The Legitimacy of Land Use Determinations and Substantive Due Process

By Steven J. Eagle*

I. LAND USE DETERMINATIONS AND THE RULE OF LAW

Chief Justice Marshall famously declared in *Marbury v. Madison* that "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[1] Taking this admonition as our starting point, rules that affect private property must be those propounded in accordance with processes that ensure stable expectations of individual liberty. In particular, vague rules that leave too much to the proclivities of government officials and administrators should be avoided. However, just such a set of "essentially ad hoc" determinations are the legacy of the United States Supreme Court's most general takings rule, that enunciated in *Penn Central Transportation Co. v. City of New York*.[2]

Professor Susan Rose-Ackerman highlighted the problem of "ad hocery" over a decade ago.[3] As she has noted much more recently, the problem remains. "The Supreme Court's glorification of ad hoc balancing is impossible to reconcile with its interest in preserving investment-backed expectations."[4] The difficulty is made even worse by the fact that development requires the confidence to make large expenditures early in the process, whereas judicial review of government permit denials occurs only after substantial injuries have been incurred.[5]

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[1] 5 U.S. (1 Cranch) 137, 163 (1803).

[2] 438 U.S. 104, 124 (1978).

[3] Susan Rose-Ackerman, *Against Ad Hocery, A Comment on Michelman*, 88 COLUM. L. REV. 1697 (1988).

[4] Susan Rose-Ackerman & Jim Rossi, *Disentangling Deregulatory Takings*, 86 VA. L. REV. 1435, 1449 (2000)

[5] *See*, *id.* at 1448.

The question of what constitutes the "Rule of Law" is a subtle matter, since government regulations must be promulgated and enforced through men and not by divine intervention.[6] While political theorists and legal scholars have elucidated the "Rule of Law" in various formulations, Professor Richard Fallon recently has restated five elements that modern accounts generally emphasize. They are: (1) capacity (rules must be able to guide people in their affairs); (2) efficacy (rules actually do serve to guide people); (3) stability (the rule must be reasonably stable so that people can plan and coordinate their actions over time); (4) supremacy of legal authority (the law should rule officials, including judges, as well as ordinary citizens); and (5) impartiality (courts should enforce the law and use fair procedures).[7]

In addition, adherence to the Rule of Law requires that government in all its actions is bound by rules determined and announced in advance. Nothing less would permit the people to anticipate with reasonable certainty how government will use its coercive powers in given circumstances and to plan their affairs, including land ownership and use, based on this knowledge.[8] Finally, the incorporation of at least some natural law values is required to prevent the imposition of synthetic systems of rules devoid of a relationship to citizens' notions of justice and fairness.[9] In our own society, the obvious source of those natural law values is the common law, which developed, through a slow process of accretion and change, concepts of a fair relationship between the landowner and the state. The Rule of Law becomes instantiated by the fact that the property rights determination is "based upon long and venerable case precedent, developed over the last two centuries. It is further clarified in the light of our law's Common Law antecedents. The Anglo-American case precedent is literally made up of tens of thousands of cases defining property rights over the better part of a millennium."[10]

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[6] This discussion largely is based on Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating From the "Rule of Law"*, 42 N.Y.L. SCH. L. REV. 345, 357-359 (1998).

[7] *See*, Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8-9 (1997).

[8] *See*, Friedrich A. Hayek, The Road to Serfdom 72-73 (1944).

[9] *See generally*, LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

[10] Hage v. United States, 35 Fed. Cl. 147, 151 (1996).

In imposing regulations on private property, the State necessarily asserts their validity. It also asserts that they properly are classified as harm preventing, so as to require no compensation to adversely affected owners, or benefit conferring, in which case just compensation is due under the Takings Clause.[11] The State and its officials hardly are neutral in these matters, since exercise of the police power does not require the raising of taxes, whereas exercise of the eminent domain power does.[12] As the Supreme Court has recognized, there is greater need for judicial oversight when "the State's self-interest is at stake."[13]

II. SUBSUMING SUBSTANTIVE DUE PROCESS IN THE TAKINGS CLAUSE

In the enlightenment tradition of John Locke,[14] James Madison declaimed that "[a]s a man is said to have a right to his property, he may be equally said to have a property in his rights."[15] The Framers thus saw no clear distinction between property rights in land and other forms of individual liberty. Indeed, the "great focus of the Framers was the security of basic rights, property in particular, not the implementation of political liberty."[16] "By the late eighteenth century, 'Lockean' ideas of government and revolution were accepted everywhere in America; they seemed, in fact, a statement of principles built into English constitutional tradition."[17] The tension between the natural law approach of protecting liberty and property and the limited role of courts in enforcing positive law has marked American jurisprudence ever since.

