STANDARDS OF JUDICIAL REVIEW IN SUPREME COURT LAND USE OPINIONS: A TAXONOMY, AN ANALYTICAL FRAMEWORK, AND A SYNTHESIS

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I. INTRODUCTION

> Thus the central function, and it is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like.
>
> John Hart Ely[1]

Judicial review[2] is a fundamental concept of the American political system, while public land use regulation is a central feature of American property, land development, and environmental law. The combination of judicial review and state and local land use controls produces a variegated mixture of jurisprudential areas. The resulting mosaic encompasses many approaches and some sharp disagreements about constitutional doctrine, historical precedent, and social policy. This is particularly true in an increasingly conservative domestic political climate that generates demands for deregulation which are directed at both legislatures and courts. Economic conservatives, who a generation ago were associated in the popular mind with judicial restraint, now encourage the United States Supreme Court to subject land use regulations to intensive and vigorous scrutiny.[3] Conversely, liberals, land use planners, and environmentalists who previously advocated active judicial review of certain varieties of land use regulations, such as exclusionary zoning controls, today support restraintist approaches to land use laws. In light of these "flips," and in light of the competing demands placed on legislators, regulators, and judges, we should not be surprised that "no set formula" has emerged with regard to standards of judicial

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1. JOHN H. ELY, DEMOCRACY AND DISTRUST 4-5 (1980).

2. Judicial review is the Supreme Court's power to strike down and invalidate, on constitutional grounds, legislative and executive action whether its origin be federal, state, or local. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 1 (1962) (noting the Court's power of constitutional review).

3. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 29-30 (1985).

review, just as "no set formula" has yet emerged on the takings issue.[4] All of this leads, however, to an interesting, yet problematic picture of standards of judicial review in Supreme Court land use jurisprudence.

Not only have some ironic "flips" occurred in the highly charged areas of judicial review and land use jurisprudence, but, not surprisingly, most writing on these topics in the professional literature has become ideological, not analytical.[5] As a result, discussion and debate becomes contradictory and intense.[6] Frequently what purports to be scholarly analysis is instead at its core politicized and polemical.[7] This makes it all the more difficult to achieve a clear

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4. In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), Justice William Brennan remarked, in a phrase that has become an often used description of Supreme Court treatment of the takings issue, that, "[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require ... compensat[ion]. . . ." For a synopsis of this case, see Appendix A.

5. With regard to constitutional theory and judicial review, see, e.g., BRUCE ACKERMAN, WE THE PEOPLE (1991); RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977); JOHN H. ELY, DEMOCRACY AND DISTRUST (1980); SUPREME COURT ACTIVISM AND RESTRAINT (Stephen C. Halpern & Charles M. Lamb eds., 1982); LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES (1985); Michael L. Benedict, *To Secure These Rights: Rights, Democracy and Judicial Review in the Anglo-American Constitutional Heritage*, 42 OHIO ST. L.J. 69 (1981); Raoul Berger, *Ely's "Theory of Judicial Review,"* 42 OHIO ST. L.J. 87 (1981); Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986); Robert H. Bork, *Styles in Constitutional Theory*, 26 S. TEX. L.J. 383 (1985); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Joseph D. Grano, *Ely's Theory of Judicial Review: Preserving the Significance of the Political Process*, 42 OHIO ST. L.J. 167 (1981); Earl M. Maltz, *Federalism and the Fourteenth Amendment: A Comment on Democracy and Distrust*, 42 OHIO ST. L.J. 209 (1981); James E. Meeks, *Foreword, Symposium: Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981); Frank I. Michelman, *The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Richard D. Parker, *The Past of Constitutional Theory - And Its Future*, 42 OHIO ST. L.J. 223 (1981); Michael J. Perry, *Interpretivisim, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261 (1981); Michael J. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278 (1981); Richard A. Posner, *Democracy and Distrust Revisited*, 77 VA. L. REV. 641 (1991).

6. *See, e.g.*, Bradley C. Canon, *A Framework For Analysis of Judicial Activism*, *in* SUPREME COURT ACTIVISM AND RESTRAINT, *supra* note 5, at 385-419 (1982); *see generally* SUPREME COURT ACTIVISM AND RESTRAINT, *supra* note 5.

7. Canon, *supra* note 6, at 385.

portrayal of the debate.

To address the confused picture that has emerged in land use litigation, this Article offers (1) a taxonomy, i.e. a classification system; (2) an analytical framework; and (3) a synthesis of the standards of judicial review utilized in Supreme Court land use cases since *Mugler v. Kansas*[8] was decided in 1887.[9] Unlike some previous efforts, it focuses on a dimension—standards of judicial review[10]—that has not previously received detailed and systematic attention.[11]

The unit of analysis utilized in this Article is the Supreme Court opinion—be it a majority, a concurring, or a dissenting opinion. Over 120 opinions[12] in more than four dozen Supreme Court land use decisions[13] are classified, put into an analytical framework, and then analyzed.[14] The explicit, or often implicit, policy bases in these

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8. 123 U.S. 623 (1887). For a synopsis of this case, see Appendix A.

9. Professor Canon's essay, *supra* note 6, provided the original idea for this Article.

10. "Standards of judicial review" are the standards that the Court has created and used "to guide [its] review and disposition of particular issues on the merits." WILLIAM A. KAPLIN, THE CONCEPTS AND METHODS OF CONSTITUTIONAL LAW 55 (1992). In this sense standards of judicial review are what has been called adjective, as opposed to substantive law, i.e. the level of deference or the level of judicial scrutiny the court uses in reviewing a challenge to legislative or administrative action. 1 ROBERT M. ANDERSON, AMERICAN LAW OF ZONING, § 3.14, at 113 (Kenneth H. Young ed., 4th ed. 1996) (discussing the adjective nature of presumption and burden of proof). To the extent possible, I attempt to: (1) extract this adjective law dimension from each opinion and examine it separately from the substantive, constitutional law aspects of the opinion; (2) classify it; and (3) synthesize it into a four-part structure. *See infra* Parts IV, V, VI, and VII.

11. Nine other dimensions of judicial review that are not analyzed in detail in this Article include: (1) judicial treatment of the non-judicial decision, for example, validation or invalidation; (2) judicial attitude toward the non-judicial decisionmaker; (3) judicial treatment of prudential doctrines such as: justiciability, ripeness, and standing; (4) judicial treatment of relevant precedent; (5) judicial treatment of constitutional provisions; (6) judicial policy making/social engineering; (7) specificity of policy making, i.e., positive, negative, or permissive; (8) judicial identification of alternative policy-makers; and (9) judicial treatment of remedial issues. Dimensions 1, 4, 5, 6, 7 and 8 are discussed by Professor Canon, *supra* note 6, at 386-87.

12. For a list of the land use opinions categorized and analyzed for this article, see Appendix B.

13. See Appendix B for a list of decisions.

14. Typically law review articles fully or almost fully digest the judicial opinions or statutes being analyzed. I depart somewhat from this approach. As I sort out, categorize, and analyze the over 120 key land use *opinions* of the Court, I also include, in footnotes, many

opinions are examined and discussed as well.[15] My purpose is to facilitate further analysis and understanding of Supreme Court land use jurisprudence and to shed light, not heat, on that body of jurisprudence. In addition, I propose a preliminary suggestion that is designed to improve and strengthen the Court's performance, the practicing bar's comprehension, and the public's understanding of this important area.[16]

Currently there is significant disarray, if not anarchy, in both the areas of constitutional theory (judicial review) and land development planning and control. The scholarly writing in both areas, beginning in the late 1950s and continuing to the present, is diverse, centrifugal, and, in sheer volume, overwhelming.[17] Unity and consensus are not emerging; fragmentation and polarity are discernible. Some see creative tension while others perceive "deep problems."[18]

With this confused picture of robust disagreements,[19] it is hoped that a taxonomy and an analytical framework along with some

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lengthy quotes from these opinions. I do this for two reasons: (1) to provide the reader with a first-hand flavor of the opinion's approach to judicial review; and (2) to allow the reader to make his or her own assessments and compare them to the ones I make.

Appendix A to this Article provides detailed synopses of the over four dozen land use *decisions* analyzed in the Article. This is also done for two reasons. First, the synopses provide useful background and discussion and are included as a service to readers who may not be familiar with many of the decisions and cases discussed. Second, by providing the synopses in Appendix A, I reduce the amount of discussion in the text that has to be devoted to informing the reader about the factual, procedural, and substantive background of the cases.

Thirty-nine of the fifty-three synopses in Appendix A appear in LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE 210-71 (Brian W. Blaesser & Alan C. Weinstein eds., 1989) [hereinafter BLAESSER, LAND USE]. These synopses are reprinted with permission from the American Planning Association, Suite 1600, 122 South Michigan Ave, Chicago, IL 60603-6107.

15. For a summary and synthesis of the policy bases articulated as justifications for the various standards of judicial review, see *infra* Part VIII, Figure VIII-2.

16. *See infra* Part IX, The Counter-Majoritarian Difficulty: A Modest Suggestion for Improvement.

17. *See supra* note 5.

18. *See, e.g.*, Posner, *supra* note 5, at 641.

19. *See, e.g.*, William W. Fisher III, *The Trouble with* Lucas, 45 STAN. L. REV. 1393 (1993); Douglas W. Kmiec, *At Last, The Supreme Court Solves the Takings Puzzle*, 19 HARV. J. L. & PUB. POL'Y 147 (1995).

helpful illustrations will provide a useful, practicable, and generally applicable starting point for later discussions that can share a more common analytical structure. The taxonomy and the framework can be applied to any particular Supreme Court opinion or decision, a line of opinions or decisions, an individual Justice's opinions, a specific substantive land use issue such as takings or equal protection, or various judicial periods like the Euclid era, the Warren Court era, or the Rehnquist/Scalia era.[20]

II. THE TAXONOMY

This Article describes, discusses, and applies four standards of judicial review to Supreme Court land use opinions. The first three standards are familiar to students of judicial review and land use jurisprudence: deferential standards of judicial review, heightened standards of judicial review, and activist standards of judicial review.[21] This Article also recognizes a fourth variety of judicial review, categorical judicial review. Categorical judicial review involves *per se* rules or categories which, if found to be applicable to a governmental land use regulation, will result in automatic constitutional invalidation. Categorical judicial review, unlike the other varieties, rejects legislative purpose inquiries and means-ends tests. Furthermore, it rejects any considerations of comity and propriety of relationships between coordinate branches of government. It is, in short, the most assertive and intrusive form of judicial review; it is uncompromisingly deadly to legislative action.[22]

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20. Canon, *supra* note 6, at 413-14.

21. *See* KAPLIN, *supra* note 10, at 55-56. *See also* DAVID R. GODSCHALK ET AL., CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT 82-83 (1979) (noting the standards used to evaluate equal protection violations).

22. *See infra* Part VII.

III. ANALYTICAL FRAMEWORK

The four standards of judicial review outlined in Part II comprise the Y axis of my framework. Substantive constitutional law issues that consistently arise in Supreme Court land use cases comprise the X axis.

FIGURE III-1 ANALYTICAL FRAMEWORK

		Substantive Constitutional Issues - X Axis						
Standards of Judicial Review	Y Axis	Substantive Due Process	Eminent Domain	Takings	Delegation of Power	Equal Protection	Freedom of Speech	Freedom of Religion
Deferential Judicial Review - Minimal Scrutiny								
Heightened Judicial Review - Intermediate Scrutiny								
Active Judicial Review - Strict Scrutiny								
Categorical Judicial Review - *Per se* Rules								

This framework is used to analyze and discuss over 120 Supreme Court land use opinions in over four dozen important land use decisions. This Article focuses on the discussion of the standards of judicial review, explicit or implicit, used to guide each Justice's analysis and disposition of the particular substantive issues on the merits. As the reader progresses through this Article, she will see fascinating interplays; between the Justices,[23] between the various

23. Compare, for example, the majority opinions of Justice Scalia in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Lucas v. South Carolina Coastal Council*, 505

standards of judicial review, between the policy bases of each standard,[24] and between certain Justices' attitudes toward the pros and cons of governmental regulation on one hand and the strengths and weaknesses of the coordinate, non-judicial branches of government on the other.[25]

IV. SYNTHESIS: DEFERENTIAL JUDICIAL REVIEW/MINIMAL SCRUTINY

> As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint.
>
> Justice Lewis Powell[26]

Deferential judicial review is an attitude or approach adopted by courts that recognizes comity among the coordinate branches of government. This approach assumes that policy decisions by legislative and administrative bodies under usual circumstances override judicial policy judgments. Deferential judicial review allows for the exercise of police power for the public welfare and it denies private property owners' interests a *predominant* position in our constitutional system. Deferential judicial review respects the factual realities as determined by non-judicial branches of government.[27]

U.S. 1003 (1992) and Chief Justice Rehnquist in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), with the respective dissenting opinions of Justice Brennan (*Nollan*, 483 U.S. at 842), Justice Blackmun (*Lucas*, 505 U.S. at 1036), and Justice Stevens (*Dolan*, 114 S. Ct. at 2322). For perhaps the best example of judicial interplay, see the majority opinion of Justice White and the dissenting opinion of Justice Marshall in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). For synopses of these cases, see Appendix A.

24. *See infra* Parts IV, V, VI, and VII and Part VIII, Figure VIII-B.

25. *Id.*

26. Moore v. City of East Cleveland, 431 U.S. 494, 502, 503 (1977) (footnote omitted). For a synopsis of this case, see Appendix A.

27. For an account of Chief Justice Morrison Waite's contribution to the development of deferential judicial review, see C. PETER MAGRATH, MORRISON R. WAITE: THE TRIUMPH OF CHARACTER 173-203 (1963).

Further, deferential judicial review is an attitude of modesty and propriety adopted by courts in reviewing, on constitutional grounds, the actions of the other coordinate branches of government.[28] Deferential judicial review is neither a matter of absolute obligation nor mere courtesy or good will, but the recognition that a court most often accords to legislative and executive actions consistent with the

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28. For an early and influential scholarly treatment of deferential judicial review, see JAMES B. THAYER, *The Origin and Scope of the American Doctrine of Constitutional Law in* LEGAL ESSAYS 20-22 (1908):

> I have accumulated these citations and run them back to the beginning, in order that it may be clear that the rule in question is something more than a mere form of language, a mere expression of courtesy and deference. It means far more than that. The courts have perceived with more or less distinctness that this exercise of the judicial function does in truth go far beyond the simple business which judges sometimes describe. If their duty were in truth merely and nakedly to ascertain the meaning of the text of the constitution and of the impeached Act of the legislature, and to determine, as an academic question, whether in the court's judgment the two were in conflict, it would, to be sure, be an elevated and important office, one dealing with great matters, involving large public considerations, but yet a function far simpler than it really is. Having ascertained all this, yet there remains a question—the really momentous question—whether, after all, the court can disregard the Act. It cannot do this as a mere matter of course,—merely because it is concluded that upon a just and true construction the law is unconstitutional. That is precisely the significance of the rule of administration that the courts lay down. It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question. That is the standard of duty to which the courts bring legislative Acts; that is the test which they apply,—not merely their own judgment as to constitutionality, but their conclusion as to what judgment is permissible to another department which the constitution has charged with the duty of making it. This rule recognizes that, having regard to the great, complex, ever-unfolding exigencies of government, much which will seem unconstitutional to one man, or body of men, may reasonably not seem so to another; that the constitution often admits of different interpretations; that there is often a range of choice and judgment; that in such cases the constitution does not impose upon the legislature any one specific opinion, but leaves open this range of choice; and that whatever choice is rational is constitutional. This is the principle which the rule that I have been illustrating affirms and supports. The meaning and effect of it are shortly and very strikingly intimated by a remark of Judge Cooley, to the effect that one who is a member of a legislature may vote against a measure as being, in his judgment, unconstitutional; and, being subsequently placed on the bench, when this measure, having been passed by the legislature in spite of his opposition, comes before him judicially, may there find it his duty, although he has in no degree changed his opinion, to declare it constitutional.

Id. (footnote omitted).

central constitutional concept of separation of powers. Deferential judicial review is an attitude of judicial self-restraint, an approach that "the least dangerous branch" adopts in its review of the actions of non-judicial branches of government.[29]

Deferential judicial review, the "normal" approach taken by the Supreme Court as it reviews land use regulations,[30] typically has three components: (1) a presumption of constitutional validity which attaches to the challenged governmental action under review, (2) the assignment of the burden of proof to the challenging party (usually a land owner alleging over-regulation), and (3) an exacting standard of proof. For instance, in the landmark 1926 zoning case of *Village of Euclid v. Ambler Realty Co.*,[31] the Supreme Court held that "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[32] Thus, the Court explicitly gave the Village of Euclid's zoning ordinance a presumption of validity, implicitly placed the burden of proof on Ambler Realty, and explicitly established a very high standard of proof, i.e. beyond fair debate.[33] This restraintist approach became the "normal"[34] judicial approach in the years since 1926 as courts reviewed an ever-increasing number and variety of land use regulations.

Judicial review would be a fairly meaningless power and would not be as controversial a topic as it is if courts invariably utilized a restraintist, "Euclidean" approach. However, as Parts V, VI, and VII of this Article demonstrate, the Supreme Court has departed from the restraintist approach once before[35] and many times since *Euclid*, and

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29. *See generally* BICKEL, *supra* note 2.

30. *See* 1 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, WILLIAMS AMERICAN LAND PLANNING LAW § 5A.04-40, at 139 (1988 rev.).

31. 272 U.S. 365 (1926). For a synopsis of this case, see Appendix A.

32. *Id.* at 388.

33. *Id.* at 395.

34. *See supra* note 30.

35. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414-16 (1922). For a synopsis of this case, see Appendix A.

has been, in a variety of ways, at various times, interventionist in its review of governmental land use actions. It is these interventionist varieties of judicial review that have led, in land use jurisprudence as in other areas of law, to a general "distrust" of the "least dangerous branch."[36]

The distinctive feature of restraintist, deferential judicial review is the presumption of validity,[37] a presumption usually found in land use cases that involve substantive due process and takings issues.[38] The Court has developed an analogous restraintist approach in equal protection and First Amendment cases—minimal scrutiny.[39] Minimal scrutiny is the restraintist component of what has been called two-tiered or three-tiered equal protection judicial review.[40] Also, minimal scrutiny is a standard of judicial review that gives the utmost respect to legislative and administrative decisions. Minimal scrutiny and the presumption of validity are the two principal forms of deferential judicial review.

The analysis of deferential judicial review that follows discusses the varieties of deferential judicial review according to substantive area, i.e. substantive due process, eminent domain, takings, delegation of power, equal protection, First Amendment-freedom of speech, and First Amendment-freedom of religion, and identifies the key case or cases in each. This discussion gives the content and

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36. *See* BICKEL, *supra* note 2; ELY, *supra* note 1, at 1-72.

37. For a critique of the presumption of validity as a tool of judicial review, see Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute For Analysis, A Source of Significant Confusion,* 23 B.C. ENVTL. AFF. L. REV. 301 (1996).

For an interesting and excellent article on the shifting of the presumption, see Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law,* 24 URB. LAW. 1 (1992). *See also* Robert J. Hopperton, *Majoritarian and Counter-Majoritarian Difficulties: Democracy, Distrust, and Disclosure in American Land-Use Jurispruduce—A Response to Professors Mandelker and Tarlock's Reply,* 24 B.C. ENVTL. AFF. L. REV. 541 (1997); Daniel R. Mandelker & A. Dan Tarlock, *Two Cheers for Shifting the Presumption of Validity: A Reply to Professor Hopperton,* 24 B.C. ENVTL. AFF. L. REV. 103 (1997).

38. *See* ANDERSON, *supra* note 10, at 116-17 (noting that zoning ordinances are presumed constitutional).

39. *See infra* Part IV.E-F.

40. *See infra* Part VIII, Figure VIII-3.

texture of the restraintist standards of judicial review; illustrations are provided to depict relationships and the sequence of the inquiry. Parts V, VI, and VII follow the same pattern.

A. Substantive Due Process

The presumption of validity can be traced to the early case of *Fletcher v. Peck*.[41] As Justice Powell pointed out in his opinion in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[42] in 1977, the "Court has recognized ever since *Fletcher v. Peck*, that judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government."[43] Deferential judicial review was articulated as a presumption of validity by Chief Justice Morrison Waite in 1878 in the *Sinking Fund Cases*.[44] Chief Justice Waite's articulation of the presumption of validity also provided the first suggestion of policy bases for the presumption—separation of powers and the integrity of the functions of the coordinate, non-judicial branches of government.[45]

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41. 10 U.S. (6 Cranch) 87 (1810).

42. 429 U.S. 252 (1977). For a synopsis of this case, see Appendix A.

43. *Id.* at 268 n.18 (citations omitted). In *Fletcher*, Chief Justice Marshall remarked that:

> The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

Fletcher, 10 U.S. at 128.

44. 99 U.S. 700 (1878).

> Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt. One branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule.

Id. at 718.

The first "land use" case in which the presumption of validity appeared was *Mugler v. Kansas*[46] in 1887, in which Justice John Marshall Harlan's opinion identified and articulated separation of powers and the recognition of appropriate roles for the various branches of government as policy bases of the presumption of validity.[47] The presumption of validity also is articulated by various Justices in several early twentieth century, pre-*Euclid* land use cases such as *Welch v. Swasey* (Justice Rufus Peckham),[48] *Reinman v. City of Little Rock* (Justice Mahlon Pitney),[49] *Hadacheck v. Sebastian* (Justice Joseph McKenna),[50] and *Block v. Hirsh* (Justice Oliver Wendell Holmes).[51]

The most significant articulation of the presumption of validity and its companion components appeared in Justice George Sutherland's opinion in *Village of Euclid v. Ambler Realty*.[52] In one sentence, Justice Sutherland put in place the cornerstone of the arch of deferential judicial review. Legislative action, even legislative action by a local legislative body like the Village of Euclid, Ohio, received a presumption of constitutional validity.[53] That presumption

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45. *See* KAPLIN, *supra* note 10, at 49-112 (discussing federalism and the separation of powers).

46. 123 U.S. 623 (1887).

47. *Id.* at 661-62.

> [E]very possible presumption is to be indulged in favor of the validity of a statute
> ....
> ... [T]he courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation. Indeed, it is a fundamental principle in our institutions, indispensable to the preservation of public liberty, that one of the separate departments of government shall not usurp powers committed by the Constitution to another department.

Id. (citations omitted).

48. 214 U.S. 91, 105-06 (1909). For a synopsis of this case, see Appendix A.

49. 237 U.S. 171, 177 (1915). For a synopsis of this case, see Appendix A.

50. 239 U.S. 394, 413-14 (1915). For a synopsis of this case, see Appendix A.

51. 256 U.S. 135, 154-55 (1921). For a synopsis of this case, see Appendix A.

52. 272 U.S. 365.

53. *Id.* at 388.

was strengthened by placing the burden of proof on the party challenging the legislative action.[54] The presumption was further reinforced by requiring the challenging party to prove its substantive issues beyond fair debate, a very high standard of proof similar to the degree of proof required of the state in a criminal prosecution.[55] In other words, land use regulations would survive constitutional attack, as they did in *Euclid*, unless the challenging party could prove beyond fair, reasonable debate that the regulation being attacked violated the Constitution.

When deferential judicial review is adopted by a court, challengers' attacks almost always will fail and the non-judicial decisionmaker's action will be sustained. This standard of judicial review is a passive, deferential, and highly protective approach that effectively immunizes legislative and executive action against most allegations of constitutional invalidity.

The Euclidean standard of deferential judicial review received significant support in the two years after it was articulated in 1926. In 1927, Justice Sutherland reiterated his Euclidean approach in *Zahn v. Board of Public Works*[56] and in *Gorieb v. Fox*.[57] In *Gorieb*, Justice Sutherland asserted additional policy bases for deference to state and local legislatures—the expertise and competence of those non-judicial decisionmakers. This deferential approach was also apparent, if implicit, in Justice Harlan Fiske Stone's 1928 opinion in *Miller v.*

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54. *Id.*

55. *Id.*

56. 274 U.S. 325, 328 (1927). "[T]he 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." *Id.* For a synopsis of this case, see Appendix A.

57. 274 U.S. 603 (1927). For a synopsis of this case, see Appendix A.

> All [zoning regulations] rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable.

Id. at 608 (citations omitted).

Schoene.[58] Thus, the pattern of deferential judicial review was firmly, but not irrevocably, established in the early days of zoning. Land use regulations would apparently receive great respect from the highest court in the land.

Although the Supreme Court refrained from granting certiorari in land use cases for many years after 1928, the Euclidean approach would be embraced in cases such as *Goldblatt v. Town of Hempstead*[59] in 1962, *Village of Belle Terre v. Boraas*[60] in 1974, as well as in Justice Stevens' concurring opinion and Justice White's and Justice Stewart's dissenting opinions in *Moore v. City of East Cleveland*[61] in 1977. Following the Supreme Court's lead, the Euclidean presumption of validity, burden of proof, and beyond fair debate standard of proof, in other words deferential judicial review, became the norm in most state courts around the country in the years after *Euclid*.

B. Eminent Domain

Deferential judicial review is not confined to substantive due process cases such as *Euclid*. In *Berman v. Parker*,[62] a 1954 Fifth Amendment eminent domain case, the plaintiffs challenged a compensated appropriation of their property for urban renewal purposes.[63] They contended that the action taken by the District of Columbia was an unconstitutional exercise of the power of eminent domain because their property would be conveyed to private parties for private, not public, uses.[64] Justice William O. Douglas, writing for

58. 276 U.S. 272, 279-80 (1928). For a synopsis of this case, see Appendix A.

59. 369 U.S. 590 (1962) (discussing a substantive due process and takings claim). For a synopsis of this case, see Appendix A.

60. 416 U.S. 1 (1974) (discussing equal protection and First Amendment-right of association and privacy issues). For a synopsis of this case, see Appendix A.

61. 431 U.S. 494 (1977) (discussing substantive due process issues). For a synopsis of this case, see Appendix A.

62. 348 U.S. 26 (1954). For a synopsis of this case, see Appendix A.

63. *Id.* at 28-31.

64. *Id.* at 31.

a unanimous Court, provided what is perhaps the strongest statement of deferential judicial review in Supreme Court land use jurisprudence, discussing at some length the proper roles of legislative bodies and courts.[65] Douglas also spoke expansively on the idea of public welfare and the legislature's role in promoting it.[66] Consequently, Douglas stated that once a legitimate public purpose for the project has been established, there is little room for judicial discretion.[67]

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65. *Id.* at 32.

> We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia or the States legislating concerning local affairs. This principle admits of no exception merely because the power of eminent domain is involved. The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.

Id. (citations omitted).

66. *Id.* at 33.

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

Id. (citations omitted).

67. *Id.* at 35-36.

