercises of power. If such a regulation nevertheless is enforced against the owner, the owner must be compensated for the taking of her property rights. As *Lingle* emphasizes, the Due Process Clause, not the Takings Clause, defines the boundaries of police power action. But when the government acts outside those boundaries, it is no longer merely exercising an implied limitation on private property rights, and is thus taking property that belongs to a private person. That requires compensation.

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10. Pa. Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922).

In Part IV, I argue that the Takings Clause itself does require consideration of a regulation's means and ends, but not in the same way that substantive due process requires. *Lingle* rejected only a takings test that duplicates substantive due process. *Lingle* reaffirmed the fundamental principle of the Takings Clause to prevent regulation "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>11</sup> Therefore, the Court indicated a regulation may be a taking because of "how any regulatory burden is *distributed* among property owners," and not just because of how large the burden is.<sup>12</sup> A regulation's means and ends may make the regulation unfair to the individual, regardless of the magnitude of the owner's loss.

In this part of the Article, I also identify ways in which regulatory means and ends may indicate unfair distribution of burdens. Some regulatory means may serve a permissible public purpose, and therefore satisfy substantive due process, but do so in a way that inevitably results in unfairly distributed burdens. Regulatory means that are not reciprocal—that benefit others but not the regulated owners—can be unfair in this way because the purpose they serve does not include a benefit to the regulated owners themselves. Unfairly distributed burdens may also result from regulations that restrain properties that are not responsible for the problem to be solved. Again, the regulation rationally advances a permissible purpose in satisfaction of substantive due process, but the choice of means to that end is unfair. Furthermore, the purpose or end of a regulation may be permissible under substantive due process but inherently indicate unfairly distributed burdens and should therefore require compensation. Specifically, when a regulation is intended to benefit only other owners, subsidize governmental functions, reduce the cost of property targeted for public acquisition, or otherwise accomplish some bad faith purpose, the regulatory purpose does help identify how a regulatory burden is distributed among property owners and, therefore, whether the regulation requires just compensation.

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

12. *Lingle*, 544 U.S. at 542.

## II. THE BIRTH, LIFE, AND UNTIMELY DEATH OF THE SUBSTANTIAL ADVANCEMENT TEST

### A. *Origin of the Substantial Advancement Test*

The Supreme Court has long reviewed whether land use regulations are rational means to accomplish legitimate public ends. The early zoning cases, however, did not say an irrational land use regulation would be a taking requiring just compensation. Rather, the early cases said that an irrational regulation would violate substantive due process. Substantive due process required a land use regulation, like any other type of regulation, to be “reasonably necessary” to accomplish some legitimate public purpose.<sup>13</sup> In *Village of Euclid v. Ambler Realty Co.*, the Supreme Court upheld a zoning ordinance against a due process challenge because it was not “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>14</sup> But in *Nectow v. City of Cambridge*,<sup>15</sup> the Supreme Court held that a residential zoning restriction denied an owner substantive due process because its application to the particular property did “not bear a substantial relation to the public health, safety, morals, or general welfare.”<sup>16</sup>

A few decades later, however, the Court seemed to confuse this substantive due process test with regulatory takings law. The confusion may have started in 1962 with *Goldblatt v. Town of Hempstead*.<sup>17</sup> In *Goldblatt*, the property owners complained that local regulation of dredging and excavation took their property and sand and gravel business without compensation.<sup>18</sup> The Court acknowledged that a land use regulation can “be so onerous as to constitute a taking which constitutionally requires compensation,” but concluded that the impact of the regulation was not “sufficient to render it an unconstitutional taking if it is otherwise a valid police regulation.”<sup>19</sup> The Court thus seemed to suggest that, even though

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13. See, e.g., *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

14. 272 U.S. 365, 395 (1926).

15. 277 U.S. 183 (1928).

16. *Id.* at 188. The Court explained that ordinarily it would not substitute its judgment of the public welfare for the judgment of the zoning authorities. But, because the lower court had found that the residential restriction would not further the public welfare at all because the strip of land was useless for residential purposes and was bordered by commercial uses, the restriction violated the Due Process Clause. See *id.* at 188-89.

17. 369 U.S. 590 (1962).

18. See *id.* at 592 (“Appellants contended, *inter alia*, that the ordinance was unconstitutional because . . . it was not regulatory of their business but completely prohibitory and confiscated their property without compensation . . .”).

19. *Id.* at 594.

the burden of the regulation wasn't enough to amount to a taking, the regulation might still be an unconstitutional taking if it was not a valid exercise of the police power, rather than simply being invalid as a deprivation of substantive due process.<sup>20</sup> The Court went on to evaluate whether the regulation was a reasonable means to protect public safety, citing *Lawton v. Steele* and other substantive due process cases. The Court concluded that the property owners had not met their burden of proving the regulation unreasonable, and the regulation therefore was valid.<sup>21</sup>

In 1978, the Court observed in *Penn Central Transportation Co. v. City of New York*<sup>22</sup> that “[t]he question of what constitutes a ‘taking’ for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty,” and “review[ed] the factors that have shaped the jurisprudence of the Fifth Amendment injunction” against uncompensated takings.<sup>23</sup> In doing so, the Court discussed *Goldblatt* and correctly observed that “[i]t is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose.”<sup>24</sup>

However, *Lingle* states that the substantial advancement test was “minted” in a 1980 decision, *Agins v. City of Tiburon*,<sup>25</sup> not in *Goldblatt* or *Penn Central*.<sup>26</sup> *Agins* stated that “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state inter-

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20. In a recent article discussing *Lingle*, Robert G. Dreher argues that “the implication that Justice Brennan read into *Goldblatt*—that an action that does not serve a substantial public purpose is a taking—simply cannot be drawn from that case.” Robert G. Dreher, *Lingle’s Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371, 391 (2006). Dreher emphasizes that, although the Court addressed and rejected the possibility that the regulation was a taking, the Court “upheld the ordinance as a valid exercise of the police power under due process.” *Id.* at 390. Although it is true that the Court upheld the regulation because it satisfied substantive due process, the Court discussed at some length the property owners’ taking claim, which the owners clearly had asserted. The Court addressed the extent of the financial impact, citing *Pennsylvania Coal*, and then clearly was discussing the Takings Clause, not substantive due process, when it said that the regulation’s impact alone would not be a taking requiring just compensation “if it is otherwise a valid police regulation.” *Goldblatt*, 369 U.S. at 594.

21. *Goldblatt*, 369 U.S. at 594-96.

22. 438 U.S. 104 (1978).

23. *Id.* at 123.

24. *Id.* at 127.

25. 447 U.S. 255 (1980).

26. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005); see also D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343, 345 (2005) (“The test is generally attributed to the 1980 case *Agins v. City of Tiburon*, but has its origins in the *Penn Central Transportation Co. v. City of New York* case decided two years earlier.”) (footnote omitted).

ests.”<sup>27</sup> Since this passage in *Agins* initially cites only *Nectow* and then discusses *Euclid*, both due process decisions, it seems the Court simply was careless in characterizing a due process test as a takings test.<sup>28</sup> *Goldblatt*, on the other hand, did not simply mislabel due process language. Although without any explanation, the Court did indicate that even if the burden of a regulation is not great enough to be a taking, the regulation might still be a taking if it was not a valid exercise of the police power within the boundaries of the Due Process Clause. The Court in *Penn Central* seems to have correctly understood and accepted *Goldblatt*. So, even if the language of the substantial advancement test of *Agins* “was derived from due process, not takings, precedents,”<sup>29</sup> it should not be casually dismissed as merely a clumsy oversight.<sup>30</sup>

### *B. Application and Evolution of the Substantial Advancement Test*

The Supreme Court subsequently repeated the substantial advancement test several times. In *Keystone Bituminous Coal Ass’n v. DeBenedictis*,<sup>31</sup> the Court quoted the *Agins* version of the substantial advancement test and described it as an “integral part[] of our takings analysis.”<sup>32</sup> The Court then discussed at length the legitimate public purposes served by the challenged statute.<sup>33</sup> In

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

28. *See id.*; Jerold S. Kayden, *Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the Nollan Invitation (Part I)*, 23 URB. LAW. 301, 314-15 (1991) (tracing “substantial advancement” test to *Euclid* due process test).

29. *Lingle*, 544 U.S. at 540.

30. *See* R.S. Radford, *Of Course a Land Use Regulation that Fails to Substantially Advance Legitimate State Interests Results in a Regulatory Taking*, 15 FORDHAM ENVTL. L. REV. 353, 358-69 (2004) (discussing origins of the substantial advancement test and suggesting that the Court knew it was borrowing due process language in creating a takings standard). Some have suggested that the substantial advancement test resulted neither from clumsiness nor from doctrinal conviction, but rather from a substantive advantage to including due process principles in takings law. *See* John D. Echeverria, *Lingle, Etc.: The U.S. Supreme Court’s 2005 Takings Trilogy*, 35 ENVTL. L. REP. 10,577, 10,581 (2005);

It seems far more likely, however, that something more substantive was going on. Ironically, it appears that both ‘liberals’ and ‘conservatives’ may, at different times, have found something to like in the notion that takings doctrine incorporated a due process-type means-ends analysis. If doctrinal coherence were the only objective in constitutional litigation, the *Agins* substantial advancement test might never have arisen, but that plainly is not the case.

Daniel A. Jacobs, *Indigestion from Eating Crow: The Impact of Lingle v. Chevron U.S.A., Inc. on the Future of Regulatory Takings Doctrine*, 38 URB. LAW. 451, 465 (2006) (“The almost calculated ambiguity of the cases leading up to *Agins*, combined with the heavy reliance on substantive due process cases from the height of the *Lochner*-era, points to something more than Justice O’Connor’s inadvertent historical confusion justification.”).

31. 480 U.S. 470 (1987).

32. *Id.* at 485.

33. *See id.* at 485-93. The Court did more than just confirm that the regulation is a rational way to further some legitimate purpose, however. The Court suggested that the

*Yee v. City of Escondido*,<sup>34</sup> the Court refused to consider whether a mobile home park rent control ordinance was a regulatory taking because it was not included in the question on which the Court granted certiorari.<sup>35</sup> But the Court did consider whether the regulation caused a physical taking. Along the way, the Court pointed out that whether the regulation benefited only current mobile home owners was irrelevant to the physical taking claim, but it “might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance.”<sup>36</sup> In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,<sup>37</sup> the jury had been instructed to find a taking if the city’s rejection of the plaintiff’s development proposal did not substantially advance any of the legitimate purposes the city had offered in support of its decision.<sup>38</sup> The Court acknowledged that it had not “provided . . . a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions,” but noted that the instructions were “consistent with our previous general discussions of regulatory takings liability” and rejected the claim of error.<sup>39</sup> The Court thus indicated that, if the city’s permit denial did not reasonably relate to the city’s expressed purposes, it would be a taking.<sup>40</sup> Finally, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,<sup>41</sup> the Court cited *Del Monte Dunes* and *Agins* in suggesting that, “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 in-

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importance of the public purpose is also a factor to weigh in deciding whether a regulation is a taking and concluded that the statute’s important public purpose “leans heavily against finding a taking.” *Id.* at 485.

34. 503 U.S. 519 (1992).

35. *Id.* at 535-38.

36. *Id.* at 530.

37. 526 U.S. 687 (1999).

38. *See id.* at 700.

39. *Id.* at 704-07.

40. *See* Radford, *supra* note 30, at 371-72, 376-79 (arguing that *Del Monte Dunes* “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”). *But see* John D. Echeverria, *Does a Regulation that Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L. 853, 874-75 (1999) (arguing that, even though *Del Monte Dunes* affirmed the jury’s finding of a taking, five of the Justices joined in opinions indicating uncertainty about the substantial advancement test).

41. 535 U.S. 302 (2002).

terest.”<sup>42</sup> The Court thus further hinted that the substantial advancement test required a proportional response to some public need.

This remark in *Tahoe-Sierra* reflects the evolution of the substantial advancement principle during the years following *Penn Central* and *Agins*. The suggestion that the means must be proportional evokes the Court’s 1994 decision in *Dolan v. City of Tigard*.<sup>43</sup> In *Dolan*, the Court held that when the government conditions development permission on the surrender of some private property interest, the government “must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”<sup>44</sup> That is, there must be rough proportionality between the means—the property being demanded as a condition to permission—and the end—the mitigation of unwanted impacts from the planned development for which permission is sought.<sup>45</sup> Of course, the property exacted from the owner is not actually taken from her because the owner does not have to surrender the property. The owner could instead refuse and simply abandon the planned development of the property for which permission was denied.<sup>46</sup> The Court in *Dolan* therefore reasoned, not that an unrelated or disproportionate exaction was a taking, but that it was an “unconstitutional condition”:

Under the well-settled doctrine of “unconstitutional conditions,” the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.<sup>47</sup>

This theory did not require the Court to consider whether some governmental act was a taking for failing to substantially advance a legitimate state interest. The Court simply had to decide that the government made surrender of the desired property interests (in this case, a portion of Dolan’s property along a creek for a

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42. *Id.* at 334.

43. 512 U.S. 374 (1994).

44. *Id.* at 391.

45. *Id.*

46. See, e.g., Alan Romero, *Two Constitutional Theories for Invalidating Extortionate Exactions*, 78 NEB. L. REV. 348, 352 (1999).

47. *Dolan*, 512 U.S. at 385.

greenbelt and public pathway) a condition to granting her discretionary development permission and that if the government would have required the owner to give up that property it would have been a taking. Obviously, the government would have had to pay just compensation if it had simply taken an easement over Dolan's property.<sup>48</sup> And just as obviously, the government required giving up the property without compensation in exchange for development permission. But the Court still had to consider whether the exaction was roughly proportional because, if it was, then the Court reasoned that the greater power to deny the permit altogether would include the lesser power to conditionally deny the permit if Dolan refused to grant the property interest that would at least roughly mitigate the harms caused by her proposed development. The Court did not explain this in *Dolan*, but accepted it without discussion from *Nollan v. California Coastal Commission*,<sup>49</sup> an earlier case invalidating an unrelated exaction.<sup>50</sup> The Court said that the unconstitutional conditions doctrine invalidates a condition only when "the benefit sought has little or no relationship to the property."<sup>51</sup> The Court thus logically was declaring rough proportionality to be an unconstitutional conditions standard, not a takings standard. However, the Court was not that clear about its logic and at some points in the opinion spoke as if rough proportionality were a refinement of the substantial advancement test of takings law. For example, the Court began its discussion of proportionality, "the required relationship to the projected impact of petitioner's proposed development," with an indirect reference to the substantial advancement test, citing *Nollan's* quotation of *Penn Central* that "[a] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose."<sup>52</sup> But such passages are misleading because the Court's theory did not find the exaction to be a taking, but an unconstitutional condition.