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[11] *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255 (1980), Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[12] The best Supreme Court exposition of this point is Pennell v. City of San Jose, 485 U.S. 1, 15-24 (1988) (Scalia, J., concurring in part and dissenting in part).

[13] United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977).

[14] JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 123 (Peter Laslett ed., 2d ed., Cambridge Univ. Press 1967) (1688) ("lives, liberties, and estates, which I call by the general Name, 'Property"').

[15] James Madison, Property, 1 NATIONAL GAZETTE, Mar. 29, 1792, at 174, reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865).

[16] JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 92 (1990)

[17] PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 87 (1997).

In 1798, in *Calder v. Bull*,[18] Justice Iredell's view that courts cannot enforce natural law over legislation prevailed over Justice Chase's view that natural rights restricted the power of government. However, recent Supreme Court cases[19] give resonance to Justice Chase's statement in that "a law that takes property from *A*. and gives it to *B*." would be "contrary to the great first principles of the social compact" and "cannot be considered a rightful exercise of legislative authority."[20]

The Supreme Court held in 1833, in *Barron v. Mayor and City Council of Baltimore*,[21] that the Fifth Amendment's Compensation Clause did not apply to the States. Likewise, in the *Slaughter-House Cases*,[22] it narrowly ruled that the Fourteenth Amendment's Due Process Clause accorded procedural due process only. However, this result did not preclude a finding that state exercises of eminent domain for the benefit of private persons were prohibited by due process. In *Fallbrook Irrigation District v. Bradley*,[23] the Court held:

> In the fourteenth amendment the provision regarding the taking of private property is omitted, and the prohibition against the state is confined to its depriving any person of life, liberty, or property without due process of law. It is claimed, however, that the citizen is deprived of his property without due process of law if it be taken by or under state authority for any other than a public use, either under the guise of taxation or by the assumption of the right of eminent domain. In that way the question whether private property has been taken for any other than a public use becomes material in this court, even where the taking is under the authority of the state, instead of the federal, government.[24]

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[18] 3 U.S. (3 Dall.) 386 (1798).

[19] *See, e.g.*, Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) (countenancing condemnation of reversions for transfer to ground lessees); Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) (noting that right to interest arrogated by mandatory bar trust fund was "property"); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (approving regulatory takings damages where city prevented development so parcel would become parkland).

[20] *Id*. at 388 (opinion of Chase, J.).

[21] 32 U.S. (7 Pet.) 243 (1833).

[22] 83 U.S. (16 Wall.) 36 (1872).

[23] 164 U.S. 112 (1896).

[24] *Id*. at 158.

Moreover, in *Chicago, Milwaukee & St. Paul Railway Co. v. Minnesota*,[25] the Court held that railroads had a due process right to judicial review of rate regulations to ensure that they could achieve a fair return on their investments. Shortly thereafter, in *Allgeyer v. Louisiana*,[26] the Court explained in dicta that deprivation of liberty without due process of law, as that term was used in the Fourteenth Amendment, encompassed the citizen's right "to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."[27]

The Court's acceptance of economic substantive due process in the late 19th century and first third of the 20th century is exemplified by *Lochner v. New York*.[28] There, the Court struck down a limit on the working hours of bakers on the grounds that it did not protect the health, safety, and welfare of the public, and interfered with the workers' freedom of contract. Although the Court's economic substantive due process jurisprudence has been vilified as siding with business interests against workers, minorities, and others less well off, under it the Court upheld the majority of statutes challenged and there was no concerted effort to protect business against economic and social legislation.[29] Nevertheless, the Court made a sweeping and now familiar turnabout in the face of the Great Depression and New Deal, in cases such as *Nebbia v. New York*[30] and *West Coast Hotel v. Parrish*.[31] Finally, in *United States v. Carolene Products Co.*,[32] it established the dichotomy between general economic and social legislation, on the one hand, and

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[25] 134 U.S. 418 (1890).

[26] 165 U.S. 578 (1897).

[27] *Id.* at 589.

[28] 198 U.S. 45 (1905).

[29] See JAMES W. ELY, JR., THE CHIEF JUSTICESHIP OF MELVILLE W. FULLER, 1888-1910, at 74-75 (1995) (referring to the period of Fuller's tenure).

[30] 291 U.S. 502 (1934) (upholding state regulatory scheme for milk production).

[31] 300 U.S. 379 (1937) (sustaining minimum wage law for women).