> It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.
>
> . . . If the Agency considers it necessary in carrying out the redevelopment project to take full title to the real property involved, it may do so. It is not for the courts to

In *Berman*, both the legislative and administrative decisions were treated with great deference by the Court. While Justice Douglas did not speak in terms of presumptions, burdens of proof, or standards of proof, he provided what became a landmark statement of deferential judicial review.

More recently, in *Hawaii Housing Authority v. Midkiff*,[68] a 1984 eminent domain case, Justice Sandra Day O'Connor quoted extensively and approvingly from *Berman* regarding the narrow scope of deferential judicial review.[69] Justice O'Connor concluded that the deference given to a state legislature was no less than the deference to be given Congress because state legislatures were equally capable of assessing legitimate public purposes.[70] Justice O'Connor's opinion reiterates an important policy basis for

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determine whether it is necessary for successful consummation of the project that unsafe, unsightly, or insanitary buildings alone be taken or whether title to the land be included, any more than it is the function of the courts to sort and choose among the various parcels selected for condemnation.

Id. (citations omitted).

68. 467 U.S. 229 (1984). For a synopsis of this case, see Appendix A.

69. *Id.* at 239-41.

> The starting point for our analysis of the Act's constitutionality is the Court's decision in *Berman v. Parker*. . . .
>
> There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the Court in *Berman* made clear that it is "an extremely narrow" one. . . . In short, the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation."

Id. (citations omitted).

70. *Id.* at 244.

> Similarly, the fact that a state legislature, and not the Congress, made the public use determination does not mean that judicial deference is less appropriate. Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority. Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.

Id. (footnotes and citations omitted).

deferential judicial review; the expertise of the legislature makes it more qualified than courts to speak to the public purposes to be pursued in the exercise of eminent domain.

C. Regulatory Takings

Some of the most articulate and thoughtful statements of deferential judicial review and its policy bases appear in dissenting opinions. Nowhere is this more apparent than in Supreme Court regulatory takings cases. In *Pennsylvania Coal*, the first modern regulatory takings case, Justice Brandeis' dissenting opinion is a pre-*Euclid* example of a strong inclination to give deferential treatment to the legislative determination.[71] Similarly, Justice Blackmun, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[72] was highly critical of the majority opinion's categorical judicial review which overrode a legislative approach designed to deal with rapidly changing technological developments.[73] Justice Blackmun also criticized the Court's rigid, inflexible use of an archaic rule that not only decided the substantive issue of the case in a way inimicable to his own thinking, but, as will be shown in Part VII, is an example of the categorical approach to the issue of judicial review.[74] Justice

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71. *Pennsylvania Coal*, 260 U.S. at 416-22.

72. 458 U.S. 419 (1982). For a synopsis of this case, see Appendix A.

73. *Id.* at 455.

> In the end, what troubles me most about today's decision is that is represents an archaic judicial response to a modern social problem.... The New York Legislature not only recognized, but also responded to, this technological advance by enacting a statute that sought carefully to balance the interests of all private parties. New York's courts in this litigation, with only one jurist in dissent, unanimously upheld the constitutionality of that considered legislative judgment.

Id. (citations omitted).

74. *Id.* at 446-47.

> The Court argues that a *per se* rule based on "permanent physical occupation" is both historically rooted and jurisprudentially sound. I disagree in both respects. The 19th-century precedents relied on by the Court lack any vitality outside the agrarian context in which they were decided. But if, by chance, they have any lingering vitality, then, in my view, those cases stand for a constitutional rule that is uniquely unsuited to the modern urban age.

Id. (footnotes and citations omitted).

Blackmun's dissent in *Loretto* is a precursor to the dissents he, Justice William Brennan, and Justice John Paul Stevens would author in response to later majority opinions written by Justice Antonin Scalia and Chief Justice William Rehnquist.

Before discussing the vigorous Brennan, Blackmun, and Stevens dissents in *Nollan v. California Coastal Commission*,[75] *Lucas v. South Carolina Coastal Council*,[76] and *Dolan v. City of Tigard*[77] respectively, it should be pointed out that there are several other opinions in the late 1970s and in the 1980s takings cases that are representative of deferential judicial review. Justice Lewis Powell's majority opinion in *Agins v. City of Tiburon*[78] dealt with the standards of judicial review only implicitly, but it remains a solid example of the deferential approach.[79] Similarly, Justice William Brennan's majority opinion in *Penn Central Transportation Co. v. New York City*,[80] gave obvious deference to New York City's legislative and administrative decisions although there was no explicit discussion of the standards of judicial review.[81] Justice William Rehnquist's 1980 majority opinion in *Pruneyard Shopping Center v. Robins*,[82] a takings and equal protection case, Justice Sandra Day O'Connor's 1992 majority opinion in *Yee v. City of Escondido*,[83] and Justice Harry Blackmun's 1979 dissenting opinion in *Kaiser Aetna v. United States*[84] are also representative of deferential judicial review. Finally,

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75. 483 U.S. 825, 842-64 (1987) (Brennan, J., dissenting). For a synopsis of this case, see Appendix A.

76. 505 U.S. 1003, 1036-61 (1992) (Blackmun, J., dissenting). For a synopsis of this case, see Appendix A.

77. 114 S. Ct. 2309, 2322-30 (1994) (Stevens, J., dissenting). For a synopsis of this case, see Appendix A.

78. 447 U.S. 255 (1980). For a synopsis of this case, see Appendix A.

79. *Id.* at 260-63.

80. 438 U.S. 104 (1978). For a synopsis of this case, see Appendix A.

81. *Id.* at 132-36.

82. 447 U.S. 74 (1980). For a synopsis of this case, see Appendix A.

83. 503 U.S. 519 (1992). For a synopsis of this case, see Appendix A.

84. 444 U.S. 164, 180-92 (1979) (Blackmun, J., dissenting). For a synopsis of this case, see Appendix A.

in *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[85] Justice John Paul Stevens touched briefly on deference to legislative judgments, burdens of proof, and his refusal to second guess the Pennsylvania legislature's solutions to land use problems.[86]

Some of the most spirited defenses of deferential judicial review appear in recent Supreme Court dissents written by Justices Brennan, Blackmun, and Stevens.[87] These three Justices emphatically asserted their support of deferential judicial review because they were troubled by the rigid, narrow standards of the activist and categorical approaches. Those standards were perceived as hostile to legislative judgments and a positioning of the Court as a super-legislature.

In *Nollan v. California Coastal Commission*,[88] Justice William Brennan, alluding to Lochnerian[89] activist judicial review, criticized Justice Scalia's creation of a new, more exacting substantive standard for reviewing takings challenges, the "essential nexus" test.[90] This new standard, unlike deferential judicial review, was, according to Brennan, highly problematic and flawed because it placed too great a burden on state legislatures.[91] Justice Brennan also suggested that

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85. 480 U.S. 470 (1987). For a synopsis of this case, see Appendix A.

86. *Id.* at 502-05. The Court also exercised a variety of deferential judicial review by declining to decide, for prudential reasons, four other cases in the 1970's and 1980's including *Warth v. Seldin*, 422 U.S. 490 (1975) (declining to decide an exclusionary zoning case due to lack of standing), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985) (declining to decide a takings case due to lack of ripeness), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) (declining to decide a takings case due to lack of ripeness), and *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986) (declining to decide a takings case due to lack of ripeness). For synopses of these cases, see Appendix A.

87. *See supra* notes 75-77 and accompanying text.

88. 483 U.S. 825.

89. Lochner v. New York, 198 U.S. 45 (1905). *Lochner* is representative of an era when the Supreme Court typically struck down social and economic reform legislation on substantive due process grounds. *See, e.g., supra* note 26 and accompanying text.

90. *Nollan*, 483 U.S. at 842.

91. According to Justice Brennan:

> The first problem with this conclusion is that the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century. Furthermore, even under the Court's cramped standard, the permit

Justice Scalia's majority opinion placed courts in inappropriate roles with respect to legislatures.[92] Brennan further believed that Scalia not only improperly adopted a new substantive standard but then misapplied it as well.[93] Brennan concluded that courts should respect the expertise of state agencies and not create "aberrational"[94] approaches to judicial review that substitute judicial policy judgments for those made by the legislature.[95]

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condition imposed in this case directly responds to the specific type of burden on access created by appellants' development. Finally, a review of those factors deemed most significant in takings analysis makes clear that the Commission's action implicates none of the concerns underlying the Takings Clause. The Court has thus struck down the Commission's reasonable effort to respond to intensified development along the California coast, on behalf of landowners who can make no claim that their reasonable expectations have been disrupted. The Court has, in short, given appellants a windfall at the expense of the public.

Id.

92. *Id.* at 843 n.1.

Our recent decisions make it plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare.... [S]tate legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare.

Id. (quoting Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952)).

93. "'Even this rule is not applied with strict precision, for this Court has often said that debatable questions as to reasonableness are not for the courts but for the legislature....'" *Id.* at 844 n.1 (quoting *Goldblatt*, 369 U.S. at 594-95).

94. *Id.* at 864.

95. *Id.* at 846, 848, 850 n.4 & 864.

Such a narrow conception of rationality, however, has long since been discredited as a judicial arrogation of legislative authority. "To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government."

... The State's exercise of its police power for this purpose deserves no less deference than any other measure designed to further the welfare of state citizens....

... The State's position no doubt reflected the reasonable assumption that the Court would evaluate the rationality of its exercise of the police power in accordance with the traditional standard of review, and that the Court would not attempt to substitute its judgment about the best way to preserve overall public access to the ocean at the Faria Family Beach Tract.

....

... [State agencies] should be encouraged to regulate development in the context of the overall balance of competing uses of the shoreline. The Court today does precisely the opposite, overruling an eminently reasonable exercise of an expert state

In the 1992 case *Lucas v. South Carolina Coastal Council*[96] Justice Blackmun found Justice Scalia's majority opinion even more anathetical to his own views of appropriate standards of judicial review in regulatory takings cases. Citing *Euclid*,[97] *Berman*,[98] *Goldblatt*,[99] and *Keystone*[100] for the "usual presumption of constitutionality that applies to statutes attacked as takings,"[101] Blackmun noted that standards of judicial review were being turned upside down. He argued that Scalia had no policy rationale for diminishing the State's police power and presumption of constitutionality by overturning the South Carolina Supreme Court's finding of no taking.[102] According to Blackmun the evidence

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agency's judgment, substituting its own narrow view of how this balance should be struck. Its reasoning is hardly suited to the complex reality of natural resource protection in the 20th century. I can only hope that today's decision is an aberration, and that a broader vision ultimately prevails.

Id. (citations omitted). Justice Blackmun's dissent in *Nollan* echoed both Justice Brennan's dissent in that case as well as his own dissent in *Loretto*, 458 U.S. at 442:

I disagree with the Court's rigid interpretation of the necessary correlation between a burden created by development and a condition imposed pursuant to the State's police power to mitigate that burden. The land-use problems this country faces require creative solutions. These are not advanced by an "eye for an eye" mentality. The close nexus between benefits and burdens that the Court now imposes on permit conditions creates an anomaly in the ordinary requirement that a State's exercise of its police power need be no more than rationally based.

483 U.S. 865 (Blackmun, J., dissenting). Justice Blackmun's dissent seemed to imply that Justice Scalia's new, more exacting approach was punitive and that under traditional analysis there was no taking.

96. 505 U.S. 1003.

97. 272 U.S. 365.

98. 348 U.S. 26.

99. 369 U.S. 590.

100. 480 U.S. 470.

101. *Lucas*, 505 U.S. at 1046 (citing *Goldblatt*, 369 U.S. at 594).

102. *Id.* at 1039.

The South Carolina Supreme Court found that the Beachfront Management Act did not take petitioner's property without compensation. The decision rested on two premises that until today were unassailable—that the State has the power to prevent any use of property it finds to be harmful to its citizens, and that a state statute is entitled to a presumption of constitutionality.

Id.

indicated that the South Carolina Supreme Court had properly relied on the legislature's assertion of the police power.[103] Justice Blackmun also criticized Justice Scalia's new *per se* rule of regulatory takings, in which total diminution of value automatically and categorically triggered a taking, regardless of either the public interest involved or the legislative findings.[104]

Justice Blackmun reviewed, in detail, what the Court referred to as "long-settled rules"[105] of judicial review in land use litigation and concluded that the majority had shifted the burden of proof without providing a rationale except distrust of the legislature.[106] Blackmun also expressed concern about the Court's new substantive *per se* rule that focused on diminution of economic value.[107] Justice Blackmun

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103. *Id.* at 1040-41.

> The court considered itself "bound by these uncontested legislative findings . . . [in the absence of] any attack whatsoever on the statutory scheme."
>
> Nothing in the record undermines the General Assembly's assessment that prohibitions on building in front of the setback line are necessary to protect people and property from storms, high tides, and beach erosion. Because that legislative determination cannot be disregarded in the absence of such evidence, and because its determination of harm to life and property from building is sufficient to prohibit that use under this Court's cases, the South Carolina Supreme Court correctly found no taking.

Id. (quoting *Lucas*, 404 S.E.2d 895, 901 (S.C. 1991)) (citations omitted).

104. *See, e.g., id.* at 1060.

105. *Id.* at 1045.

106. *Id.* at 1046.

> Rather than invoking these traditional rules, the Court decides the State has the burden to convince the courts that its legislative judgments are correct. Despite Lucas' complete failure to contest the legislature's findings of serious harm to life and property if a permanent structure is built, the Court decides that the legislative findings are not sufficient to justify the use prohibition. Instead, the Court "emphasize[s]" the State must do more than merely proffer its legislative judgments to avoid invalidating its law. In this case, apparently, the State now has the burden of showing the regulation is not a taking. The Court offers no justification for its sudden hostility toward state legislators, and I doubt that it could.

Id. (alteration in original) (citation omitted).

107. 505 U.S. at 1046-47.

> The Court does not reject the South Carolina Supreme Court's decision simply on the basis of its disbelief and distrust of the legislature's findings. It also takes the opportunity to create a new scheme for regulations that eliminate all economic value.

was further troubled by the highly subjective nature of the Court's decisionmaking approach and its "reliance on common law principles of nuisance" to achieve what Justice Scalia perceived as neutral, "value-free takings jurisprudence."[108] Finally, noting that the Court was "eager to decide this case," Justice Blackmun implicitly questioned whether it was legislators or judges who were to be distrusted.[109]

The 1994 case of *Dolan v. City of Tigard*[110] illustrates Justice Stevens' strenuous opposition to the interventionist approach taken by the majority in regulatory takings cases.[111] Justice Stevens noted at

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> From now on, there is a categorical rule finding these regulations to be a taking unless the use they prohibit is a background common-nuisance or property principle.

Id. (citation omitted).

108. *Id.* at 1054-55.

> Even more perplexing, however, is the Court's reliance on common-law principles of nuisance in its quest for a value-free taking jurisprudence. In determining what is a nuisance at common law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today: They determine whether the use is harmful. Common-law public and private nuisance law is simply a determination whether a particular use causes harm.

Id. at 1054-55 (citation omitted).

109. *Id.* at 1053.

> The Court rejects the notion that the State always can prohibit uses it deems a harm to the public without granting compensation because "the distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder." Since the characterization will depend "primarily upon one's evaluation of the worth of competing uses of real estate," the Court decides a legislative judgment of this kind no longer can provide the desired "objective, value-free basis" for upholding a regulation. The Court, however, fails to explain how its proposed common-law alternative escapes the same trap.

Id. (citations omitted).

Justice John Paul Stevens, although having less to say in *Lucas* than Justice Blackmun, worried about the court casually abandoning a doctrine of judicial restraint by ignoring certain prudential rules. "Cavalierly dismissing the doctrine of judicial restraint, the Court today tersely announces that 'we do not think it prudent to apply that prudential requirement here.' I respectfully disagree and would save consideration of the merits for another day." *Id.* at 1062-63 (citation omitted).

110. 114 S. Ct. 2309.

111. *Id.* at 2322. Stevens was joined in his *Dolan* dissent by Justices Blackmun and Ginsberg. Justice Stevens also dissented in an important 1987 takings case, *First English*

the outset of his dissent that in addition to the "essential nexus" between public purpose and the conditions imposed on a developer by a state or local land use regulatory body, the majority also held that a regulatory body must "demonstrate 'rough proportionality' between the harm caused by the new land use and the benefit obtained [by the regulatory] condition."[112] The burden of demonstrating this now constitutionally required rough proportionality test is on the state or local entity, not the challenging party.[113] Justice Stevens suggested that the majority had stretched significantly to find any state judicial authority for the new rough proportionality requirement it constitutionalized, and he expressed concern about judicial micro-management of a new class of land use cases.[114]

Unlike Justice Blackmun's general allusion to and concerns regarding Lochnerian judicial review, Justice Stevens noted what he saw as the "obvious kinship with the line of substantive due process cases that *Lochner* exemplified."[115] He feared that the majority opinion resulted in "the Court's resurrection of a species of substantive due process analysis that it firmly rejected decades

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Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 322 (1987). While Chief Justice Rehnquist's majority opinion focused on the question of the appropriate remedy, Justice Stevens, in his dissent, articulated and endorsed a strong presumption of constitutionality. For a synopsis of this case, see Appendix A.

112. *Id.* at 2323.

113. *Id.*

114. *Id.* at 2326.

> If the Court proposes to have the federal judiciary micro-manage state decisions of this kind, it is indeed extending its welcome mat to a significant new class of litigants. Although there is no reason to believe that state courts have failed to rise to the task, property owners have surely found a new friend today.
>
> The Court has made a serious error by abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan.

Id.

115. *Id.* at 2327.

ago."[116] However, Stevens seemed most concerned with two aspects of the standard of judicial review adopted by the majority: the impact that the Courts' "almost insurmountable burden"[117] activist standard would have on land use regulations in a rapidly changing world[118] and the potentially vast expansion of activist judicial review.[119]

Justice David Souter also dissented in *Dolan*, apparently believing that Dolan's argument and the Court's new position were questionable. Justice Souter noted that the city, not the petitioner, had supported its argument with solid evidence.[120] Souter also raised

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116. *Id.* at 2326. Justice Stevens pointed out the similarity between the *Lochner* results and the disposition of *Dolan*:

> The *Lochner* Court refused to presume that there was a reasonable connection between the regulation and the state interest in protecting the public health. A similar refusal to identify a sufficient nexus between an enlarged building with a newly paved parking lot and the state interests in minimizing the risks of flooding and traffic congestion proves fatal to the city's permit conditions in this case under the Court's novel approach.

Id. at 2327 n.9 (citation omitted).

117. *Id.* at 2329.

118. *Id.* at 2328-29.

> The city's conditions are by no means immune from constitutional scrutiny. The level of scrutiny, however, does not approximate the kind of review that would apply if the city had insisted on a surrender of Dolan's First Amendment rights in exchange for a building permit. One can only hope that the Court's reliance today on First Amendment cases, and its candid disavowal of the term "rational basis" to describe its new standard of review, do not signify a reassertion of the kind of superlegislative power the Court exercised during the *Lochner* era.

Id. (citations omitted).

119. *Id.* at 2327.

> The so-called "regulatory takings" doctrine that the Holmes dictum kindled has an obvious kinship with the line of substantive due process cases that *Lochner* exemplified. Besides having similar ancestry, both doctrines are potentially open-ended sources of judicial power to invalidate state economic regulations that Members of this Court view as unwise or unfair.

Id. (footnote omitted).

120. *Id.* at 2331.

> I cannot agree that the application of *Nollan* is a sound one here, since it appears that the Court has placed the burden of producing evidence of relationship on the city, despite the usual rule in cases involving the police power that the government is presumed to have acted constitutionally. Having thus assigned the burden, the Court

questions about what the majority was really trying to accomplish and suggested that neither *Dolan* nor *Lucas* were appropriate cases for enunciating a new takings doctrine.[121]

In summary, there are several notable points articulated by the dissenters in *Loretto, Nollan, Lucas*, and *Dolan* including the concerns: (1) that activist (*Nollan* and *Dolan*) and categorical (*Lucas*) standards of judicial review will seriously damage existing land use and environmental regulations; (2) that these highly interventionist varieties of judicial review will chill new, much-needed land use and environmental regulation; (3) that substantively these interventionist standards of judicial review are vague and subjective and therefore allow courts to make conclusory decisions; (4) that in their application the *Nollan* and *Dolan* standards impose rigid and narrow tests that will force the Court to micro-manage state and local land use regulations; (5) that the new standards of judicial review are based on questionable interpretations of precedent; (6) that the new standards of judicial review have no policy bases except hostility to legislatures and to legislation that restricts land owners' rights; (7) that the majority in *Nollan*, *Lucas*, and *Dolan* misapplied its own new standards; (8) that the new standards of judicial review will lead to unrestricted judicial discretion of the sort represented by *Lochner*;

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concludes that the City loses based on one word ("could" instead of "would"), and despite the fact that this record shows the connection the Court looks for. Dolan has put forward no evidence that the burden of granting a dedication for the bicycle path is unrelated in kind to the anticipated increase in traffic congestion, nor, if there exists a requirement that the relationship be related in degree, has Dolan shown that the exaction fails any such test. The city, by contrast, calculated the increased traffic flow that would result from Dolan's proposed development to be 435 trips per day, and its Comprehensive Plan, applied here, relied on studies showing the link between alternative modes of transportation, including bicycle paths, and reduced street traffic congestion.

Id. (footnote and citations omitted).

121. *Id.*

In any event, on my reading, the Court's conclusions about the city's vulnerability carry the Court no further than *Nollan* has gone already, and I do not view this case as a suitable vehicle for taking the law beyond that point. The right case for the enunciation of takings doctrine seems hard to spot.

Id. (citation omitted).

and (9) that the new *per se* rule in *Lucas* is particularly objectionable because of its outright hostility to legislative judgments and its replacement of not just deferential judicial review, but activist judicial review as well, with a *per se* rule which usurps the power and authority of the non-judicial decisionmaker

D. Delegation of Power

The Supreme Court has held that:

> [state and l]ocal legislative bodies may not delegate their legislative or policy making power to administrative agencies. However, legislatures may delegate substantial discretion to such agencies, so long as this delegation is accompanied by clear-cut policy guidelines to control the exercise of the delegated authority, particularly when the regulation potentially affects fundamental rights such as those protected by the First Amendment.[122]

In *Thomas Cusack Co. v. City of Chicago*,[123] the Supreme Court upheld a Chicago ordinance prohibiting billboards in residential areas.[124] The Court held that this regulation was not invalidated by a provision that removed the prohibition against billboards when owners of a majority of nearby lots consented.[125] Justice Clarke cited *Reinman v. City of Little Rock*[126] for the proposition that such an ordinance was valid unless the record clearly showed that the regulation was unreasonable and arbitrary.[127] The majority opinion also noted the Court's inclination to give deference to laws relating to matters completely under the supervision of the state enacting

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122. BLAESSER, LAND USE, *supra* note 14, at 17.

123. 242 U.S. 526 (1917). For a synopsis of this case, see Appendix A.

124. *Id.* at 527.

125. *Id.* at 530.

126. 237 U.S. 171.

127. *Cusak*, 242 U.S. at 529.

them.[128]

The issue of delegation of legislative power also arose in *City of Eastlake v. Forest City Enterprises, Inc.*,[129] where a majority of the Court, in an opinion written by Chief Justice Burger, upheld a city charter provision requiring the ratification of proposed land use changes by fifty-five percent of the votes cast in a zoning change referendum. In contrast to Justices Powell, Stevens, and Brennan in their dissents,[130] Justice Burger was highly sympathetic to the city of Eastlake's charter requirement.[131] Without discussing standards of judicial review, Chief Justice Burger reviewed with deference the charter provision in question and concluded that decisionmaking by the electorate through the referendum process did not involve a delegation of power.[132]

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128. *Id.* at 530-31.

> We therefore content ourselves with saying that while this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the State enacting them and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the State whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare. And this, for the reasons stated, cannot be said of the ordinance which we have here.

Id. (citation omitted).

129. 426 U.S. 668 (1976). For a synopsis of this case, see Appendix A.

130. *Id.* at 680-95.

131. *Id.* at 678.

132. *Id.* at 672.

> The conclusion that Eastlake's procedure violates federal constitutional guarantees rests upon the proposition that a zoning referendum involves a delegation of legislative power. A referendum cannot, however, be characterized as a delegation of power. Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.

Id. (citations and footnote omitted).

E. Equal Protection

Equal protection standards of judicial review have had a different historical development pattern than the standards of judicial review associated with substantive due process, eminent domain, and regulatory takings issues. The equal protection standards evolved out of the emergence of a doctrine based on concerns about governmental restrictions that established suspect classifications or that impinged upon fundamental constitutional rights. In the area of the equal protection doctrine, there exists a merging of standards of judicial review with substantive law to a degree not present in substantive due process and takings cases. To illustrate, an equal protection challenge to a governmental classification asks or should ask and answer the following questions:

1. Does the governmental classification treat citizens differently?
2. Does the governmental classification involve state action?

If either question is answered negatively, then there can be no equal protection violation. If both questions are answered affirmatively, then one of three equal protection tests may be chosen.

3. Does the governmental classification impact fundamental rights?
4. Does the governmental classification involve a suspect classification?

If *either* 3 *or* 4 (*or* both) is answered affirmatively, then *strict judicial scrutiny* is deployed, and questions 5 and 6 must both be answered affirmatively for the governmental classification to withstand *strict scrutiny* and be constitutionally valid;

5. Is there a compelling governmental interest that justifies the classification?
6. Is the classification necessary to accomplish the compelling governmental interest?

If both questions 3 and 4 are answered negatively, then *intermediate judicial scrutiny* is applied. *Intermediate scrutiny* asks both questions 7 and 8.

7. Does the governmental classification impact a *quasi*-fundamental right?

8. Does the governmental classification involve a *quasi*-suspect classification?

If *either* 7 *or* 8 (*or* both) is answered affirmatively, then *intermediate judicial scrutiny* is deployed, and questions 9 *and* 10 must both be answered affirmatively for the governmental classification to withstand *intermediate scrutiny* and be constitutionally valid;

9. Is there an important governmental interest that justifies the classification?

10. Is the classification directly related to the important governmental interest?

If both questions 7 and 8 (as well as 3 and 4) are answered negatively, then *minimal judicial scrutiny* is deployed, and questions 11, 12, and 13 must all be answered affirmatively to withstand *minimal scrutiny* and be constitutionally valid;

11. Is there a legitimate governmental interest that justifies the classification?

12. Is the classification rationally-related to the legitimate governmental interest?

13. Is the classification applied in a non-discriminatory way?[133] (Note: The minimal judicial scrutiny identified in questions eleven, twelve, and thirteen is the equal protection variety of deferential judicial review and is analogous to the presumption of validity in substantive due process cases.)