*Lingle* points out that the rough proportionality test of *Dolan* is not a takings test at all, but is part of the unconstitutional conditions doctrine.<sup>53</sup> The Court in *Lingle* therefore said that its hold-

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48. *See id.* at 384 ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred.")

49. 483 U.S. 825, 834 (1987).

50. *See id.* at 836-37; Romero, *supra* note 46, at 355.

51. *Dolan*, 512 U.S. at 385.

52. *Id.* at 388 (citing *Nollan*, 483 U.S. at 834 (internal quotation marks omitted) (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978)).

53. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547-48 (2005).

ing did not disturb the decisions in *Dolan* or *Nollan*.<sup>54</sup> However, this part of *Lingle* is a little misleading as well. Although *Dolan* certainly relied on the unconstitutional conditions theory, *Nollan* never referred to the doctrine and the opinion's reasoning does not correspond to unconstitutional conditions theory. In fact, *Nollan* clearly relied on takings law—and specifically the substantial advancement test.<sup>55</sup> The Court in *Nollan* began its central analysis by quoting the substantial advancement test from *Agins* and citing the *Penn Central* passage that a regulation may be a taking “if not reasonably necessary to the effectuation of a substantial government purpose.”<sup>56</sup> The Court then noted that it had not previously explained much about the substantial advancement test:

Our cases have not elaborated on the standards for determining what constitutes a “legitimate state interest” or what type of connection between the regulation and the state interest satisfies the requirement that the former “substantially advance” the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements.<sup>57</sup>

The Court also insisted in a footnote that the substantial advancement test was not the same as the rationality test of substantive due process:

[O]ur opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation “substantially advance” the “legitimate state interest” sought to be achieved, not that “the State ‘could rationally have decided’ that the measure

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54. *Id.* at 548.

55. See Lawrence Berger, *Public Use, Substantive Due Process and Takings—An Integration*, 74 NEB. L. REV. 843, 867 (1995);

In *Nollan v. California Coastal Commission*, the Court, in the first modern case to do so, actually struck down as a taking, rather than as a denial of substantive due process, a regulation that flunked a means/ends nexus review. Stated more precisely, the Court held to be a taking a regulation, wherein, though the ends sought by the regulators were legitimate, the means selected were not fairly directed toward those ends. (footnote omitted). *Id.*

56. *Nollan*, 483 U.S. at 834 (quoting *Penn Cent.*, 438 U.S. at 127).

57. *Id.* at 834-35 (footnote omitted).

adopted might achieve the State's objective." . . . [T]here 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.<sup>58</sup>

This was not mere dicta because the Court went on to apply the substantial advancement test to the regulation that prevented the Nollans from building a bigger house on their lot unless they dedicated to the public an easement along the beach. The Court assumed that the Coastal Commission could deny the Nollans the right to build a bigger house in order to preserve views of the beach and overcome psychological barriers to public use of the beach and acknowledged that this power to deny outright included the power to conditionally deny a permit unless the Nollans complied with conditions that helped mitigate those harms.<sup>59</sup> But "if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition . . . [that] unrelated condition alters the purpose [of the development ban] to one which, while it may be legitimate, is inadequate to sustain the ban."<sup>60</sup> The Court explained:

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

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58. *Id.* at 834 n.3 (internal citations omitted).

59. *Id.* at 835-36.

60. *Id.* at 837.

a valid regulation of land use but “an out-and-out plan of extortion.”<sup>61</sup>

The “constitutional [im]propriety,” then, was not that the Commission asked for a beachfront easement.<sup>62</sup> The impropriety was refusing to grant a permit to build a bigger house if the Nollans didn’t agree. Because the condition did not mitigate the harms that a bigger house would cause, the purpose of the building restriction was “altered”: now the only reason the Commission wouldn’t give the Nollans a permit was that they would not give up an easement without compensation. Thus, the Commission’s restriction on the Nollans’ property did not serve any “legitimate” purpose, but only the purpose of extorting an easement from them.<sup>63</sup> So even though *Dolan* shifted to an unconstitutional conditions theory, *Nollan* clearly did apply the substantial advancement test to find the building restriction a taking, even though doing so did not require the Court to define the “outer limits” of “legitimate state interests.”

*Lucas v. South Carolina Coastal Council*,<sup>64</sup> decided in 1992, also developed and clarified the substantial advancement test. In *Lucas*, the South Carolina Supreme Court had concluded that a law forbidding certain beachfront construction was not a taking or deprivation of substantive due process because the law merely prohibited activities akin to public nuisances.<sup>65</sup> Rejecting this conclusion, the U.S. Supreme Court explained the substantial advancement test as something different from the substantive due process rationality test.

The Court acknowledged that early takings cases “suggested that ‘harmful or noxious uses’ of property may be proscribed by government regulation without the requirement of compensation.”<sup>66</sup> However, *Penn Central* later explained that

[t]hese cases are better understood as resting not on any supposed “noxious” quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable

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61. *Id.*

62. *See* Romero, *supra* note 46, at 353.

63. *Id.* at 358-60.

64. 505 U.S. 1003 (1992).

65. *Id.* at 1022.

66. *Id.*

to all similarly situated property.<sup>67</sup>

Finally, *Lucas* explained the harmful or noxious use principle as “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.”<sup>68</sup> The Court thus suggested that preventing harmful use did not necessarily mean no compensation was due to the landowner. Rather, “prevention of harmful use’ was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value.”<sup>69</sup> In short, a regulation must advance a legitimate public purpose, whether that purpose is seen as preventing harm or not, or else it will require compensation. But the *Penn Central* passage quoted in *Lucas* also indicates that, if the regulation “produce[s] a widespread public benefit and appli[es] to all similarly situated property,” the regulation is not a taking.<sup>70</sup> Even though the substantial advancement test used substantive due process words, the Court in *Lucas* thus explained the test as the outgrowth of a takings principle. The principle, first expressed in “harmful or noxious use” language, is that the government must pay compensation for any regulation if it is not serving such a legitimate purpose—even though the Court explained that the distinction between preventing harms and conferring benefits is not a reliable way to identify sufficient regulatory purposes.<sup>71</sup> Furthermore, if a regulation advances a policy with widespread benefit and general applicability, then it does not require compensation.

### C. Rejection of the Substantial Advancement Test

The Supreme Court in *Lingle* disregarded much of the development of the substantial advancement test. The Court’s opinion begins by hinting that the substantial advancement test was never seriously considered by the Court and that it became part of takings law by accident:

On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase—however fortuitously coined. A quarter

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67. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 133 n.30 (1978).

68. *Lucas*, 505 U.S. at 1023-24 (alteration in original) (internal quotation marks omitted).

69. *Id.* at 1026.

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

71. *Lucas*, 505 U.S. at 1024-26.

century ago, in *Agins v. City of Tiburon*, the Court declared that government regulation of private property “effects a taking if [such regulation] does not substantially advance legitimate state interests . . . .” Through reiteration in a half dozen or so decisions since *Agins*, this language has been ensconced in our Fifth Amendment takings jurisprudence.<sup>72</sup>

The Court also claimed that the *Lingle* case was the Court’s “first opportunity to consider its validity as a freestanding takings test.”<sup>73</sup> This assertion overlooks the debate in *Nollan* over whether the substantial advancement test is equivalent to the substantive due process rationality test, a debate which was necessary to the Court’s reasoning that the land-use restriction was a taking because the unrelated condition revealed an extortionate purpose.<sup>74</sup> The assertion also minimizes the Court’s efforts in other cases to understand and explain the connection between due process rationality and takings.<sup>75</sup>

Regardless of what it said before, the Court in *Lingle* held that the substantial advancement test “prescribes an inquiry in the nature of a due process, not a takings, test.”<sup>76</sup> The substantial advancement test, the Court explained,

suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. But such a test is not a valid

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72. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 531-32 (2005) (alteration and ellipses in original) (citations omitted).

73. *Id.* at 540.

74. See *supra* notes 56-63 and accompanying text.

75. See Dreher, *supra* note 20, at 373:

At one level, therefore, *Lingle* can be seen as simply separating distinct strands of constitutional doctrine that had been mistakenly woven together, for reasons that now appear insubstantial or even accidental, twenty-five years ago in *Agins*. The full story of the Court’s century-long dalliance in takings law with due process principles, however, and *Lingle*’s significance for that debate, are considerably more complex.

76. *Lingle*, 544 U.S. at 540.

method of discerning whether private property has been “taken” for purposes of the Fifth Amendment.<sup>77</sup>

The Court reasoned that all the other tests of regulatory takings explore “the magnitude or character of the burden” on the property owner or the distribution of such burdens among property owners.<sup>78</sup> The magnitude or character of the burden determines whether the regulation’s “effects are functionally comparable to government appropriation or invasion of private property.”<sup>79</sup> The distribution of the burden is also relevant because the Takings Clause is meant “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>80</sup> But the substantial advancement test “tells us nothing about the actual burden imposed on property rights, or how that burden is allocated.”<sup>81</sup> The test ensures that the regulation is legitimate and useful, but

[t]he owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless “takes” private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.<sup>82</sup>

Furthermore, the Court maintained that “the ‘substantially advances’ inquiry probes the regulation’s underlying validity,” rather than its “effect on private property.”<sup>83</sup> “[T]he Takings Clause presupposes that the government has acted in pursuit of a valid public purpose.”<sup>84</sup> So if a regulation did not substantially

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77. *Id.* at 542 (citation omitted).

78. *Id.* (emphasis omitted).

79. *Id.*

80. *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001) (quoting *Armstrong* and describing this as “the purpose of the Takings Clause”).

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

82. *Id.*

83. *Id.*

84. *Id.*

advance a legitimate state interest, then the regulation would simply be “impermissible” because it did not satisfy the public use requirement of the Takings Clause or because it did not satisfy the requirements of substantive due process. That would be “the end of the inquiry” because “[n]o amount of compensation can authorize such action.”<sup>85</sup> The Court thus seemed to assume that the substantial advancement test was the same as the public use or substantive due process tests, which was the question that the Court had begun to debate in *Nollan*.<sup>86</sup> The Court in *Lingle* did not address the possibility that a regulation might be for public use under the Takings Clause and might not be so arbitrary and irrational that it denied substantive due process and yet still required compensation under a substantial advancement standard that was different from those broader, more deferential constitutional requirements.

As the Court understood the substantial advancement test, the test did not help identify unfair burdens on owners but instead evaluated the permissibility of the government’s action rather than the compensability, thus improperly duplicating the public use requirement and the substantive due process rationality test. Therefore, it is no wonder that *Lingle* concluded “that the ‘substantially advances’ formula is not a valid takings test, and . . . has no proper place in our takings jurisprudence.”<sup>87</sup>

### III. REQUIRING JUST COMPENSATION FOR ENFORCING IRRATIONAL REGULATIONS

Even if the substantial advancement test was not a valid takings test but merely a duplication of substantive due process, that does not necessarily mean that it has no place in takings jurisprudence. An arbitrary or irrational regulation could also take property from an owner and therefore require compensation, even though the regulation should never have been enforced. In such situations, there is no need for an independent takings test like the substantial advancement test. But in this Part I argue that a regulation that violates substantive due process requires compensation when it is enforced against the owner. The means-ends test of substantive due process therefore is still relevant to takings law, even though *Lingle* says the Takings Clause itself does not create a duplicate means-ends test.

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85. *Id.*

86. See *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 834 n.3 (1987); *id.* at 843 n.1 (Brennan, J., dissenting).

87. *Lingle*, 544 U.S. at 548.

*A. A Regulation May Both Deny Substantive Due Process and  
Require Compensation*

As the Court and others have pointed out, if a regulation does not rationally advance a permissible interest—if it denies substantive due process—then the regulation is simply invalid. Even if the government pays compensation, the regulation exceeds its power and cannot be enforced.<sup>88</sup> So it might seem that an invalid regulation under substantive due process would never have the chance to “take” an owner’s property.

But when a regulation is enacted, the government treats it as valid even if it is not. It may be a long time before someone challenges the regulation and a court declares that it denies substantive due process. In the meantime, the regulation may in fact be “taking” people’s property. That is, the regulation may be preventing certain uses of property and may be impairing the value of property.

Violating due process should not immunize a regulation from the just compensation requirement. An invalid regulation could take property just as much as a valid regulation could. Imagine two regulations. The first regulation declares that certain property owners cannot develop or even use their property in any way, perhaps because the property is located in a sensitive coastal area. The government has chosen a rational way to advance a valid public purpose. The regulation therefore satisfies substantive due process. But this rational regulation nevertheless denies the owner all economically viable use of her land, and therefore the government must pay just compensation under the Takings Clause. The second regulation also declares that certain property owners cannot develop or use their property, but this time for no good reason at all—the regulation arbitrarily says prime-numbered subdivision lots cannot be developed or occupied. The second regulation is not a rational way to advance any valid public purpose and denies substantive due process. It also denies the owner all economically viable use of her land just as much as the first regulation does.

When a regulated owner eventually challenges the first regulation, the owner will win and the government will have two choices:

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88. See, e.g., *id.* at 543 (“Conversely, if a government action is found to be impermissible—for instance because it fails to meet the ‘public use’ requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.”); William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1082 (1980) (“[I]f the regulatory measure is found void it will be unnecessary, indeed logically impossible, to consider whether it amounts to a taking.”).

continue to enforce the regulation and pay permanent compensation or repeal (or acceptably modify) the regulation and pay temporary compensation for the period during which the regulation took the property. The Supreme Court settled this point in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.<sup>89</sup> The Court explained:

Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain. . . . [W]here the government’s activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.<sup>90</sup>

Of course, the Court also suggested that sometimes temporary compensation will not be required,<sup>91</sup> but that is beside the point right now. Whatever circumstances will require compensation for a temporary regulatory taking—and there surely are such circumstances—assume those circumstances are present in this case.

When a regulated owner eventually challenges the second regulation, the second owner will also win. But this time, the government will not have the choice to continue to enforce the regulation because the regulation exceeds the police power and is invalid.<sup>92</sup> But there is no reason why an involuntary repeal of the invalid regulation should change the requirement of compensation for the temporary taking that preceded repeal. Whether the government had the right to do so or not, the government did in fact restrict use of the land in a way that made it economically useless. That regulation actually deprived the owner of the same value of which the first owner was deprived for as long as the regulation

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89. 482 U.S. 304 (1987).

90. *Id.* at 321; *see also* Berger, *supra* note 55, at 861-62 (“[W]here a regulation is held to be a taking, the government has the option of continuing to enforce it permanently upon payment of damages or to acquiesce in its being voided. This is a perfectly appropriate result. If the regulation has a legitimate public purpose, the government should be allowed to continue it in effect . . .”) (footnote omitted).