[32] 304 U.S. 144 (1938) (sustaining regulations on sale of filled milk).

legislation protecting "fundamental" rights and protected classes, on the other.[33] While these cases often are considered to have repudiated substantive due process, the Court instead used them to establish a new set of preferred rights to replace its discredited emphasis on contract and property. Through its new paradigm, Bruce Ackerman has noted the Supreme Court accommodated itself to the New Deal era and "brilliantly endeavored to turn the Old Court's recent defeat into a judicial victory."[34]

Using "fundamental rights" as a new preferred value, in *Moore v. City of East Cleveland*,[35] the Court struck, on substantive due process grounds, a zoning requirement for "single-family" occupancy resulting in the separation of non-sibling grandchildren. The case was decided shortly after *Village of Belle Terre v. Boraas*,[36] where in a sweeping opinion it had upheld single family zoning ordinances generally. *Moore* was reminiscent of the Court's substantive due process approach to striking down racial zoning in 1917, in *Buchanan v. Warley*.[37]

Consistent with its New Deal era repudiation of economic substantive due process, the Supreme Court recast earlier precedents protecting private property rights from Due Process Clause cases into Takings Clause cases. As Justice Stevens noted in his dissent in *Dolan v. City of Tigard*,[38] the case in which the Court first required that an owner be compensated for deprivation by a locality for a property interest, *Chicago, Burlington & Quincy Railroad*,[39] "applied the same kind of substantive due process" as gave rise to *Lochner*.[40] Likewise, the concept of regula-

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[33] *Id.* at 152-53 n.4.

[34] Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 714-15 (1985).

[35] 431 U.S. 494 (1977).

[36] 416 U.S. 1 (1974).

[37] 245 U.S. 60 (1917).

[38] 512 U.S. 374, 405 (1994) (Stevens, J., dissenting) (asserting that shifting the burden to municipalities to justify administrative exactions from landowners represented a "resurrection of a species of substantive due process analysis").

[39] Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897).

[40] 512 U.S. at 406.

tory takings enunciated by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*,[41] "has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified."[42] Chief Justice Rehnquist quickly retorted that "there is no doubt that later cases have held that the Fourteenth Amendment does make the Takings Clause of the Fifth Amendment applicable to the States. Nor is there any doubt that these cases have relied upon *Chicago, B. & Q. R.R. Co. v. Chicago* to reach that result."[43]

III. *EASTERN ENTERPRISES*, *DEL MONTE DUNES*, AND A POSSIBLE DUE PROCESS REAPPRAISAL

The Court's recent decisions in *Eastern Enterprises v. Apfel*[44] and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[45] reflect its continued ambivalence towards the use of due process in judging the legitimacy of land use decisions.

In *Eastern Enterprises*, the Coal Industry Retiree Health Benefit Act of 1992 required that substantial payments with respect to miners who last had been employed many years earlier. The Court determined that the act imposed "severe retroactive liability on a limited class of parties that could not have anticipated the liability."[46] The Court split four-one-four. Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, deemed the Act unconstitutional under the Takings Clause.[47] Justice Breyer's dissent, joined by Justices Stevens, Souter and Ginsberg, deemed the Act constitutional under the Due Process Clause.[48] Justice Kennedy, concurring in the judgment and dissenting in part, deemed the Act

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[41] 260 U.S. 393 (1922).

[42] 512 U.S. at 407.

[43] Dolan, *id*. at 384 n.5.

[44] 524 U.S. 498 (1998).

[45] 526 U.S. 687 (1999).

[46] 524 U.S. at 528-529. This discussion of *Eastern Enterprises* borrows from Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977 (2000).

[47] 524 U.S. at 553.

[48] *Id.* at 558.

unconstitutional under the Due Process Clause.[49] Thus, the plurality plus Justice Kennedy judged the Act unconstitutional as applied, but the dissent plus Justice Kennedy constituted a majority for a due process analysis.

Justice O'Connor supported the takings approach on the following basis:

> That Congress sought a legislative remedy for what it perceived to be a grave problem in the funding of retired coal miners' health benefits is understandable; complex problems of that sort typically call for a legislative solution. When, however, that solution 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. Eastern cannot be forced to bear the expense of lifetime health benefits for miners based on its activities decades before those benefits were promised. Accordingly, in the specific circumstances of this case, we conclude that the Coal Act's application to Eastern effects an unconstitutional taking.[50]

She went on to dismiss the need to consider due process:

> Our analysis of legislation under the Takings and Due Process Clauses is correlated to some extent … and there is a question whether the Coal Act violates due process in light of the Act's severely retroactive impact. At the same time, this Court has expressed concerns about using the Due Process Clause to invalidate economic legislation. … Because we have determined that the third tier of the Coal Act's allocation scheme violates the Takings Clause as applied to Eastern, we need not address Eastern's due process claim.[51]

Justice O'Connor's refusal to entertain due process obviously was intended to avoid the "specter" of *Lochner*.[52] This notwithstanding Justice Breyer's proffered distinction in dissent that *Lochner* was "misplaced." "As the plurality points out, an unfair retroactive assessment of liability upsets settled expectations, and it thereby undermines a basic ob-

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[49] *Id.* at 568.