As with other areas of substantive law, certain Supreme Court equal protection opinions effectively demonstrate deferential judicial review and minimal scrutiny. For instance, in *Village of Belle Terre v. Boraas,*[134] Justice Douglas used the *Euclid* presumption of validity and beyond fair debate standards as a starting point.[135] Justice Douglas also cited his own opinion in *Berman* regarding the Court's broad concept of the public welfare and then shifted to an equal

133. For a two-tiered version of the equal protection inquiry, see GODSCHALK, *supra* note 21, at 82-83. *See also* KAPLIN, *supra* note 10, at 147-51.

134. 416 U.S. 1.

135. *Id.* at 3-4.

protection analysis.[136] Noting that the Belle Terre definition of family[137] had been challenged on, *inter alia*, right to travel and right of privacy grounds as well as equal protection grounds, Justice Douglas concluded that the local legislature had not violated any fundamental constitutional rights.[138] The Village of Belle Terre ordinance then easily survived the minimal, rational-basis scrutiny to which economic and social legislation is subjected.[139] Justice Douglas noted in conclusion that "every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function."[140]

The *Belle Terre* majority opinion is echoed by the *per curiam* opinion in the 1976 case of *City of New Orleans v. Dukes*,[141] which involved an equal protection challenge to a New Orleans pushcart-vendor permit ordinance that was designed to protect the vital role that the French Quarter had in New Orleans' economy.[142] Regarding

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136. *Id.* at 5-9.

137. *Id.* at 2.

> The word "family" is defined in the ordinance as, "[o]ne or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family."

Id.

138. *Id.* at 7.

> We find none of these reasons in the record before us. [The ordinance] is not aimed at transients. It involves no procedural disparity inflicted on some but not on others . . . . It involves no "fundamental" right guaranteed by the Constitution, such as voting, the right of association, the right of access to the courts, or any rights of privacy.

Id. (citations omitted).

139. "We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' and bears 'a rational relationship to a [permissible] state objective.'" *Id.* at 8 (quoting Royster Givano Co. v. Virginia, 253 U.S. 412, 415 (1920) and Reed v. Reed, 404 U.S. 71, 76 (1971)).

140. *Id.*

141. 427 U.S. 297 (1976). For a synopsis of this case, see Appendix A.

142. *Id.* at 298-300.

standards of judicial review, the Court concluded that unless a legislated ordinance intrudes on fundamental personal rights or makes suspect distinctions, deference to the legislature is appropriate and the classification used must only be rationally related to the state interest.[143] Also notable is the Court's conclusion that a municipal ordinance is a "State statute" for purposes of jurisdiction (and judicial review) under Title 28 of the United States Code, section 1254 subsection 2.[144] In effect, for purposes of judicial review, local ordinances stand on the same basis as state statutes and acts of Congress. The *Dukes* Court then used minimal scrutiny to review the New Orleans ordinance and concluded that the judiciary could not "judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines."[145]

Justice Byron White's and Chief Justice Burger's dissenting opinions in *Moore v. City of East Cleveland*[146] and the Court's *per curiam* opinion in *County Board of Arlington County v. Richards*[147] are also examples of deferential judicial review in the area of equal protection.

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143. *Id.* at 303.

> When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest. States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude.

Id. (citation omitted).

144. *Id.* at 301. In *Hawaii Housing Authority* the Court concluded that the deference given to a state legislature was equal to the deference given to Congress. *See supra* note 70 and accompanying text.

145. 427 U.S. at 303 (citation omitted).

146. 431 U.S. at 521-52.

147. 434 U.S. 5 (1977). For a synopsis of this case, see Appendix A.

In the 1977 case *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[148] the Court examined the issue of whether proof of racially discriminatory intent or purpose is required to show a violation of equal protection.[149] The respondent's allegation of racial prejudice raised the specter of strict scrutiny and activist judicial review.[150] The Court concluded, however, that the "[r]espondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor" in the local decision.[151] This determination ended the possibility of activist judicial review and dictated the constitutional inquiry.[152] Minimal scrutiny meant deferential judicial review and deferential judicial review meant that the Village of Arlington Heights' action would survive constitutional inquiry.[153]

An especially interesting Supreme Court decision and accompanying set of opinions occurred in the 1985 case of *City of Cleburne v. Cleburne Living Center, Inc.*[154] Justice Byron White's majority opinion, which held that the city's "zoning ordinance insofar as it require[d] a special use permit for homes for the mentally retarded"[155] was invalid, represents what Justice White described as

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148. 429 U.S. 252.

149. *Id.* at 264-65.

150. *Id.* at 265-66.

> But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified.
>
> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.

Id. (footnote omitted).

151. *Id.* at 270.

152. *Id.* at 271.

153. *Id.* at 270-71.

154. 473 U.S. 432 (1985). For a synopsis of this case, see Appendix A.

155. *Id.* at 447.

minimal equal protection scrutiny.[156] Justice White also identified a policy basis for deferential judicial review and minimal scrutiny not previously articulated in a land use case: "[T]he Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes."[157]

Justice White discussed, in some detail, both heightened and strict equal protection scrutiny but declined to employ either standard for the following reasons: (1) the "predicate for such judicial oversight is [not] present where the classification deals with mental retardation";[158] (2) in view of the "wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts";[159] (3) the legislative responses of Congress and state legislatures belie "any claim that the mentally retarded are politically powerless . . . to attract the attention of the lawmakers";[160] and (4) "if the large and amorphous class of the mentally retarded were deemed [a] quasi-suspect [class] . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities."[161]

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156. *Id.* at 439-40.

> The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike. Section 5 of the Amendment empowers Congress to enforce this mandate, but absent controlling congressional direction, the courts have themselves devised standards for determining the validity of state legislation or other official action that is challenged as denying equal protection. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude . . . .

Id. (citations omitted).

157. *Id.* at 440.

158. *Id.* at 443.

159. *Id.* at 445.

160. *Id.*

161. *Id.*

Instead, Justice White (using minimal scrutiny) reached an unusual, perhaps unique, result; the City's special permit provision was invalid because it was based upon what appeared to be "irrational prejudice against the mentally retarded."[162] Remarkably, in no other Supreme Court land use opinion that employed deferential judicial review has a governmental classification been found unconstitutional. The *Cleburne* holding disproves the sometimes asserted proposition that validation of legislation invariably occurs under the deferential approach to judicial review.

Chief Justice Rehnquist also deployed deferential judicial review/minimal scrutiny in his 1988 opinion in *Pennell v. City of San Jose.*[163] Justice Rehnquist noted that under the Equal Protection Clause, a statute's classification scheme need only be "'rationally related to a legitimate state interest.'"[164] Thus, the approach in *Pennell* is substantially different from the activist judicial review that Chief Justice Rehnquist employed in *Dolan.*[165]

F. Freedom of Speech

In the last 25 years, standards of judicial review in the area of freedom of speech have developed in a fashion similar to those in the area of equal protection. Some cases demonstrate deferential judicial review, some heightened judicial review, and some activist judicial review. The standard of judicial review selected by a given Justice depends on how significantly the Justice believes freedom of speech is implicated in each case. For instance, three opinions by Chief Justice Burger provide examples of deferential judicial review in First

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162. *Id.* at 450.

163. 485 U.S. 1 (1988). For a synopsis of this case, see Appendix A.

164. *Id.* at 14 (quoting City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976)). "'[W]e will not overturn [a statute that does not burden a suspect class or a fundamental interest] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.'" *Id.* (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)) (alteration in original).

165. *See infra* notes 323-30 and accompanying text.

Amendment cases. In *Erznoznik v. City of Jacksonville*,[166] Justice Burger dissented from the majority's invalidation of Jacksonville's restriction on drive-in movie theaters.[167] Chief Justice Burger would have sustained the Jacksonville ordinance, believing that "[t]he First Amendment interests involved in this case are trivial at best,"[168] and therefore that rational basis review was appropriate. Six years later, in *Schad v. Borough of Mount Ephraim*,[169] Chief Justice Burger, joined by Justice Rehnquist, again dissented because he saw "minimal intrusion on genuine rights of expression" imposed by the Mount Ephraim total ban on nude dancing.[170] Justice Burger, citing *Belle Terre,* advocated deference to the local legislative judgment "[b]ecause I believe that a community of people are—within limits—masters of their own environment."[171] Finally, in a decision the same year as *Schad, Metromedia, Inc. v. City of San Diego*,[172] Chief Justice Burger decried the plurality's willingness to substitute its judgment for that of city officials in invalidating a ban on offensive and intrusive means of communication.[173] Burger concluded that it was not the Court's role to make policy decisions but rather to ensure that the legislative approach to achieve those decisions was neutral.[174]

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166. 422 U.S. 205 (1975). For a synopsis of this case, see Appendix A.

167. *Id.* at 218.

168. *Id.* at 223.

169. 452 U.S. 61 (1981). For a synopsis of this case, see Appendix A.

170. *Id.* at 87.

171. *Id.* at 85.

172. 453 U.S. 490 (1981). For a synopsis in this case, see Appendix A.

173. *Id.* at 561.

174. *Id.* at 561.

> The means chosen to effectuate legitimate governmental interests are not for this Court to select. "These are matters for the legislative judgment controlled by public opinion." The plurality ignores this Court's seminal opinions in *Kovacs* by substituting its judgment for that of city officials and disallowing a ban on one offensive and intrusive means of communication when other means are available. Although we must ensure that any regulation of speech "further[s] a sufficiently substantial government interest," given a reasonable approach to a perceived problem, this Court's duty is not to make the primary policy decisions but instead is to determine whether the legislative approach is essentially neutral to the messages conveyed and leaves open other

Because of his unwillingness to second guess the legislature, Justice Rehnquist also supported use of deferential judicial review in the *Metromedia* case.[175] Likewise, in the 1980 case of *Pruneyard Shopping Center v. Robins,*[176] Justice Rehnquist wrote for the majority[177] and applied the deferential standard of judicial review he had advocated in *Metromedia.*[178] In his dissent in *Erznoznik,* Justice White indicated that he was not ready to take the step toward activist judicial review represented by Justice Powell's majority opinion.[179] Similarly, Justice John Paul Stevens' dissenting opinion in *Metromedia* is another example of deferential judicial review.[180]

In First Amendment cases, Justice Antonin Scalia has shown no inclination toward the activist or categorical varieties of judicial review that are pervasive in his takings opinions.[181] For instance, in

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> adequate means of conveying those messages. This is the essence of both democracy and federalism, and we gravely damage both when we undertake to throttle legislative discretion and judgment at the "grass roots" of our system.

Id. (citations omitted). Justice Burger concluded that "[t]he plurality today confuses the degree of constitutional protection—i.e., the strictness of the test applied—with the outcome of legislative judgment." *Id.* at 567.

175. *Id.* at 570.

> Unlike Justice Brennan, I do not think a city should be put to the task of convincing a local judge that the elimination of billboards would have more than a negligible impact on aesthetics. Nothing in my experience on the bench has led me to believe that a judge is in any better position than a city or county commission to make decisions in an area such as aesthetics. Therefore, little can be gained in the area of constitutional law, and much lost in the process of democratic decisionmaking, by allowing individual judges in city after city to second-guess such legislative or administrative determinations.

Id.

176. 447 U.S. 74.

177. In *Pruneyard* the concurring opinions of Justices Marshall, White, and Powell also are examples of deferential judicial review. *Id.* at 89-101.

178. Justice Rehnquist held that the "First Amendment rights [of the Appellants] have [not] been infringed by the California Supreme Court's decision recognizing a right of appellees to exercise state-protected rights of expression and petition on appellants' property." *Id.* at 88.

179. 422 U.S. at 224.

180. 453 U.S. at 540.

181. *See infra* Parts VI.B, VII.A.

FW/PBS, Inc. v. City of Dallas,[182] Justice Scalia concluded that an ordinance in which "no substantial quantity of First Amendment activity is anticipatorily 'chilled'"[183] was constitutional and that no "strong [judicial] medicine"[184] should be prescribed by the court. In *Barnes v. Glen Theatre, Inc.*,[185] Justice Scalia concluded that a general law not specifically targeted at expressive conduct "does not. . . implicate the First Amendment"[186] and therefore "is not subject to First Amendment scrutiny."[187] Although Justice Scalia agreed with the plurality's result, he voiced reservations about the heightened standard of judiciary scrutiny.[188] The *Barnes* opinion is one of Justice Scalia's few explicit discussions of standards of judicial review. Instead, he usually announces his conclusions regarding the merits of a case without providing a rationale or justification for his approach to judicial review.[189]

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182. 493 U.S. 215, 250 (1990) (Scalia, J., concurring in part and dissenting in part). For a synopsis of this case, see Appendix A.

183. *Id.* at 262.

184. *Id.* at 261.

185. 501 U.S. 560, 572 (1991) (Scalia, J., concurring). For a synopsis of this case, see Appendix A.

186. *Id.* at 576. The law prohibited public nudity, and was challenged because respondents claimed the law interfered with their First Amendment right to freedom of expression. *Id.* at 563.

187. *Id.* at 572.

188. *Id.* at 579-80.

> While I do not think the plurality's conclusions differ greatly from my own, I cannot entirely endorse its reasoning. The plurality purports to apply to this general law, insofar as it regulates this allegedly expressive conduct, an intermediate level of First Amendment scrutiny: The government interest in the regulation must be "'important or substantial.'" As I have indicated, I do not believe such a heightened standard exists. I think we should avoid wherever possible, moreover, a method of analysis that requires judicial assessment of the "importance" of government interests—and especially of government interests in various aspects of morality.

Id. (citation omitted).

189. *See infra* Part V.G (discussing Scalia's objections to heightened scrutiny).

G. Freedom of Religion

In *Larkin v. Grendel's Den, Inc.*,[190] the Supreme Court invalidated a Massachusetts licensing statute that provided that a city could not issue a liquor license if a religious or educational institution located within 500 feet of the premises objected.[191] The invalidation was based on the Establishment Clause of the First Amendment. Justice Rehnquist's dissent, although it did not explicitly mention standards of judicial review,[192] nevertheless is an example of deferential judicial review, because it discussed the statute's legislative purposes and suggested that the "heavy First Amendment artillery that the Court fires at this sensible and unobjectionable Massachusetts statute is both unnecessary and unavailing."[193] As with Justice Scalia, Justice Rehnquist is only occasionally explicit in discussing standards of judicial review.[194]

H. Illustration: Deferential Judicial Review/Minimal Scrutiny

Figure IV-1 depicts the key components of deferential judicial review in the areas of substantive due process, takings/eminent domain, equal protection, and the First Amendment. For a composite illustration of the four types of judicial review see Figure VIII-1.

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190. 459 U.S. 116 (1982). For a synopsis of this case, see Appendix A.

191. *Id.* at 117-18.

192. *Id.* at 127.

193. *Id.* at 130.

194. *But see infra* Part VI.B (discussing Justice Rehnquist's opinion in *Dolan*).

FIGURE IV-1 STANDARDS OF JUDICIAL REVIEW

SUBSTANTIVE DUE PROCESS

Deferential Judicial Review
Euclid

Presumption of Validity— Burden of Proof— On the Challenger Standard of Proof— Beyond Fair Debate

TAKINGS/EMINENT DOMAIN

Deferential Judicial Review

Berman
Agins
Penn Central
Keystone

Presumption of Validity— Burden of Proof— On the Challenger Standard of Proof— Beyond Fair Debate

EQUAL PROTECTION

Minimal Scrutiny

Belle Terre
Cleburne

No Fundamental or Quasi-Fundamental Rights Implicated No Suspect Classifications or Quasi-Suspect Classifications Implicated then: Minimal Level of Equal Protection Review—i.e.: 1) Legitimate Governmental Purpose 2) Rational Relationship Between Legitimate Governmental Purpose and Means Utilized 3) Is the classification applied in a non-discriminatory way?

FIRST AMENDMENT — FREEDOM OF SPEECH/FREEDOM OF RELIGION

Deferential Judicial Review

Minimal Scrutiny

Pruneyard

FW/PBS—
Scalia Dissent

If First Amendment Not Threatened then: Presumption of Validity and Minimal Scrutiny—i.e.: 1) Legitimate Governmental Purpose 2) Rational Relationship Between Legitimate Governmental Purpose and Means Utilized

I. Conclusion

Figure VIII-2 in Part VIII summarizes the various policy-based justifications the Court has advanced for deferential judicial review and minimal scrutiny over the years. Those justifications that appear to be the most important and weighty are: (1) separation of powers concerns, i.e., a recognition of appropriate constitutional roles; (2) recognition of the policymaking expertise of legislative bodies regarding social and economic issues; (3) recognition of the competence of legislative bodies, as compared to the courts, to gather facts regarding social and economic problems; (4) recognition of legislative bodies' familiarity with local problems; and (5) the impracticality of courts making day-to-day administrative decisions. These factors all weigh heavily in favor of judicial restraint and non-arrogation to courts of powers exercised by non-judicial decisionmakers. In short, the factors amount to prudential considerations of courtesy, constitutional propriety, and comity between coordinate branches of government. Deferential judicial review lets legislators legislate and courts adjudicate. As other commentators have suggested, in deciding what our fundamental law is, the role of nine life-tenured judges should be one of restraint because, the "Court is so small, so insulated, and so narrow in its knowledge, expertise, and experience that it cannot effectively decide broad questions of public policy."[195] Additionally, it has been suggested that the Court lacks the competence to act effectively as a deliberative body because it does not have the staff, the procedures, or the institutional capacity to resolve social and economic issues.[196]

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195. JAMES E. BOND, THE ART OF JUDGING 59 (1987).

196. *Id.* at 60.

Of course, other facets of deferential judicial review appear when contrasted with the dangers of interventionist varieties of review. As Justice Felix Frankfurter noted more than half a century ago:

> As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard . . . .
>
> . . . .
>
> Of course patriotism can not [sic] be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation.[197]

Frankfurter was suggesting two considerations: First, the danger of activist judges trying to impose their personal predilections, whether in the area of land use, criminal rights, or freedom of speech; and second, the likelihood of failure if judges did try more activist approaches to judicial review.

While some have criticized the Court for timidity and cowardice in its traditional deferential approach to land use regulations,[198] the restraintist approach is historic, based on constitutional concepts and the recognition that both courts and judges have significant limitations.[199] However, while the Court is traditionally cautious and restraintist, it does on numerous occasions abandon this deferential approach in favor of a more activist role.

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197. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 647, 670 (1943).

198. *See* Kmiec, *supra* note 19, at 148-49. However, Kmiec also praised the Rehnquist/Scalia Court for boldly and brilliantly solving the "takings puzzle." *Id.* at 152.

199. However, it should be noted that the complete quote of Justice Powell from his opinion in *Moore* (provided at the beginning of this Part) is:

> As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. *But it does not counsel abandonment*, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family.

431 U.S. at 502 (emphasis added) (footnote omitted).

V. SYNTHESIS: HEIGHTENED JUDICIAL REVIEW/INTERMEDIATE SCRUTINY

> [I]t is hard to resist the temptation to label anything we do not like as unconstitutional.
>
> Justice Robert H. Jackson[200]

The deferential approach at one end of the continuum of standards of judicial review and the categorical approach at the other, are types of judicial review that are fairly clear and easy to identify. Presumptions of validity and minimal scrutiny are most often explicitly articulated by the Justices using them.[201] *Per se*, categorical approaches that result in automatic invalidation are usually explicit as well.[202]

However, standards of judicial review that fall between these polar extremes of the judicial review continuum often are more implicit than explicit. The reviewing Justice may obviously depart from passive, deferential judicial review but exactly how far he or she enters into the realm of more intensive judicial review is sometimes difficult to identify.

The opinions considered in this section dealing with substantive due process, takings, and delegation of power do not discuss standards of judicial review explicitly, and therefore require some guessing and estimation.[203] This is also true of the First Amendment opinions, which sometimes validate and other times invalidate challenged land use regulations. These First Amendment opinions necessarily involve "guesstimates" of the precise standard of judicial review adopted by the opinion's author.[204] As previously indicated, the *Cleburne* set of opinions—Justice White's opinion for the Court,

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200. *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 825 (1991) (quoting an unpublished concurring opinion of Justice Jackson).

201. *See supra* Part IV.

202. *See infra* Part VII.

203. *See infra* Part V.A-C.

204. *See infra* Part V.D-E.

Justice Marshall's concurrence and dissent, and Justice Stevens' concurrence—constitute an especially interesting, valuable, and informative combination of opinions in Supreme Court land use jurisprudence.[205] In *Cleburne*, Justice Marshall explicitly articulates the heightened judicial review level of scrutiny that emerges between deferential judicial review at one extreme and categorical judicial review at the other extreme.[206] Justice Marshall adopts this intermediate level of scrutiny in the context of an equal protection challenge to a City of Cleburne ordinance that required a special permit for homes serving the mentally retarded.[207] His extensive discussion directly challenges the use of minimal scrutiny by Justice White and the majority.[208]

A. Substantive Due Process

In *Euclid,* Justice Sutherland outlined deferential judicial review, its presumption of validity, burden of proof, and beyond fair debate components, and related it to policy bases that he had discussed earlier in *Radice v. New York.*[209] Sutherland reaffirmed his Euclidean approach to judicial review in the 1927 cases of *Zahn* and *Gorieb.*[210]

In 1928, Sutherland, while paying lip service to Euclidean deferential judicial review, deviated from his earlier pattern with profound consequences. This deviation occurred in *Nectow v. City of Cambridge,*[211] a case in which the Court considered the reasonableness of a multi-family residential zoning classification as applied to a portion of plaintiff's property.[212] Nectow's land was located between single-family residences and other land zoned for

205. 473 U.S. at 432-78. *See supra* notes 154-62 and accompanying text.

206. *Id.* at 455-60.

207. *Id.* at 455-56.

208. *Id.* at 455-78.

209. 264 U.S. 292, 294 (1924); *Euclid,* 272 U.S. at 388.

210. *See supra* notes 56-57 and accompanying text.

211. 277 U.S. 183 (1928). For a synopsis of this case, see Appendix A.

212. *Id.* at 185-86.

industrial purposes.[213] In other words, the city had created a buffer zone[214] between two incompatible zones—a common zoning technique to which the plaintiff objected. Even though the Court was dealing with a legislative classification, Justice Sutherland indicated that a "court should not set aside the determination of public officers in such a matter unless it is clear that their action [is unreasonable]."[215] However, the Court invalidated the City's regulation because the "invasion of the property of plaintiff in error was serious and highly injurious." [216] Justice Sutherland's opinion only briefly mentions *Euclid*, and provides no discussion of the *Euclid* presumption of validity, burden of proof, or the "fairly debatable" standard of proof.[217] Justice Sutherland's avoidance of these factors is particularly interesting in view of the lower court's adherence to the *Euclid* factors in upholding the reasonableness of the Cambridge buffer zone.[218] While the lower court may have had

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213. *Id.* at 186.

214. Buffer zones are:

> [S]trips of land, identified in the zoning ordinance, established to protect one type of land use from another with which it is incompatible. Buffer zones may either be shown on the zoning map or described in the ordinance with reference to neighboring districts. Where a commercial district abuts a residential district, for example, additional use, yard, or height restrictions may be imposed to protect residential properties.

MICHAEL J. MESHENBERG, THE LANGUAGE OF ZONING: A GLOSSARY OF WORDS AND PHRASES 6 (1976).

215. *Nectow*, 277 U.S. at 187-88 (citing *Euclid*, 272 U.S. at 395).

216. *Id.* at 188.

217. *See id.* at 187-88.

218. Nectow v. City of Cambridge, 157 N.E. 618, 620 (Mass. 1927), *rev'd*, 277 U.S. 183 (1928).

> If there is to be zoning at all, the dividing line must be drawn somewhere. There cannot be a twilight zone. If residence districts are to exist, they must be bounded. In the nature of things, the location of the precise limits of the several districts demands the exercise of judgment and sagacity. There can be no standard susceptible of mathematical exactness in its application. Opinions of the wise and good well may differ as to the place to put the separation between different districts. Seemingly there would be great difficulty in pronouncing a scheme for zoning unreasonable and capricious because it embraced land on both sides of the same street in one district instead of making the center of the street the dividing line. . . . No physical features of

doubts about the legislative judgment, under deferential judicial review, that judgment was not clearly unfounded.[219] Justice Sutherland's *Nectow* opinion engaged in a less deferential, heightened scrutiny that invalidated the legislative judgment even though the reasonableness of that judgment was fairly debatable.[220] As a result, the *Nectow* decision generated confusion because the *Euclid* approach was not explicitly overruled, yet *Nectow* implicitly called deferential judicial review into question and introduced a new, unarticulated, heightened standard of review.[221]

The Supreme Court's unexplained move to a more exacting scrutiny of legislative decisionmaking "muddied the waters" regarding the appropriate standard of judicial review in zoning cases. This uncertainty of judicial review standards and the presumption of validity remained unclarified, as the Court did not take another zoning case for almost fifty years.[222] Justice Sutherland, whether he realized it or not, lowered the standard of proof required under the Euclidean variety of deferential judicial review. In *Nectow*, he did not

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> the locus stamp it as land improper for residence. Indeed, its accessibility to means of transportation, to centers of business, and to seats of learning, as well as its proximity to land given over to residence purposes, give to it many of the attributes desirable for land to be used for residence.
>
> ....
>
> Courts cannot set aside the decision of public officers in such a matter unless compelled to the conclusion that it has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety, or the public welfare in its proper sense. These considerations cannot be waived with exactness. That they demand the placing of the boundary of a zone one hundred feet one way or the other in land having similar material features would be hard to say as matter of law....
>
> The case at bar is close to the line. But we do not feel justified in holding that the zoning line established is whimsical, without foundation in reason.

Id.

219. *See Euclid*, 272 U.S. at 395 (noting that for an ordinance to be unconstitutional, it must be clearly arbitrary and unreasonable).

220. *See Nectow*, 157 N.E. at 620 (noting the lower court's analysis of the ordinance's reasonableness).

221. *Nectow*, 277 U.S. at 187-88.

222. The next zoning case decided by the United States Supreme Court was *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

require the challenger to establish his substantive due process argument beyond fair debate. Sutherland became convinced that invalidation was appropriate because he saw evidence that questioned the legislative judgment. He undoubtedly was influenced by the findings of the special master that the city's regulation would not promote health, safety, convenience, and general welfare in the zoned district.[223] In effect, Justice Sutherland introduced a heightened judicial review by lowering the standard of proof from beyond fair debate to one closer to clear and convincing. Whatever his thought process was, Sutherland created, more implicitly than explicitly, a variety of judicial review less deferential than the Euclidean standard.