91. *See First English Evangelical*, 482 U.S. at 321 (“We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.”).

92. *See, e.g.,* Berger, *supra* note 55, at 869-70 (arguing that if a land use regulation is for no legitimate purpose, “the regulation should be voided as a violation of substantive due process, and . . . the government should not have the option of enforcing the regulation even upon payment of full compensation”).

remained in effect. Both owners suffered the same loss, and that loss qualifies as a taking.

Because the Takings Clause does not limit the police power, the Court has reasoned that the Clause applies only to legitimate exercises of the police power. The Court in *Lingle* stressed that the Takings Clause does not prevent any “governmental interference with property rights,” but simply requires the government to pay compensation when “otherwise proper interference amount[s] to a taking.”<sup>93</sup> As Justice Kennedy put it earlier,

the Takings Clause . . . has not been understood to be a substantive or absolute limit on the government’s power to act. The Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional . . . .<sup>94</sup>

But that does not mean that the Takings Clause never requires compensation for otherwise unconstitutional acts. It just means that the Takings Clause asks a different question than other constitutional provisions: rather than asking whether the government acted validly or invalidly, it asks whether the government took property. Both valid and invalid actions can take away a person’s property. The government does not have the right to enforce irrational regulations, but if the government does so anyway, the requirement of just compensation is “self-executing” and the government should have to pay after the fact.<sup>95</sup>

Some have argued that the Takings Clause itself prevents compensation for regulations that deny substantive due process. The Takings Clause says property may not be taken for “public use” without just compensation. The Court has construed the public use clause not to merely describe compensable actions, but to actually restrict the eminent domain power—to prohibit exercising eminent domain for something other than a legitimate public purpose.<sup>96</sup> This suggests the Takings Clause does more than just

93. *Lingle*, 544 U.S. at 537 (quoting *First English Evangelical*, 482 U.S. at 315).

94. *Eastern Enters. v. Apfel*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

95. *First English Evangelical*, 482 U.S. at 315 (“We have recognized that a landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the constitutional provision with respect to compensation . . . .” (internal quotation marks omitted) (citation omitted)).

96. See, e.g., *Kelo v. City of New London*, 545 U.S. 469, 480 (2005) (“The disposition of this case therefore turns on the question whether the City’s development plan serves a ‘public purpose.’ ”); Berger, *supra* note 55, at 844 (“[The] obvious purpose [of the public use

“presuppose” a valid governmental action: it actually declares certain actions—takings that are not “for public use”—invalid. The Court has said that “for public use” means the same thing as substantive due process: the regulation is a rational way to advance a valid public purpose.<sup>97</sup> Therefore, the argument goes, the Takings Clause only requires just compensation for regulations that are for a public use and thus are also valid under substantive due process. Irrational regulations are simply void and never invoke the requirement of just compensation.<sup>98</sup>

But that would be a strange rule: the government must pay compensation if it takes for a legitimate purpose, but the government need not pay anything if it takes for an illegitimate purpose.<sup>99</sup> Even if the public use clause limits the eminent domain power, that doesn’t mean the public use clause also limits the obligation to pay just compensation if a taking has actually occurred. Sure, the government does not have the right to take property for illegitimate purposes. As presently understood, the public use requirement and the substantive due process doctrine both say that. But if the government does so anyway, it does not change the fact

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clause] is to prevent government from seizing, even with compensation, the property of one person merely to benefit another private person.”).

97. See *Kelo*, 545 U.S. at 480 (“Without exception, our cases have defined [public use] broadly, reflecting our longstanding policy of deference to legislative judgments in this field.”); *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 240 (1984) (“The ‘public use’ requirement is thus coterminous with the scope of a sovereign’s police powers.”); Kayden, *supra* note 28, at 316.

98. See, e.g., Dreher, *supra* note 20, at 388 (“Thus, a conclusion that a government action does not serve a valid public purpose would seem to *preclude* a finding of a taking, rather than support it.”); Echeverria, *supra* note 40, at 876 (stating argument that “a valid government action is a prerequisite for a finding of a taking and, therefore, there can be no taking if the action fails means-ends review, regardless of the action’s impact on the property owner.”); Romero, *supra* note 46, at 364-65 (“Therefore, if the takings and due process standards are the same, then any regulation that does not substantially advance a legitimate state interest is also not for a public use, and cannot be a taking at all. It is simply invalid under the Due Process Clause.”).

99. See *Cole v. City of La Grange*, 113 U.S. 1, 7-8 (1885):

The express provisions of the constitution of Missouri tend to the same conclusion. It begins with a declaration of rights, the sixteenth article of which declares that ‘no private property ought to be taken or applied to public use without just compensation.’ This clearly presupposes that private property cannot be taken for private use. Otherwise, as it makes no provision for compensation except when the use is public, it would permit private property to be taken or appropriated for private use without any compensation whatever. *Id.* (citations omitted);

John A. Humbach, *Constitutional Limits on the Power to Take Private Property: Public Purpose and Public Use*, 66 OR. L. REV. 547, 554 (1988):

[T]he words ‘for public use’ may be read as a proviso under which takings for private use are simply placed outside the subject matter of the just compensation clause. This reading would admit (though not *compel*) the possibility that the government could take for private use without paying at all—at least so far as the just compensation clause is concerned. *Id.*

that the government has taken property without compensation. In that case, the government should not have the choice to continue enforcing the regulation, but if the regulation has already effected a taking, then compensation should be required. In other words, the public use requirement might forbid takings for private or otherwise illegitimate uses, but it does not mean that no compensation is required if the government nevertheless takes property for private or otherwise illegitimate uses in spite of that prohibition. Contrary to the Court's suggestion in *Lingle*, awarding just compensation does not mean that the Court "authorize[s] such action."<sup>100</sup> Awarding compensation does nothing more than remedy an unfair burden on a property owner. Other provisions, such as the public use clause and substantive due process, determine whether the action is authorized.

The Just Compensation Clause surely is meant to require compensation whenever the government actually takes away someone's property, and it would be perverse if the government could defend against a claim for compensation by saying it took the person's property for an illegitimate reason.<sup>101</sup> But even if the public use clause implies that the Fifth Amendment itself requires the government to pay compensation only when it takes property for legitimate purposes, neither the public use clause nor any other part of the Fifth Amendment suggests the false inference that the government can therefore take for non-public uses without paying compensation. As Justice Thomas explained in his dissent in *Kelo v. City of New London*:

Alternatively, the [Public Use] Clause could distinguish those takings that require compensation from those that do not. That interpretation, however, "would permit private property to be taken or appropriated for private use without any compensation whatever." In other words, the Clause would require the government to compensate for takings done "for public use," leaving it free to take property for purely private uses without the payment of compensation. This would contradict a bedrock principle

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100. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

101. John Humbach argues that the Just Compensation Clause does not require compensation for such takings, but the Due Process Clause does. *See* Humbach, *supra* note 99, at 587 ("[A] reassignment by the state of private property rights may be reasonably necessary in light of the public interest and yet still be impermissible as a matter of due process, unless provision is made to compensate those whose rights are taken.").

well established by the time of the founding: that all takings required the payment of compensation.<sup>102</sup>

If the government has actually taken property, the principle of the Takings Clause requires compensation regardless of whether the government had a permissible reason for taking it.

*B. A Regulation May Require Compensation Because It Violates Substantive Due Process*

It might be a rare case in which an irrational regulation is enforced so long and is so burdensome that it would amount to a taking. But, rare or not, compensation should be required in such a case. So it is important to at least recognize that invalidity under substantive due process should not prevent claims of just compensation. But so far I have only talked about irrational regulations that take property because of the extent of the burden they impose, not merely because of their irrationality. That's enough to make the point that an invalid regulation under substantive due process may also be a taking.<sup>103</sup>

But the bigger question is whether a regulation might be a taking simply because it is not a rational way to advance some valid public purpose, regardless of the burden it imposes on the owner. There is a good argument that a regulation might be a taking simply because of irrationality, but the Court's opinion in *Lingle* did not address this argument. However, the Court itself suggested the argument earlier in *Lucas*. As discussed above, the *Lucas* opinion connected the contemporary substantial advancement test to the early cases that allowed the government to prevent harmful land uses without compensation.<sup>104</sup> At the end of that discussion,

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102. 545 U.S. 469, 507-08 (2005) (Thomas, J., dissenting) (citations omitted). An owner may also have a claim for damages that result from the deprivation of substantive due process, under § 1983 of the Civil Rights Act. See, e.g., L. Kinvin Wroth, *Lingle and Kelo: The Accidental Tourist in Canada and NAFTA-Land*, 7 VT. J. ENVTL. L. 62 (2005-2006):

In sum, *Lingle* and *Kelo* mean that, if governmental action is not warranted by the police power because it does not satisfy the due process rational relationship test, it is not a public use and the government cannot undertake the action even if it compensates the affected property owner. The owner's remedy in such a case may be an action for violation of the Due Process Clause under Section 1983 of the Civil Rights Act.

But the Civil Right Acts certainly did not change the meaning or effect of the Fifth Amendment, which requires compensation for any actual taking.

103. Cf. Echeverria, *supra* note 40, at 876 (stating the argument that even if "an invalid or arbitrary government action could not be held to be a taking on that basis, [it] might nonetheless be found to be a taking because it has deprived the owner of all economic use of the property").

104. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1020-26 (1992); see also *supra*

the *Lucas* Court said that “prevention of harmful use’ was merely our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value.”<sup>105</sup> The Court thus suggested that “*any* regulatory diminution in value” would require compensation unless it had a “police power justification.”<sup>106</sup>

The essential premise of this argument is that any regulatory action taking away any property right would be a taking if there was not a public justification that outweighed the private owner’s interests. Unless a land use regulation merely duplicates the “restrictions that background principles of the State’s law of property and nuisance already place upon land ownership,”<sup>107</sup> a regulation will inevitably deprive a landowner of some property right she would otherwise have had. The government has broad powers within the boundaries of substantive due process to adopt such regulations. But that is because this police power, when exercised, “override[s] . . . the substantive protections of the Constitution.”<sup>108</sup> It is not because the mere existence of the police power simply eliminates all other rights that might, at some point, conflict with the police power.<sup>109</sup> The owner retains all common law property rights that have not been constitutionally restricted.

Denying any of those property rights does “take” property from the owner, but sometimes does not require compensation because the police power justifies the deprivation. Justice Holmes’s opinion for the Court in *Pennsylvania Coal Co. v. Mahon*<sup>110</sup> reflects this

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notes 64-71 and accompanying text.

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

106. See Dreher, *supra* note 20, at 385 (“The Court [in *Lucas*] treated its early due process cases not as establishing a broad categorical exemption from takings liability, but rather as reflecting only the police power predicate for government action to affect private property at all.”).

107. *Lucas*, 505 U.S. at 1029.

108. Richard A. Epstein, *The Supreme Court, 1987 Term—Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 59 (1988); see also Romero, *supra* note 46, at 364.

109. See Epstein, *supra* note 108, at 60 (“[E]ven this broad construction of the police power does not give the state ordinary ownership rights over the property that it may restrict or regulate.”). The Supreme Court’s 1798 decision in *Calder v. Bull* seems to acknowledge that any deprivation of a property right would ordinarily require just compensation. Justice Chase wrote:

It is not to be presumed, that the federal or state legislatures will pass laws to deprive citizens of *rights* vested in them by *existing* laws; unless for the benefit of the whole community; and on making full satisfaction. The restraint against making any *ex post facto* laws was not considered, by the framers of the constitution, as extending to prohibit the depriving a citizen even of a *vested right to property*; or the provision, ‘that *private* property should not be taken for PUBLIC use, without just compensation,’ was unnecessary. 3 U.S. 386, 394 (1798).

110. 260 U.S. 393 (1922).

perspective. Justice Holmes described the contract right to mine coal without maintaining surface support as a very valuable estate in land.<sup>111</sup> The regulation limiting the right to mine coal did not completely prohibit coal mining. Still, the Court said that this property interest was protected by the Just Compensation Clause of the Fifth Amendment. But the “seemingly absolute protection” of property rights—requiring compensation whenever property is taken—is “qualified by the police power.”<sup>112</sup> The danger is that “the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.”<sup>113</sup> So the Court did not say that the Just Compensation Clause does not protect owners at all from less burdensome regulatory deprivations, but rather that the protection is “qualified” by the police power. The Court explained that the police power qualifies the just compensation requirement because, practically, “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”<sup>114</sup> Not only is this qualification a practical necessity, it is “an implied limitation” on property rights—to some extent, they are subject to and “must yield to the police power.”<sup>115</sup> But this implied limitation does not mean that any action pursuant to the police power justifies deprivation of property without compensation: the implied police power limitation “must have its limits or the contract and due process clauses are gone.”<sup>116</sup>

Ordinarily, as in *Pennsylvania Coal*, we assume that the government is legitimately exercising the police power when it regu-

111. *Id.* at 414.

112. *Id.* at 415.

113. *Id.*

114. *Id.* at 413.

115. *Id.*; see also Mark W. Cordes, *Takings Jurisprudence as Three-Tiered Review*, 20 J. NAT. RES. & ENVTL. L. 1, 44-45 (2005-2006) (explaining that regulatory burdens are generally not unfair in part because “our legal system has long recognized that private property ownership is subject to a broader public interest” and therefore “this accommodation between private and public interests is an inherent limitation in the nature of private property to begin with, rather than a deprivation of interests”).

116. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). The Court does not mention the Takings Clause in this sentence, and some might think this discussion does not apply to the Takings Clause. See, e.g., Glen E. Summers, Comment, *Private Property Without Lochner: Toward a Takings Jurisprudence Uncorrupted by Substantive Due Process*, 142 U. PA. L. REV. 837, 848 (1993) (“What some observers have failed to understand, however, is that these comments were made in the context of a general discussion of the validity of the Kohler Act, not under the Takings Clause, but under the Due Process and Contract Clauses.”). However, the opinion immediately goes on to say that the extent of the diminution is one factor in determining the limits on the police power, and when that diminution “reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.” *Penn. Coal*, 260 U.S. at 413. So the Court clearly meant to say that the police power can limit property use to some extent, but at some point it goes too far and just compensation is required.

lates land use—that is, that the government rationally thinks the regulation will serve some public interest. As Justice Holmes said, “[w]e assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of eminent domain.”<sup>117</sup> In such cases, “the question at bottom is upon whom the loss of the changes desired should fall.”<sup>118</sup> “One fact for consideration” in deciding whether the loss should fall on the individual owner is “the extent of the diminution.”<sup>119</sup>

But if a court were not justified in assuming that a regulation was “passed upon the conviction that an exigency existed that would warrant it,” there is an additional objection to the regulation.<sup>120</sup> Regardless of the extent of the diminution, if the police power has not been exercised in a way that qualifies the owner’s property rights, then the “seemingly absolute protection” of the Just Compensation Clause remains.<sup>121</sup> The government does not have to pay for every change in the law because property rights are implicitly qualified by the police power. In the words of *Lucas*, “any regulatory diminution in value” that is not accompanied by compensation must be justified by the police power.<sup>122</sup> Private property rights, whatever their magnitude, can be taken only if the government pays compensation or if the police power—the power to adopt rational means to accomplish legitimate public ends—qualifies or overrides the private property interest.