[50] 524 U.S. at 537 (emphasis added).

[51] *Id.* at 537-538.

[52] *See*, Cass R. Sunstein, Lochner's *Legacy*, 87 COLUM. L. REV. 873, 873 (1987) (characterizing Lochner as a "specter" that "has loomed over most important constitutio

jective of law itself."[53] It is plausible, although not certain, that Justice Breyer's opinion sufficiently distinguishes economic harm caused by retroactivity from economic substantive due process more generally.[54] Breyer is more persuasive in asserting that the protection of settled expectations, a hallmark of the Rule of Law, does find what he terms its "natural home"[55] in the Due Process Clause.

In 1999, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[56] the Supreme Court resisted revisiting the substantive due process elements of its takings jurisprudence. This was a case in which the city would not take "yes" for an answer. Del Monte was forced to submit five complete plans for the redevelopment of its oceanfront parcel that previously had been the site of a petroleum tank farm. Each plan met the city's requirements, which subsequently were changed. The Supreme Court accepted the developer's argument of municipal bad faith, and the Court's statement of facts essentially was taken from the developer's brief.[57]

If the theme of *Eastern Enterprises* was retroactivity as unfairness, the theme of *Del Monte Dunes* is that governmental bad faith constitutes unfairness. The bad faith alleged had nothing to do with procedure, but rather with the city's determinations on the merits. While the trial judge reserved Del Monte's substantive due process claim for the court, over the city's objections he submitted its takings and equal protection claims to the jury.[58] The jury instruction included the following language:

> Now, if the preponderance of the evidence establishes that there was no reasonable relationship between the city's denial of the ... proposal and legitimate public purpose, you should find in favor of the plaintiff. If you find that there existed a

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[53] *Id.* at 557-58 (Breyer, J., dissenting).

[54] However, the vindication of Eastern's expectations mean that its liability is limited to that under its long-expired contract. Therefore, a due process victory might be viewed as upholding the sanctity of contract that was central to the *Lochner* line of cases.

[55] 524 U.S. at 556 (Breyer, J. dissenting).

[56] 526 U.S. 687 (1999).

[57] *Id.* at 697-701.

[58] *Id*. at 699.

> reasonable relationship between the city's decision and a legitimate public purpose, you should find in favor of the city. As long as the regulatory action by the city substantially advances their legitimate public purpose, ... its underlying motives and reasons are not to be inquired into.[59]

Back in 1980, in *Agins v. City of Tiburon*,[60] the Supreme Court had declared: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land."[61] The requirement that a regulation "substantially advance legitimate state interests," the first prong of the *Agins* test, is an example of what I have referred to as "circuitous recursion."[62] The word "recursion" refers to nesting, as is the case with one Russian doll within another. The circuity is derived from the fact that the Court's jurisprudence has created an endless loop. The outer layer is due process, represented in the Due Process Clause of the Fourteenth Amendment and *Chicago, Burlington & Quincy Railroad*.[63] The middle layer is the Takings Clause of the Fifth Amendment, now deemed incorporated in the Fourteenth Amendment and applicable to the States. The inner layer is due process again, now in the form of the first *Agins* prong, deeming the lack of advancement of a legitimate state interest to be a taking.

The Solicitor General's brief in support of the city proposed an additional question for the Court to consider: "Whether a land-use restriction that does not substantially advance a legitimate public purpose can be deemed, on that basis alone, to effect a taking of property requiring the payment of just compensation."[64]

Writing for the Court, Justice Kennedy parried the Solicitor's demand:

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[59] *Id*. at 701.

[60] 447 U.S. 255 (1980).

[61] *Id*. at 260.

[62] Steven J. Eagle, Del Monte Dunes, *Good Faith, and Land Use Regulation*, 30 ENVTL. L. REP. 10100, 10105 (2000).

[63] Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226 (1897).

[64] Brief for the United States as Amicus Curiae Supporting Petitioner, Part *1 (Questions Presented), 1998 WL 308006.