A more recent substantive due process opinion by Justice Lewis Powell offers a more explicit analysis of standards of judicial review. In *Moore v. City of East Cleveland*,[224] Justice Powell, joined by Justices Brennan, Marshall, and Blackmun, argued that when a governmental action intrudes upon family living arrangements, the usual deference accorded legislative judgments is inappropriate.[225] In invalidating the East Cleveland provision, Justice Powell neither imposed an activist standard of judicial review, accompanied by strict scrutiny, nor relied on *Euclid's* restraintist standard of review. Thus, Justice Powell seemed to start with a presumption of validity, perhaps with the burden of proof on the challenger, but when the challenger asserted and demonstrated that certain fundamental family rights were at issue, Powell deemed more careful judicial scrutiny appropriate.[226] However, Justice Powell cautioned the Court of the risks involved with a heightened standard of review.[227] In effect,

223. *Nectow*, 277 U.S. at 187.

224. 431 U.S. 494 (1977).

225. At issue in this case was East Cleveland's narrow definition of "family" in a housing ordinance. *Id.* at 495-96.

226. *Id.* at 499.

227. "Substantive due process has at times been a treacherous field for this Court. There *are* risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights." *Id.* at 502. *See also supra* note 196 and accompanying text.

Powell articulated a quasi-fundamental rights[228] approach to achieve heightened, but not activist, judicial review or strict equal protection scrutiny.

The *Nectow* and *Moore* opinions of Sutherland and Powell, respectively, suggest that in certain substantive due process settings, when property or family rights are at issue, some members of the Court are prepared to apply a standard somewhat more rigorous than Euclidean minimal scrutiny notwithstanding concerns about unprincipled, Lochnerian, activist judicial review. Some Justices, however, are far more activist in other settings. For instance, Justices Brennan and Stevens called for active, fundamental rights judicial review and strict scrutiny in their concurrences in *Moore*.[229] Brennan saw the East Cleveland ordinance as burdening the fundamental right of "personal choice of related members of a family to live together."[230] Justice Stevens, on the other hand, called for rigorous judicial review because East Cleveland's definition of family "cuts so deeply into a fundamental right normally associated with ownership of residential property—that of an owner to decide who may reside on his or her property."[231] Justice Stevens even suggested that this right was so fundamental that the East Cleveland definition would be invalid even under a Euclidean deferential standard of judicial review.[232]

The *Nectow* and *Moore* majority opinions of Justices Sutherland and Powell demonstrate two examples of heightened judicial review. While Justice Sutherland never articulated a policy basis for his approach, Justice Powell suggested that concerns about fundamental family rights justify the Court's closer scrutiny.

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228. The right protected in this case was the freedom of relatives to live together. *Id.* at 504-06.

229. 431 U.S. at 506-521.

230. *Id.* at 512.

231. *Id.* at 520.

232. *Id.* at 520-21.

B. Regulatory Takings

Pennsylvania Coal Co. v. Mahon[233] involved a challenge to Pennsylvania's Kohler Act, which prohibited coal mining when removal of coal would cause subsidence of buildings, streets, or public facilities.[234] As previously indicated, Justice Brandeis adopted a deferential approach and would have validated the challenged state legislation.[235] Justice Oliver Wendell Holmes' majority opinion held that the Kohler Act was invalid under the Fourteenth Amendment because it authorized a taking of property without due process.[236] Justice Holmes' "flip," from his position of deferential judicial review in *Lochner*[237] to a stance of heightened judicial review in *Pennsylvania Coal*, has generated comment and conjecture over the years.[238] His opinion in *Pennsylvania Coal*, however, did not explicitly discuss the standard of judicial review he used. Clearly it was not a Euclidean standard, although he indicated some approval of the police power and the presumption of validity.[239] However, that presumption seems to shift to a presumption of invalidity, or at least to a placement of the burden of persuasion on the legislature, when the regulation goes "too far."[240]

It is obviously the role of the Court to assess when the regulation

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233 260 U.S. 393 (1922).

234. *Id.* at 412-13.

235. *See supra* note 71 and accompanying text.

236. 260 U.S. at 414-15. Notably, Justice Holmes dissented and advocated deferential judicial review in *Lochner v. New York* on the ground that "a constitution is not intended to embody a particular economic theory." 198 U.S. 45, 75 (1905).

237. *See supra* note 236.

238. *See, e.g.*, William Michael Treanor, *The Original Understanding of the Takings Clause*, 95 COLUM. L. REV. 782, 798-803 (1995). *See also* SEYMOUR I. TOLL, ZONED AMERICAN 225-27, 244-45 (1969).

239. 260 U.S. at 413 ("some values are enjoyed under an implied limitation and must yield to the police power . . . [t]he greatest weight is to be given to the judgment of the legislature").

240. Holmes articulated a new, if vague, substantive rule "that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking." *Id.* at 415. "It always is open to interested parties to contend that the legislature has gone beyond its constitutional power." *Id.* at 413.

goes "too far." The test suggested is an impact test—the "extent of the diminution" of value caused by the regulation.[241] Justice Holmes used the language of substantive rules and accompanying tests, but he did not explain the standard of judicial review he employed. However, he did suggest a policy basis for his heightened judicial review; the Court should be careful about legislative exercises of the police power because "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."[242] In a gentle, rather avuncular manner, Holmes expressed skepticism about non-judicial decisionmakers and then applied something more rigorous than Euclidean deferential judicial review.

Justice William Rehnquist made his initial foray into takings jurisprudence in his *Penn Central* dissent.[243] After discussing the *Pennsylvania Coal* decision, Justice Rehnquist echoed Justice Holmes when he called for a "closer scrutiny" of New York City's legislative and administrative actions.[244] In later opinions, Chief Justice Rehnquist would become more activist and explicit about judicial review in takings cases.[245]

C. Delegation of Power

The delegation of power doctrine is a corollary to the concept of separation of powers.[246] No one branch of government may delegate its distinctive power to another branch. In particular, the legislature may not delegate any distinctively legislative power to an administrative agency. The delegation doctrine is important in land use regulation because it raises constitutional questions regarding the

241. *Id.* at 413.

242. *Id.* at 415.

243. 438 U.S. at 138-53.

244. *Id.* at 142.

245. *See infra* Part VI.B.

246. *See* DANIEL R. MANDELKER, LAND USE LAW § 6.02, at 223-34 (3d ed. 1993).

validity of standards for flexible, discretionary zoning devices.[247] It is particularly important when there is a strong presumption of constitutional validity employed by the reviewing court. Thus, if power is to be delegated to administrative agencies by the legislature, as frequently happens in land use regulations, such delegation of power must provide standards to serve as guidelines for the exercise of that power.

When the Supreme Court identifies an impermissible, standardless delegation of power, it will hold it unconstitutional as violative of the delegation doctrine. In *Eubank v. City of Richmond*,[248] the plaintiff challenged the validity of a Richmond ordinance that required city officials to establish building set-back lines at the request of the owners of two-thirds of the property affected.[249] Justice Joseph McKenna, writing for a unanimous Court, started with a presumption of validity but shifted the presumption because the ordinance "create[d] no standard by which the power thus given [was] to be exercised."[250] The Court concluded that the lack of discretionary guidelines triggered heightened judicial review and that, under this standard, the ordinance provision was constitutionally impermissible.[251]

In *Washington ex rel. Seattle Title Trust Co. v. Roberge*,[252] Justice Pierce Butler, writing for a unanimous Court, invalidated a city ordinance provision that required a property owner to obtain the consent of two-thirds of the neighboring land owners before the city could issue a building permit.[253] Again, as in *Eubank*, the lack of standards to guide the decisionmaking of the neighboring land owners shifted the presumption of validity and caused the Court to

247. *Id.*

248. 226 U.S. 137 (1912). For a synopsis of this case, see Appendix A.

249. *Id.* at 140-41.

250. *Id.* at 143-44.

251. *Id.* at 144.

252. 278 U.S. 116 (1928). For a synopsis of this case, see Appendix A.

253. *Id.* at 118-20.

find the "delegation of power . . . repugnant to the due process clause of the Fourteenth Amendment."[254]

D. Equal Protection

In *Cleburne,* Justice Thurgood Marshall explained and debated various standards of judicial review.[255] Justice White's majority opinion held the city's special permit requirement invalid as it applied to a group home for the mentally retarded.[256] The majority rejected heightened judicial review and embraced the deferential approach with its minimal scrutiny, rational-basis test.[257] Although Justice Marshall agreed with the result, he asserted that the majority was essentially applying a heightened standard and calling it deferential judicial review.[258] Marshall chided the majority for focusing on the label given to their standard of review rather than

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254. *Id.* at 122.

255. 473 U.S. at 456-51 (concurring in part and dissenting in part). *See also* Mark Tushnet, *Thurgood Marshall in* THE SUPREME COURT JUSTICES: A BIBLIOGRAPHICAL DICTIONARY 307, 308-12 (Melvin I. Urofsky ed., 1994) (discussing Marshall's "sliding scale" of equal protection scrutiny).

256. 473 U.S. at 435.

257. *Id.* at 442-47.

258. *Id.* at 456.

> With [the majority's] holding and principle I agree. The Equal Protection Clause requires attention to the capacities and needs of retarded people as individuals.
>
> I cannot agree, however, with the way in which the Court reaches its result or with the narrow, as-applied remedy it provides for the city of Cleburne's equal protection violation. The Court holds the ordinance invalid on rational-basis grounds and disclaims that anything special, in the form of heightened scrutiny, is taking place. Yet Cleburne's ordinance surely would be valid under the traditional rational-basis test applicable to economic and commercial regulation. In my view, it is important to articulate, as the Court does not, the facts and principles that justify subjecting this zoning ordinance to the searching review—the heightened scrutiny—that actually leads to its invalidation. Moreover, in invalidating Cleburne's exclusion of the "feebleminded" only as applied to respondents, rather than on its face, the Court radically departs from our equal protection precedents. Because I dissent from this novel and truncated remedy, and because I cannot accept the Court's disclaimer that no "more exacting standard" than ordinary rational-basis review is being applied, I write separately.

Id. (citation omitted).

identifying the interests and classifications at stake.[259] Moreover, the majority's approach baffled Justice Marshall because although it focused on labels, he believed that ultimately the wrong label was applied.[260]

Justice Marshall also found it unfortunate that the Court did not provide more guidance to lower courts in the application of the "new" standard of review.[261] Justice Marshall called for disclosure

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259. *Id.* at 478.

> The Court's opinion approaches the task of principled equal protection adjudication in what I view as precisely the wrong way. The formal label under which an equal protection claim is reviewed is less important than careful identification of the interest at stake and the extent to which society recognizes the classification as an invidious one. Yet in focusing obsessively on the appropriate label to give its standard of review, the Court fails to identify the interests at stake or to articulate the principle that classifications based on mental retardation must be carefully examined to assure they do not rest on impermissible assumptions or false stereotypes regarding individual ability and need. No guidance is thereby given as to when the Court's freewheeling, and potentially dangerous, "rational-basis standard" is to be employed, nor is attention directed to the invidiousness of grouping all retarded individuals together. Moreover, the Court's narrow, as-applied remedy fails to deal adequately with the overbroad presumption that lies at the heart of this case.

Id.

260. *Id.* at 456, 458.

> At the outset, two curious and paradoxical aspects of the Court's opinion must be noted. First, because the Court invalidates Cleburne's zoning ordinance on rational-basis grounds, the Court's wide-ranging discussion of heightened scrutiny is wholly superfluous to the decision of this case. This "two for the price of one" approach to constitutional decisionmaking—rendering two constitutional rulings where one is enough to decide the case—stands on their head traditional and deeply embedded principles governing exercise of the Court's Article III power. . . .
>
> . . . .
>
> Second, the Court's heightened-scrutiny discussion is even more puzzling given that Cleburne's ordinance is invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny. To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called "second order" rational-basis review rather than "heightened scrutiny." But however labeled, the rational-basis test invoked today is most assuredly not the rational-basis test [of prior cases].

Id. (citations omitted).

261. *Id.* at 459-60.

> The refusal to acknowledge that something more than minimum rationality review is at work here is, in my view, unfortunate in at least two respects. The suggestion that the traditional rational-basis test allows this sort of searching inquiry creates precedent

and forthrightness; "[c]andor requires me to acknowledge the particular factors that justify invalidating Cleburne's zoning ordinance under the careful scrutiny it today receives."[262] Citing case precedent for heightened, but not strict, scrutiny, Justice Marshall concluded that heightened judicial review was appropriate in areas such as exclusionary zoning.[263] Justice Marshall also expounded upon the virtues of heightened scrutiny as it applied to equal protection cases and the validity of certain legislative classifications.[264]

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for this Court and lower courts to subject economic and commercial classifications to similar and searching "ordinary" rational-basis review—a small and regrettable step back toward the days of *Lochner v. New York*. Moreover, by failing to articulate the factors that justify today's "second order" rational-basis review, the Court provides no principled foundation for determining when more searching inquiry is to be invoked. Lower courts are thus left in the dark on this important question, and this Court remains unaccountable for its decisions employing, or refusing to employ, particularly searching scrutiny.

Id. (footnote and citation omitted).

262. 473 U.S. at 460.

263. *Id.*

I have long believed the level of scrutiny employed in an equal protection case should vary with "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." When a zoning ordinance works to exclude the retarded from all residential districts in a community, these two considerations require that the ordinance be convincingly justified as substantially furthering legitimate and important purposes.

Id. (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973)) (citations omitted).

264. *Id.* at 471-72.

That more searching inquiry, be it called heightened scrutiny or "second order" rational-basis review, is a method of approaching certain classifications skeptically, with judgment suspended until the facts are in and the evidence considered. The government must establish that the classification is substantially related to important and legitimate objectives, so that valid and sufficiently weighty policies actually justify the departure from equality. Heightened scrutiny does not allow courts to second-guess reasoned legislative or professional judgments tailored to the unique needs of a group like the retarded, but it does seek to assure that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day. By invoking heightened scrutiny, the Court recognizes, and compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment. Where classifications based on a particular characteristic have done so in the past, and the

Justice Marshall outlined a structure for equal protection judicial review that employed heightened judicial review/intermediate scrutiny.[265] This intermediate scrutiny put the burden of proof on the non-judicial decisionmaker to show that the land use regulation was justified by a legitimate reason not related to discrimination against the handicapped.[266]

Justice Marshall's opinion in *Cleburne*, and his reaction to Justice White's majority opinion, caused Justice Stevens to articulate his own approach—or perhaps non-approach—to standards of judicial review.[267] In effect, Stevens rejected the Marshall structure of a three-tiered analysis and asserted that the Court only had (or needed) one standard of judicial review.[268] Justice Stevens carved out his own

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threat that they may do so remains, heightened scrutiny is appropriate.

Id. (footnote and citation omitted).

265. See *supra* Part IV.E, text accompanying note 133, for the equal protection inquiry that leads to intermediate scrutiny.

266. 473 U.S. at 460-61

267. *Id.* at 451-55 (Stevens, J., concurring).

268. *Id.* at 451-54.

> In fact, our cases have not delineated three—or even one or two—such well-defined standards. Rather, our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from "strict scrutiny" at one extreme to "rational basis" at the other. I have never been persuaded that these so-called "standards" adequately explain the decisional process. Cases involving classifications based on alienage, illegal residency, illegitimacy, gender, age, or—as in this case—mental retardation, do not fit well into sharply defined classifications.
>
> "I am inclined to believe that what has become known as the [tiered] analysis of equal protection claims does not describe a completely logical method of deciding cases, but rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion." In my own approach to these cases, I have always asked myself whether I could find a "rational basis" for the classification at issue. The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational"—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.
>
> The rational-basis test, properly understood, adequately explains why a law that deprives a person of the right to vote because his skin has a different pigmentation than that of other voters violates the Equal Protection Clause. It would be utterly irrational

distinctive position on equal protection judicial review. He repudiated the analyses of both the majority and Justice Marshall, challenged their assumptions, and suggested his own unique approach. In the land use jurisprudence of the Court, no other Justice has taken an approach similar to Justice Stevens.[269]

If one believes that standards of judicial review are important to sound, principled decisionmaking by courts, then the trio of opinions in *Cleburne,* with their sharp disagreements and their debates on structure, authority, and policy bases, are refreshing and candid when compared to the *Nectow* opinion of Sutherland and the *Pennsylvania Coal* opinion of Holmes.[270] Unlike opinions in which Justices merely state their substantive conclusions, especially when legislative or administrative action has been invalidated on constitutional grounds, the disclosure and debate in *Cleburne* is informative and constructive because it allows evaluation and response.

> to limit the franchise on the basis of height or weight; it is equally invalid to limit it on the basis of skin color. None of these attributes has any bearing at all on the citizen's willingness or ability to exercise that civil right. We do not need to apply a special standard, or to apply "strict scrutiny," or even "heightened scrutiny," to decide such cases.
>
> In every equal protection case, we have to ask certain basic questions. What class is harmed by the legislation, and has it been subjected to a "tradition of disfavor" by our laws? What is the public purpose that is being served by the law? What is the characteristic of the disadvantaged class that justifies the disparate treatment? In most cases the answer to these questions will tell us whether the statute has a "rational basis." The answers will result in the virtually automatic invalidation of racial classifications and in the validation of most economic classifications, but they will provide differing results in cases involving classifications based on alienage, gender, or illegitimacy. But that is not because we apply an "intermediate standard of review" in these cases; rather it is because the characteristics of these groups are sometimes relevant and sometimes irrelevant to a valid public purpose, or, more specifically, to the purpose that the challenged laws purportedly intended to serve.

Id. (quoting Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring)) (footnotes and citations omitted).

269. *See* Sue Davis, *John Paul Stevens, in* THE SUPREME COURT JUSTICES, *supra* note 255, at 409, 410-12.

270. *See supra* Part V.A-B.

If Justices were to engage, on a regular basis, in the "truth-in-jurisprudence" exercises undertaken by Justices Marshall, Stevens, and White in *Cleburne,* the world of constitutional adjudication would be a better place. If an entrenched understanding or an established expectation were to develop to the effect that Justices should disclose their reasoning concerning standards of judicial review, fewer instances of judicial sloppiness or "personal predilections" would occur or would be suspected. In a democratic society in which judicial review is a central concept, distrust of courts could and would be significantly addressed through the type of debate and disclosure that emerged in *Cleburne.* As Justice Brandeis said in a different context, "Sunlight is said to be the best of disinfectants."[271]

E. Freedom of Speech

Several opinions dealing with First Amendment issues in the context of land use regulation employ deferential judicial review and minimal scrutiny.[272] The common threads in these opinions are: (1) their authors' conclusions that the challenged regulation burdens First Amendment activities in a trivial or non-existent way and (2) a recognition of local governmental interests in privacy, the environment, traffic safety, and morals.[273]

This Part examines a different variety of judicial review; judicial review with heightened or intermediate (as opposed to strict) scrutiny. The opinions that demonstrate this variety of judicial review fall into two categories: (1) cases where the author validates the challenged regulation and (2) cases where the author invalidates the challenged regulation on First Amendment grounds.

A typical First Amendment inquiry would first question whether the land use regulation was content-neutral or content-based.[274] The

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271. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914).

272. *See supra* Part IV.F.

273. *Id.*

274. *See* City of Ladue v. Gilleo, 114 S. Ct. 2038, 2047 (1994) (O'Connor, J., concurring).

answer to that question determines the standard of judicial review and the level of scrutiny that will be applied.[275] If the regulation is deemed content-neutral, then heightened judicial review/intermediate scrutiny will be used; if the regulation is deemed content-based, then activist judicial review/strict scrutiny is applied.

Assuming the regulation is content-neutral, then the regulation must advance a substantial or important governmental interest, not just a legitimate governmental interest, and be narrowly tailored to further that interest.[276] Validation occurs (or would occur if the dissenting Justice was writing for a majority of the Court) when the author of the opinion uses this more demanding test, employs a traditional presumption of validity, and leaves the burden of proof on the challenging party.[277] This approach to heightened judicial review accords the non-judicial decisionmaker a more favorable position.[278] Thus, validation occurs when content-neutral time, place, and manner regulations are narrowly drawn and adopted to protect important governmental interests such as the quality of urban life, the stability of neighborhoods, aesthetics, safety, public order, and public morality.[279]

For a synopsis of this case, see Appendix A.

275. *Id.*

276. *See* Young v. American Mini Theatres, Inc., 427 U.S. 50, 79-80 (1976) (Powell, J., concurring). For a synopsis of this case, see Appendix A.

277. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50-55 (1986). For a synopsis of this case, see Appendix A.

278. See, for example, Justice Stevens' majority opinion in *City of Ladue v. Gilleo*, 114 S. Ct. 2038 (1994); Chief Justice Rehnquist's dissenting opinion in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1521 (1993); Justice Souter's concurring opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 581 (1991); Justice White's concurrence and dissent in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 244 (1990) and his dissent in *City of Lakewood v. Plain Dealer Pub'g Co.*, 486 U.S. 750, 772 (1988); Justice O'Connor's majority opinion in *Frisby v. Schultz*, 487 U.S. 474 (1988), and Justice White's concurring opinion in that case, 487 U.S. at 488; Justice Rehnquist's majority opinion in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); Justice Stevens' majority opinion in *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); Justice Stevens' majority opinion in *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), and Justice Powell's concurring opinion in that case, 427 U.S. at 73. For synopses of these cases, see Appendix A.

279. *See Young*, 427 U.S. at 71-73; *see also Renton*, 475 U.S. at 54-55.

However, invalidation occurs (or would occur if the dissenting Justice was writing for a majority of the Court) when the author of the opinion uses the heightened standard of judicial review but shifts either the presumption to a rebuttable one of invalidity or, more likely, shifts the burden of persuasion to the non-judicial decisionmaker.[280] This approach puts the governmental defendant in a less favorable position and usually leads to a finding that the challenged regulation is unconstitutional.[281] So, for example, when content-neutral regulations that further important state interests are insufficiently justified by the governmental defendant[282] or when the governmental entity fails to prove that the regulation is not narrowly drawn,[283] then heightened judicial review will find the regulation unconstitutional.

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280. *See, e.g.*, Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 512-17 (1981).

281. *See, e.g.*, Justice Stevens' majority opinion in *Discovery Network, Inc.*, 113 S. Ct. 1505; Justices Brennan's and Stevens' respective dissents in *Frisby*, 487 U.S. at 491, 496; Justice White's majority opinion in *Metromedia, Inc.*, 453 U.S. 490, and Justice Brennan's concurring opinion in that case, 453 U.S. at 521; Justice White's majority opinion in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), and Justice Powell's concurring opinion in that case, 452 U.S. at 79.

282. *See, e.g., Schad*, 452 U.S. at 67-77.

283. *See, e.g., Frisby*, 487 U.S. at 491-96 (Brennan, J., dissenting).

F. Illustration: Heightened Judicial Review/Intermediate Scrutiny

FIGURE V-1 HEIGHTENED JUDICIAL REVIEW/INTERMEDIATE SCRUTINY

SUBSTANTIVE DUE PROCESS

Heightened Judicial Review

Nectow
Moore

Presumption of Validity—

Burden of Proof—
On the Challenger

Standard of Proof—
Clear and Convincing

TAKINGS

Heightened Judicial Review

Pennsylvania Coal

Presumption of Validity—
Burden of Proof—
On the challenger
Standard of Proof—
Clear and Convincing

EQUAL PROTECTION

Intermediate Scrutiny

Cleburne—
Marshall Dissent

Quasi-Fundamental Right
or
Quasi-Suspect Classification Implicated then:
Intermediate Level of Equal Protection Scrutiny— i.e.:
1) Substantial Governmental Interest
2) Direct Relationship Between Substantial Governmental Interest and Means Utilized

FIRST AMENDMENT

Heightened Judicial Review—
Intermediate Scrutiny

Two Types:
- Validation
  Young
  Renton
  Barnes
- Invalidation
  Schad

—Burden of Proof is the key

Content—Neutral Restriction, i.e. Incidental Impact On First Amendment Interests, Must:
1) Advance Substantial Governmental Interest
2) Be Narrowly Tailored to Further Substantial Governmental Interest
— Rebuttable Presumption of Validity
— Burden of Proof/Burden of Persuasion—
Varies
— Standard of Proof
Not Articulated

G. Conclusion

In his concurring opinion in *Barnes v. Glen Theater Inc.*,[284] Justice Scalia suggested that heightened judicial review neither does, nor should, exist.[285] As the discussion in this Part has shown, Justice Scalia is certainly mistaken as to whether there exists a standard of judicial review that is less deferential and more rigorous than the Euclidean approach[286] yet more deferential and less rigorous than the activist standards of review.[287] Heightened judicial review/intermediate scrutiny appears repeatedly in Supreme Court land use jurisprudence.

With regard to Justice Scalia's second point, that heightened judicial review *should not* exist, it would have been helpful if Justice Scalia had disclosed his reasoning and rationale, instead of merely stating his negative conclusion. As seen in *Cleburne*, Justice Marshall discussed in detail and provided an extensive rationale for his application of heightened judicial review.[288] Interestingly, Justice Scalia is not unfamiliar with the more intensive varieties of judicial review; in fact, he created two dramatic new interventionist variations.[289] Accordingly, he should provide a rationale for his

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284. 501 U.S. 560 (1991).

285. *Id.* at 579-80.

> While I do not think the plurality's conclusions differ greatly from my own, I cannot entirely endorse its reasoning. The plurality purports to apply to this general law, insofar as it regulates this allegedly expressive conduct, an intermediate level of First Amendment scrutiny: The government interest in the regulation must be "'important or substantial.'" As I have indicated, I do not believe such a heightened standard exists. I think we should avoid wherever possible, moreover, a method of analysis that requires judicial assessment of the "importance" of government interests — and especially of government interests in various aspects of morality.

Id. (Scalia, J., concurring) (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

286. *See supra* Part IV.

287. *See infra* Part VI.

288. *See supra* Part V.D.

289. See Scalia's activist approach to takings in *Nollan*, 483 U.S. 825, and his categorical approach to takings in *Lucas*, 505 U.S. 1003. *See also infra* Parts VI.B, VII.A (discussing *Nollan* and *Lucas*, respectively).

conclusion that heightened scrutiny should be avoided.[290] This conclusion cannot, in the context of land use jurisprudence, be properly and intelligently evaluated until this rationale is provided.

As will be seen in the following Parts of this Article, many Justices, including Scalia, articulate and practice the even more vigorous varieties of judicial review.

VI. SYNTHESIS: ACTIVIST JUDICIAL REVIEW/STRICT SCRUTINY

> "Judicial activism" is a slippery term, but perhaps one of its aspects can be acceptably defined as the Supreme Court's propensity to intervene in the governing process.
>
> Robert G. McCloskey[291]

Activist judicial review comes in various sizes and shapes. Perhaps the most familiar manifestation is strict equal protection scrutiny, which is evident in Justice Marshall's dissent in *Belle Terre*.[292] This equal protection analysis integrates levels of judicial scrutiny and substantive law and incorporates inquiries about fundamental rights and suspect classifications.[293]

In *Moore v. City of East Cleveland*, the concurring opinions of both Justice Brennan and Justice Stevens used a fundamental rights approach to review substantive due process questions and both concluded that the East Cleveland definition of family was constitutionally impermissible.[294] In *Moore*, Justices Stewart and White rejected strict scrutiny and instead applied a minimal level of scrutiny to review the city's ordinance because they believed no fundamental rights were implicated.[295] On the other hand, Justice Powell, who wrote the opinion of the Court, embraced a form of

290. *See supra* note 285.