Deciding when the police power qualifies or overrides private property interests is obviously difficult. But as Justice Holmes indicated, there must be a limit to the implied police power qualification of property rights or else rational regulations would never take property.<sup>123</sup> That limit may depend both on the extent of the individual burden and the character of the public interest. But for this argument, it is enough to say that there is a limit and it does not matter that courts may change those limits over time or that the accepted scope of the police power may change over time. If a land use regulation is not an exercise of the police power at all—if it is not a valid exercise of the police power because it is not a rational way to accomplish a permissible public purpose—then the regulation is not in any degree a manifestation of a power that

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117. *Penn. Coal*, 260 U.S. at 416.

118. *Id.*

119. *Id.* at 413.

120. *Id.* at 416.

121. *See id.* at 415.

122. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1026 (1992); *see also supra* note 105 and accompanying text.

123. *Penn. Coal*, 260 U.S. at 413.

qualifies property rights or overrides the Just Compensation Clause. The Just Compensation Clause thus still requires compensation for the property deprivation.

This argument does not advocate a “stand-alone regulatory takings test,” which the Court rejected in *Lingle*.<sup>124</sup> The means-ends test comes from the Due Process Clause. The argument is simply that government must pay compensation for a temporary taking when a land use regulation violates substantive due process but nevertheless is somehow applied against a property owner. This would certainly mean greater risk of loss for governments regulating land use because an irrational regulation could result in compensation, not just invalidation. But that risk is not significantly different from the risk of having to pay compensation because the regulation imposes too great a burden or results in an unfairly distributed burden. The government can be expected to understand the requirements of substantive due process and avoid violations, just as it is expected to understand and avoid uncompensated regulatory takings.

This argument also does not justify closer judicial scrutiny of means and ends. The Court in *Lingle* feared that the substantial advancement test could “be read to demand heightened means-ends review of virtually any regulation of private property.”<sup>125</sup> The Ninth Circuit’s decision in the case had certainly required heightened review, concluding that the substantial advancement test requires a regulation to “bear[] a ‘reasonable relationship’ to that interest,” indicating “an intermediate level of review, more stringent than the rational basis test used in the due process context.”<sup>126</sup> But my argument here is that, despite the Court’s rejection of a stand-alone takings test, a substantive due process violation itself may require compensation under the Takings Clause. This argument therefore would not permit more intrusive judicial scrutiny of the government’s judgments as a separate means-ends test

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124. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005).

125. *Id.* at 544. It does not seem the federal courts had used the test “to substitute their predictive judgments for those of elected legislatures and expert agencies.” *Id.* Very few federal courts ever held that a land use regulation failed to substantially advance a legitimate state interest. See Jacobs, *supra* note 30, at 479-81:

Other than in *Agins* itself, there were only a few cases in the federal and state courts that had the chance to apply the test, and those that did rarely find a challenged law failed to substantially advance a legitimate state interest. Therefore, although the federal applications of the *Agins* test are now void of all precedential value . . . , the failure of the cases to utilize the test to place limits on government regulation made the voiding a mere formality (footnote omitted).

126. *Chevron USA, Inc. v. Bronster*, 363 F.3d 846, 853-54 (9th Cir. 2004); see also Radford, *supra* note 30, at 382-88 (arguing that substantial advancement test requires heightened scrutiny).

might.<sup>127</sup> The risk of an innocent mistake resulting in compensation therefore would be small because of courts' liberal deference to legislative judgments about whether regulations are rational means to accomplish permissible purposes under substantive due process doctrine.<sup>128</sup>

#### IV. UNIQUE CONSIDERATIONS OF MEANS AND ENDS IN TAKINGS LAW

Even if just compensation were not required simply because a regulation took recognized property rights without a police power justification, *Lingle* itself affirms principles of takings law to which regulatory means and ends may still be relevant. The Court's rejection of the substantial advancement test should not be taken as rejection of such considerations of means and ends in takings law.

The *Lingle* opinion repeated that the Takings Clause is meant to compensate property owners when a regulation would otherwise "forc[e] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."<sup>129</sup> The Court suggested that the public should bear the burden if the individual burden is too great or the regulation disproportionately burdens some owners. The substantial advancement test is not a valid takings test because it

reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners. In consequence, this test does not help to identify those regulations whose

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127. See Dreher, *supra* note 20, at 402 ("But the 'substantially advances' formulation offered conservatives much more: an opportunity to challenge *directly* the economic underpinnings of liberal government regulation, free from the suffocating deference to legislative judgment that would otherwise apply if such a challenge were mounted under due process."); Echeverria, *supra* note 40, at 878 ("Third, the label might matter if, in affirming the means-ends test as part of takings analysis, the Supreme Court were to formulate the test to be more demanding of government than the modern, deferential due process means-ends test.").

128. See, e.g., *Zahn v. Bd. of Public Works*, 274 U.S. 325, 328 (1927):

[I]t is impossible for us to say that their conclusion in that respect was clearly arbitrary and unreasonable. The most that can be said is that whether that determination was an unreasonable, arbitrary, or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.

129. *Armstrong v. United States*, 364 U.S. 40, 49 (1960), *quoted in Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 543 (2005).

effects are functionally comparable to government appropriation or invasion of private property . . . .<sup>130</sup>

The objective is to determine “when justice might require that the burden be spread among taxpayers through the payment of compensation,” so a takings test must reveal something “about the actual burden imposed on property rights, or how that burden is allocated.”<sup>131</sup>

The Court said that the substantial advancement test tells us nothing about the extent or distribution of the burden. But both the nature of the regulatory purpose and the means of accomplishing that purpose may tell us something about the distribution of the burden. The substantial advancement test could have matured into a takings principle, distinct from substantive due process, that considered the ways in which ends and means might affect the fairness of regulatory burdens. But even if we do not use the substantial advancement terminology anymore because of its genealogy and confusing similarity to substantive due process formulations, we still need some words that will direct attention to the ways in which regulatory means and ends are relevant to takings claims.

The courts could use words from *Penn Central* without making up new words. The Supreme Court in *Lingle* once again reaffirmed that most “takings challenges are governed by the standards set forth in *Penn Central*.”<sup>132</sup> The *Penn Central* “factors that have particular significance” include “the character of the governmental action.”<sup>133</sup> This “character” factor could be the verbal home for appropriate considerations of means and ends in takings cases.

“Character” is a broad term inviting many relevant considerations.<sup>134</sup> In fact, the Court’s takings opinions referring to the character factor suggest that any characteristic relating to the fairness of the regulatory burden is relevant to the takings decision. *Penn Central* did not elaborate much on what aspects of the “character of the governmental action” might be relevant to a regulatory takings challenge, but the Court gave some hint in the next sentence of the opinion: “A ‘taking’ may more readily be found when the interference with property can be characterized as a physical inva-

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130. *Lingle*, 544 U.S. at 542.

131. *Id.* at 543.

132. *Id.* at 538.

133. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

134. See R.S. Radford, *Just a Flesh Wound? The Impact of Lingle v. Chevron on Regulatory Takings Law*, 38 URB. LAW. 437, 448 (2006) (“What considerations might reasonably be included in the ‘character’ calculus remains as great a mystery today as the day *Penn Central* was drafted.”).

sion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>135</sup> This is not merely another way of determining the magnitude of the regulation, because a physical invasion does not necessarily impose a greater burden than a regulation that limits the owner’s use of the property.<sup>136</sup> Rather, as the Court later declared, a regulation authorizing a “permanent physical occupation of property” is a taking “without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.”<sup>137</sup> The Court reasoned that such a regulation “is perhaps the most serious form of invasion of an owner’s property interests” because it interferes with the rights to possess, use, and dispose of property and requires suffering a stranger to invade and occupy the land without any “control over the timing, extent, or nature of the invasion.”<sup>138</sup>

This aspect of the regulatory “character” thus concerns the qualitative burden on the owner—it hurts people more to invade their property than to restrict their use of the property. But there are other regulatory characteristics that might be relevant to the qualitative burden. Elsewhere in the *Penn Central* opinion, the Court stated that “government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute ‘takings.’”<sup>139</sup> Again, such actions do not necessarily impose a greater regulatory burden. They are more likely to be takings because they are more likely to impose unfairly distributed burdens. The government in such cases is clearly not just regulating property to harmonize conflicting land uses, but is making some few owners “bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>140</sup> The government generally has to pay the cost of resources necessary to perform its uniquely public functions; it is not fair to make a few owners provide those resources by regulating them.<sup>141</sup>

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135. *Id.* (citation omitted).

136. See Steven J. Eagle, “Character” as “Worthiness”: A New Meaning for *Penn Central*’s Third Test?, 27 ZONING & PLANNING L. REP. 2 (2004) (“However, trivial physical invasions, such as the roof-mounted bread-box sized cable TV box in *Loretto* that was intended to facilitate service to apartment house tenants, often benefit third parties and impose far lighter burdens on owners than severe restrictions on their use of land.”).

137. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

138. *Id.* at 435-36.

139. *Penn Central*, 438 U.S. at 128.

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

141. “Scholars who have addressed the nature of *Penn Central*’s ‘character’ prong are broadly in agreement that the test must somehow relate to the considerations of fairness that have animated much of the Court’s recent takings jurisprudence.” Radford, *supra* note

On the other hand, *Penn Central* indicated that a regulation is less likely to be a taking if it is part of “some public program adjusting the benefits and burdens of economic life to promote the common good.”<sup>142</sup> This characteristic of a regulation likewise tells us only about its character or quality, not about the magnitude of the burden. Of course, any regulation adjusts benefits and burdens in some way, even if it makes some complete losers. But regulations that adjust benefits and burdens to promote the common good are less likely to unfairly burden individual owners because they are part of a wide-scale effort to benefit the whole society and thus to benefit all individual owners. Individuals will sometimes lose, but will also sometimes win. *Pennsylvania Coal* suggested that, when a particular regulation both burdens and benefits an owner by making others subject to the same restrictions, this “average reciprocity of advantage” justifies the law without requiring compensation for the regulatory burden.<sup>143</sup>

In *Lucas*, the Court expressly connected the “adjusting benefits and burdens” phrase from the character factor of *Penn Central* with the “reciprocity of advantage” justification from *Pennsylvania Coal*. The Court explained:

Surely, at least, in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted, it is less realistic to indulge our usual assumption that the legislature is simply “adjusting the benefits and burdens of economic life” in a manner that secures an “average reciprocity of advantage” to everyone concerned.<sup>144</sup>

The Court thus indicated that at least one reason regulations “adjusting the benefits and burdens of economic life” are less likely to take property is that they secure an “average reciprocity of advantage.”<sup>145</sup> As I will argue later, this characteristic of governmental

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134, at 449. Steven Eagle has argued that *Penn Central*'s expression of the character element “differentiates only between physical and regulatory actions. It gives an undifferentiated grade of ‘pass’ to all programs promoting the ‘common good,’ regardless of the extent to which they do so or to how evenly they distribute corresponding burdens. Fairness, it would seem, requires more.” Eagle, *supra* note 136.

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

143. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

144. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1017-18 (1992) (internal citations omitted).

145. See John D. Echeverria, *The “Character” Factor in Regulatory Takings Analysis*, ALI-ABA Continuing Legal Education: Wetlands Law and Regulation SK081 ALI-ABA 143, 150-51 (June 9-10, 2005) (identifying reciprocity as a possible definition of the “character” of the governmental action). The Court has not always been so clear about its understanding of why “adjusting benefits and burdens” is a justification for uncompensated regulation. In

regulation relates to the legitimacy of the regulatory means and ends in a means-ends analysis that is distinctive to the Takings Clause and different from the substantive due process means-ends analysis that *Lingle* declared is not required by the Takings Clause.

The Court itself has previously suggested that whether a regulation substantially advances a legitimate purpose is part of the relevant “character of the governmental action.” In *Keystone Bituminous Coal Ass’n v. DeBenedictis*,<sup>146</sup> the Court quoted the substantial advancement test from *Agins*, citing *Penn Central* as additional support, then proceeded to apply the substantial advancement test to the case.<sup>147</sup> The Court said that, “unlike the Kohler Act, the character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare.”<sup>148</sup> The Court thus considered the substantial advancement of a legitimate public purpose to be a relevant characteristic of the governmental action under the *Penn Central* framework.<sup>149</sup> Justice O’Connor suggested the same perspective in her concurring opinion in *Palazzolo v. Rhode Island*.<sup>150</sup> She said that one significant factor in takings decisions is “the character of the governmental action.’ The purposes served, as well as the effects produced, by a particular regulation inform the takings analysis.”<sup>151</sup> O’Connor then cited the *Penn Central* version of the means-ends test: “a use restriction on real property may

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*Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), the Court held that federal legislation did not take property by requiring employers withdrawing from multiemployer pension plans to pay the employer’s share of the plans unfunded vested benefits. *Id.* at 217. The Court addressed the *Penn Central* factors, and in discussing the character of the governmental action, said: “This interference with the property rights of an employer arises from a public program that adjusts the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking requiring Government compensation.” *Id.* at 225. The opinion does not clearly indicate whether the Court felt that the law was not a taking simply because it was an economic regulation to promote the common good, or whether it felt that the law provided reciprocal benefits by requiring all withdrawing employers to contribute their proportionate share, thus helping all participating employers to provide benefits to their employees.

146. 480 U.S. 470 (1987).

147. *Id.* at 485.

148. *Id.*

149. See Echeverria, *supra* note 145, at 148-49 (“In applying the first branch of this test, the Court focused in various ways on what it termed the ‘character’ or ‘nature’ of the government action, apparently equating the *Penn Central* character factor with the *Agins* substantially advances test.”); John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL’Y 171, 189 (2005) (“The Court [in *Keystone*] at several points equated the substantially advances inquiry with an examination of the ‘character’ or ‘nature’ of the government action.”).

150. 533 U.S. 606 (2001).