> In any event, although this Court has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor 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, we note that the trial court's instructions are consistent with our previous general discussions of regulatory takings liability. The city did not challenge below the applicability or continued viability of the general test for regulatory takings liability recited by these authorities and upon which the jury instructions appear to have been modeled. Given the posture of the case before us, we decline the suggestions of amici to revisit these precedents.[65]

Taking up the issue of the use of the "substantial advancement" by the jury, Justice Kennedy found that it was not free to interfere with the city's land use policies:

> Rather, the jury was instructed to consider whether the city's denial of the final proposal was reasonably related to a legitimate public purpose. Even with regard to this issue, however, the jury was not given free rein to second-guess the city's land-use policies. Rather, the jury was instructed, in unmistakable terms, that the various purposes asserted by the city were legitimate public interests.
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> The jury, furthermore, was not asked to evaluate the city's decision in isolation but rather in context, and, in particular, in light of the tortuous and protracted history of attempts to develop the property.[66]

IV. A SUBSTANTIVE DUE PROCESS AGENDA

The following materials sketch a possible agenda for judicial exploration of the contours of substantive due process. Discussions of specific legal issues are preceded by a short treatment of the appropriate standard for judicial review. The adoption of too deferential a standard would render consideration of specific issues nugatory. While perhaps some commentators might urge substantive due process review as a substitute for Takings Clause analysis with the object of smothering private property rights with notoriously deferential rational basis scrutiny, that is not the intent here. Rather, substantive due process review should augment the Takings Clause—protecting property rights in circumstances where takings analysis is a less useful tool.

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[65] *Del Monte Dunes*, 526 U.S. at 704.

[66] *Id*. at 706.

A. *"Meaningful Scrutiny" Review is Needed*

In the aftermath of *Carolene Products* and other New Deal cases,[67] the Supreme Court adopted a practice of "strict scrutiny" for "fundamental" rights,[68] "mid-level" review for gender and illegitimacy,[69] and a "rational basis" test for the general run of economic and social legislation.[70] In its operation, the rational basis test might better be termed the "plausible basis test." Land use determinations are based on a multitude of facts. It is always possible that some combination, under some conceivable circumstance, might favor an otherwise inexplicable regulation.

I have suggested elsewhere[71] that "meaningful scrutiny" is a term that might stand for an appropriate level of scrutiny. It takes into account, as the Court has stated in another context, that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[72] The same idea is captured by the term "rough proportionality," which the Court has used in *Dolan v. City of Tigard*.[73]

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[67] United States v. Carolene Products Co., 304 U.S. 144 (1938). For discussion, *see* text accompanying n. 28 et seq., supra.

[68] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) (abortion rights); see also Gerald Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (referring to "strict scrutiny" as "'strict' in theory and fatal in fact").

[69] *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983) (providing that legislation must be "narrowly tailored to serve a significant government interest").

[70] *See, e.g.*, Allied Stores v. Bowers, 358 U.S. 522, 530 (1959) (upholding any classification based "upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy").

[71] Eagle, supra n. 46 at 1025-1026.

[72] City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (holding that the Religious Freedom Restoration Act exceeded Congressional powers).

[73] 512 U.S. 374, 391 (1994).

The best model for "meaningful scrutiny" as advocated here is the type of inquiry used by the Court in *City of Cleburne v. Cleburne Living Center*.[74] The zoning ordinance examined in that case required a special use permit for a group home for the mentally retarded, notwithstanding that hotels, fraternity houses and similar intense uses could locate in the same residential district as a matter of right.[75] The Court carefully reviewed the proffered reasons for the requirement and concluded that it was not "rationally related to a legitimate governmental purpose."[76] *City of Cleburne* nominally applied rational basis review. As Professor Laurence Tribe has observed, it better might be styled "covert heightened scrutiny."[77] But an even-handed approach to the police power and private property rights should not be covert and the Supreme Court should not cringe from straightforwardly denominating it.

B. *Property Rights, the Notice Rule and "Reasonable Investment-Backed Expectations"*

Justice Brennan's invocation of Professor Michelman's notion of investment-backed expectations[78] in *Penn Central* [79] has created exactly the problem[80] with circuity that Justice Kennedy warned about in *Lucas*.[81] The doctrine, without apparent thought, was relabeled "reasonable investment-backed expectations" by Chief Justice Rehnquist in *Kaiser Aetna v. United*

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[74] 473 U.S. 432 (1985).

[75] *Id*. at 435-39.

[76] *Id*. at 446.

[77] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1612 (2d ed. 1988).

[78] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just* , 80 HARV. L. REV. 1165 (1967).

[79] Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[80] For an elaboration of the troublesome nature of investment-backed expectations, *see* Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations"*, 32 URB. LAW. 437-446 (2000).