291. ROBERT G. MCCLOSKEY, THE MODERN SUPREME COURT 338 (1972).

292. 416 U.S. at 12-20.

293. *See supra* note 133 and accompanying text (discussing the three-tiered analysis).

294. 431 U.S. at 506-21.

295. *Id.* at 531-52. *See supra* Part IV.A.

heightened judicial review to invalidate the city's ordinance.[296]

Justice Stevens, in his dissenting opinion in *City of Eastlake v. Forest City Enterprises, Inc.*, also used a fundamental rights approach to argue that the Eastlake zoning change referendum procedure was constitutionally defective.[297] Chief Justice Burger used the Establishment Clause of the First Amendment as the basis for invalidating a Massachusetts statute in *Larkin v. Grendel's Den, Inc.*[298]

Moreover, at least three variations of activist judicial review can be identified in First Amendment freedom of speech cases involving land use regulations. These variations include strict scrutiny for content-based regulations, strict scrutiny with the presumption of invalidity for content-based regulations of individuals on private property, and strict scrutiny involving a heavy presumption of invalidity with regard to prior restraints.[299] But perhaps the most intriguing recent examples of activist judicial review in Supreme Court land use jurisprudence are the new tests created by Justice Antonin Scalia in *Nollan*[300] and Chief Justice William Rehnquist in *Dolan*.[301]

A. Substantive Due Process

In *Moore*, Justice Brennan's concurrence condemned the "cultural myopia" of East Cleveland and suggested that the zoning power should not be used "to enact senseless and arbitrary restrictions which cut deeply into private areas of protected family life."[302] Brennan's fundamental rights analysis asserted that East Cleveland was constitutionally powerless to abridge the freedom of related members

296. *Id.* at 495-506. *See supra* Part V.A.

297. 426 U.S. at 680-95.

298. 459 U.S. at 120-27. *See infra* Part VI.F.

299. *See infra* Part VI.E.

300. 483 U.S. at 837 (creating the "essential nexus" test). *See infra* Part VI.B.

301. 114 S. Ct. at 2319-20 (creating the "rough proportionality" test). *See infra* Part VI.B.

302. 431 U.S. at 507.

of a family to choose to live together.[303] This basic right triggered Justice Brennan's activist review and led to his conclusion that the necessary relationship between ends and means was absent.[304]

Justice Stevens, as suggested earlier,[305] saw the fundamental right involved in *Moore* somewhat differently. However, he too embraced activist judicial review in concluding that the narrow definition of family adopted by East Cleveland was constitutionally infirm because it lacked the "'substantial relation to the public health, safety, morals, or general welfare.'"[306] Justice Stevens believed that property owners had a basic right to decide who may live on their property and concluded that the ordinance constituted a taking of property without due process or just compensation.[307] Interestingly, this is a rare, if not unique, instance of a Supreme Court Justice suggesting that property rights under the Fifth Amendment due process and takings clauses are fundamental rights in the same sense that freedom of speech, religion, and voting are fundamental rights under strict equal protection scrutiny.

B. Regulatory Takings

Common themes in the opinions of Justice Antonin Scalia are his distrust and disdain for non-judicial governmental decisionmakers, his dislike and distaste for redistributionalist governmental programs

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303. *Id.* at 511.

> "If any freedom not specifically mentioned in the Bill of Rights enjoys a 'preferred position' in the law it is most certainly the family." The cited decisions recognized, as the plurality recognizes today, that the choice of the "extended family" pattern is within the "freedom of personal choice in matters of . . . family life [that] is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."

Id. (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639-40 (1974)) (citation and emphasis omitted).

304. 431 U.S. at 512-13.

305. *See supra* notes 231-32 and accompanying text.

306. 431 U.S. at 520 (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926)).

307. 431 U.S. at 520-21.

and their effects, and his high regard for private property rights.[308] All of these themes are evident in his opinion in *Nollan*, in which he created a new variety of activist judicial review.[309] Justice Scalia noted the opportunity to reaffirm the *per se* permanent physical occupation rule of *Loretto*[310] in order to decide the constitutionality of the California Coastal Commission's conditioning of a building permit on a beach access requirement.[311] However, Scalia raised a new issue: "Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land-use permit alters the outcome."[312] Justice Scalia then cited *Agins* and *Penn Central* for the authority that "a use restriction may constitute a 'taking'" if not reasonably necessary to effectuate a substantial governmental interest.[313] Scalia applied this

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308. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (Scalia, J., writing for the majority); Pennell v. City of San Jose, 485 U.S. 1, 15 (1988) (Scalia, J., concurring in part and dissenting in part); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (Scalia, J., writing for the majority).

309. 483 U.S. at 837.

310. *See infra* Part VII.A.

311. 483 U.S. at 831-32.

> We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" In *Loretto* we observed that where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

Id. (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982)) (footnote and citations omitted).

312. *Id.*

313. *Id.* (quoting *Penn Central*, 438 U.S. at 127). Scalia also noted that:

> 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

rule to the Coastal Commission's building permit condition and found that such a condition may amount to extortion if the underlying state purpose is not valid.[314]

Justice Scalia moved from the "substantially advances a legitimate state interest" test of *Agins* and "the reasonably necessary to the effectuation of a substantial governmental purpose" test of *Penn Central* to a new, more rigorous standard. His new requirement of takings jurisprudence was that there must be an "essential nexus" between the governmental interest the California Coastal Commission pursued and the condition it imposed.[315] Finding that the building restriction lacked this essential nexus, Justice Scalia concluded it was invalid.[316] The building restriction was an example of a non-judicial decisionmaker's bad faith and unscrupulousness and burdened the rights of private property owners without just compensation.[317]

Scalia's essential nexus test sparked debate as to its origins and effect on judicial review standards. First, Justice Scalia asserted that t

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and regulations satisfies these requirements.

Id. at 834-35 (footnote omitted).

314. *Id.* at 836-37.

> If a prohibition designed to accomplish that [state] purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.
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> The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. 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.... In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."

Id. (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)).

315. *Id.* at 837.

316. 483 U.S. at 840-42.

317. *Id.* at 838-42.

he test originated in *Agins* and *Penn Central*.[318] Justice Brennan, in his *Nollan* dissent, however, denied that the new test was an articulation of existing recent precedent and suggested it was a long discredited standard of judicial review.[319] Second, the new essential nexus test is a substantive law standard that Justice Scalia used to override the normal presumption of validity, burden of proof, beyond fair debate variety of deferential judicial review.[320] It created a more exacting form of judicial review than the heightened standard applied in *Nectow* or *Pennsylvania Coal*.[321] More accurately, Justice Scalia's essential nexus test shifted the normal presumption of validity to a rebuttable presumption of invalidity. It also placed the burden of proof on the governmental entity to demonstrate an essential nexus between the ends and means. Accordingly, the essential nexus test is indeed a new example of activist judicial review, subjecting the non-judicial decisionmaker to a difficult test. This activist standard is consistent with Justice Scalia's cynical view of non-judicial decisionmakers[322] and is certainly contrary to the deferential judicial review obvious in both *Penn Central* and *Agins*.

Activist judicial review was taken one step further by Chief Justice Rehnquist in *Dolan*.[323] In *Dolan*, Rehnquist layered another

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318. *See supra* Part IV.C (discussing *Agins* and *Penn Central* in the context of deferential judicial review).

319. 483 U.S. at 842.

> The Court finds this an illegitimate exercise of the police power, because it maintains that there is no reasonable relationship between the effect of the development and the condition imposed.
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> The first problem with this conclusion is that the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century.

Id.

320. *See supra* Part IV.C.

321. In *Nectow*, Justice Sutherland appeared to have lowered the challengers' standard of proof from beyond fair debate to clear and convincing. *See supra* Part V.A. In *Pennsylvania Coal*, Justice Holmes started with a presumption of validity but shifted it to a presumption of invalidity because the legislation went "too far." *See supra* Part V.B.

322. *See infra* Part VII.A.

323. 114 S. Ct. 2309.

substantive test, "rough proportionality," onto *Nollan*'s essential nexus test.[324] He held that a non-judicial decisionmaker that imposed conditions on its land development permits had to prove both an essential nexus between ends and means and also a rough proportionality between the benefits sought and the projected impact on the proposed development.[325] With each test the governmental entity faced a rebuttable presumption of invalidity and had to shoulder the burden of proof. Like Justice Scalia, Chief Justice Rehnquist raised the level of review and created a new variety of judicial activism. The Court again demonstrated a "propensity to intervene in the governing process."[326]

The Chief Justice also discussed the Euclidean variety of judicial review and argued for an increased respect of property rights.[327] Interestingly, Chief Justice Rehnquist found no Supreme Court precedent to anchor his new rough proportionality requirement, and instead turned to state courts for guidance.[328] From his analysis of the

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324. *Id.* at 2317.

> In evaluating petitioner's claim, we must first determine whether the "essential nexus" exists between the "legitimate state interest" and the permit condition exacted by the city. If we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development. We were not required to reach this question in *Nollan*, because we concluded that the connection did not meet even the loosest standard. Here, however, we must decide this question.

Id. (citations omitted).

325. *Id.* at 2317-20.

326. *See supra* note 291.

327. 114 S. Ct. at 2320.

> Justice Stevens' dissent relies upon a law review article for the proposition that the city's conditional demands for part of petitioner's property are "a species of business regulation that heretofore warranted a strong presumption of constitutional validity." But simply denominating a governmental measure as a "business regulation" does not immunize it from constitutional challenge on the grounds that it violates a provision of the Bill of Rights.... We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances.

Id. (quoting Stevens, J., dissenting) (citations omitted).

328. *Id.* at 2318-19.

state court tests, the Chief Justice selected a variation of the states' "reasonable relationship" standard because he concluded it was closest "to the federal constitutional norm."[329] Notwithstanding Chief Justice Rehnquist's characterization of this new test as one akin to an "intermediate position," the rough proportionality test is an activist standard of review because it reverses the presumption of validity and places the burden of proof on the non-judicial decisionmaker as do other activist forms such as strict scrutiny.[330]

C. Delegation of Power

Chief Justice Burger, writing for the majority in *City of Eastlake v. Forest City Enterprises, Inc.*, held that the city's zoning change referendum was constitutional under a deferential standard of judicial review.[331] However, Justices Powell and Stevens (joined by Justice Brennan) dissented. Justice Powell, in a one paragraph opinion, implicitly suggested that he was inclined to apply an activist standard

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Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them.

In some states, very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice. . . .

Other state courts require a very exacting correspondence, described as the "specifi[c] and uniquely attributable" test. . . .

A number of state courts have taken an intermediate position, requiring the municipality to show a "reasonable relationship" between the required dedication and the impact of the proposed development.

. . . Despite any semantical differences, general agreement exists among the courts "that the dedication should have some reasonable relationship to the needs created by the [development]."

Id. (quoting Call v. City of West Jordan, 606 P.2d 217, 220 (Utah 1979)) (citations omitted).

329. *Id.* at 2319.

[W]e do not adopt [the state test] as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment.

Id.

330. *Id.* at 2319-20. *See infra* Part VI.D.

331. 426 U.S. at 679-80.

to the Eastlake referendum procedure because of his concern about individual rights.[332] Justice Stevens' opinion also expressed concern for individual rights and explicitly approved the lower court's invalidation of the referendum requirement.[333] Justice Stevens then suggested that fundamental fairness required rigorous judicial review of a local procedure that required a referendum to decide the merits of a private property owner's claim.[334] Consequently, Justice Stevens believed that the Eastlake charter provision violated the due process clause of the Fourteenth Amendment.[335]

Similarly, Chief Justice Burger's majority opinion in *Larkin v. Grendel's Den, Inc.*,[336] a case involving a delegation of power to private, non-governmental entities such as churches,[337] utilized activist judicial review to determine that the delegation violated the First Amendment Establishment Clause.[338]

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332. *Id.* at 680.

> There can be no doubt as to the propriety and legality of submitting generally applicable legislative questions, including zoning provisions, to a popular referendum. But here the only issue concerned the status of a single small parcel owned by a single "person." This procedure, affording no realistic opportunity for the affected person to be heard, even by the electorate, is fundamentally unfair. The "spot" referendum technique appears to open disquieting opportunities for local government bodies to bypass normal protective procedures for resolving issues affecting individual rights.

Id.

333. *Id.* at 690.

> "The law recognizes that the use a person makes of his property must inevitably affect his neighbors and, in some cases, the surrounding community. These real interests are entitled to be balanced against the rights of a property owner; but a law which requires a property owner, who proposes a wholly benign use of his property, to obtain the assent of thousands of persons with no such interest, goes beyond any reasonable public purpose."

Id. (quoting Forest City Enterprises, Inc. v. City of Eastlake, 324 N.E.2d 740, 748-49 (Ohio 1975)).

334. *Id.* at 694-95 n.16.

335. *Id.* at 694-95.

336. 459 U.S. 116 (U.S. 1982).

337. *Id.* at 117-18.

338. *See infra* Part VI.F (discussing Justice Burger's opinion in *Larkin*).

D. Equal Protection

Justice Thurgood Marshall's dissenting opinion in *Belle Terre* is a classic example of strict equal protection scrutiny applied to a governmental classification.[339] Justice Marshall concluded that Belle Terre's definition of family in a zoning ordinance burdened certain fundamental rights of the petitioners, and therefore warranted strict scrutiny.[340] Despite this, Justice Marshall praised deferential judicial review and supported some of its policy bases.[341] However, Justice Marshall rejected the deferential judicial review employed by the majority, because he asserted that the First Amendment places limits on zoning.[342] Justice Marshall also advocated an expanded

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339. 416 U.S. at 12-20 (applying strict scrutiny to the Village's definition of family). For the equal protection framework see *supra* note 133 and accompanying text.

340. 416 U.S. at 13.

> In my view, the disputed classification burdens the students' fundamental rights of association and privacy guaranteed by the First and Fourteenth Amendments. Because the application of strict equal protection scrutiny is therefore required, I am at odds with my Brethren's conclusion that the ordinance may be sustained on a showing that it bears a rational relationship to the accomplishment of legitimate governmental objectives.

Id.

341. *Id.*

> I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principle of *Euclid* ... that deference should be given to governmental judgments concerning proper land-use allocation. That deference is a principle which has served this Court well and which is necessary for the continued development of effective zoning and land-use control mechanisms. Had the owners alone brought this suit alleging that the restrictive ordinance deprived them of their property or was an irrational legislative classification, I would agree that the ordinance would have to be sustained. Our role is not and should not be to sit as a zoning board of appeals.

Id. (citation omitted).

342. *Id.* at 14.

> And, it is appropriate that we afford zoning authorities considerable latitude in choosing the means by which to implement such purposes. But deference does not mean abdication. This Court has an obligation to ensure that zoning ordinances, even when adopted in furtherance of such legitimate aims, do not infringe upon fundamental constitutional rights.

fundamental rights rationale.[343] Consequently, Justice Marshall placed the burden of proof on the Village of Belle Terre to show a compelling governmental interest and lack of alternative.[344] Justice Marshall concluded that the Village's "quality of life"-oriented justifications for the ordinance were insufficient to sustain it.[345] Even

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> When separate but equal was still accepted constitutional dogma, this Court struck down a racially restrictive zoning ordinance. I am sure the Court would not be hesitant to invalidate that ordinance today.... By the same token, I think it clear that the First Amendment provides some limitation on zoning laws. It is inconceivable to me that we would allow the exercise of the zoning power to burden First Amendment freedoms, as by ordinances that restrict occupancy to individuals adhering to particular religious, political, or scientific beliefs.

Id. (citation omitted).

343. *Id.* at 15.

> My disagreement with the Court today is based upon my view that the ordinance in this case unnecessarily burdens appellees' First Amendment freedom of association and their constitutionally guaranteed right to privacy. Our decisions establish that the First and Fourteenth Amendments protect the freedom to choose one's associates. Constitutional protection is extended, not only to modes of association that are political in the usual sense, but also to those that pertain to the social and economic benefit of the members.

Id. (citation omitted).

344. 416 U.S. at 18.

> Because I believe that this zoning ordinance creates a classification which impinges upon fundamental personal rights, it can withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest. And, once it be determined that a burden has been placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect the compelling state interest and that the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden.

Id. (citation omitted).

345. *Id.*

> A variety of justifications have been proffered in support of the village's ordinance. It is claimed that the ordinance controls population density, prevents noise, traffic and parking problems, and preserves the rent structure of the community and its attractiveness to families.... But I think it clear that the means chosen to accomplish these purposes are both overinclusive and underinclusive, and that the asserted goals could be as effectively achieved by means of an ordinance that did not discriminate on the basis of constitutionally protected choices of lifestyle.

Id.

though the Village embarked on a commendable course, it utilized a "constitutionally faulty vessel."[346] No better example of activist fundamental rights, strict scrutiny judicial review exists in Supreme Court land use jurisprudence than Justice Marshall's *Belle Terre* dissent.

E. Freedom of Speech

In some ways the Court's use of activist judicial review in First Amendment cases parallels the use of activist judicial review and strict scrutiny apparent in Justice Marshall's *Belle Terre* dissent. This Article evaluates numerous First Amendment freedom of speech cases that arose in the land use regulatory setting, starting with *Erznoznik v. City of Jacksonville* in 1975.[347] These cases have also generated a remarkable variety of differing opinions. In the area of First Amendment law, the Justices have found it difficult to agree on basic doctrinal approaches as well as on the application of those doctrines to specific facts. However, six generalizations can be made. First, as Justice Blackmun stated in *Schad*, the presumption of validity that traditionally attaches to a local government's exercise of its zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment.[348] In other words, activist judicial review is a distinct possibility when First Amendment issues are raised in the land use regulatory setting. Second, as Justice O'Connor indicated in *City of Ladue*, the normal First Amendment inquiry is to initially determine "whether a regulation is content-based or content-neutral, and then, based on the answer to that question, to apply the proper level of [judicial] scrutiny."[349] Third, if the regulation is content-neutral, then courts do not subject time, place, and manner restrictions to strict

346. *Id.* at 20.

347. 422 U.S. 205 (1975). *See supra* Part VI.G (listing other First Amendment cases).

348. 452 U.S. at 77 (Blackmun, J., concurring).

349. *City of Ladue*, 114 S. Ct. at 2047 (O'Connor, J., concurring).

scrutiny, but rather to a variety of heightened judicial review.[350] That is to say that the regulations are sustainable if they are narrowly tailored to meet an important governmental interest and there is a direct relationship between the governmental interest and the means adopted.[351] Fourth, if the regulation is content-based then strict scrutiny is appropriate and courts will uphold the regulation only if it is narrowly drawn to accomplish a compelling governmental interest.[352] In other words, when the regulations involve fundamental rights of expression, strict scrutiny is utilized to test both the ends and the relationship between the ends and means.[353] Fifth, if the regulation is content-based and regulates private citizens on private property then, according to Justice O'Connor, it should be presumed invalid.[354] The non-judicial decisionmaker then faces a rebuttable presumption of invalidity and must show that the regulation is narrowly drawn to accomplish a compelling governmental interest.[355] Finally, prior restraints require particularly activist judicial review. Although a prior restraint is not unconstitutional *per se,* it will face a "heavy," rebuttable presumption of invalidity and the non-judicial decisionmaker will have to prove that the restraint is narrowly drawn to accomplish a compelling governmental interest.[356]

One example of activist judicial review is Justice Blackmun's dissenting opinion in *Young v. American Mini Theaters, Inc.*, where he opined that the court could not approve suppression of speech without a judicial finding that the regulated speech was obscene.[357] In addition, Justice Brennan concluded in his dissenting opinion in *City*

350. *See supra* Part V.E.

351. *See, e.g., Young*, 427 U.S. at 62-73.

352. *See, e.g., FW/PBS*, 493 U.S. at 223-30.

353. *Id.*

354. *See City of Ladue*, 114 S. Ct. at 2047 (O'Connor, J., concurring).

355. *See, e.g., Erznoznik*, 422 U.S. at 216-17.

356. *See FW/PBS*, 493 U.S. at 225-28.

357. 427 U.S. 50, 96 (1976) (Blackmun, J., dissenting).

of Renton v. Playtime Theatres, Inc. that if a "'regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited merely because public officials disapprove the speaker's views.'"[358] Justice Brennan further asserted that time, place, and manner restrictions are valid only if "'they are narrowly tailored to serve a significant governmental interest ... and leave open ample alternative channels for communication of the information.'"[359] In *Barnes v. Glen Theatre, Inc.*, Justice White's dissenting opinion, which was joined by Justices Marshall, Blackmun and Stevens, is an example of activist judicial review.[360] Justice White noted that the Indiana statute sustained by the majority was "not a *general* prohibition of the type we have upheld in prior cases."[361] As a result, the majority's "references to the State's general interest in promoting societal order and morality are not sufficient justification for a statute which concededly reaches a significant amount of protected expressive activity."[362]

F. Freedom of Religion

Chief Justice Burger, writing for the majority in *Larkin v. Grendel's Den, Inc.*, utilized activist judicial review to invalidate a Massachusetts statute which granted churches and schools the power

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358. 475 U.S. 41, 57 (1986) (Brennan, J., dissenting) (quoting Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980)).

359. *Id.* at 63 (quoting Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

360. 501 U.S. at 587-96 (White, J., dissenting).

361. *Id.* at 590.

362. *Id.* For other examples of activist judicial review see Justice Stevens' majority opinion in *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993); Justice O'Connor's majority opinion in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) as well as Justices White's and Stevens' respective concurring and dissenting opinions in that case, 493 U.S. at 244, 249; Justices Blackmun's and Stevens' respective concurring opinions in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 77, 79 (1981); and Justice Powell's majority opinion in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), as well as Justice Douglas' concurring opinion in that case, 422 U.S. at 218.

to veto liquor license applications.[363] The Court held that the statute violated the Establishment Clause of the First Amendment.[364] The Chief Justice acknowledged that deference should be paid to zoning law.[365] Burger asserted, however, that the Massachusetts law was an improper delegation of legislative power to churches, which allowed them to occupy a prohibited role in government processes.[366] Chief Justice Burger's approach to judicial review in *Larkin* parallels Justice Marshall's equal protection approach in *Belle Terre*[367] and the Supreme Court's general approach to content-based speech restrictions in First Amendment cases.[368]

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363. 459 U.S. at 117-20.

364. *Id.*

365. "Given the broad powers of states under the Twenty-first Amendment, judicial deference to the legislative exercise of zoning powers by a city council or other legislative zoning body is especially appropriate in the area of liquor regulation." *Id.* at 121-22.

366. *Id.* at 127.

> The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions.
>
> [The statute] substitutes the unilateral and absolute power of a church for the reasoned decisionmaking of a public legislative body acting on evidence and guided by standards, on issues with significant economic and political implications. The challenged statute thus enmeshes churches in the processes of government and creates the danger of "[p]olitical fragmentation and divisiveness on religious lines." Ordinary human experience and a long line of cases teach that few entanglements could be more offensive to the spirit of the Constitution.

Id. (citation omitted) (footnote omitted).

367. *See supra* Part VI.D.

368. *See supra* Part VI.E.

G. Illustration: Activist Judicial Review/Strict Scrutiny

FIGURE VI-1 ACTIVIST JUDICIAL REVIEW/STRICT SCRUTINY

SUBSTANTIVE DUE PROCESS

Activist Judicial Review

Moore—Brennan and Stevens Concurrences

Rebuttable Presumption of Invalidity—

Burden of Proof—
On the Legislative or Administrative Entity

Standard of Proof—Not articulated

TAKINGS

Activist Judicial Review

Nollan
Dolan

Rebuttable Presumption of Invalidity—

Burden of Proof—
On the Legislative or Administrative Entity to Prove
— Essential Nexus
— Rough Proportionality

Standard of Proof—
—Not Articulated

EQUAL PROTECTION

Strict Scrutiny

Belle Terre—
Marshall Dissent

Fundamental Right or Suspect Classification Implicated then Strict Equal Protection Scrutiny
1) Compelling Governmental Interest
2) Is Legislative Classification Necessary to Achieve Compelling Governmental Interest?

FIRST AMENDMENT

Activist Judicial Review—Strict Scrutiny

Erznoznik
Ladue
Lakewood
FW/PBS
Larkin

Content-Based Restriction, i.e. Direct Impact on First Amendment Interests, Must:
1) Advance Compelling State Interest:
2) Be Narrowly Tailored to Reach No Further Than Necessary To Accomplish Compelling State Interest
— Rebuttable Presumption of Invalidity
- Strong Presumption Against Restrictions on Private Speech on Private Property
- Heavy Presumption Against Prior Restraints

— Burden of Proof/Burden of Persuasion On Government

H. Conclusion: Activist Judicial Review/Strict Scrutiny

The opinions examined as examples of activist judicial review validate Professor McCloskey's proposition concerning judicial activism; the authors of these opinions are prepared to intervene in the governing process in bold, dramatic ways.[369] Some of the opinions are based (or would be based, if the dissent had prevailed) on fundamental rights.[370] Others, such as *Nollan* and *Dolan,* are based on new interpretations of property rights and the protection those rights can receive under the Fifth and Fourteenth Amendments.[371]

These opinions illustrate a cyclical trend between judicial protection of civil liberties and private property rights, noted by Professor James W. Ely.[372] The concurring opinion of Justice Brennan in *Moore* and the dissenting opinion of Justice Marshall in *Belle Terre* illustrate judicial concern about "civil liberties" and distrust of exclusionary tendencies of local governments.[373] The opinions of Justice Scalia in *Nollan* and Chief Justice Rehnquist in *Dolan* exemplify judicial concern for "property and economic rights" and distrust of local governments whose "natural tendency" is to adopt regulations that go "too far."[374]

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369. MCCLOSKEY, *supra* note 291.

370. *See Moore*, 431 U.S. at 506-13 (Brennan, J., concurring); *Forest City Enterprises*, 426 U.S. at 680 (Powell, J., dissenting); *Belle Terre*, 416 U.S. at 12-20 (Marshall, J., dissenting). *See also* the various First Amendment opinions discussed *supra* Part VI.E-F.

371. *See supra* Part VI.B.

372. JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 3 (1992)

> For decades the protection afforded to property and economic rights under the Constitution has been of scant concern to judges and scholars. The topic, however, never entirely disappeared from view. In 1955 Justice Felix Frankfurter observed: "Yesterday the active area in this field was concerned with 'property.' Today it is 'civil liberties.' Tomorrow it may be 'property' again." As Frankfurter predicted, in recent years there has been a revival of interest in property issues among courts and commentators.

Id. (footnote omitted).

373. *See Moore*, 431 U.S. at 506-13 (Brennan, J., concurring); *Belle Terre*, 416 U.S. at 12-20 (Marshall, J., dissenting).

374. *See Nollan*, 483 U.S. at 827-42 (Scalia, J.); *Dolan*, 114 S. Ct. at 2312-22 (Rehnquist,

Activist judicial review is not, however, the most aggressive and interventionist form of judicial review. That distinction belongs to categorical judicial review, a variety that completely displaces the judgment of non-judicial decisionmakers.

VII. SYNTHESIS: CATEGORICAL JUDICIAL REVIEW/*PER SE* RULES

> No justice of the Supreme Court and no other judge has ever had the temerity to suggest that he is authorized to substitute his views of public policy for those of elected legislators, that he may reject legislative choices on the ground that he considers them unwise or unenlightened. The claim invariably is, instead, that the rejected legislative choice is *unconstitutional*, that it is prohibited by some provision of the Constitution.
>
> Lino A. Graglia[375]

Some Justices adopt more rigorous forms of judicial review out of concern for disadvantaged citizens[376] or protecting fundamental rights of citizens.[377] Other Justices scrutinize governmental actions more closely because of concerns about the natural tendencies of non-judicial decisionmakers[378] or distrust of non-judicial decisionmakers.[379]

Activist judicial review can be achieved through strict scrutiny of governmental classifications or through more exacting substantive law tests such as essential nexus and rough proportionality.[380] Under these activist approaches, non-judicial decisionmakers, although

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C.J.).

375. Lino A. Graglia, *In Defense of Judicial Restraint, in* SUPREME COURT ACTIVISM AND RESTRAINT, *supra* note 5, at 135, 138.

376. *See, e.g.*, *Cleburne*, 473 U.S. at 455-78 (Marshall, J., concurring in part and dissenting in part).

377. *See, e.g.*, *Moore*, 431 U.S. at 506-13 (Brennan, J., concurring).

378. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

379. *See, e.g.*, *Nollan*, 483 U.S. 825.

380. *See supra* Part VI.B.

subjected to more demanding standards, may still constitutionally prevail. It is possible for the governmental purpose to be compelling and possess the necessary relationship to the means adopted. Moreover, the government may be able to demonstrate an essential nexus between ends and means and a rough proportionality between the means adopted and the burdens imposed.

However, in Supreme Court land use jurisprudence there is yet a fourth variety of judicial review, a variety more interventionist than activist judicial review. This variety uses categorical, *per se* rules to decide substantive issues.[381] As these categorical rules create sharp, distinct lines between what is constitutionally permitted and what is not, the standards of judicial review are dramatically affected. In fact, categorical rules supersede the three standards of judicial review already examined. Judicial review itself is by no means displaced, but once a categorical rule is applied, the other standards of judicial review are automatically rejected.

In practice, categorical judicial review cannot be described as a standard of judicial review, for it is standardless in the sense of the varying degrees of scrutiny discussed by this Article. Therefore, categorical judicial review is the most potent, aggressive, and inflexible form of judicial review of non-judicial government action. It is uncompromisingly lethal to land use legislation.

A. Regulatory Taking/Substantive Due Process

While the most dramatic examples of categorical judicial review are found in recent Supreme Court takings opinions, there are hints of such an approach in early cases raising takings and substantive due process issues. Justice Stephen Fields, in his dissenting opinion in *Mugler v. Kansas*,[382] argued that it "is plain that [a] great wrong will often be done ... [when legislation] crosse[s] the line which separates regulation from confiscation."[383] Similarly, Justice Joseph

381. *See* MANDELKER, *supra* note 246, §§ 2.03, 2.17.

382. 123 U.S. 623 (1887).

383. *Id.* at 678.

McKenna, in a rambling, somewhat emotional dissent in *Block v. Hirsh*,[384] discussed the "absolute" axioms of Fifth Amendment protection of property,[385] the exercise of "unbounded or irresponsible [legislative] power,"[386] and the "doom of judicial judgment on legislative action" that would result from the majority's validation of the District of Columbia rent control legislation at issue.[387] Justice McKenna thought a bright line had been crossed that should have resulted instead in the constitutional invalidation of the legislation.[388]

A more recent takings opinion that exemplifies categorical judicial review is Justice Thurgood Marshall's majority opinion in *Loretto v. Teleprompter Manhattan CATV Corp.*[389] In that case, a New York City law provided that landlords had to allow cable television companies to install cable facilities on the landlords' property.[390] Justice Marshall and the Court, with Justices Blackmun, Brennan, and White dissenting, concluded that the law amounted to a permanent physical occupation of appellant's property, and that such an occupation was always a taking.[391] Marshall traced this *per se* physical occupation rule, which invariably and automatically results in a taking, back to *Pumpelly v. Green Bay Co.*[392]

For Justice Marshall the result in *Loretto* was clear and definitive; if a permanent physical occupation exists, a taking has occurred.[393] This test is the beginning and the end of the constitutional inquiry. In

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384. 256 U.S. 135 (1921).

385. *Id.* at 163.

386. *Id.* at 167.

387. *Id.* at 168.

388. *Id.* at 168-70.

389. 458 U.S. 419 (1982).

390. *Id.* at 423-24.

391. *Id.* at 438-41.

392. *Id.* at 427. "[I]n Pumpelley v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871), this Court held that the defendant's construction, pursuant to state authority, of a dam which permanently flooded plaintiff's property constituted a taking." *Id.*

393. *Id.* at 426.

contrast, appropriate restrictions on an owner's *use* of her property[394] would trigger other forms of judicial review, such as deferential, intermediate, or activist standards of review. The policy reasons for this categorical, permanent physical occupation rule are derived from the long line of cases that stand for the proposition that conceptually, a permanent physical occupation is "the most serious form of invasion,"[395] and is "qualitatively more severe than a regulation of the *use* of property."[396]

Somewhat ironically, perhaps, given his life experience and his long-held values and concerns,[397] Justice Marshall in *Loretto* adopted a more extreme, aggressive form of judicial review to protect the property rights of landlords than he adopted in *Cleburne* and *Belle Terre* to protect the rights of the disadvantaged and the excluded.[398]

In *Lucas v. South Carolina Coastal Council*,[399] with Justice Scalia writing for the majority, the Supreme Court held that when land use restrictions deprive an owner of all "economically beneficial or productive options for [the property's] use," the government is constitutionally required to compensate the landowner.[400] However, if the land use restriction does "no more than duplicate the result that could have been achieved ... under the State's law of private nuisance, or by the State under its complementary power to abate [public] nuisances,"[401] then no taking has occurred. Justice Scalia articulated a new and different approach to both the takings issue and categorical judicial review—the total regulatory takings test.

Under this new test, when a land use restriction denies all economically beneficial or productive use of property the

394. *Id.* at 441.

395. *Id.* at 435.

396. *Id.* at 436.

397. *See, e.g.*, Tushnet, *supra* note 255, at 310-12 (discussing Justice Marshall's concern for individual rights and affirmative action).

398. *See supra* Parts V.D. and VI.D (discussing *Cleburne* and *Belle Terre*, respectively).

399. 505 U.S. 1003 (1992).

400. *Id.* at 1018-19.

401. *Id.* at 1029.

constitutional inquiry is over no matter how legitimate, important, or compelling the governmental interest. No questions about reasonable, direct, or necessary relationships between governmental purposes and means are relevant. Issues concerning essential nexus and rough proportionality are also irrelevant to the total regulatory takings inquiry.[402] No presumption of validity operates; in fact, an *irrebuttable* presumption of invalidity arises unless the government can show that the regulation merely prohibits nuisances.[403] Otherwise, judgments and findings of non-judicial decisionmakers are displaced automatically. The judicial finding of a total regulatory taking is uncompromisingly lethal to the validity of land use restrictions.

Justice Scalia aligned this new approach with the permanent physical occupation rule of *Loretto*.[404] He asserted that there was authority for the total regulatory takings rule in the *dicta* of recent Supreme Court opinions.[405] Justice Scalia acknowledged that the Court previously had not provided a rationale for the "belief" that a deprivation of all economically beneficial use was a taking, but he rationalized that in such an extreme situation a bright-line rule was appropriate.[406] In contrast to deferential judicial review, Justice Scalia

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402. *See supra* Part VI.B (discussing the essential nexus and rough proportionality tests).

403. 505 U.S. at 1029.

404. *Id.* at 1015.

> We have, however, described at least two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint. The first encompasses regulations that compel the property owner to suffer a physical "invasion" of his property. In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.

Id.

405. *Id.* at 1015-16.

> The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation "does not substantially advance legitimate state interests *or denies an owner economically viable use of his land.*"

Id. (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)) (footnote and citations omitted).

406. *Id.* at 1017-19.

found reasons to dismiss legislative findings that support land use restrictions.[407] He attacked legislative findings that justified land use regulations by characterizing of the restriction as one that prevents harm.[408] By adopting the bright-line test, Justice Scalia closed the door on legislative attempts to justify the regulation and avoid the total regulatory taking rule.[409] The justification of "harmful use

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> We have never set forth the justification for this rule. Perhaps it is simply, as Justice Brennan suggested, that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. 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. And the *functional* basis for permitting the government, by regulation, to affect property values without compensation—that "Government 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,"—does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses.
>
> . . . .
>
> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

Id. (quoting Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) and Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), respectively) (footnote and citations omitted).

407. *Id.* at 1022-24.

408. "Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations." *Id.* at 1025 n.12.

409. 505 U.S. at 1026.

> When it is understood 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; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation. *A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated. If it were, departure would virtually always be allowed.

Id.

prevention" would no longer be permitted to sustain a regulation that "involved an allegation that the regulation wholly eliminated the value of the claimant's land."[410]

Justice Scalia effectively circumvented legislative action in an additional way. The only exception to the categorical rule was the case in which the state's common law of nuisance proscribed the land owner's intended use.[411] In that situation, a legislative proscription would be constitutionally permissible because the land owner never enjoyed the right to the intended use as part of her "bundle" of property rights.[412] Justice Scalia used a judicially created body of law, nuisance law, as the measure of the constitutional validity of legislatively adopted land use regulations that deprived the owner of all economic benefit.[413]

Justice Scalia boldly asserted some novel constitutional, historical, and policy bases in support of the *Lucas* categorical approach to takings jurisprudence. These included: first, "the understandings of our citizens"; second, what "the property owner necessarily expects" of the state's police power; third, "the historical compact recorded in the Takings Clause;" and fourth, "our constitutional culture."[414] As

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410. *Id.*

411. *Id.* at 1027.

412. "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.*

413. This view is consistent with the position espoused by Professor Kmiec, *supra* note 19, at 154, that "common law nuisance can govern the constitutional acceptability of land use regulation."

414. 505 U.S. at 1027-28.

> [This rule is in accord with] *the understandings of our citizens* regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property. It seems to us that *the property owner necessarily expects* the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers .... In the case of land, however, we think the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with *the historical compact recorded in the Takings Clause* that has become part of *our constitutional culture.*

Id. (emphasis added) (footnote and citations omitted).

previously suggested, more discussion, elaboration, and justification would be helpful to fully understand Justice Scalia's jurisprudence.[415]

B. Illustration: Categorical Judicial Review

FIGURE VII-1 CATEGORICAL JUDICIAL REVIEW

Categorical Judicial Review
Loretto
Lucas

Irrebuttable Presumption of Invalidity
Legislative or Administrative Entity Loses Automatically If Categorical *Per se* Rule Is Deemed Violated: • Permanent Physical Occupation • Total Regulatory Taking

C. Conclusion: Categorical Judicial Review

Justice Marshall's categorical judicial review in *Loretto* and Justice Scalia's in *Lucas*, stand in sharp contrast to the notions of judicial restraint and judicial respect for legislative determinations expressed by Justice Sutherland in *Euclid*, Justice Douglas in

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415. Justice Blackmun emphatically disagreed with Justice Scalia's assertions of new constitutional, historical, and policy bases for the *Lucas* categorical rule:

> In short, I find no clear and accepted "historical compact" or "understanding of our citizens" justifying the Court's new takings doctrine. Instead, the Court seems to treat history as a grab bag of principles, to be adopted where they support the Court's theory, and ignored where they do not. If the Court decided that the early common law provides the background principles for interpreting the Takings Clause, then regulation, as opposed to physical confiscation, would not be compensable. If the Court decided that the law of a later period provides the background principles, then regulation might be compensable, but the Court would have to confront the fact that legislatures regularly determined which uses were prohibited, independent of the common law, and independent of whether the uses were lawful when the owner purchased. What makes the Court's analysis unworkable is its attempt to package the law of two incompatible eras and peddle it as historical fact.
>
> The Court makes sweeping and, in my view, misguided and unsupported changes in our taking doctrine. While it limits these changes to the most narrow subset of government regulation—those that eliminate all economic value from land—these changes go far beyond what is necessary to secure petitioner Lucas' private benefit. One hopes they do not go beyond the narrow confines the Court assigns them to today.

Id. at 1060-61 (footnote omitted).

Berman, as well as by Justices Brennan, Blackmun, and Stevens in *Nollan, Lucas*, and *Dolan*, respectively. The policy bases supporting legislative decisionmaking such as separation of powers, legislative expertise, competence, familiarity with local problems, and innovative solutions have little weight when the Court both distrusts legislatures and gives property rights a predominate position in the constitutional hierarchy.[416]

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416. Justice Scalia's concurring and dissenting opinion in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), presents another possible example of categorical judicial review. Justice Scalia asserted that a provision in the San Jose rent control ordinance that allowed a hearing officer to consider the "hardship" of the tenant in fixing a reasonable rent, renders the ordinance facially invalid. *Id.* at 21. For Scalia, a bright line had been crossed by the San Jose City Council because the landlord regulated by the "hardship" provision did not cause the problem the provision addressed.

> Since the San Jose Ordinance does not require any specification of how much reduction in rent is attributable to each of the various factors that the hearing officer is allowed to take into account, it is quite possible that none of the many landlords affected by the Ordinance will ever be able to meet the Court's requirement of a "showing in a particular case as to the consequences of [the hardship factor] in the ultimate determination of rent." There is no reason thus to shield alleged constitutional injustice from judicial scrutiny.

Id. at 19 (citation omitted).

A legislative provision of this sort is improper and unconstitutional because it effects a taking without just compensation. This sort of regulation falls into a category of governmental redistribution measures that are particularly objectionable to Justice Scalia:

> Appellants' only claim is that a reduction of a rent increase below what would otherwise be a "reasonable rent" under this scheme may not, consistently with the Constitution, be based on consideration of the seventh factor—the hardship to the tenant as defined in [the ordinance]. I think they are right.
>
> Once the other six factors of the Ordinance have been applied to a landlord's property, so that he is receiving only a reasonable return, he can no longer be regarded as a "cause" of exorbitantly priced housing; nor is he any longer reaping distinctively high profits from the housing shortage. The seventh factor, the "hardship" provision, is invoked to meet a quite different social problem: the existence of some renters who are too poor to afford even reasonably priced housing. But *that* problem is no more caused or exploited by landlords than it is by the grocers who sell needy renters their food, or the department stores that sell them their clothes, or the employers who pay them their wages, or the citizens of San Jose holding the higher paying jobs from which they are excluded. . . .
>
> . . . Here the city is not "regulating" rents in the relevant sense of preventing rents that are excessive; rather, it is using the occasion of rent regulation (accomplished by the rest of the Ordinance) to establish a welfare program privately funded by those landlords who happen to have "hardship" tenants.

VIII. SYNTHESES: ILLUSTRATIONS

A. Taxonomy and Analytical Framework

Summary Figure VIII-1 synthesizes the standards of judicial review into one diagram. This illustration oversimplifies a very complex and messy body of jurisprudence. Many fine points and appropriate qualifiers are absent. The cases listed are deemed examples of the given type of judicial review, and are not intended to constitute an exhaustive list. However, Figure VIII-1 captures both the taxonomy outlined in Part II and discussed in Parts IV, V, VI and VII as well as the analytical framework presented in Part III and applied in Parts IV, V, VI, and VII. Figure VIII-1 can serve as a

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> Of course all economic regulation effects wealth transfer. When excessive rents are forbidden, for example, landlords as a class become poorer and tenants as a class (or at least incumbent tenants as a class) become richer. Singling out landlords to be the transferors may be within our traditional constitutional notions of fairness, because they can plausibly be regarded as the source or the beneficiary of the high-rent problem. Once such a connection is no longer required, however, there is no end to the social transformations that can be accomplished by so-called "regulation," at great expense to the democratic process.

Id. at 21-22. The redistributionalist tendencies of the legislature caused Scalia to express distrust of the legislative motive:

> The fact that government acts through the landlord-tenant relationship does not magically transform general public welfare, which must be supported by all the public, into mere "economic regulation," which can disproportionately burden particular individuals....
>
> ....
>
> The politically attractive feature of regulation is not that it permits wealth transfers to be achieved that could not be achieved otherwise; but rather that it permits them to be achieved "off budget," with relative invisibility and thus relative immunity from normal democratic processes.... Subsidies for these groups may well be a good idea, but because of the operation of the Takings Clause our governmental system has required them to be applied, in general, through the process of taxing and spending, where both economic effects and competing priorities are more evident.

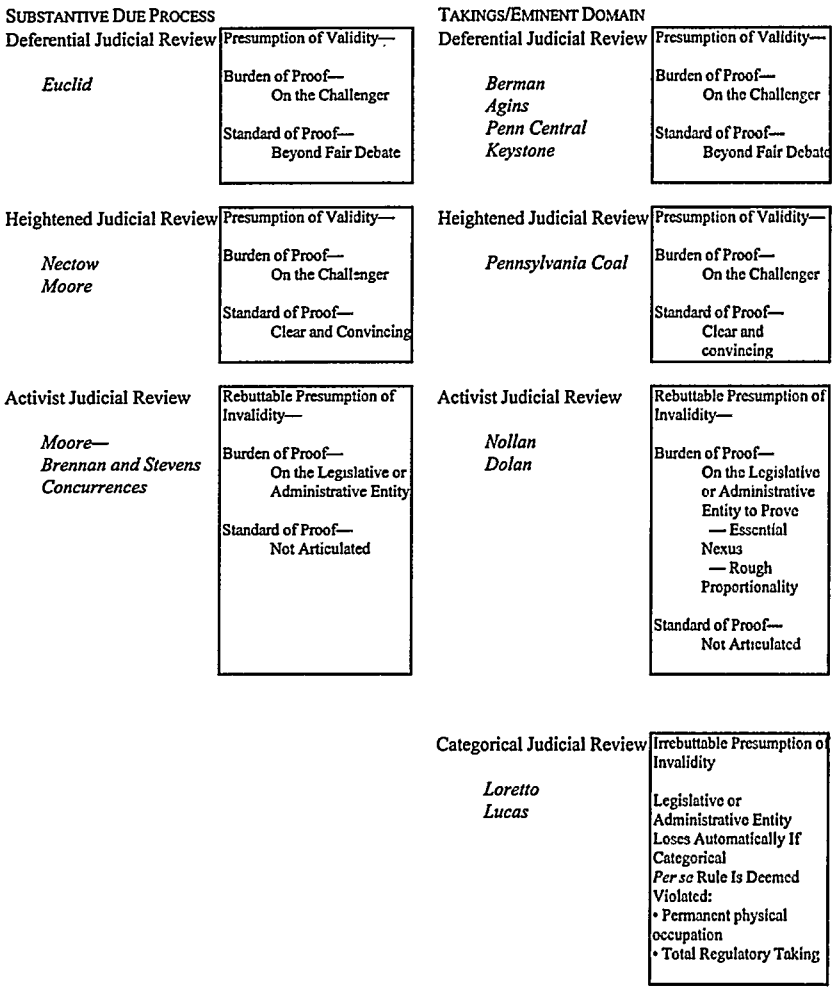
Id. at 22-23. This cynical view of the legislative process required strong judicial medicine. If Justice Scalia had been writing for the majority in *Pennell*, then a new category of Takings Clause violation, one that automatically resulted in a finding of unconstitutionality, would probably have been established.

general overview of Supreme Court standards of judicial review as well as a starting point for future studies of judicial review of land use regulations.

B. Articulated Policy Bases for Standards of Judicial Review and Levels of Judicial Scrutiny

Figure VIII-2 summarizes the policy rationales that Justices have explicitly offered to justify their creation and use of various standards of judicial review and levels of judicial scrutiny. As with Figure VIII-1, this depiction is an oversimplification of a complex body of policy reasons. However, it too captures the broad range of articulated, yet often confusing and frequently contradictory, justifications and rationales and can serve as an overview as well as a starting point for future studies of judicial review.

FIGURE VIII-1 SYNTHESIS OF STANDARDS OF JUDICIAL REVIEW AND LEVELS OF JUDICIAL SCRUTINY



EQUAL PROTECTION		FIRST AMENDMENT—FREEDOM OF SPEECH/FREEDOM OF RELIGION	
Minimal Scrutiny *Belle Terre* *Cleburne*	No Fundamental or Quasi-Fundamental Rights Implicated No Suspect Classifications or Quasi-Suspect Classifications Implicated then Minimal Level of Equal Protection Review—i.e.. 1) Legitimate Governmental Purpose 2) Rational Relationship Between legitimate Governmental Purpose and Means Utilized 3) Is the classification applied in a non-discriminatory way?	Deferential Judicial Review—Minimal Scrutiny *Pruneyard* *FW/PBS*— Scalia Dissent	If First Amendment Not Threatened then: Presumption of Validity and Minimal Scrutiny—i.e.: 1) Legitimate Governmental Purpose 2) Rational Relationship Between Legitimate Governmental Purpose and Means Utilized
Intermediate Scrutiny *Cleburne*— Marshall Dissent	Quasi-Fundamental Right or Quasi-Suspect Classification Implicated then: Intermediate Level of Equal Protection Scrutiny—i.e.: 1) Substantial Governmental Interest 2) Direct Relationship Between Substantial Governmental Interest and Means Utilized	Heightened Judicial Review—Intermediate Scrutiny *Two Types*: • Validation *Young* *Renton* *Barnes* • Invalidation *Schad* — Burden of Proof is the key	Content-Neutral Restriction, i.e. Incidental Impact On First Amendment Interests, Must: 1) Advance Substantial State Interest; 2) Be Narrowly Tailored to Further Substantial Governmental Interest — Rebuttable Presumption of Validity — Burden of Proof/Burden of Persuasion—Varies —Standard of Proof?
Strict Scrutiny *Belle Terre*— Marshall Dissent	Fundamental Right or Suspect Classification Implicated then Strict Equal Protection Scrutiny 1) Compelling Governmental Interest 2) Is Legislative Classification Necessary to Achieve Compelling Governmental Interest?	Activist Judicial Review—Strict Scrutiny *Erznoznik* *Ladue* *Lakewood* *FW/PBS* *Larkin*	Content-Based Restriction, i.e. Direct Impact on First Amendment Interests, Must 1) Advance Compelling State Interest 2) Be Narrowly Tailored to Reach No Further Than Necessary To Accomplish Compelling State Interest — Rebuttable Presumption of Invalidity • Strong Presumption Against Restrictions on Private Speech on Private Property • Heavy Presumption Against Prior Restraints — Burden of Proof/Burden of Persuasion On Government

FIGURE VIII-2 ARTICULATED POLICY BASES FOR STANDARDS OF JUDICIAL REVIEW AND LEVELS OF JUDICIAL SCRUTINY

●SUBSTANTIVE DUE PROCESS

●●DEFERENTIAL JUDICIAL REVIEW (DJR)

Separation of Powers

- ●Matter of courtesy and propriety between coordinate branches (*Fletcher*)
- ●Appropriate roles for separate branches (*Mugler*)
- ●Usurpation of another branches role is threat to form of government (*Mugler*)
- ●Courts, out of duty and necessity, must respect non-judicial decision-makers, re: public interest
- ●Exercise of discretion is legislative function (*Block, Moore*-White)
- ●Exercise of judicial power inappropriate unless fundamental right implicated or suspect classification burdened (*Moore*-White).