151. *Id.* at 634 (O’Connor, J., concurring) (internal citations omitted).

constitute a ‘taking’ if not reasonably necessary to the effectuation of a substantial public purpose.”<sup>152</sup> These passages likewise suggest that the “character” factor includes consideration of the regulatory purposes.

The Court’s decision in *Hodel v. Irving*<sup>153</sup> includes another, more subtle, consideration of regulatory ends under the “character” label. The Court held that the Indian Land Consolidation Act of 1983 took property by declaring that certain small fractional interests in Indian lands would escheat to the tribe without requiring compensation. The Court described the “character” of this statute as “extraordinary” because it essentially eliminated the right to pass on this type of property to one’s heirs, “even when the passing of the property to the heir might result in consolidation of property—as for instance when the heir already owns another undivided interest in the property.”<sup>154</sup> The Court thus suggested that if a statute restricts property even when it serves no legitimate purpose, that characteristic makes it more likely to be a taking.

So, even if a regulation is not necessarily a taking because of its irrationality under the substantive due process doctrine, sometimes the legislative ends and the effect of the chosen means may indicate that a regulatory burden is unfairly distributed and should require compensation. Even after abandoning the “substantially advances” test of *Agins*, the Court still affirmed the relevance of the “character of the governmental action.”<sup>155</sup> In some cases, at least, the relevant character of a land use regulation includes the purposes it serves and whether the chosen means accomplish those purposes. The next Part discusses particular ways in which, consistent with *Lingle*, means and ends may still be relevant to determination of a taking.

#### V. HOW THE REGULATORY CHOICE OF “MEANS” MAY TAKE PROPERTY

If the regulatory means do not advance any public purpose, the regulated owner may understandably feel unjustly burdened. The owner loses some of her property rights for no good reason at all. Why should she be made to give up anything when it is not legiti-

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152. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978).

153. 481 U.S. 704 (1987).

154. *Id.* at 716.

155. Benjamin Barros has argued that, despite the Court’s reaffirmation of the *Penn Central* character factor in *Lingle*, the Court’s analysis “illustrates why the character of the government act generally should have no role in the takings analysis” other than in “relatively narrow circumstances” when the regulation involves a physical invasion or is abating a common law nuisance. Barros, *supra* note 26, at 353-54.

mately benefiting the public?

Nevertheless, the Court in *Lingle* suggested that this is not the sort of unfairness the Takings Clause is meant to prevent. After all, why should the public have to pay either, if the public is not gaining anything from the regulation?<sup>156</sup> Rather, the Court reasoned that the Takings Clause is meant to avoid unfairness in the magnitude, character, or distribution of regulatory burdens.<sup>157</sup> Although one might still say that the irrational “character” of a regulation makes it more unfair, the Court said that would not require compensation because “an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless ‘takes’ private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.”<sup>158</sup> While irrational regulations are rare—and thus unique in a way—they may merely impose a modest burden on virtually all landowners and in that sense not unfairly burden particular individuals.

But the regulatory means may be unfair in other ways, consistent with the principles expressed in *Lingle*, because of their irrationality or arbitrariness or the extent to which they accomplish a legitimate purpose.

*A. Means That Advance a Purpose for Others, but Not for the Regulated Owner*

One of these ways is when the means advance a legitimate purpose for some, but not for the regulated owners themselves. The extent to which the regulatory means accomplishes the public purpose may in this situation indicate unfairly distributed regula-

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156. See, e.g., Kayden, *supra* note 28, at 322:

Finally, the fundamental purpose of the just compensation clause—to assure that private individuals do not bear burdens which, in all fairness and justice, should be borne by society as a whole—is not necessarily furthered by a guarantee of means-ends rationality. Regulations failing to substantially advance legitimate state interests do not inherently implicate concerns about distributional fairness to a greater degree than regulations that substantially advance legitimate interests. Indeed, a regulation may reflect a perfect fit between means and ends and advance wonderful public interests, yet unfairly distribute public burdens. The thing about ‘irrational’ regulations is that they should not be borne by either society as a whole or by a single individual, because they are beyond the constitutional authority of the government to enact in the first place. (footnote omitted).

157. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) (criticizing the substantial advancement test for not revealing anything “about the *magnitude or character of the burden*” or “how any regulatory burden is *distributed* among property owners”).

158. *Id.* at 543.

tory burdens. This sort of unfairness might also be described as an unfair end: to benefit a group of owners other than the regulated owners.

From early on, the Supreme Court recognized that land use regulations may require compensation if they burden an owner to benefit others. In *Pennsylvania Coal*, the Court observed that the challenged statute, which restricted the mining of coal in order to maintain surface support, benefited other private parties who owned surface land, but not the coal company itself. The Court acknowledged that there is a public interest even in protecting the welfare of private surface owners but pointed out that the statute “does not apply to land when the surface is owned by the owner of the coal.”<sup>159</sup> This statute thus was different from the statute in *Plymouth Coal Co. v. Pennsylvania*,<sup>160</sup> which

require[d] a pillar of coal to be left along the line of adjoining property, that with the pillar on the other side of the line would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water.<sup>161</sup>

Even though that statute would likewise have “ha[d] very nearly the same effect for constitutional purposes as appropriating or destroying” rights to mine certain coal, the Court suggested it would not be a taking because it “secured an average reciprocity of advantage.”<sup>162</sup> Although the regulated owner suffered a regulatory burden, it received a corresponding benefit from the regulation’s restriction of its neighbors to help protect the safety of its own employees.<sup>163</sup>

*Pennsylvania Coal* thus indicates that reciprocal benefits may justify regulations that otherwise would require compensation. But the Court did not say that regulations require compensation whenever they do not provide reciprocal benefits. That would go too far. As the Supreme Court more recently observed,

[i]n the course of regulating commercial and other human affairs, Congress routinely creates burdens

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159. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922).

160. 232 U. S. 531 (1914).

161. *Penn. Coal*, 260 U.S. at 415.

162. *Id.* at 414-15.

163. See Jan G. Laitos, *Takings and Causation*, 5 WM. & MARY BILL RTS. J. 359, 404 (1997) (discussing reciprocity of advantage in *Plymouth Coal*).

for some that directly benefit others. For example, Congress may set minimum wages, control prices, or create causes of action that did not previously exist. Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.<sup>164</sup>

Still, a regulation that only burdens some, while benefiting others, is certainly more likely to be unfairly distributed than a regulation that benefits those who are burdened.<sup>165</sup>

In *Agins v. City of Tiburon*, the Court seemed to connect the reciprocity of advantage justification to the substantial advancement test. After reciting the test, the Court said that “the zoning ordinances substantially advance legitimate governmental goals” in avoiding “the ill effects of urbanization.”<sup>166</sup> But in explaining the public benefits of the ordinances, the Court also pointed out that the

ordinances benefit the appellants as well as the public by serving the city’s interest in assuring careful and orderly development of residential property with provision for open-space areas. There is no indication that the appellants’ 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city’s exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants might suffer.<sup>167</sup>

Perhaps the Court recognized that the substantial advancement test could help determine the fairness of regulatory burdens by drawing attention not to the mere permissibility of the goals served, but to the legitimacy of such goals in land use regulation: whether the public goals include benefits to those regulated or just benefits to others.

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164. *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986).

165. *See, e.g., United States v. Sperry Corp.*, 493 U.S. 52, 59-64 (1989) (holding that deduction from Iran-United States Claims Tribunal award to help pay the costs of the tribunal was not a taking because the claimant received benefits fairly approximate to the deducted fee).

166. *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980).

167. *Id.* at 262.

The more a regulation burdens an owner without benefiting her, the more likely the regulatory burdens are unfairly distributed and the regulation is a taking. But, a regulation would not be a taking simply because it burdens the owner more than it benefits her. Justice Brennan's opinion in *Penn Central* stressed that "[l]egislation designed to promote the general welfare commonly burdens some more than others," and does not require compensation simply because it impacts some more severely than others.<sup>168</sup> Furthermore, Justice Brennan denied that *Penn Central* was "solely burdened and unbenefited," because "the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole."<sup>169</sup> *Penn Central* thus suggested that a regulatory burden may be unequal but fair because, even though the regulated owner bears a disproportionate burden, the owner is benefited by the regulatory burden on other owners.<sup>170</sup> *Penn Central* still enjoyed some reciprocal benefit from the fact that other property owners were subject to the landmark preservation regulation just as *Penn Central* was.

Some have argued that even if a particular regulation does not directly benefit the burdened owner by restraining others, every rational land use regulation makes a better community and thus benefits every citizen and every property in the community, including the regulated owners and their property.<sup>171</sup> Raymond Coletta, for example, argues:

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168. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 133-34 (1978); see also Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297, 329 (1990) ("Recalling prior explanations of the concept of reciprocity of advantage, Brennan emphasized that there was no significance to the fact that the appellants were burdened more than benefited. As long as some benefits accrued to the regulated party, reciprocity demands were met." (footnote omitted)).

169. *Penn Cent.*, 438 U.S. at 134.

170. Justice Rehnquist disagreed. He pointed out that only 400 of over one million buildings in New York were designated historic structures and that "the landmark designation imposes upon [the owner] a substantial cost, with little or no offsetting benefit except for the honor of the designation." *Id.* at 138-39 (Rehnquist, J., dissenting).

171. See Coletta, *supra* note 168, at 329:

Brennan's relaxation and widening of the benefit criterion significantly expanded the concept of average reciprocity of advantage. Without the requirement of some individualized nexus between the burden and the benefit, nearly every police power regulation can be justified on reciprocity grounds. Because the very purpose of land use restrictions is to confer benefits on the general community, regulated landowners, by virtue of being members of the community, always benefit, however obtusely, from the restrictions. (footnote omitted).

Reciprocity demands should be deemed to be met, and the regulation therefore deemed to be a legitimate exercise of the police power, in any case where the land use restrictions affirmatively enhance the community's welfare. Therefore, rather than requiring that direct individualized benefits accrue to the burdened individual, reciprocity defenses would focus on the benefits gained by the community at large. Individuals' use of property could legally be restricted even where their properties received no reciprocal, or offsetting, enhanced value; insofar as the individual landowners, in their role as members of society, could be characterized as sharing in the restriction's benefit, they would be denied legal redress. In short, the concept of "average reciprocity of advantage" could be utilized to provide broad justification for land use regulation and thereby substantially limit the accessibility of inverse condemnation actions.<sup>172</sup>

Some of the Court's later cases seem to make this point as well. In *Andrus v. Allard*,<sup>173</sup> for example, the Court justified a restriction on property by referencing Justice Brandeis's explanation in *Pennsylvania Coal* that property owners must "bear the . . . burden [of regulation] to secure 'the advantage of . . . doing business in a civilized community.'"<sup>174</sup> In *Hodel v. Irving*,<sup>175</sup> the Court held that a law escheating to tribes small undivided fractional interests in Indian lands was a taking. But the Court offered "weakly" in support of the statute

something of an "average reciprocity of advantage," to the extent that owners of escheatable interests maintain a nexus to the Tribe. Consolidation of Indian lands in the Tribe benefits the members of the Tribe. All members do not own escheatable interests, nor do all owners belong to the Tribe. Nevertheless, there is substantial overlap between the two groups. The owners of escheatable interests often benefit from the escheat of others' fractional interests. Moreover, the whole benefit gained is greater

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172. *Id.* at 303.

173. 444 U.S. 51 (1979).

174. *Id.* at 67.

175. 481 U.S. 704 (1987).

than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands.<sup>176</sup>

So, even if the property owner did not enjoy any direct, personal benefit from consolidation of lands, the owner might enjoy a benefit from consolidation in the tribe.

Furthermore, even if the specific regulation at issue does not produce a corresponding benefit (direct or indirect) to the burdened party, other land use regulations will certainly benefit the burdened party. In *Keystone Bituminous Coal Ass'n v. DeBenedictis*,<sup>177</sup> the Supreme Court suggested that even this sort of benefit might mitigate the impact or unfairness of a regulation and thereby avoid the just compensation requirement.<sup>178</sup> The Court reasoned that when a regulation “merely restrains uses of property that are tantamount to public nuisances,” the regulation is, at least, “consistent with the notion of ‘reciprocity of advantage.’”<sup>179</sup> Even though the nuisance-preventing regulation may burden a particular owner, the owner will “in turn, benefit greatly from the restrictions that are placed on others.”<sup>180</sup>

If the benefits of regulatory activity generally offset the burdens of a specific regulation—and those benefits include not just direct benefits but also the benefits of living in an orderly society—the Takings Clause would almost never require just compensation for regulation. Any regulation that accomplishes a public purpose would provide diffuse societal benefits and, even if a particular regulation did not accomplish such a purpose, other regulations of the same type surely would.<sup>181</sup> But the Supreme Court’s decisions

176. *Id.* at 715-16 (citation omitted).

177. 480 U.S. 470 (1987).

178. See Laitos, *supra* note 163, at 407 (“[U]nder *Keystone’s* variant of reciprocity, the advantage that the burdened property owner experienced need not result from the legislation that created the burden.”).

179. *Keystone Bituminous Coal*, 480 U.S. at 491.

180. *Id.*; see also Cordes, *supra* note 115, at 47 (describing such “general reciprocity”); Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL’Y 1, 64 (2004) (“Takings should accordingly be limited to those narrow cases where the claimant proves a categorical taking and the complete absence of reciprocity, not just from the regulation in question, but from the whole system of applicable economic regulations, of which the particular regulation is merely a part.”).

181. See, e.g., Coletta, *supra* note 168, at 364 (“Considering this ‘societal contribution’ to a parcel’s economic value as one of the benefits of living in a civilized society, most land use regulations provide a reciprocity of advantage since most regulations implement public goals.”); Laitos, *supra* note 163, at 413:

Third, Brandeis’s model, taken to its logical extreme, as in *Keystone*, effectively would swallow the Takings Clause so long as a regulation burdening private property in some fashion advanced the public interest. In

clearly indicate that some land use regulations do burden individual owners unfairly and require just compensation, even though they are part of a rational regulatory scheme that provides legitimate public benefits. So there must be some limit on the range and types of regulatory benefits that are considered as mitigating the burden of a land use regulation. Some have argued that only direct benefits to the individual owner, resulting from the challenged regulation itself, should be considered.<sup>182</sup> But even if broader benefits of a regulatory scheme are considered in assessing the regulatory burden imposed on a property owner, the essential point is that, as Justice Rehnquist argued in dissent in *Keystone Bituminous Coal*, the Just Compensation Clause

is designed to prevent “the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.”<sup>183</sup>

In general, all members of a community enjoy the benefits of living in an ordered society. If an individual bears an additional and unique regulatory burden to provide those benefits, the fact that she enjoys the benefits along with everyone else does not change

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*Keystone*, the ‘advantage’ the property owner enjoyed did not result from the statute that created the burden. So long as a statute confers any benefits on the society in which an owner exists, reciprocity would be present, and no taking would result. The government could then circumvent its just-compensation duty simply by providing some reciprocal benefits to the general community, even if the reciprocal value to the property owner was far less than what just compensation requires. This would lead to the anomalous result that a property regulation reasonably related to a public purpose could never be a taking.” *Id.* (footnote omitted).