[81] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring). "There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is." *Id.*

States,[82] a term utilized by the Court in subsequent cases. "Expectations" have progressed beyond those related to past events, with landowners being charged with a knowledge of the "regulatory climate" that purports to bind them to subsequent enactments as well.[83]

Likewise problematic is the notice rule which has grown around Justice Scalia's "background principles" analysis in *Lucas*. There he stated:

> Any limitation so severe [as to deprive an owner of all economically beneficial use] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.[84]

A number of courts have held that ordinances and other restrictions put in place at any time prior to an owner's acquisition of title are background principles from the perspective of ownership rights.[85] The Supreme Court recently has heard argument in one case raising the issue, *Palazzolo v. Rhode Island*.[86] A petition for certiorari now is pending on another case, *McQueen v. South Carolina Coastal Council*,[87] that is strikingly similar to *Lucas* except that the development restriction was promulgated prior to the landowner's purchase.

In *Schneider v. California Dept. of Corrections*,[88] a case involving inmate trust accounts, the state asserted that it could define rights in the accounts so as to preclude accrued interest. It cited the Supreme Court's holding in *Board of Regents v. Roth* that "[p]roperty interests ... are

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[82] 444 U.S. 164, 175 (1979).

[83] *See* Good v. United States, 189 F.3d 1355, 1361 (Fed. Cir. 1999).

[84] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[85] *See*, *e.g.*, Kim v. City of New York, 681 N.E.2d 312, 315 (N.Y. 1997); Hunziker v. State, 519 N.W.2d 367 (Iowa 1994). *See also* Steven J. Eagle, *The 1997 Regulatory Takings Quartet, Retreating From the "Rule of Law"*, 42 N.Y.L. SCH. L. REV. 345 (1998).

[86] Palazzolo v. State, 746 A.2d 707 (R.I. 2000), *cert. granted sub nom.* Palazzolo v. Rhode Island, 121 S.Ct. 296 (Oct. 10, 2000) (oral argument heard February 26, 2001).

[87] 530 S.E.2d 628 (S.C. 2000).

[88] 151 F.3d 1194 (9th Cir. 1998).

not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as state law.*"[89]

The Ninth Circuit responded:

> The State's reliance upon *Roth*, however, is misplaced. Understood in proper context, it is clear that *Roth* stands not for a theory of plenary state control over the definition and recognition of compensable property interests, as the State assumes, but for a much more modest proposition. *Roth* was a so-called "new property" case; in it, the Court considered the circumstances under which state law might serve to elevate certain nontraditional forms of property—such as public employment, welfare assistance, state contracts and licenses, and other government largesse—to constitutional status. The *Roth* Court's recognition of the unremarkable proposition that state law may affirmatively *create* constitutionally protected "new property" interests in no way implies that a State may by statute or regulation *roll back* or *eliminate* traditional "old property" rights. As the Supreme Court has made clear, "the government does not have unlimited power to redefine property rights."[90] Rather, there is, we think, a "core" notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny. The States' power vis-à-vis property thus operates as a one-way ratchet of sorts: States may, under certain circumstances, confer "new property" status on interests located outside the core of constitutionally protected property, but they *may not* encroach upon traditional "old interests found within the core. Were the rule otherwise, States could unilaterally dictate the content of—indeed, altogether opt out of—both the Takings Clause and the Due Process Clause simply by statutorily recharacterizing traditional property-law concepts.[91]

Substantive due process protection might protect against arbitrary deprivation of core property rights through state expectations imputed to owners under the rubric of "reasonableness" and through the abrogation of property rights through recent ordinances under the notice rule.

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[89] *Id*. at 1200 (*quoting Roth*, 408 U.S. 564, 577 (1972) (emphasis supplied by Ninth Circuit).

[90] *Id*. (*quoting* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982)).

[91] *Id*. at 1200-01 (internal citations omitted, emphasis in original).

C. *Are Unreasonable Regulations Best Deemed to be Takings?*

The first prong of the Supreme Court's *Agins* test is 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."[92] But some reasonable regulations are takings, others are not. For instance, the regulations at issue in *Lucas*[93] and *Dolan*,[94] would have been reasonable even if they were intended solely for the advancement of tourism or the creation of a bicycle path, respectively. Valid exercises of governmental powers *ought* to be reasonable. The problem with those regulations is the reason for their validity. They were not valid exercises of the police power in the sense that they protected the health, safety, or welfare of the community from harm, but rather valid under government's power of eminent domain to acquire resources for the creation of public goods. As Justice Holmes explained in *Pennsylvania Coal*, "[t]he protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment."[95] As Justice Kennedy later put it, the "[Takings] Clause presupposes what the Government intends to do is otherwise constitutional."[96]

Likewise, unreasonable regulations affecting individuals' rights in land may have as their primary object quite a different sort of unfairness. The racial zoning struck in *Buchanan v. Warley*[97] was reprehensible not because it restricted ownership or use rights with respect to a particu-

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[92] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). *See* text accompanying note 60, et seq.