Competence and Expertise of Legislative Bodies

- ●Fact gathering is legislative role (*Radice/Euclid*)
- ●Policy making on issues of general welfare is legislative role (*Berman*)
- ●Courts cannot be super-legislature (*Cleburne*)

Familiarity With Local Problems

- ●Proximity of legislators to urban problems (*Gorieb*)
- ●Legislators have information or innovative solutions (*Gorieb*)

Practicality

- ●Courts cannot micro-manage local matters (*Dolan*-Stevens)

●●HEIGHTENED JUDICIAL REVIEW (HJR)

- ●Legislative classification has no foundation in reason (*Nectow*)
- ●Legislative classification intruded on sanctity of family (*Moore*-Powell)

●●ACTIVIST JUDICIAL REVIEW (AJR)

- ●Legislative classification burdened fundamental right of freedom of personal choice in matters of family life (*Moore*-Brennan)
- ●Legislative classification cut too deeply into Fundamental right associated with ownership of property (*Moore*-Stevens)

●●CATEGORICAL JUDICIAL REVIEW (CJR)

Not Applicable

●REGULATORY TAKINGS/EMINENT DOMAIN

●●DEFERENTIAL JUDICIAL REVIEW (DJR)

Separation of Powers

- ●Legislative function to declare public interest (*Berman, Midkiff, Keystone*)
- ●Judiciary's role re: public interest is narrow (*Berman*)
- ●Empirical debates over wisdom of exercise of eminent domain power is for legislature (*Midkiff*)
- ●Intolerable supervision of non-judicial decision-makers is hostile to basic principles of government (*Nollan*-Brennan)
- ●Judicial intervention chills problem solving, creates severe tensions (*Nollan*-Stevens)
- ●Court's lack of self-restraint is improvident (*First English*-Stevens)
- ●Court's intervention based on hostility, disbelief, distrust of legislative findings, not precedent (*Lucas*-Blackmun)
- ●Court purports to have federal courts micro-manage state decisions (*Dolan*-Stevens)
- ●Court's approach, similar to Lochner, embraces potentially open-ended source of judicial power to invalidate state economic legislation that members of this Court view as unwise (*Dolan*-Stevens)

Expertise

- ●Courts should not second guess legislature (*Keystone*)
- ●Courts should not sit as super-legislature to weigh wisdom of legislation (*Nollan*-Brennan)
- ●Narrow view of Court should not be substituted for expert state agency judgment (*Nollan*-Brennan)

●●HEIGHTENED JUDICIAL REVIEW (HJR)

- ●Skepticism about legislative tendencies (*Pennsylvania Coal*)

●●ACTIVIST JUDICIAL REVIEW (AJR)

Property Rights

- ●Right to exclude is essential stick in bundle of property rights (*Nollan*)
- ●Non-judicial decision-makers must pay if it wants a property interest (*Nollan*)
- ●Cynicism about non-judicial decision-makers' motives; regulation was "out and out extortion" (*Nollan*)

●●CATEGORICAL JUDICIAL REVIEW (CJR)

Regulatory Takings/Physical Invasion

- ●Physical intrusions by government are a property restriction of unusually serious character (*Loretto*)

Total regulatory taking

- ●Total deprivation of economically beneficial use is the equivalent of a physical appropriation (*Lucas*)
- ●Legislative recitation of noxious use is insufficient justification for regulation that denies all economic use (*Lucas*)
- ●"Understandings of our citizens," "owners' necessary expectations," "or one constitutional culture," "the historic compact" (*Lucas*)

•EQUAL PROTECTION

••DEFERENTIAL JUDICIAL REVIEW

Fundamental rights/suspect classifications

- •Legislative classification involves no fundamental rights suspect classification or procedural disparity (*Belle Terre*)
- •Legislative Classification deals only with social and economic legislation (*Belle Terre*)
- •Disparity of racial impact alone does not call for strict scrutiny (*Arlington Heights*)
- •Petitioners' interest in housing does not trigger strict scrutiny (*Arlington Heights*)

Separation of Powers

- •Presumption of validity (*Belle Terre*)
- •Exercise of discretion is legislative, not judicial, function (*Belle Terre*)
- •Court presumes improvident decisions will be rectified by democratic process (*Cleburne*)
- •Court reluctant to supervise legislative classifications because of separation of powers (*Cleburne*)

Federalism

- •Wide latitude is accorded to states (*Dukes*)
- •States presumed to have acted within constitutional powers (*Moore*-White)

Judicial Review

- •No clearly defined standards of equal protection review (*Cleburne*-Stevens)

••HEIGHTENED JUDICIAL REVIEW (HJR)

Judicial Review

- •Heightened standard of judicial review exists since Carolene Products (*Cleburne*-Marshall)
- •Judicial candor requires judge to articulate justification for approach to judicial review (*Cleburne*-Marshall)
- •Importance of interest at stake plus history of discrimination against mentally retarded justify heightened judicial review (*Cleburne*-Marshall)
- •Heightened judicial review is method of approaching certain legislative classifications skeptically with judgment suspended until facts are in and evidence considered (*Cleburne*-Marshall)

••ACTIVIST JUDICIAL REVIEW (AJR)

Fundamental rights/suspect classifications

- •Legislative classification burdened fundamental rights of association and privacy (*Belle Terre*-Marshall)
- •Presumption of validity deferential approach (*Belle Terre*-Marshall)

••CATEGORICAL JUDICIAL REVIEW (CJR)

Not Applicable

•FIRST AMENDMENT—FREEDOM OF SPEECH/FREEDOM OF RELIGION

••DEFERENTIAL JUDICIAL REVIEW (DJR)

Legitimate Governmental Interests

- •Privacy (*Erznoznik*-Burger)
- •Traffic safety (*Metromedia*-Stewart)
- •Local environment (*Metromedia*-Stevens) (*Schad*-Burger)
- •Protective community standards (*FW/PBS*-Burger)
- •Decent society (*FW/PBS*-Scalia)
- •Liquor control (*Larkin*-Rehnquist)
- •Communities should be masters of their own environment (*Schad*-Burger)

Legitimate governmental interests will control when burdens on First Amendment activities are trivial or non-existent (*Erznoznik*-Burger; *FW/PBS*-Scalia)

••HEIGHTENED JUDICIAL REVIEW (HJR)

Type 1—Validation of Local Regulation

Important governmental Interest

- •Quality of urban life (*Young; Renton; Lakewood*-White)
- •Stable neighborhoods (*Young*-Powell; *Frisby*)
- •Eliminating urban blight (*Vincent*)
- •Esthetics (*Vincent*)
- •Safety (*Vincent*)
- •Secondary effects of adult theaters (*Renton*)
- •Public order (*Barnes*)
- •Public Morality (*Barnes*)
- •Important government interest will control when regulations are content—neutral time, place, manner restrictions that are narrowly drawn to further important governmental interest

Type 2—Invalidation of Local Regulation

Governmental Interest must yield to protect First amendment expression

- •Restrictions are not narrowly tailored and reach too far (*Metromedia*; *Schad*; *Frisby*-Brennan)
- •City has failed to show governmental interests are substantial enough; city has burden of proof (*Metromedia*-Brennan)

••ACTIVIST JUDICIAL REVIEW (AJR)

Separation of Powers

Normal presumption of validity carries little in review of content-based restrictions (*Schad*-Blackmun; *Renton*-Brennan)

Fundamental Rights

Transcendent value of speech puts burden of proof on government (*Barnes*-White)

- •Governmental interests will control if:
- •they are shown to be compelling (government has burden of proof) (*Erznoznik*; *Vincent*-Brennan; *Ladue*)
- •they are narrowly drawn to accomplish compelling state interest (*Barnes*-White)
- •Heavy presumption of Invalidity for prior restraints (*Lakewood; FW/PBS*)

••CATEGORICAL JUDICIAL REVIEW (CJR)

Not Applicable

C. Three-Tiered Equal Protection Scrutiny

Figure VIII-3 is a synthesis of the various forms of equal protection scrutiny—strict, intermediate, and minimal. It is an approximation and an oversimplification, but it can be helpful in sorting out equal protection cases and opinions.

FIGURE VIII-3 THREE-TIERED EQUAL PROTECTION JUDICIAL SCRUTINY

1. Does the governmental classification treat citizens differently?
2. Does the governmental classification involve state action?

   If either question is answered negatively, then there can be no equal protection violation. If both questions are answered affirmatively, then one of three equal protection tests may be chosen.
3. Does the governmental classification impact fundamental rights?
4. Does the governmental classification involve a suspect classification?

   If *either* 3 *or* 4 (*or* both) is answered affirmatively, then *strict judicial scrutiny* is deployed, and questions 5 and 6 must both be answered affirmatively for the governmental classification to withstand *strict scrutiny* and be constitutionally valid;
5. Is there a compelling governmental interest that justifies the classification?
6. Is the classification necessary to accomplish the compelling governmental interest?

   If both questions 3 and 4 are answered negatively, then *intermediate judicial scrutiny* is applied. *Intermediate scrutiny* asks both questions 7 and 8.
7. Does the governmental classification impact a *quasi*-fundamental right?
8. Does the governmental classification involve a *quasi*-suspect classification?

   If *either* 7 *or* 8 (*or* both) is answered affirmatively, then *intermediate judicial scrutiny* is deployed, and questions 9 *and* 10 must both be answered affirmatively for the governmental

classification to withstand *intermediate scrutiny* and be constitutionally valid;

9. Is there an important governmental interest that justifies the classification?
10. Is the classification directly related to the important governmental interest?

If both questions 7 and 8 (as well as 3 and 4) are answered negatively, then *minimal judicial scrutiny* is deployed, and questions 11, 12, and 13 must all be answered affirmatively to withstand *minimal scrutiny* and be constitutionally valid;

11. Is there a legitimate governmental interest that justifies the classification?
12. Is the classification rationally-related to the legitimate governmental interest?
13. Is the classification applied in a non-discriminatory way?

(Note: The minimal judicial scrutiny identified in questions eleven, twelve, and thirteen is the equal protection variety of deferential judicial review and is analogous to the presumption of validity in substantive due process cases.)

IX. THE COUNTER-MAJORITARIAN DIFFICULTY: A MODEST SUGGESTION FOR IMPROVEMENT

> The root difficulty is that judicial review is a counter-majoritarian force in our system.
>
> Alexander M. Bickel[417]

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417. BICKEL, *supra* note 2, at 16. One pair of authors has defined the "counter-majoritarian difficulty" as follows:

> The so-called "counter-majoritarian difficulty" is typical of such concern for judicial restraint. The difficulty as generally identified is this: federal judges, who are not elected, are able to set aside or penalize the actions of elected representatives and the President. This seems inconsistent with the democratic principle that the will of the majority should govern policy outcomes. Most lawyers resolve the difficulty by concluding that the Constitution, which became law through super-majoritarian procedures, creates this situation. In addition, the bench is tinged with electoral accountability in that: judges must be nominated by the President and confirmed by the Senate; Congress and the President can respond to unfavorable court decisions by

> Candor requires me to acknowledge the particular factors that justify invalidating Cleburne's zoning ordinance under the careful scrutiny it today receives.
>
> Thurgood Marshall[418]

The main purpose of this Article is to provide a taxonomy and an analytical framework for one dimension of Supreme Court judicial review of land use regulations. The standards of judicial review are those standards that the Court creates and uses to guide its review and disposition of particular land use cases on their merits. Additionally, I wish to apply the taxonomy and framework to the vast number of land use opinions (not just decisions) authored by Supreme Court Justices. In applying the taxonomy and the framework to over 120 land use opinions, it is quite clear that the "no set formula" label is applicable to standards of judicial review as well as it is to the takings issue. But the "no set formula" label is an understatement regarding judicial review. Confusion, disarray, and inconsistency might be more accurate descriptions. While, undoubtedly, there are several standards of judicial review apparent in Supreme Court land use jurisprudence, there neither is, nor has there been, a consensus on the principles, applications, or policy bases underlying those standards.

This disarray perhaps is in some ways positive; standards of judicial review are not frozen into some Procrustean mold. Creative new approaches can and will be tried, although those new approaches may sometimes lead to rigid *per se* rules. In this disarray, the Court can be flexible to changing times and new demands.

However, there is a distinct downside to the confusion. It invites the knight-errant on a crusade, whether he or she be a liberal protecting fundamental rights or a conservative promoting property rights. The already present "counter-majoritarian difficulty" is

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changes in the budget, jurisdiction, or other aspects of the courts; Congress and the President can also override disfavored court decisions through new legislation or (in extreme cases) constitutional amendment.

BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 92 (1994).

418. *Cleburne*, 473 U.S. at 460.

exacerbated by the confusion. Judicial predilections can dominate and be disguised at the same time. Moreover, a review of the massive writings in the realm of constitutional theory published since Alexander Bickel's *Least Dangerous Branch*[419] in 1962, indicates that no workable and generally accepted means of constraining judicial discretion has emerged, or is likely to emerge soon. Thus, liberal advocates of judicial activism praise Justice Brennan but, in so doing, have perhaps licensed Justice Scalia's interventionist approaches. Conversely, conservative supporters of Justice Scalia and Chief Justice Rehnquist are perhaps clearing the way for the next Justice Douglas.[420] Lochnerian, activist judicial review is succeeded by the fundamental rights-oriented Warren Court, which in turn, is followed by the property rights-oriented Rehnquist/Scalia Court. Whatever the revolution, the Thermidor sets in sooner or later.

Into this dialectical confusion one modest improvement suggests itself. An "entrenched understanding" or "established expectation" should emerge to the effect that Justices would engage in "reasoned elaboration"[421] of their selection of judicial review standards. In other words, Justices should disclose their rationale for using deferential, heightened, activist, or categorical judicial review and set forth their reasoning process with regard to this dimension of the judicial decisionmaking process.

The disclosure of reasons supporting a Justice's results, reasoned elaboration, is a tenet of the legal process school of jurisprudence.[422] It is a technique advanced as a useful constraint on judicial dogmatism and personal judicial predilections in a democratic

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419. *See supra* note 2.

420. Figuratively speaking, the Justice Douglas referred to is not the same Justice who wrote the *Berman v. Parker*, 348 U.S. 26 (1954) or *Village Belle Terre v. Boraas*, 416 U.S. 1 (1974) opinions of the Court, but rather the Justice Douglas who authored, for example, the *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of privacy) and *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (voting rights) majority opinions.

421. For a discussion of "reasoned elaboration," see G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 286-94 (1973).

422. *Id.*

society. Reasoned elaboration has its limitations,[423] however, and has been labeled obsolete by some,[424] but in the welter of conflicting, contradictory, and often *un*elaborated Supreme Court approaches to judicial review, I would assert that reasoned elaboration, or truth-in-jurisprudence (call it what you will), retains contemporary value.

The colloquy engaged in by Justices White, Stevens, and Marshall in *Cleburne* is a useful example.[425] In that case, there were sharp disagreements, points and counter-points, and critical evaluations of opposing positions regarding competing standards of judicial review. The Justices engaging in that colloquy disclosed, informed, and educated, while also advancing and furthering their own thinking and analysis. When compared to the silence of Justice Sutherland in *Nectow*, the mostly unformulated position of Justice Holmes in *Pennsylvania Coal*, or the novel assertions of Justice Scalia in *Lucas*, the combination of fully engaged opinions in *Cleburne* stands out in refreshing and constructive contrast.[426] If, in a democratic society, the premise of distrust attaches to the judiciary then disclosure (reasoned elaboration) can still operate as a modest but useful constraint on judges as they select a standard of judicial review.

X. CONCLUSION

> "Our great and sacred Constitution, serene and inviolable, stretches its beneficent powers over our land ... like the outstretched arm of God himself ... the people of the United States ... ordained and established one Supreme Court—the most rational, considerate, discerning, veracious, impersonal power—the most candid, unaffected, conscientious, incorruptible power ... O Marvelous Constitution!

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423. *Id.* at 298-301.

424. *Id.*

425. 473 U.S. 432 (1985).

426. *See Nectow*, 277 U.S. at 183-89; *Pennsylvania Coal*, 260 U.S. at 412-16; *Lucas*, 505 U.S. at 1003-32.

> Magic Parchment! Transforming Word! Maker, Monitor, Guardian of Mankind!"
>
> Henry E. Estabrook[427]

Few today would subscribe to Estabrook's 1913 paean to the Supreme Court. Today, we are all realists. That said, however, perhaps we can agree that Supreme Court land use jurisprudence presents an incredibly interesting mosaic. It is a mosaic that does not readily come into focus. Contours may be glimpsed, but lines, shapes, and shadings are certainly not well-defined or clearly understood. Much more study and examination is needed. This Article is designed to provide a classification system and a structure that can assist in future examinations regardless of the author's politics. My invitation is to commentators, teachers, lawyers, and students of land use law to use the taxonomy and framework presented here to evaluate or perhaps to deconstruct land use law doctrine, to critique one's favorite or least favorite judge or group of judges, and to unpack interesting cases past, present, or future. We have a mosaic to work with that is fascinating, thought-provoking, and significant in its impact on property rights, land use regulation, civil liberties, and environmental protection. Let's have at it.

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427. *Quoted in* R.H. GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT 402 (1940) and ALEXANDER BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 15 (1978).

APPENDIX A

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

1. *Type of Regulation*: Zoning ordinance.
2. *Land Use Issue:* Whether the adoption of two ordinances that restricted development of valuable residential land to between one and five dwelling units substantially deprived the owners of all reasonable use of their property.
3. *Type of Legal Challenge*: Facial.
4. *Remedy Sought*: Damages for inverse condemnation and a declaration that the ordinances were facially unconstitutional.
5. *Constitutional Issue*: Taking of property without just compensation (Fifth Amendment as applied to the states through the Fourteenth Amendment).
6. *Facts*: After the Agins acquired five acres of undeveloped land in the city of Tiburon, California, for residential development, the city, in response to state-mandated planning requirements, adopted two ordinances that modified existing zoning requirements. The ordinances placed the Agins' five acres in "RPD-I," a residential planned development and open space zone, which permitted the development of from one to five single-family residences on the property. The Agins did not submit a development plan to the city, but instead sued the city, seeking damages for inverse condemnation and a declaration that the ordinances were facially unconstitutional.

The California Supreme Court found that the city's zoning ordinances, on their face, did not constitute a taking of the Agins' property because the ordinance by its terms permitted construction of one- to five-acre residences on the five-acre tract and therefore did not prevent all use of their property. The court also ruled that inverse condemnation was not an available remedy in cases where a party alleges a regulatory taking; the exclusive remedies are injunctive and declaratory relief. The Agins sought review from the U.S. Supreme Court.

7. *Decision*: Zoning ordinances upheld as not constituting a taking of property.

8. *Opinion of the Court*: The ends sought to be achieved by enactment of the ordinances discouraging the premature and unnecessary conversion of open-space land to urban uses are legitimate state interests under the [C]onstitution. The means selected to achieve those goals—restricting the number of dwelling units—substantially advances those legitimate interests. Moreover, the zoning ordinance benefited the Agins 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. As a result, the ordinances' provisions on their face did not constitute a taking under the Fifth and Fourteenth Amendments because the public interest in achieving those goals outweighs the landowners' interest in developing the land in the most profitable way possible. Because the [C]ourt did not find a taking in this case, it declined to address the question of whether damages for inverse condemnation are a required remedy in regulatory takings cases.

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Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

1. *Type of Regulation:* State public indecency law.
2. *Land Use Issue:* Whether the State's public indecency law, which required dancers to wear pasties and G-strings, violated the First Amendment.
3. *Type of Legal Challenge:* Facial and as applied.
4. *Remedy Sought:* Injunctive relief.
5. *Constitutional Issue:* Freedom of Speech (First Amendment).
6. *Facts:* Respondents, two establishments in South Bend, Indiana, that wished to provide totally nude dancing as entertainment, and individual dancers who were employed at those places, claim that the First Amendment's guarantee of freedom of expression prevented the State from enforcing its public indecency law to prevent this kind of dancing. The two establishments, the Kitty Kat Lounge and the Glen Theatre, Inc., provided adult entertainment and wished to

present totally nude dancing. The two individual dancers had worked at those establishments and wished to dance nude. The State's public indecency statute required that the dancers in these establishments wear pasties and G-strings. The District Court originally granted respondent's prayer for an injunction, finding that the statute was facially overbroad. The Court of Appeals for the Seventh Circuit reversed and remanded to the District Court in order for the plaintiffs to pursue their claim that the statute violated the First Amendment as applied to their dancing. The District Court then concluded that the type of dancing the respondents wished to perform was not expressive activity protected by the Constitution and rendered judgment for the petitioners. The case was again appealed to the Seventh Circuit and the court reversed, holding that the nude dancing involved here was expressive conduct protected by the First Amendment.

7. *Decision:* The Indiana statutory requirement that the dancers in the establishments involved in this case wear pasties and G-strings did not violate the First Amendment.

8. *Opinion of the Court:* The Court applied the four-part *O'Brien* test in determining whether or not the State's public indecency statute violated the First Amendment. "'[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" 501 U.S. at 567 (quoting *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968). The Court ruled that the statute was clearly within the power of the State and that it furthered a substantial government interest by protecting order and morality. The Court further concluded that this interest is unrelated to the suppression of the freedom of expression. Respondents argued that prohibiting nude dancing is related to expression because the State sought to prevent its erotic message. The Court disagreed, concluding that the requirement of wearing pasties and G-strings did not deprive the dance of the erotic message it conveys; rather it simply makes the message less graphic. Public nudity is the evil that

the statute addressed, not erotic dancing. The statute's requirement is the bare minimum necessary to achieve this goal.

Berman v. Parker, 348 U.S. 26 (1954).

1. *Type of Regulation*: Legislation for urban redevelopment that authorize[d] condemnation (District of Columbia Redevelopment Act of 1945).

2. *Land Use Issue*: Whether property condemned and compensated for by government action must actually be intended for a public use, or may condemnation achieve more general public purposes.

3. *Type of Legal Challenge*: Both facial and as applied.

4. *Remedy Sought*: Injunction to prevent condemnation and declaratory judgment that the legislation was unconstitutional.

5. *Constitutional Issues:*

   a. Use of eminent domain under the Fifth Amendment.

   b. Due process limitations (Fourteenth Amendment) on the police power.

   c. Role of legislative bodies and courts.

6. *Facts*: Congress, acting as the local governing and legislative body of the District of Columbia, adopted a plan for the redevelopment and beautification of the national capital area pursuant to the District of Columbia Redevelopment Act. The plan called for the District of Columbia Redevelopment Land Agency to acquire property by eminent domain and then to transfer that property to public agencies and private developers, who would carry out the redevelopment plan. The government planned to design development for the project to prevent blighting influences and improve the area aesthetically. The owners of a department store that was in sound condition objected to the appropriation of their property for re-development, contending that it was an unconstitutional exercise of the power of eminent domain, since their property would be redeveloped by private parties for private, not public use. They also contended that the purpose of the exercise of eminent domain under the act was to rid the area of slums, not to condemn property to develop a better balanced, more attractive community.

7. *Decision*: Redevelopment act upheld as constitutional exercise of the power of eminent domain.

8. *Opinion of the Court.* The use of the power of condemnation and the police power of government is a matter primarily for determination by legislative bodies, not the courts. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. When a legislative body determines that the public interest will be served by certain purposes, such determinations are "well-nigh conclusive." The role of the judiciary in determining whether eminent domain is being exercised for a public purpose is narrow. "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." The legislative body may determine where, when, how much, and why the power of eminent domain will be used.

Here, Congress decided that the redevelopment plan should include aesthetic considerations as well as considerations of health. Such a determination—"that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled"—is within the power of the legislature. Further, since the means for accomplishing a public purpose are for Congress alone to choose, Congress may conclude that the end of achieving a redevelopment plan is better served by using private developers than public agencies. Similarly, the choice of the size and scope of the plan, and the decision to redevelop the area as a whole—including existing sound structures—rather than to adopt a piecemeal approach targeted at blighted structures, is to be made by Congress. "Once the question of [the] public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch."

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Block v. Hirsh, 256 U.S. 135 (1921).

1. *Type of Regulation*: Rent control.

2. *Land Use Issue*: Reasonableness of legislative imposition of emergency two-year rent-control statute which allowed tenants to hold over but also provided a mechanism for rent adjustment.

3. *Type of Legal Challenge*: Facial.

4. *Remedy Sought*: Recovery of possession of the housing unit by the owner of the building.

5. *Constitutional Issue*: Substantive due process (a taking of property without just compensation under the Fourteenth Amendment).

6. *Facts*: A housing emergency caused by this country's entry into World War I resulted in the rent law of 1919 in Washington, D.C. The act provided that a tenant could continue to occupy rental property, despite the expiration of his lease, so long as that tenant continued to pay his rent and performed whatever other conditions were set out in the lease. The same law provided a mechanism for rent adjustment and allowed the owner to oust the tenant, after 30 days' notice, and have possession for himself and for his family. Mr. Hirsh wanted the apartment that he had rented to Mr. Block for his own use, but he did not comply with the 30 days' notice requirement. He challenged the law's validity, contending that such rent control inhibited his right to free-market enterprise.

7. *Decision*: Rent control statute upheld as valid temporary measure.

8. *Opinion of the Court*: The emergency declared by the statute is assumed to exist since legislative findings are entitled to a considerable degree of judicial deference. Because housing is a necessity of life, and because the public interest in the availability of housing during the state of emergency justifies some degree of public control, the statute is a valid temporary measure to achieve the goal of public health and welfare. This was so, despite the inevitable deprivation of a profit on high rent that the owners of apartments in Washington would otherwise have made. The emergency, the two-year (or less) duration of the act, and the rent adjustment feature make the act reasonable under the circumstances.

City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984).

1. *Type of Regulation*: Municipal sign ordinance.
2. *Land Use Issues:* Whether a city's advancement of aesthetic values is an interest sufficiently substantial to justify a city's ordinance forbidding the posting of all signs on public property, and whether utility poles are a traditional public forum for First Amendment purposes.
3. *Type of Legal Challenge:* As applied.
4. *Remedy Sought*: Injunction against enforcement of the ordinance to prohibit plaintiffs' political campaigning efforts, and for compensatory and punitive damages.
5. *Constitutional Issue*:
    a. Freedom of speech/expression (First Amendment).
    b. Substantive due process (Fourteenth Amendment).
6. *Facts*: A candidate support organization entered into a contract with a political sign service to make and post signs bearing [the] candidate's name. City employees removed the signs attached to public property.
7. *Decision*: Ordinance upheld under First Amendment as not violative of freedom of speech.
8. *Opinion of the Court*: The plaintiffs' freedom of speech was not unconstitutionally violated. The ordinance [was] neutral concerning any speaker's point of view, and the state's interest in advancing aesthetic values [was] sufficiently substantial to justify the effect of the ordinance on plaintiffs' freedom of expression because the effect [was] no greater than necessary to accomplish the city's purpose. Utility poles are not a "traditional public forum," and their use may be restricted . . . to their primary purpose.

City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993).

1. *Type of Regulation:* City ordinance prohibiting distribution of "commercial handbills" on public property.

2. *Land Use Issue:* Whether the City of Cincinnati's refusal to allow respondents to distribute their commercial publications through freestanding newsracks located on public property violated the First Amendment.

3. *Type of Legal Challenge:* As applied.

4. *Remedy Sought:* Declaratory and injunctive relief.

5. *Constitutional Issue:* Freedom of Speech (First Amendment).

6. *Facts:* Respondents, Discovery Network, Inc., and Harmon Publishing Company, Inc., provided free magazines that were distributed, among other places, on newsracks throughout the city. Discovery Network provided adult educational, recreational, and social programs to individuals in the Cincinnati area. It advertised those programs in a free magazine that it published nine times a year. Harmon Publishing Company published and distributed a free magazine that advertised real estate for sale at various locations throughout the United States. The city's Director of Public Works notified respondents that their respective permits to use dispensing devices on public property was revoked and ordered the newsracks removed within 30 days. The city considered the publications "commercial handbills," because they contained advertising, and therefore, respondents were prohibited from distributing them on public property. The City Manager determined that publications that qualify as newspapers are those that are published daily and or weekly and "primarily present coverage of, and commentary on, current events." Respondents were granted administrative hearings and review by the Sidewalk Appeals Committee. While the Committee did not modify the city's position, it agreed to allow the dispensing devices to remain in place pending a judicial determination of the constitutionality of its prohibition. Respondents then filed suit in district court. The district court found that the prohibition of the distribution of these commercial handbills on public property violated the First Amendment, and the court of

appeals affirmed.

7. *Decision:* The ban on newsracks containing "commercial handbills," which did not apply to newsracks containing "newspapers" was not a "reasonable fit" between the city's legitimate interest in safety and aesthetics and means chosen to serve that interest; and its enforcement did not constitute a valid time, place, and manner restriction of protected speech as it was not content-neutral.