182. See Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court’s Fairness Mandate Benefits Landowners*, 31 FLA. ST. U. L. REV. 429, 469 (2004) (“The notion of ‘reciprocity of advantage’ . . . works so long as the category of landowners burdened by the restrictions individually is coextensive with the category of landowners and citizens who are benefited.”); Laitos, *supra* note 163, at 414 (“Reciprocity sufficient to defeat a takings claim requires that the owners receive a direct in-kind benefit rather one due solely to their membership in the general community. This is the better rule, and the one that the Supreme Court and many lower courts have now endorsed.”(footnote omitted)); Frank R. Strong, *On Placing Property Due Process Center Stage in Takings Jurisprudence*, 49 OHIO ST. L.J. 591, 617 (1988) (“For Holmes the concept [of reciprocity of advantage] was applicable only in the presence of a direct, in-kind reciprocal, as in *Plymouth Coal*, *New York Central*, and (less closely) *Ambler Realty*.”).

183. *Keystone Bituminous Coal Ass’n*, 480 U.S. at 512 (Rehnquist, J., dissenting) (quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893)).

the fact that she is bearing more than her fair share of the regulatory burden in obtaining those benefits. So whatever the benefits she receives, the question is not simply whether she received regulatory benefits as well as bearing regulatory burdens, or even whether the benefits exceeded the burdens. The question is whether the net regulatory impact on her—burdens and benefits—is fair in comparison to the net impact on the rest of the community, even though the net impact certainly does not have to be equal for all.

That is why Justice Stevens has maintained that “a regulation that targets one or two parcels of land” is more likely to be a taking than “a regulation that enforces a statewide policy.”<sup>184</sup> If a regulation applies to all landowners, then the burden obviously is not unfairly concentrated on particular owners, and the net regulatory impact will be roughly the same for all owners. A regulation that applies generally will not only avoid concentrated burdens but will make reciprocal benefits likely:

[T]he generality v. particularity of a regulation speaks directly to the question of whether the apparent burden imposed by a regulation on an owner may be offset by the corresponding benefits to that owner from the fact that his neighbors and others in the community are similarly restricted. Quite apart from the direct calculation of the economic impact of a regulation, using the “with and without” method or some other approach, the generality v. particularity of a regulation provides a useful, alternate perspective on whether a regulation may impose a severe, unfair burden.<sup>185</sup>

As I discussed earlier, *Lucas* suggested that the “substantial advancement” test was an evolution of this generality principle expressed in *Penn Central*, that regulations are less likely to require just compensation if they are “reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property.”<sup>186</sup> So this is one way that the regulatory means and ends are still relevant in takings law. Even though regulations are permissible exercises of

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184. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1073 (1992) (Stevens, J., dissenting); see also Echeverria, *supra* note 145, at 151.

185. Echeverria, *supra* note 145, at 159-60; see also Echeverria, *supra* note 149, at 204.

186. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 133 n.30 (1978); see also *supra* nn. 66-71 and accompanying text.

the police power as long as they rationally benefit some part of the public, they may require just compensation if they do not apply to all similarly situated property, or do not produce a reciprocal benefit for those regulated.

*B. Restraining Property That Doesn't Cause the Problem to Be Solved*

In substantive due process doctrine, a rational regulation generally is one that could be thought to accomplish the intended purpose. By using substantive due process language, the substantial advancement test of takings law naturally was often understood to mean the same thing.<sup>187</sup> I have argued that a regulation that does not accomplish a legitimate purpose should be considered a taking as well but, properly understood, the substantial advancement test looks for another sort of rationality as well: whether the regulatory means chosen, although it may clearly be one of the possible ways of accomplishing the public purpose, is a rational or an arbitrary choice from among those possible means. If the use of certain property somehow interferes with the public purpose or causes the need for the regulation, then it is rational and not arbitrary to accomplish the purpose by regulating it. But if the government just chooses particular property to bear the load of accomplishing the purpose, even though its use does not somehow uniquely create the need for regulation, then the government has chosen a regulatory means that, while within the scope of the police power, requires just compensation to the owners chosen to bear the load.

Some accounts of substantive due process might also invalidate an unfair choice from among possibly effective means if the chosen means were “unduly oppressive upon individuals.”<sup>188</sup> But substantive due process is primarily or even solely concerned with whether the chosen means are actually an exercise of the government’s

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187. See, e.g., *Yee v. City of Escondido*, 503 U.S. 519, 530 (1992) (observing that whether the regulation benefited only current mobile home owners “might have some bearing on whether the ordinance causes a *regulatory* taking, as it may shed some light on whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance.”).

188. *Lawton v. Steele*, 152 U.S. 133, 137 (1894); see also *Presbytery of Seattle v. King County*, 787 P.2d 907, 913 (Wash. 1990) (observing that unduly oppressive regulations may deny substantive due process and identifying as one consideration “the extent to which the owner’s land contributes to [the public problem]”); Berger, *supra* note 55, at 856 (“In *Lawton v. Steele*, the Court indicated for the first time that a confiscatory land use regulation, that is, one ‘unduly oppressive upon individuals’ might be unconstitutional. However, it did not make clear whether it considered this to be a taking or a deprivation of due process.” (footnotes omitted)).

power to pursue public goals. The Takings Clause, on the other hand, serves a different purpose. The Takings Clause requires the government to pay compensation when it chooses means that burden individuals too much or too unfairly. So the Takings Clause more naturally examines the choice of means, not just whether the means is one of a class of possible means to a legitimate end. This type of means-ends test, which examines the relationship between the use of the regulated property and the regulation's goals, is primarily meant to ensure fairness, not rationality or efficiency.<sup>189</sup> Yet it still is a type of means-ends test because it considers whether the chosen means are a natural or necessary solution to a problem—whether the owners' property use would somehow prevent accomplishment of the public purpose if unregulated—or whether the means arbitrarily burden some owners to solve a problem.<sup>190</sup>

This inquiry might be called a “reasonably necessary means” test, since the fundamental question is whether the means is needed to accomplish the purpose, rather than just appropriate. The *Agins* substantial advancement formulation, rejected by the Court in *Lingle*, does not suggest this type of means-ends inquiry. *Agins* stated that “[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests.”<sup>191</sup> As far as this expression goes, a regulation would be a taking only if the regulation did not actually accomplish a legitimate purpose. But the means-ends formulation of *Penn Central* does at least suggest the possibility of such an inquiry. The Court there said that a regulation may be a taking if not “reasonably necessary to the effectuation of a sub-

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189. See John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 488-89 (1983):

The core value of use-dependency is fairness, whether a property owner has been singled out in a manner consistent with the just share principle; the core value of reasonable relationship is rationality or, perhaps, nominal efficiency, whether the measure is reasonably designed to achieve its goals irrespective of its redistributive consequences.” (footnote omitted);

Molly S. McUsic, *Looking Inside Out: Institutional Analysis and the Problem of Takings*, 92 NW. U. L. REV. 591, 604 (1998) (“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.”); Radford, *supra* note 30, at 390-91 (“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.”).

190. See Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1651 (1988) (“[T]he nexus requirement to be applied in these cases measures not just the closeness of fit between regulatory means and ends but also whether the burden of the regulation is properly placed on *this* landowner.”).

191. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

stantial public purpose.”<sup>192</sup> Although this language also echoes early substantive due process cases,<sup>193</sup> verbally it suggests some investigation into whether the means are “necessary,” not just whether they are appropriate or effective. So if the chosen means burden owners unnecessarily, then it is more likely to require just compensation.

This means-ends inquiry might also be considered a causation test. But rather than just asking whether the regulation causes a public benefit, this test asks whether the property use in question somehow causes the public need—the absence of the public benefit.<sup>194</sup> If a property’s use does not cause the public need, then the regulation almost surely “forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>195</sup>

This may sound like a revival of the harm-benefit distinction criticized by the Supreme Court in *Lucas*, but it is not. It does not matter whether the property use is viewed as causing a harm or

192. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978).

193. *See, e.g., Lawton*, 152 U.S. at 137 (“To justify the state in thus interposing its authority in behalf of the public, it must appear . . . that the means are reasonably necessary for the accomplishment of the purpose . . .”).

194. *See Laitos, supra* note 163, at 364:

Regulated property owners do not merit compensation when their use of property caused or contributes to a societal problem that a regulation seeks to redress. Under this exception, the government may single out the property owner or owners responsible for the problem and may require that they bear the regulation’s cost. . . . If the owners subject to regulation did not cause the problem, however, then regulating that class of owners likely is an uncompensated taking.

McUsic, *supra* note 189, at 602 (“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 and the regulatory burden imposed: a cause-effect test.” (footnote omitted)); Radford, *supra* note 134, at 443, observing that *Lingle* characterized the substantial advancement test

as a ‘means-ends’ inquiry into the effectiveness of legislation . . . without seeming to recall that this was not in fact how the Court had understood and applied the substantial advancement test originally. The obvious alternative interpretation—that the Ninth Circuit had simply misapplied the substantial advancement inquiry in *Lingle*, and that the standard retained its original vitality as a *cause-effect* inquiry—did not seem to occur to Justice O’Connor or any other member of the Court (footnotes omitted).

195. *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Eagle, supra* note 182, at 498:

However, in a constitutional republic, rules do not change in ways that target the property of selected individuals to bear burdens unrelated to them. Where rules do act in such a fashion, their character augurs [sic] for the finding that there has been a taking under the *Penn Central* test.

Laitos, *supra* note 163, at 373 (“Absent a causative link, the idea of fairness incorporated in *Armstrong* as well as Rawls’s equality principle indicates that it should be unconstitutional for government to saddle certain property owners with the burden of correcting the societal harm.”) (footnotes omitted).

obstructing a benefit. In *Lucas*, the Court acknowledged early takings cases declaring that “harmful or noxious uses’ of property may be proscribed by government regulation without the requirement of compensation.”<sup>196</sup> But the Court said that those cases really were just “our early formulation of the police power justification necessary to sustain (without compensation) *any* regulatory diminution in value.”<sup>197</sup> So, while earlier cases suggested regulations that prevent harms are not takings, *Lucas* said the correct point is that regulations that do not prevent harms are takings. And harm prevention, the Court observed, “is often in the eye of the beholder.”<sup>198</sup> To some, harm prevention may seem like “benefit-conferring.”<sup>199</sup> The Court rejected such a distinction, thus indicating that the substantial advancement test, of which “harmful or noxious use” analysis was the progenitor, simply requires that a regulation prevent a harm or confer a benefit, however you want to look at it. If the regulation does not prevent a harm or confer a benefit, then it does not substantially advance a legitimate state interest and is a taking. But a regulation that does substantially advance a legitimate state interest—that prevents a harm or confers a benefit—is not thereby insulated from the requirement of just compensation. Such a regulation may nevertheless require compensation because of the burden imposed on the owner. The regulation is inherently non-compensable only if it does not take any property right from the owner—if it “do[es] no more than duplicate the result that could have been achieved in the courts” under “background principles of the State’s law of property and nuisance.”<sup>200</sup> But that is a different point altogether. The essential point here is the Court’s preliminary point: a regulation must prevent a harm or confer a benefit or else it is a taking. The Court in *Lucas* did not elaborate, and did not need to elaborate, on any required relationship between the harm or benefit and the property’s use.

The Court has commented on that required relationship in other cases, however. Although, as the Court stressed in *Lingle*, its decision in *Nollan v. California Coastal Commission*<sup>201</sup> dealt with a unique sort of land use regulation that demands surrender of property rights in exchange for regulatory permission, *Nollan* discussed the general application of the substantial advancement

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196. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1022 (1992).

197. *Id.* at 1026.

198. *Id.* at 1024.

199. *Id.*

200. *Id.* at 1029.

201. 483 U.S. 825 (1987).

test of takings law. The Court assumed that denying the property owners permission to build a bigger house would help protect the public's view of the nearby beach, overcome a psychological barrier to use of the public beach, and prevent congestion on the public beaches—all legitimate state interests.<sup>202</sup> But the Court suggested that was not enough to sustain a building prohibition against a takings challenge. The Court said that the Commission could deny the permit “if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes.”<sup>203</sup> In a footnote, the Court elaborated on this remark:

If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is “to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” But that is not the basis of the Nollans' challenge here.<sup>204</sup>

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202. *See id.* at 835.

203. *Id.* (footnote omitted).

204. *Id.* at 835 n.4 (citations omitted); *see also* Berger, *supra* note 55, at 868 (“In other words, the *Nollan* opinion stands for the propositions that, for such a regulatory exaction to be valid: 1) the owner's proposed activity must create or contribute to the creation of a public need; and 2) the exaction must tend toward the satisfaction of that same need.”); Echeverria, *supra* note 149, at 207-08 (arguing that, despite *Lucas*, regulations that prevent “obviously affirmatively harmful” land uses are less likely to require compensation than other regulations because fairness does not favor compensation in such cases); Radford, *supra* note 134, at 444:

[T]he constitutional propriety of the regulatory imposition was expressly tied to the existence of a *causal* relationship between the proposed land use and the objective sought to be achieved by a regulatory constraint. The Coastal Commission, on the other hand, persistently argued that it should prevail under a *means-ends analysis*—a rationale that the Court seemingly recognized as inapposite when it applied the substantial advancement test in favor of the Nollans.

Justice Scalia also made this point in dissent in *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., dissenting in part):

[T]here is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly.

*Nollan* thus indicates that, even if a regulation accomplishes a legitimate purpose, it may be a taking if the regulation is not “reasonably necessary” to accomplish the purpose,<sup>205</sup> or in the words of *Nollan*, if leaving the property unregulated would not “substantially impede” the purpose.<sup>206</sup> The footnote also indicates the fairness principle that underlies this inquiry, rather than the rationality principle of substantive due process.