[93] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[94] Dolan v. City of Tigard, 512 U.S. 374 (1994).

[95] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[96] Eastern Enterprises v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

[97] 245 U.S. 60 (1917).

lar parcel, but because "this attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State."[98]

Two types of arbitrary government action considered here are the general deprivation of rights adhering to no specified asset, and the deprivation of property where just compensation is unavailing as a remedy.

D. *Arbitrary Takings of Pecuniary Value Without "Property"*

As discussed earlier,[99] the Supreme Court in *Eastern Enterprises v. Apfel*[100] struck a severely retroactive statute as applied to former employers of coal miners as a violation of the Takings Clause. However, the statute took no specific property. It merely required that the employers pay large sums of money to a pension fund. Only four Justices asserted that this constituted a taking.[101] Four other justices asserted that the statute should be analyzed through the lens of due process and that it was valid.[102] The swing vote, Justice Kennedy, asserted that the statute was "arbitrary and beyond the legitimate authority of the Government to enact" since it violated the Due Process Clause.

Justice Kennedy noted that the plurality opinion had relied upon the fact that the "character" of the Coal Act was that it imposed "severe retroactive liability."[103] Furthermore, "character" was one of the three factors highlighted in the Court's *Penn Central* ad hoc balancing test.[104] Nevertheless, there is no reason why the "character" of a government action is especially evocative of the Takings Clause. Kennedy added:

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[98] *Id*. at 82. *See*, David E. Bernstein, *Philip Sober Controlling Philip Drunk:* Buchanan v. Warley *in Historical Perspective*, 51 VAND. L. REV. 797, 859 (1998).

[99] *See* text accompanying note 46, et seq.

[100] 524 U.S. 498 (1998).

[101] Justice O'Connor's plurality opinion was joined by Rehnquist, C.J., and Scalia and Thomas, JJ.

[102] Justices Stevens and Breyer filed dissenting opinions. Each was joined by the other and by Souter and Ginsburg, JJ.

[103] *Eastern Enters.*, 524 U.S. at 528-529.

> If the plurality is adopting its novel and expansive concept of a taking in order to avoid making a normative judgment about the Coal Act, it fails in the attempt; for it must make the normative judgment in all events. The imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions. This sort of analysis is in uneasy tension with our basic understanding of the Takings Clause, which 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.[105]

E. *Arbitrary Takings of Property Interests Without Pecuniary Value*

In 1998, in *Phillips v. Washington Legal Foundation*,[106] the Supreme Court observed: "The government may not seize rents received by the owner of a building simply because it can prove that the costs incurred in collecting the rents exceed the amount collected."[107] The gravamen of the comment seems to be that government cannot opportunistically arrogate to itself private property of no net pecuniary value to the owner. The concept is a natural application of due process principles.

The issue in *Phillips* was the constitutionality of the rules mandating that lawyers place in bar pooled interest on lawyers trust accounts (IOLTA accounts) sums entrusted to them by clients that are too small to have interest inure to the individual clients.[108] These programs now are mandatory in every state.[109] The funds are used to fund legal agencies representing indigents and other law-related public purposes. The Courts of Appeals were split with regard to the constitu-

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[104] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[105] Eastern Enters., 524 U.S. at 544-45 (Kennedy, J., concurring in the judgment and dissenting in part).

[106] 524 U.S. 156 (1998).

[107] *Id*. at 170.

[108] *See id.* at 159 n.1, 159-160 (1998).

[109] *See* Washington Legal Foundation v. Legal Foundation of Washington, 236 F.3d 1097, 1102 (9th Cir. 2001) (explaining requirement now applies in all states).

tionality of IOLTA plans by clients and their lawyers who objected to the mandatory use of such accounts.[110]

In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*,[111] the Supreme Court held that "interest on a … deposited fund follows the principal and is to be allocated to those who are ultimately [112] *Phillips*, adhering to *Webb's*, held that interest on a client's trust funds deposited in an IOLTA account was the property of the client. It relied on the fact that Texas follows the general rule that "interest follows principal," and determined that the adoption of the Texas IOLTA program did not alter this general rule. The Court explicitly did not rule on the issue of whether a taking has occurred. On remand,[113] the district court noted that the purpose of the Takings Clause was not to limit governmental interference with private property, but rather to secure compensation for takings.[114] This requires that the claimant be placed "in as good a position pecuniarily as if his property had not been taken."[115] The court determined that, as a matter of fact, the interest generated would possess "no economically realizable value."[116] Hence, no taking had occurred.[117]

Subsequently, in *Washington Legal Foundation v. Legal Foundation of Washington*,[118] the U. S. Court of Appeals for the Ninth Circuit reviewed a challenge to the Washington IOLTA program in light of *Phillips*. The court quickly rejected assertions that the *Phillips* holding did

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[110] *See, e.g.*, Cone v. State Bar of Florida, 819 F.2d 1002 (11th Cir. 1987); Washington Legal Found. v. Texas Equal Access to Justice Found., 94 F.3d 996 (5th Cir.1996)).

[111] 449 U.S. 155 (1980).

[112] *Id*. at 162. See also Kevin H. Douglas, Note, *IOLTAS Unmasked: Legal Aid Program Funding Results in Taking of Clients' Property*, 50 VAND. L. REV. 1297 (1997).

[113] Washington Legal Foundation v. Texas Equal Access to Justice Foundation, 86 F.Supp.2d 624 (W.D. Tex. 2000).

[114] *Id*. at 637.

[115] *Id*. at 638 (*quoting* United States v. 564.54 Acres Land, 441 U.S. 506, 510 (1979)).

[116] *Id*. at 643.

[117] *Id.* at 647.

not apply to the Washington program, since its details differed from those in Texas. "*Phillips* is not based on some odd quirk of Texas law, but on a fundamental and pervasive common law principle accepted by both states."[119] Just as the permanent physical occupation of a small space by a cable television box was a *per se* taking in *Loretto v. Teleprompter Manhattan CATV Corp.*,[120] regardless of public purpose or a *Penn Central* balancing test,[121] the Ninth Circuit deemed the same result to follow here. "The IOLTA rule entirely appropriates the interest on the

ncipal in a trust account, so the distinction between regulation under the police power and a taking subject to Fifth Amendment protection is not affected by the economic impact."[122]

The Ninth Circuit went on to determine that the IOLTA program could deprive clients of money. It noted that the "expectation" that a given client deposit could not itself generate a positive economic return, which triggered the mandatory IOLTA deposit, would not infrequently be mistaken.[123] Furthermore, some clients were charged an "IOLTA fee," apparently to offset the cost of services previously performed for free by banks while client money was deposited in non-interest bearing accounts.[124] Together, these generated sufficient issues of fact for the case to be remanded.

The Supreme Court in *Phillips* had declared:

> We have never held that a physical item is not "property" simply because it lacks a positive economic or market value. … Our conclusion in this regard was premised on our longstanding recognition that property is more than economic value; it also consists of "the group of rights which the so-called owner exercises in his dominion of the physical thing," such "as the right to possess, use and dispose of it." While the interest income at issue here may have no economically realizable

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[118] 236 F.3d 1097 (9th Cir. 2001).

[119] *Id*. at 1106.

[120] 458 U.S. 419 (1982).

[121] *Id*. at 1111 (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

[122] *Id*.

[123] *Id*.

[124] *Id*. at 1112.

> value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property. …[125]

Likewise, in *Lucas*, the Court noted that, although its takings cases had focused on productive use of land "there are plainly a number of noneconomic interests in land whose impairment will invite exceedingly close scrutiny under the Takings Clause."[126] It cited *Loretto* for this proposition, describing that case as involving an "interest in excluding strangers from one's land."[127] Apart from other issues involved in the question of whether mandatory contributions to IOLTA programs and the agencies they fund constitute compelled speech or further core government functions,[128] scrutiny also is warranted here given the fact that there is little apparent relationship between the use of individuals' funds to provide for legal services for indigents and the purposes for which those funds were deposited.

Yet the Takings Clause seems to provide no relief for opportunistic seizures of assets that have value in the hands of the government but not in the hands of the owners. The problem is particularly acute respecting programs like IOLTA, where the property owner is deprived of positive economic value because of other governmental regulations.[129] Only the arbitrary quality of such a program would give scope for relief, and that is a matter of due process.

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[125] *Phillips*, 524 U.S. at 170.

[126] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 n. 8 (1992).

[127] *Id*. (*citing* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 436 (1982).

[128] *See*, e.g., Washington Legal Foundation v. Texas Equal Access to Justice Foundation, 86 F.Supp.2d 624, 632-636 (W.D. Tex. 2000) (finding no compelled expression and presence of core function).

[129] While federal banking regulations permit banks to pay interest to IOLTA funds, they forbid banks to make similar payments to the pooled client funds of law firms. *See Phillips*, 524 U.S. at 161.