As *Lingle* observed, the Court’s subsequent exactions case, *Dolan v. City of Tigard*, did not rely on takings law, despite hints to the contrary.<sup>207</sup> Instead, *Dolan* relied on unconstitutional conditions doctrine.<sup>208</sup> But *Dolan* nevertheless suggests an important point about this reasonable necessity or causation test. Even if the property use in question does cause the need for regulation, if the resulting regulation is seriously disproportional to the property’s contribution to the problem, then the regulation raises the same fairness concerns.<sup>209</sup> In that case, the owner is not bearing a regulatory burden because her property needs to be regulated in that way in order to accomplish the public purpose; rather, she is bearing a regulatory burden to some extent merely because she is a convenient target to bear burdens the public should bear.<sup>210</sup> As *Lingle* suggests, poorly distributed burdens may be takings regardless of magnitude. A regulation may be poorly distributed altogether—where no good reason exists to impose a burden on certain owners and not others—but a regulation may also be poorly distributed because some owners bear a burden beyond what is required to mitigate whatever reasons justified placing the burden on them and not others in the first place. For example, in *Dolan*, the city could fairly prevent Dolan from developing her property in a way that would increase the risk of flooding. “[I]ncreasing the amount of impervious surface [would] increase the quantity and

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205. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).

206. *Id.* at 835.

207. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547-48 (2005).

208. See *supra* notes 43-54 and accompanying text.

209. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994):

We think a term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

210. See *Laitos, supra* note 163, at 398:

The disproportionate-impact rule assumes that although laws, particularly exercises of the police power, can impact individuals, that impact should be proportionate to the individual’s activity that triggers the need for regulation. The rule thereby prevents policymakers seeking regulation from enjoying benefits in excess of costs or from requiring that regulated property owners bear costs in excess of benefits. (footnotes omitted).

rate of storm water flow from [Dolan's] property,"<sup>211</sup> so the city could prevent her from doing that. "But the city demanded more—it not only wanted [Dolan] not to build in the floodplain, but it also wanted [her] property along Fanno Creek for its greenway system."<sup>212</sup> Even that demand would have been fair "[i]f [Dolan's] proposed development had somehow encroached on existing greenway space in the city," but it did not.<sup>213</sup> Even though the Court maintains that *Dolan* deals with a different doctrine and a different situation, and therefore the rough proportionality rule of *Dolan* does not apply to land use regulations generally,<sup>214</sup> the fairness principle it implements should apply to all regulations.

*Lingle* supports this conclusion by reaffirming that unfairly distributed burdens, not just large burdens, can be takings. The causation or reasonably necessary means-ends test identifies unfairly distributed burdens. The government may fairly burden an owner with regulations that prevent her property from interfering with a public purpose, but the government may not just choose owners—arbitrarily or because they happen to be convenient targets as they are seeking development permission—to bear burdens that are not connected to their land use. The Court has also expressed the relevance of this principle in cases not involving exactions. In *Eastern Enterprises v. Apfel*,<sup>215</sup> the Court said that when a regulation "singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause."<sup>216</sup> Similarly, in *United States v. Willow River Power Co.*<sup>217</sup> the Court said that the Takings Clause "undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project."<sup>218</sup>

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211. *Dolan*, 512 U.S. at 392.

212. *Id.* at 393.

213. *Id.* at 394.

214. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999):

It was not designed to address, and is not readily applicable to, the much different questions arising where, as here, the landowner's challenge is based not on excessive exactions but on denial of development. We believe, accordingly, that the rough-proportionality test of *Dolan* is inapposite to a case such as this one.

215. 524 U.S. 498 (1998).

216. *Id.* at 537.

217. 324 U.S. 499 (1945).

218. *Id.* at 502; *see also* Laitos, *supra* note 163, at 391 ("The Court's apparent willingness to utilize the Takings Clause to protect property owners 'who happen to lie in the path'

So, for example, some courts have held that land use regulations have taken property when they “are clearly imposed to support or subsidize some distinct Government function or enterprise (such as the provision of public parks, schools, playgrounds, roads, airports, or flood control projects, etc.), where the burdens imposed are based largely on the accident of ownership of land at a particular location.”<sup>219</sup> Similarly, Jan Laitos has observed:

[n]o matter how strong the proffered state interest, if a regulation benefits a societal class whose needs the affected property owners did not create, the regulation constitutes a taking. Many lower courts have agreed that the government cannot require that property owners who are not responsible for the plight of low income people bear the costs of alleviating their economic problems.<sup>220</sup>

In the words of *Penn Central*, in such cases there may be “a widespread public benefit,” but the regulation is not “applicable to all similarly situated property.”<sup>221</sup> The regulated properties are not differently situated because they are not specially causing the need for regulation. Any other properties, or all properties, could just as well be required to share the burden. The burden is unfairly distributed and the burdened owners should be compensated.

This may seem to invite higher judicial scrutiny of legislative decisions about how to pursue permissible public purposes. The Court in *Lingle* cited this fear as one reason for rejecting the substantial advancement test.

The *Agins* formula can be read to demand heightened means-ends review of virtually any regulation of private property. If so interpreted, it would require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which

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of some government enterprise implies a special sensitivity to property owners whose use did not prompt the government action but were merely convenient targets of opportunity.”).

219. 1 EDWARD H. ZIEGLER, JR. ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 6:60 (4th ed. 2004) (citing cases); see also Allison Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 665 (1958):

[In such cases] there is no approximation of equal sharing of cost or of sharing according to capacity to pay as there is where a public benefit is obtained by subsidy or expenditure of public funds. The accident of ownership of a particular location determines the persons in the community bearing the cost of increasing the general welfare.

220. Laitos, *supra* note 163, at 373-74 (footnotes omitted).

221. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 133 n.30 (1978).

courts are not well suited. Moreover, it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies.<sup>222</sup>

But the means-ends analysis I am advocating here does not require heightened means-ends review; it just requires judicial scrutiny of a different issue. Substantive due process rationality involves judicial examination of whether the chosen means are a rational way to accomplish the legislative purpose. Courts properly defer to legislative choices about what ends to pursue and how to pursue them.<sup>223</sup> On the other hand, this reasonably necessary means test, or causation test, requires judicial examination of whether the chosen means are a rational choice of means—whether there is a fair reason to choose a means that burdens the particular owners targeted by the regulation. Even though the Takings Clause thus asks a different question about legislative judgments, courts should still defer to legislative judgments in much the same way. First, courts should defer to legislative choices from among fair means. A particular regulation might fairly be applied to all properties or just some groups of properties that raise special concerns related to the public purpose. As long as the regulated properties are causally connected to the public need, the legislature should be free to choose from among permissible alternatives.<sup>224</sup> Second, courts should defer to legislative judgments about whether regulated properties are causally connected to the public need. As long as the legislature could rationally conclude that the regulated properties somehow cause the public need, courts should accept the legislative judgment. As long as courts are appropriately respectful of legislative judgments, this

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

223. *See, e.g., Zahn v. Bd. of Public Works*, 274 U.S. 325, 328 (1927):

[I]t is impossible for us to say that their conclusion in that respect was clearly arbitrary and unreasonable. The most that can be said is that whether that determination was an unreasonable, arbitrary, or unequal exercise of power is fairly debatable. In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.

224. *Cf. Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 477 (1985) (holding that Congress “had absolutely no obligation to select the scheme that a court later would find to be the fairest, but simply one that was rational and not arbitrary”). *But see Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 & n.3 (1987) (suggesting that different verbal formulations of substantial advancement test and substantive due process rationality test indicate different levels of judicial scrutiny); *McUsic*, *supra* note 189, at 603 (“[T]he Court [in *Nollan*] suggested that the means-end test would require a higher level of connection than merely a rational relationship between the regulation and the government’s goal . . .”).

sort of judicial means-ends review should not result in judicial second-guessing of legislative judgments, but only judicial protection of individuals when there is no good reason to place regulatory burdens upon them rather than upon the public as a whole.

## VI. HOW THE REGULATORY “END” MAY TAKE PROPERTY

Even after *Lingle*, the purpose of a regulation may also favor finding a regulation to be a taking requiring just compensation, even though the purpose may be a permissible police power goal under substantive due process. I have already discussed one way that the legislative purpose may indicate unfairly distributed burdens: when the purpose is solely to benefit a group other than the regulated owners, and those regulated neither enjoy a reciprocal benefit nor somehow caused the need that the regulation is meant to fill.<sup>225</sup> But there are other ways in which, using the words of the rejected *Agins* substantial advancement test, a regulation substantially advances an interest that is not “legitimate” in the takings context, regardless of whether it is a permissible public purpose within the police power.

### *A. The Regulatory Purpose Is to Get Private Property Rights for Cheap or Free*

There is nothing wrong with the government wanting to obtain private property for public benefit. And there is nothing wrong with the government wanting to save money in doing so. But when the government regulates property not for the purpose of facilitating orderly development, harmonizing land use conflicts, or some other such direct regulatory benefit, but rather for the purpose of saving money on acquisition of the property, then the government’s interest is not legitimate and the government must pay just compensation.

In such a case, the regulatory burden is inevitably unfairly distributed because of the regulatory purpose. As I discussed above, *Lingle* reaffirmed that a regulation may be a taking because of “how any regulatory burden is *distributed* among property owners.”<sup>226</sup> A regulation that is intended to reduce the cost of acquiring the regulated property inevitably imposes an unfairly distributed burden on the property. The government seeks to acquire only a small percentage of all property, so such regulations will

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225. See *infra* Part V.A.

226. *Lingle*, 544 U.S. at 529; see also *supra* Part III.B.

inevitably be concentrated on a relatively small group of properties. Of course, *Penn Central* points out that a regulation is not a taking just because it “has a more severe impact on some landowners than on others.”<sup>227</sup> But there has to be some fair reason for the disproportion, as *Lingle* acknowledges. *Penn Central* explained that in a number of earlier cases, prohibitions of “harmful” uses were held not to be takings, despite unique and substantial burdens on the property owners, because “the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property.”<sup>228</sup> When regulations are intended to reduce the cost of acquiring private property, there may be a “widespread public benefit,” but the regulations certainly are not “applicable to all similarly situated property.” Instead, the regulatory burden applies only to those properties that the government happens to have targeted for acquisition, while virtually identical properties may be left unaffected.

### 1. *Unrelated or Disproportional Conditions*

One type of government regulation that advances this unfair purpose is the unrelated or disproportional exaction. When a property owner seeks permission to develop her land somehow, the government may condition such permission on the surrender of some property right to the government. In the *Nollan* and *Dolan* cases discussed above, the defending governmental entities had granted permission to build a bigger house on beachfront property only if the Nollans granted a public easement along the beach<sup>229</sup> and permission to expand a store and pave a parking lot only if Dolan granted easements for a storm drainage system and for a pedestrian and bicycle pathway.<sup>230</sup> When such a condition proportionally mitigates the harms of the proposed development, the condition confirms the legitimate purpose of the regulatory restriction. For example, if the City of Tigard was concerned about flooding because of Dolan building a bigger store and paving a parking lot, the city might simply deny permission altogether to avoid the increased risk of flooding. But the city might instead try to accommodate Dolan’s interests without compromising the public interest in flood prevention. So the city might permit some develop-

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227. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 133 (1978).

228. *Id.* at 133 n.30.

229. *See Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 827-28 (1987).

230. *See Dolan v. City of Tigard*, 512 U.S. 374, 380 (1994).

ment, but prohibit building in the floodplain.<sup>231</sup> The city might even permit development only if Dolan would grant an easement for a storm drainage system that would manage the increased storm water flow from her property. Such conditions would show that the city really is trying to fairly accomplish the purpose of flood control while allowing private development that will not interfere with that purpose.<sup>232</sup>

But if the city imposes an unrelated or disproportional condition, then it changes the character of the government's otherwise legitimate regulation. For example, if the City of Tigard says it will either deny development permission altogether to prevent flooding, or it will grant development permission on the condition that Dolan grant an easement for a pedestrian and bicycle pathway, the condition changes the purpose of the city's conditional denial of development permission. Limiting the impervious surface on Dolan's land can reduce flooding, but inviting pedestrians and bicyclists to pass over her property will not change the risk of flooding at all.<sup>233</sup> Yet the city effectively says that even if Dolan does what is necessary to avoid the increased risk of flooding, it still will not let her develop her property because she will not surrender an easement for pedestrians and bicyclists.<sup>234</sup> So now the reason for the conditional denial is not flood control, but rather the owner's refusal to give up some property that the city would like to have.<sup>235</sup> That purpose is unfair under the *Armstrong* principle reaffirmed in *Lingle* because there is no good reason to require the owner to bear the burden of obtaining such public recreational amenities. Dolan bears the burden because she happens to own property where the city has decided to develop such an amenity, while others who own similar commercial property do not bear such a burden at all.

Although *Dolan* relied on a different theory—unconstitutional conditions—the Court's earlier opinion in *Nollan* explained how an unrelated condition makes the purpose of a conditional permit denial illegitimate. The Court described how “the Commission's assumed power to forbid construction of the house in order to protect

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231. See *id.* at 392-93.

232. See Romero, *supra* note 46, at 358-59.

233. See *Dolan*, 512 U.S. at 393 (“The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.”).

234. The city argued that the public pathway easement would offset increased traffic resulting from a bigger store, but the Court found that “the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by petitioner's development reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement.” *Id.* at 395.

235. See Romero, *supra* note 46, at 359-61.

the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end."<sup>236</sup> But if the condition does not "further the end advanced as the justification for the prohibition," then the purpose of the regulation is different.<sup>237</sup> The Court explained:

When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a \$100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster.<sup>238</sup>

The government in that case still has a legitimate reason for seeking tax contributions, just as the government might have a legitimate reason for seeking public pathways, but the regulation—the ban on smoking in the Court's example, or the conditional denial of permission to expand a store—now is not for the purpose of preventing dangerous panic in crowded theaters or preventing flooding in Tigrard. The government is willing to allow those harms. Once the unrelated condition is imposed, the only reason a person cannot shout fire in a crowded theater is because she has not paid \$100. That purpose—"quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation"—is not a "legitimate state interest[]" in the takings and land-use context." Instead, "the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"<sup>239</sup>

The Court in *Lingle* insisted that it was not disturbing the nexus and rough proportionality requirements of *Nollan* and *Dolan* because those cases "cannot be characterized as applying the

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236. *Nollan*, 483 U.S. at 836.

237. *Id.* at 837.

238. *Id.*

239. *Id.* (citations omitted).

‘substantially advances’ test.”<sup>240</sup> The Court is right that *Dolan* relied on unconstitutional conditions theory and therefore did not need to apply the substantial advancement test. But *Nollan* certainly can be characterized as applying the test. In fact, the critical passage in *Nollan* that identifies the essential constitutional objection—the passage with the speech restriction example discussed above—clearly says that the unconstitutional act is that, “[w]hatever may be the outer limits of ‘legitimate state interests’ in the takings and land-use context, this is not one of them.”<sup>241</sup> The building restriction’s purpose is changed by the unrelated condition into a purpose that is not a legitimate state interest. The constitutional violation in the *Nollan* opinion, then, is the failure to advance a legitimate state interest.<sup>242</sup>

This does not mean that the Takings Clause invites heightened scrutiny of legislative purposes. Courts should still defer to legislative choices among permissible purposes, as well as how to accomplish them. But the Takings Clause compensates owners, even though the legislative purpose is permissible, if the regulation is unfair or too burdensome. So a distinct takings version of a means-ends test would declare a subset of all permissible legislative purposes not to be impermissible, but to be illegitimate without compensation because those purposes inherently involve unfairly distributed burdens.<sup>243</sup>

Examining whether a condition is unrelated or disproportional does not require any more intrusive judicial scrutiny either. As the Court in *Lingle* observed, *Nollan* and *Dolan* did not “question whether the exaction would substantially advance *some* legitimate state interest. Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether.”<sup>244</sup> This Takings Clause analysis does not require courts to examine any more closely than usual whether the regulation furthers a permissible purpose. In *Nollan*, for example, a court should not examine any more closely whether limiting the size of beachfront houses rationally furthers the purpose of preserving the public’s visual access to the beach. But, as *Nollan* explained, when the government conditionally grants permission to develop despite such con-

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240. *Lingle*, 544 U.S. at 547-48.

241. *Nollan*, 483 U.S. at 837.

242. Other parts of the *Nollan* opinion are not so clear about the Court’s theory, however. But even though there are some inconsistencies in the Court’s reasoning, this passage is the most clear and affirmative indication of the Court’s constitutional theory for invalidating the unrelated exaction. See *Romero*, *supra* note 46, at 354.

243. See *id.* at 367.

244. *Lingle*, 544 U.S. at 547.

cerns about the public welfare, the government's own action indicates the government's objective purpose for the restriction: if the government restricts the use of property, it is only because the owner does not comply with the condition. If that condition roughly mitigates the harms of the development, then it does not rebut the court's deferential acceptance of the legislative choice of means and ends. But if the condition is unrelated or disproportional, then the government itself has revealed an illegitimate, extortionate purpose. Courts thus are not looking any more closely at legislative choices of ends or means but are simply examining a specific concern raised by the government's own action—the possibility that the government is regulating to get property for free. So courts in that case are just scrutinizing a different question, even though that question involves a more particularized, and thus an apparently less deferential, inquiry.<sup>245</sup>

Despite *Lingle's* abandonment of the substantial advancement test as a redundant takings version of substantive due process, *Nollan* illustrates a way in which the regulatory purpose can indicate unfairly distributed burdens. *Lingle* maintains that such unfairness can result in takings. When an unrelated or disproportional condition is imposed on regulatory approval, the owner is subject to an unfair burden because the government does not make the regulatory decision based on whether the planned land use is in harmony with public interests. Instead, the government makes the decision based on whether the owner will submit to its extortionate scheme. The only reason the owner is singled out for such treatment is that the owner happens to own property that the government would like to obtain. Most store owners in Tigard would readily obtain permission to expand their stores and pave their parking lots, perhaps with restrictions requiring some property to remain undeveloped to avoid flooding. But, because Dolan happened to be on Fanno Creek, and that is where the city wanted a public greenbelt, she was conditionally denied permission. She had to give up some of her property in order to get it. So, when the *Nollan* principle is understood in this way, there is no reason for

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245. See *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (taking an “intermediate position” and requiring governments to “make some sort of individualized determination” that an exaction is not only related to the “impact of the proposed development,” but that the exaction is “roughly proportional” to the needs created by the development); Cordes, *supra* note 115, at 26-28 (characterizing “rough proportionality” as intermediate scrutiny because “of the potential abuse of the exaction process”); Romero, *supra* note 46, at 372 (arguing that the scrutiny required in exactions cases is not really heightened, just different, because the government's own actions raise the possibility of regulatory abuse); Schwartz, *supra* note 180, at 19 (“Heightened scrutiny emanates from the Court's concern that . . . the public agency might improperly leverage its police power . . .”).

the *Lingle* Court to distinguish it. Instead, the Court should recognize the principle of *Nollan* as one way in which regulatory burdens may be unfairly distributed.

## 2. Regulation to Reduce the Cost of Buying or Condemning

Unrelated or disproportional exactions reveal a government effort to obtain private property by “extortion” rather than by paying the owner a fair price. But exactions are only possible when owners seek permission to do something new with their properties. Even when the government imposes no exaction, though, government regulation may make property worth less and so, when the government buys or condemns the land, it will not have to pay as much. When the government does not have a legitimate reason for regulating the property, but does so only to acquire the land for less money, the regulatory end is inherently unfair in the same way an unrelated or disproportional exaction is unfair.

In a recent article I discussed the various ways in which the government might use its regulatory power to depress property values in anticipation of condemnation.<sup>246</sup> I will refer to that article and not repeat much of that discussion. The simplest version of this strategy would be if the government downzones property to less valuable uses, not because it believes that is a more appropriate land use for the area, but simply because the downzoning will reduce the market value of the land and then the government can buy the land for less when the time comes to condemn it. For example, in *Kissinger v. City of Los Angeles*,<sup>247</sup> the city rezoned property that was soon to be acquired for an airport from multi-family residential to single-family residential, reducing its market value from \$114,000 to \$48,000.<sup>248</sup> No other changes accounted for the rezoning, and surrounding property remained zoned for multi-family residential use.<sup>249</sup> The court concluded “that the true purpose of the ordinance was to prevent the improvement of the subject property in order that it might be acquired at a lesser price for airport purposes.”<sup>250</sup> The court held that the city thereby took the property without just compensation, observing that “[a] zoning ordinance may not be used as a device to take property for public use without the payment of compensation.”<sup>251</sup>

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246. Alan Romero, *Reducing Just Compensation for Anticipated Condemnations*, 21 J. LAND USE & ENVTL. L. 153 (2006).

247. 327 P.2d 10 (Cal. Ct. App. 1958).

248. *See id.* at 13-14.

249. *See id.* at 15.

250. *Id.* at 16.

251. *Id.*; *see also* *San Diego Gas & Elec. Co. v. City of San Diego*, 146 Cal. Rptr. 103,

Such regulation reflects the same type of unconstitutional strategy invalidated by the Court in *Nollan*, even though no exaction is involved in these cases. *Nollan* said that, “[w]hatever may be the outer limits of ‘legitimate state interests’ in the takings and land-use context,” legitimate state interests do not include “the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.”<sup>252</sup> The government does the same thing when it zones property for the purpose of reducing the cost of condemning it. The only difference is one of degree—the purpose of the regulation is to obtain property for less, rather than for free.<sup>253</sup>

So, for the same reason, this kind of a regulatory purpose indicates a taking requiring just compensation, not just a deprivation of substantive due process. Such a regulatory purpose by its very nature indicates unfairly distributed burdens. Burdens are imposed on certain owners “largely on the accident of ownership of land at a particular location” in order to “support or subsidize some distinct Government function or enterprise.”<sup>254</sup> Rather than the benefited public bearing the burden equally, or even all similarly situated properties bearing the burden equally, only the unlucky few who happen to own the land chosen for acquisition bear the

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110 (Ct. App. 1978) (“[I]f the state downzones a property to decrease its value as a prelude to later acquiring the property, the zoning may be found to have been a condemnation.”); *Grand Trunk W. R. Co. v. City of Detroit*, 40 N.W.2d 195, 200 (Mich. 1949) (holding zoning ordinance “unreasonable and confiscatory” because it zoned property residential even though it could not be used that way without government condemnation); *State v. Gurda*, 243 N.W. 317, 320 (Wis. 1932) (holding that city unlawfully zoned property residential to reduce the cost of condemning it for a road in the future); Gideon Kanner, *What to Do Until the Bulldozers Come? Precondemnation Planning for Landowners*, 27 REAL ESTATE L.J. 47, 60 (1998) (“[Z]oning may be changed so as to lower property values in anticipation of condemnation.”); *Romero*, *supra* note 246, at 158-59.

252. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 837 (1987).

253. *See Romero*, *supra* note 246, at 179.

254. 1 EDWARD H. ZIEGLER, JR. ET AL., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 6:60 (4th ed. 2004) (citing cases); *see also Berger*, *supra* note 55, at 879:

Takings rules . . . attempt to decide whether when government bears down harder on one person than the rest of society, there is some valid justification for its doing so. Such justification might be the wrongful or tortious conduct of the person, which the nuisance rule addresses, or that any detriments visited upon the person are *de minimis* or offset by a corresponding benefit to him. . . . It would not be a justification, however, that imposing a substantial burden results in great public benefit, if the person is without fault and fortuitously in the position where it becomes cheaper and easier to have him rather than society to bear the cost.

Allison Dunham, *supra* note 219, at 665:

[T]here is no approximation of equal sharing of cost or of sharing according to capacity to pay as there is where a public benefit is obtained by subsidy or expenditure of public funds. The accident of ownership of a particular location determines the persons in the community bearing the cost of increasing the general welfare.

burden. This violates the fairness principle of *Armstrong* that was reaffirmed in *Lingle*.

*B. The Regulation is in Bad Faith*

In broader terms, any bad faith regulatory purpose favors finding the regulation to be a taking. Regulating property in order to get private property for cheap or free is one type of bad faith purpose: the government is not regulating because it decides that it is best for the community if the property is used or not used in a certain way, but rather because, by acting as if it had so decided, the government can obtain private property that it wants without spending as much money. But the government may have other bad faith reasons for regulating—reasons other than the genuine judgment that the community will be better off if the land is used or not used in a certain way. Any such bad faith purpose makes the regulation a taking for the same basic reason: the owner is burdened in a way that neither all owners, nor even all similarly situated owners, are burdened.

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, the Supreme Court suggested that the government's bad faith could make a regulatory act a taking. The Court stated that “[c]onsiderations of ‘fairness and justice’ arguably could support the conclusion that TRPA’s moratoria were takings of petitioners’ property based on any of seven different theories.”<sup>255</sup> One of those theories was “that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact,” but that “bad faith theory” was “foreclosed by the District Court’s unchallenged findings of fact” that “TRPA acted diligently and in good faith.”<sup>256</sup> Even though the Court did not elaborate on why bad faith stalling would indicate a taking, the Court at least suggested that it would be a taking because of unfairly distributed burdens. The Court said that bad faith would raise “considerations of fairness and justice,” quoting the *Armstrong* passage that the Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”<sup>257</sup>

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255. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 333 (2002).

256. *Id.* at 333-34; see also Echeverria, *supra* note 149, at 198-99 (“[T]he language in *Tahoe-Sierra*, and the Court’s reference to *Del Monte Dunes*, has given rise to the idea that the relative bad faith versus good faith of government officials may be a relevant factor in takings analysis.”).

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

A Federal Circuit case developed the idea that bad faith makes regulatory burdens unfair and that the “character” factor of *Penn Central* invites consideration of such bad faith in determining whether a regulation amounts to a taking. In *Cooley v. United States*,<sup>258</sup> property owners complained that the Army Corps of Engineers had taken their property by denying a wetlands fill permit under the Clean Water Act. The Federal Circuit held that the permit denial was a final action that was ripe for a takings challenge and remanded for the trial court to consider whether the taking was temporary and if it was compensable under *Penn Central*. In doing so, the court discussed the *Penn Central* factors for the trial court to consider on remand. In discussing “the character of the governmental action,” the court said the trial court should “consider both the nature of the permitting process and the reasons for delaying the Cooley permit.”<sup>259</sup> The court noted evidence that the Corps had requested additional information in order to delay a decision, not “in an altruistic effort to issue a permit.”<sup>260</sup> Therefore, the court directed the trial court to “weigh whether the Corps’ conduct evinces elements of bad faith. A combination of extraordinary delay and intimated bad faith, under the third prong of the *Penn Central* analysis, influences the character of the governmental action.”<sup>261</sup>

In light of *Lingle* and its reaffirmation that unfair distribution of burdens may favor finding compensable takings, bad faith would include any conduct that indicated the government was not doing what it usually does with landowners generally and what it would do with similarly situated landowners when bad faith did not corrupt the process. Steven Eagle described some situations when bad faith might favor finding a taking:

Assume, for instance, that a substantial planning moratorium is employed at the behest of a competitor who wishes to take over the landowner’s business location, perhaps on the allegation of blight and through the intermediary of an urban redevelopment authority. Alternatively, assume the planning moratorium resulted from a process of selling condemnation powers or squeezing out owners not making the highest possible contribution to the municipal tax base. In all of these instances, the land-

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258. 324 F.3d 1297 (Fed. Cir. 2003).

259. *Id.* at 1306.

260. *Id.* at 1307.

261. *Id.*

owner would have a viable argument that the character of the governmental action lends itself to a finding that there has been a compensable taking.<sup>262</sup>

In cases like these, the government does not regulate for fair and usual reasons. As a result, the regulatory burdens are not distributed fairly. Other similarly situated owners are not subject to the same restraints because, for example, no competitor is urging a moratorium in the hopes of taking over the location. The purpose of a regulation can thus indicate unfairly distributed burdens and should be at least a relevant consideration in deciding whether the regulation is a taking.

## VII. CONCLUSION

*Lingle* attempted to clarify and simplify takings law, conceptually separating substantive due process from takings law. That is certainly a worthy goal. But I have argued that, despite the different purposes of substantive due process and the Takings Clause, if a regulation is not rational under substantive due process doctrine, and yet is enforced against the property owner in a way that causes the owner to suffer loss, just compensation should be required. Even if it is too late for the Supreme Court to consider that argument, state courts could take that argument seriously under state constitutions.<sup>263</sup>

But even if *Lingle* is the end of such arguments, *Lingle* only rejected paying just compensation for a regulation solely because it denied substantive due process—in other words, because the means did not rationally advance a permissible public purpose. This may tempt courts to think that the choice or effectiveness of the means, or the legitimacy of the ends, may never be considered in deciding whether a regulation is a taking requiring just compensation. That would be a mistake. *Lingle* itself reaffirms that a regulatory burden may be a taking because it is unfair, not just because it is large. The choice of means may result in unfairly distributed burdens because the means do not benefit the regulated owners or because the regulated owners were not somehow responsible for the need to regulate in the first place. The regulatory end may also indicate unfairly distributed burdens if the purpose is to obtain property from the owner without having to pay just

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262. Eagle, *supra* note 182, at 497 (footnotes omitted).

263. See, e.g., *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 115 (Minn. 2003) (deciding under state constitution, rather than federal *Penn Central* test, that abuse “specifically directed against a particular parcel” may establish a regulatory taking).

compensation or to reduce the cost of the property when the government obtains it. And, more broadly, the regulatory end may indicate unfairly distributed burdens when the purpose is not a good faith attempt to improve the public welfare, but is the result of hostility, favoring other private interests or similar purposes, other than genuinely judging what would be best for the community.