8. *Opinion of the Court:* A city "may regulate publication dispensing devices pursuant to its substantial interest in promoting safety and aesthetics on or about the public right of way," but the city has the burden of establishing "a reasonable 'fit' between the legislature's ends and the means chosen to accomplish those ends." In this case, the Court concluded that the city did not meet the reasonable fit that it required. First, the ordinance on which the city relied was an outdated prohibition against the distribution of any commercial handbills on public property. Its purpose was to prevent the kind of visual blight caused by littering rather than any harm associated with freestanding, permanent dispensing devices. The benefit of the removal of approximately 62 newsracks, while 1,500-2,000 remained in place, was considered "minute" by the district court and "paltry" by the court of appeals. The Court shared their evaluation of the "fit" between the city's goal and its method of achieving it. The city argued that there was a close fit between its ban on newsracks dispensing "commercial handbills" and its interest in safety and esthetics because every decrease in the number of such dispensing devices necessarily effects an increase in safety and an improvement in the attractiveness of the cityscape. The Court found this to be an insignificant justification for the discrimination against respondents' use of newsracks that were no more harmful than the permitted newsracks, and had only a minimal impact on the overall number of newsracks on the city's sidewalks. The premise of the city's argument was that commercial speech has only a low value, and therefore the fact that more valuable publications were allowed to use newsracks did not undermine its judgment that its esthetic and safety interests were stronger than the interest in allowing commercial speakers to have similar access to the reading public. The

Court disagreed with this assessment, concluding that the city's argument attached more importance to the distinction between commercial and non-commercial speech than the Court's cases warrant, and seriously underestimated the value of commercial speech. Furthermore, the distinction bore no relationship to the interests that the city had asserted. Therefore, it was an impermissible means of responding to the city's legitimate interest. Finally, the Court addressed the notion of the regulation as a time, place, and manner restriction. The Court has held that government may impose reasonable restrictions on the time, place, or manner of engaging in protected speech provided that they are adequately justified "'without reference to the content of the regulated speech.'" Here, the city contended that its regulation of newsracks qualified as such a restriction because the interests in safety and esthetics that it serves were entirely unrelated to the content of respondents' publications. Therefore, the justification for the regulation was content-neutral. The Court disagreed with this contention, stating that the basis for the regulation was, in fact, the difference in content between ordinary newspapers and commercial speech. The city had enacted a sweeping ban on the use of newsracks that distributed "commercial handbills," but not "newspapers." Under this policy, whether any particular newsrack fell within the ban was determined by the content of the publication resting inside the newsrack. Therefore, the regulation was content-based. Since the ban was predicated on the content of the publication distributed by the subject newsracks, it was not a valid time, place, or manner restriction on protected speech.

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).

1. *Type of Regulation*: Zoning ordinance.
2. *Land Use Issue*: Whether requiring a special use permit for a proposed group home for mentally retarded persons was rationally related to a legitimate state interest.
3. *Type of Legal Challenge*: Facial and as applied.
4. *Remedy Sought*: Declaratory and injunctive relief to prevent

the special use permit requirement from applying to the proposed home.

5. *Constitutional Issue*: Equal protection (Fourteenth Amendment).

6. *Facts*: Plaintiff purchased a building in the city of Cleburne, Texas, with plans to lease it to the Cleburne Living Center, which would operate the building as a group home for the mentally retarded. The building was located in an area zoned as an apartment house district, which included, among other uses: fraternity houses, hospitals, sanitariums and nursing homes; however, the ordinance specifically excluded uses for the care of the feeble minded. The city classified the proposed home as a hospital for the feeble minded and informed the center that a special use permit would be required. The city based its requirement of a special use permit upon factors such as the negative attitudes and fears of neighborhood residents, the location of the proposed home across from a junior high school whose students might harass the occupants, its location near a 500-year floodplain, and the number of people who would occupy the home. The application for the special use permit was subsequently denied by the city council.

7. *Decision*: Special use permit requirement invalid as applied to group home.

8. *Opinion of the Court*: The ordinance [was] invalid as applied because it violate[d] the center's right to equal protection of the law. Although the mentally retarded are not a suspect class, such as racial or religious minorities, and thus the zoning ordinance [was] not subject to the strict scrutiny standard, the ordinance [could not] survive even the normal rational relationship test under equal protection analysis. The record [did] not reveal any rational basis to believe that the group home would pose a special threat to the city's legitimate interests different from other uses permitted under the zoning district; the special use permit requirement appear[ed] to rest solely on an irrational prejudice against mentally retarded persons.

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City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976).

1. *Type of Regulation*: Zoning change referendum.

2. *Land Use Issue*: Legality of a city charter provision that requires zoning changes approved by the city council to be ratified in a referendum by 55 percent of the voters.

3. *Type of Legal Challenge*: Facial.

4. *Remedy Sought*: Declaratory judgment to invalidate the referendum as an unauthorized delegation of legislative authority.

5. *Constitutional Issue*: Due process (Fourteenth Amendment).

6. *Facts*: A developer's request for a zoning change was approved by the plan commission and the city council, but was not ratified by a favorable vote of the citizens at the referendum required by the city charter. The developer then sought to have the charter provision requiring the referendum declared unconstitutional. The primary contention was that the provision constituted an unauthorized delegation of legislative authority and that the provision had no standards to guide the decisions of the voters. The Ohio Constitution specifically reserves the referendum power to the people, and it has been frequently exercised in matters of local government within the history of the state.

7. *Decision*: Zoning referendum charter provision upheld as constitutional.

8. *Opinion of the Court*: A referendum cannot be characterized as a delegation of legislative power. The referendum power is, in fact, reserved by the people to deal directly with matters that they might otherwise assign to the legislature, and such direct legislation by the people is subject to the same constitutional standards of substantive due process as are regular legislative decisions. Since legislators are not required to have standards to guide their decisions, the same is true when the people exercise their reserved legislative power through a referendum.

City of Ladue v. Gilleo, 512 U.S. 43 (1994).

1. *Type of Regulation:* Municipal ordinance regulating display of signs.

2. *Land Use Issue:* Whether an ordinance that bans all residential signs except those that fall within one of ten exemptions violated a resident's right to free speech.

3. *Type of Legal Challenge:* As applied.

4. *Remedy Sought:* Injunctive relief.

5. *Constitutional Issue:* Freedom of Speech (First Amendment).

6. *Facts:* Respondent placed a 24x36 inch sign in her front yard protesting the conflict in the Persian Gulf. The sign disappeared soon after, and a subsequent sign was knocked down. When respondent reported these two incidents to the police, they informed her that the city prohibited such signs. The city council denied her petition for a variance. She filed suit, and the district court issued a preliminary injunction against enforcement of the ordinance. Respondent then placed a smaller sign in her window. The city council responded to the injunction by repealing the ordinance and enacting a new one. This ordinance contained a general prohibition of signs, and prohibited all signs except those falling within one of ten exemptions. Respondent's sign did not meet one of the exemptions. She amended her complaint to challenge the new ordinance. The district court held that the ordinance was unconstitutional and the court of appeals affirmed.

7. *Decision:* The ordinance violated respondent's free speech rights.

8. *Opinion of the Court:* In determining whether the ordinance's restrictions on free speech impermissibly prohibited too much speech, the court assumed, arguendo, that the exemptions were valid. A "time, place, and manner" restriction can still violate one's freedom of speech if there are not adequate alternatives available. Residential signs carry a distinct message, by providing information as to the identity of the speaker. They are also a cheap and convenient form for conveying one's ideas. Carrying hand-held signs or handing out handbills does not garner the same effect. In this case, the Court ruled that even if the city's ordinance was content-neutral and was

narrowly tailored to serve a significant government interest, the ordinance infringed on respondent's freedom of speech. The Court was confident that more temperate measures could satisfy the city's regulatory needs without injuring the First Amendment rights of its citizens.

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988).

1. *Type of Regulation*: Municipal permit ordinance.
2. *Land Use Issue:* Placement of newsracks on public property.
3. *Type of Legal Challenge*: Facial.
4. *Remedy Sought*: Judgment that the ordinance is unconstitutional and injunction against its enforcement.
5. *Constitutional Issues*:
    a. Whether the newspaper could bring a facial challenge to the ordinance under the First Amendment without first applying for, and being denied, a permit.
    b. Whether the standards for granting or denying a permit are sufficiently definite to avoid constituting a prior restraint on freedom of expression.
    c. Whether the ordinance violates the First Amendment because it places financial requirements on the owners of newsracks located on public property that are not placed on the owners of other structures on public property.
6. *Facts*: Prior to 1983, the city of Lakewood, Ohio prohibited the placement of any privately owned structure on public property. After the Plain Dealer successfully challenged this prohibition in federal court, the city adopted an ordinance that allowed newsracks to be located on public property in commercial districts, while still banning them in residential districts. The ordinance gave the mayor the authority to approve or deny applications for annual newsrack permits. If the mayor denied an application, he was required to "state the reasons for such denial." If the mayor granted an application, the city issued an annual permit subject to several terms and conditions, including: approval of the newsrack's design by the city's architectural review board; an agreement by the newsrack owner to

indemnify the city against any liability arising from the newsrack, guaranteed by a $100,000 insurance policy; and any "other terms and conditions deemed necessary and reasonable by the mayor."

The Plain Dealer elected to challenge the ordinance rather than seek a permit. The federal district court declared the ordinance constitutional in its entirety. The U.S. Court of Appeals for the Sixth Circuit reversed, finding that the ordinance was unconstitutional for three reasons. First, it gave the mayor unbounded discretion to grant or deny a permit application and to place unlimited additional terms and conditions on any permit. Second, the architectural review board had unbridled discretion to deny applications. Third, the indemnity and insurance requirements violated the First Amendment because no similar requirements were placed on owners of other structures on public property. However, the court of appeals did decide that the absolute ban on newsracks in residential districts was constitutional and that this portion of the ordinance was severable from the portions regulating placement of newsracks in commercial districts.

7. *Decision*: Portions of the ordinance invalidated as constituting prior restraint on expression, in violation of First Amendment.

8. *Opinion of the Court*: Where First Amendment guarantees are involved, a licensing statute that allegedly gives a government official unbridled discretion over whether to permit or deny any expressive activity may be challenged facially by one who is subject to the law, without the necessity of first applying for and being denied a permit. This recognizes that such unbridled discretion can constitute a prior restraint on expression and may result in censorship. The prior restraint problem [was] particularly acute under [the Lakewood] ordinance because it [was] directed specifically at expressive conduct: the circulation of newspapers. Those portions of the ordinance that [gave] the mayor unbridled discretion to deny a permit application and unbridled authority to condition the permit on any additional terms he deem[ed] necessary and reasonable [were] unconstitutional. Since the ordinance contain[ed] no real constraints on the mayor's discretion, his licensing decisions [could not] be measured against any constitutionally sufficient standard to determine the boundaries of that discretion, and thus the ordinance

. . . render[ed] the First Amendment's guaranty against censorship little more than a high-sounding ideal.

City of New Orleans v. Dukes, 427 U.S. 297 (1976).

1. *Type of Regulation*: Pushcart vendor permit ordinance.

2. *Land Use Issue*: Whether an ordinance prohibiting pushcart vending, but excepting vendors who had continuously operated in the area for eight or more years, denied equal protection of the laws to all pushcart vendors.

3. *Type of Legal Challenge*: As applied.

4. *Remedy Sought*: Declaration that the ordinance was invalid and an injunction against its enforcement.

5. *Constitutional Issue*: Equal protection (Fourteenth Amendment).

6. *Facts:* In order to preserve the charm and character of the French Quarter, the city of New Orleans passed an ordinance prohibiting pushcart vending in that area. However, the ordinance made an exception for pushcart vendors who had continuously operated eight years or longer in the French Quarter. This provision permitted two vendors to maintain their operations. A pushcart vendor who had been in business for two years was barred from vending by the ordinance and brought suit to have the ordinance declared invalid for failing to provide equal protection of the laws to all pushcart vendors.

7. *Decision*: Ordinance upheld under Fourteenth Amendment (equal protection).

8. *Opinion of the Court*: Regulating vendors is merely regulating economic activity. When government regulates economic activity, its enactments need only be rationally related to a legitimate state purpose. Preserving the charm and character of the French Quarter [was] a legitimate government purpose, and prohibiting street vendors rationally further[ed] that purpose, since vendors tend[ed] to disrupt the charm of a historic area. As for the exception for vendors

who had worked in the area for eight years, the government [could] rationally determine to eliminate vendors gradually and [could] even rationally decide that vendors who had been in the French Quarter for over eight years [had] become a part of the charm of the area. Therefore, the regulation [did] not violate equal protection of the law.

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City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

1. *Type of Regulation*: Zoning ordinance.
2. *Land Use Issue*: Whether an ordinance that has the effect of concentrating all theaters in a 400-acre area in one corner of the city serves a substantial governmental interest and is thereby constitutional, and whether it is constitutionally permissible for one city to rely on the experience and studies done in other cities to support enacting an ordinance that regulates adult theaters.
3. *Type of Legal Challenge*: As applied.
4. *Remedy Sought*: Declaratory judgment and injunctive relief to prevent enforcement of ordinance.
5. *Constitutional Issue*: Freedom of speech (First Amendment).
6. *Facts:* Playtime Theatres, Inc. purchased two theaters in down-town Renton, Washington, to exhibit adult films. At about the same time, Playtime filed suit against the city of Renton on First Amendment grounds to invalidate the city's ordinance that restricted theaters that exhibit adult films to a 400-acre area on the edge of the city.
7. *Decision*: Ordinance upheld under First Amendment.
8. *Opinion of the Court:* The ordinance serv[ed] a substantial governmental interest in protecting the quality of urban life by preventing the serious secondary effects of adult theaters on the surrounding community. Renton could reasonably rely on the experience and studies produced by other cities to find that it was also likely to experience these secondary effects. The First

Amendment does not require a city to conduct new studies or to produce its own independent evidence before enacting such an ordinance. Since this ordinance did not ban adult theaters altogether, it was characterized as a content neutral, time, place, and manner regulation. And, although the ordinance had the effect of concentrating adult theaters in an area of about 400 acres in one corner of the city, the ordinance was found to allow reasonable access to adult theaters.

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County Board of Arlington County v. Richards, 434 U.S. 5 (1977).

1. *Type of Regulation*: Parking permit ordinance.
2. *Land Use Issue*: Reasonableness of a residential zoning ordinance which denied parking permits to nonresidents of a community in order to stem traffic flow from commercial and industrial areas into residential neighborhoods.
3. *Type of Legal Challenge*: Facial.
4. *Remedy Sought*: Injunction to prevent enforcement of the ordinance.
5. *Constitutional Issue*: Equal protection (Fourteenth Amendment).
6. *Facts*: Arlington County, Virginia passed an ordinance directing the county manager to designate those residential areas which were crowded with nonresidential vehicles. The stated purposes of the ordinance included minimizing social and environmental concerns of the residents and encouraging reliance on alternative means of transportation to the industrial and commercial complex. The manager issued residents, persons doing business with residents, and some guests weekday parking permits, while denying permits to all others. Commuters working in the large commercial and office complex next to the designated area sued to enjoin enforcement of the ordinance on the grounds that the ordinance was

facially unconstitutional.

7. *Decision*: Ordinance upheld under Fourteenth Amendment (equal protection).

8. *Opinion of the Court*: Because the social and environmental goals sought to be achieved by the ordinance [were] not prohibited under the Constitution, the county [could] select any rational means to meet them as long as the distinction made [was] not invidious. The distinction made between residents and nonresidents [was] not presumed to be invidious under the Constitution, and the means selected rationally promote[d] the regulation's objectives.

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

1. *Type of Regulation:* Land dedication requirements.

2. *Land Use Issue:* Whether an "essential nexus" existed between a legitimate state interest and a land use permit condition. If one did, then it had to be decided whether the degree of exactions demanded by the permit conditions bore the required relationship, a "rough proportionality," to the projected impact on the proposed development.

3. *Type of Legal Challenge:* As applied.

4. *Remedy Sought:* Declaration that land dedication requirements constituted an uncompensated taking of petitioner's property under the Fifth Amendment.

5. *Constitutional Issue:* Takings Clause (Fifth Amendment).

6. *Facts:* Dolan applied to the City of Tigard to redevelop her store, a plumbing and electric supply store. She planned to nearly double the size of her store and add a parking lot, as well as build an additional structure on the northeast side of the site. The City's Planning Committee granted her permit application, subject to conditions imposed by the City's Community Development Code. The Commission required that petitioner convey a 15-foot strip of land on her property to the City to be used as a bicycle pathway and that she dedicate the portion of her property lying within the 100-year

old floodplain for improvement of a storm drainage along the Fanno Creek, which runs alongside her property. Petitioner then sought variances from these standards. She argued that her proposed development would not conflict with the policies of the Commission's comprehensive plan to reduce traffic congestion and flooding. The Commission denied her request. Petitioner then appealed to the Land Use Board of Appeals (LUBA), alleging that the city dedication requirements were not related to her proposed development, and therefore, the requirements constituted an uncompensated taking of her property under the Fifth Amendment. LUBA ruled in favor of the City, and both the Court of Appeals and the Oregon Supreme Court affirmed, finding that the pathway condition and the storm drainage had an essential nexus to the development of the proposed site.

7. *Decision:* The City's dedication requirements constituted an uncompensated taking of petitioner's property.

8. *Opinion of the Court:* A land use regulation is not a taking if it substantially advances legitimate state interests and does not deny a property owner economically viable use of his land. Building on *Nollan v. California Coastal Commission* and several state supreme court decisions, the Court here formulated a two-part test to determine whether or not the permit equaled an unconstitutional taking of petitioner's property. First, there has to be an "essential nexus" between the legitimate interest and the permit condition exacted by the city. The Court found a nexus between preventing flooding along the creek and limiting the creek's 100-year old floodplain, as well as a nexus between reducing traffic congestion and providing for an alternative means of transportation. The second requirement imposed by the Court was that there must be a "rough proportionality" between the required dedication and the impact on the proposed development. According to the Court, the city did not satisfy this requirement. With respect to the floodplain, the Court concluded that the city never explained why a public, as opposed to a private, greenway is necessary in the interest of flood control. As a result, petitioner had lost her right to exclude others from her property. In terms of the pedestrian/bicycle pathway, the city had failed to meet its burden of demonstrating that the increased number

of automobile and bicycle trips created by the petitioner's development was reasonably related to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The Court asserted that the city had to make an effort to quantify its findings in support of the easement beyond the conclusory statement that it could offset some of the traffic demand created. Therefore, the judgment of the Supreme Court of Oregon was reversed and the case remanded.

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

1. *Type of Regulation:* Ordinance that prohibited showing films containing nudity at a drive-in movie theater when its screen was visible from a public street or place.

2. *Land Use Issue:* Whether an ordinance that prohibited showing films containing nudity at a drive-in movie theater when its screen could be seen from a public street or place was a legitimate exercise of the municipality's police power and whether it infringed upon appellant's First Amendment rights.

3. *Type of Legal Challenge:* Facial.

4. *Remedy Sought:* Declaratory judgment that ordinance was invalid.

5. *Constitutional Issue:* Freedom of Speech (First Amendment).

6. *Facts:* Appellant, the manager of the University Drive-In Theatre in Jacksonville, was charged with violating Section 330.313 of the municipal code for showing a movie, visible from the public streets, in which "female buttocks and bare breasts were shown." Appellant moved to stay his prosecution so the validity of the ordinance could be tested in a separate declaratory action. The trial court upheld the ordinance as a legitimate exercise of the municipality's police power, and ruled that it did not violate appellant's First Amendment rights. The District Court of Appeals for the First District of Florida affirmed and the Florida Supreme Court denied certiorari.

7. *Decision:* The ordinance was facially invalid as an infringement of First Amendment rights.

8. *Opinion of the Court:* A municipality or a state may protect individual privacy interests "by enacting reasonable time, place, and manner regulations applicable to all speech" regardless of content. "But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." In this case, the City of Jacksonville first tried to argue that the ordinance was a means of preventing significant intrusions of privacy. The ordinance's purpose was to keep these films from being seen from the public streets and places where the offended viewer can avert his or her eyes. The Court rejected this argument, concluding that the limited privacy interests of persons on the public streets cannot justify the censorship of otherwise protected speech on the basis of its content. The Court also rejected the argument that the ordinance was an exercise of the city's police power to protect children, finding that the ordinance was overly broad. It forbade the display of all films containing any uncovered buttocks or breasts. Finally, the city sought to justify the ordinance as a traffic regulation, but the Court found nothing in the record or in the text of the ordinance that suggested that it was aimed as a traffic regulation. In determining whether or not the ordinance was facially invalid, the Court looked at both the possibility of a narrowing construction of the ordinance and whether the deterrent effect of it was both real and substantial. The Court concluded that, by its plain terms, the ordinance was not easily susceptible to a narrowing construction and that the deterrent effect was both real and substantial. Therefore, the ordinance did not satisfy the rigorous constitutional standards that apply when the government attempts to regulate expression.

Eubank v. City of Richmond, 226 U.S. 137 (1912).

1. *Type of Regulation:* Municipal ordinance establishing a building line.

2. *Land Use Issue:* Whether the ordinance and the state statute under which it was enacted were valid exercises of police power.

3. *Type of Legal Challenge:* As applied.

4. *Remedy Sought:* Declaration that the ordinance and the state statute under which the ordinance was enacted infringed the Constitution in that they deprived plaintiff in error of his property without due process of law and denied him the equal protection of the laws.

5. *Constitutional Issue:* Due Process and Equal Protection Clauses (Fifth and Fourteenth Amendments).

6. *Facts:* Plaintiff in error applied for and received a permit to build a detached brick building to be used for a dwelling, according to certain plans and specifications which had been approved by the building inspector. Two-thirds of the property owners on the side of the square where plaintiff's lot was situated petitioned for the establishment of a building line. A resolution was passed establishing a building line on the line of a majority of the houses then erected. Plaintiff was notified that all portions of his house, including the octagon bay window, had to be set back to conform to this line. The building conformed to the line with the exception of the window, which was three feet over the line. The Supreme Court of Virginia sustained the statute, stating that it was reasonable and that the court was justified in concluding that the statute was passed by the legislature in good faith.

7. *Decision:* The ordinance was unconstitutional as an attempt to deprive non-assenting owners of their property without due process of law.

8. *Opinion of the Court:* The police power of a state extends not only to regulations which promote the public health, morals, and safety, but also to those which promote the public convenience or the general prosperity. Yet, it has limits and must stop when it encounters the prohibitions of the Constitution. When a statute is assailed as offending against the higher guarantees of the Constitution, it must clearly do so to justify the courts in declaring it invalid. The ordinance here left no discretion in the committee on streets as to whether the street line should or should not be established in a given case. The statute and the ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, created no standard by which the power given was to

be exercised; in other words, the property holders who had the authority and desire to establish the line could do so for their own interest. Taste or judgment may vary in localities, or even in the same locality. The only discretion was in the location of the line. The Court found it hard to understand how public comfort or convenience, much less public health, can be promoted by a line which could be so variously disposed. There was control of the property of plaintiff in error by other owners of property. This, the Court said, was the vice of the ordinance and made it an unreasonable exercise of police power.

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

1. *Type of Regulation*: Interim flood protection ordinance.

2. *Land Use Issue*: Whether a landowner who was denied all reasonable use of its property by a public safety regulation [could] recover compensation for the loss of use prior to the time that a court determined that the ordinance constituted a regulatory taking.

3. *Type of Legal Challenge*: As applied.

4. *Remedy Sought*: Compensation for loss of land value between the time the regulation went into effect and the time the court determined that the ordinance was a regulatory taking.

5. *Constitutional Issue*: Taking without just compensation (Fifth Amendment as applied to the states through the Fourteenth Amendment).

6. *Facts*: First English Evangelical Lutheran Church owned and operated Lutherglen, a campground for handicapped children, located in a canyon along the banks of the middle fork of Mill Creek in the Angeles National Forest. The middle fork is the natural drainage channel for a watershed area. In 1977, a forest fire denuded the hills upstream of Lutherglen. Seven months later, in February 1978, a rain storm caused Mill Creek to overflow, flooding Lutherglen and destroying its buildings. In January 1979, Los Angeles County passed an ordinance prohibiting construction in the interim flood protection area for health and safety reasons. The church claimed that the regulation denied it all reasonable use of its property and a month

later sued the county in inverse condemnation. Interpreting California caselaw as precluding a monetary remedy for a regulatory taking, the California state court granted a motion to strike the plea for monetary compensation.

7. *Decision*: Monetary compensation held proper remedy where government regulation has prevented all reasonable use of private property, regardless of whether such a regulatory taking was permanent or temporary.

8. *Opinion of the Court*: [*Editor's note*: The U.S. Supreme Court reviewed the remedy question only. The Court accepted as true the claim in the church's pleadings that it had been denied all reasonable use of its property and thus that a taking had occurred.] Where government regulation works a taking of property, as in this case, the just compensation clause of the Fifth Amendment is self-executing and requires that compensation be paid to the property owner for the period of time that the regulation denied all reasonable use of the property. This holding [was] limited to the facts of the case and [did] not address "the quite different questions that arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like." The case [was] remanded to the state court for a determination on the merits of the taking claim. If the state court on remand [were to] determine[] that this interim flood protection ordinance effected a regulatory taking, the county [would be] free to amend the regulation, acquire the land by eminent domain, or abandon its regulation altogether. However, if a taking [were to be] found to have occurred, even if the county [then] abandons the regulation, there [would have] been a temporary taking of property rights between the time the regulation went into effect and the time the regulation was declared to be a regulatory taking. Consistent with this holding, the county would be liable for the value of the use of the land during this temporary period. A temporary taking of the landowner's property is not different in kind from a permanent taking of the property; both clearly require compensation under the self-executing, express terms of the Constitution.

9. *Dissenting Opinion*: There is a fundamental distinction between physical invasions—which are easily identifiable without making any economic analyses and may constitute a taking requiring

compensation—and regulatory programs which affect property values in many ways and amount to a taking only when they are extreme. The majority fail[ed] to recognize that regulatory restrictions on property have a significant temporal element and that the duration of the challenged restriction is a critical factor in determining whether a taking has occurred. Just because a landowner can prove that a regulation would constitute a taking if left in effect does not mean that he can prove that a temporary application of the regulation also constitutes a taking.

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Frisby v. Schultz, 487 U.S. 474 (1988).

1. *Type of Regulation*: Ordinance banning certain types of picketing.

2. *Land Use Issue*: Whether a ban on picketing individual residences violates the First Amendment.

3. *Type of Legal Challenge*: Facial.

4. *Remedy Sought*: Declaratory and injunctive relief finding the ordinance unconstitutional and barring its enforcement.

5. *Constitutional Issue*: Whether the ordinance was facially invalid under the First Amendment as a prior restraint on freedom of speech.

6. *Facts*: In 1985, persons opposed to abortion began to picket the residence of a doctor who perform[ed] abortions at clinics in neighboring towns. Although the picketing was peaceful and orderly, it generated substantial controversy and numerous complaints. In response, the town board enacted a total ban on all picketing before or about private residences. The ordinance stated that its primary purpose was to protect and preserve the tranquility and privacy persons enjoy in their own homes. The board believed a ban was necessary because such residential picketing causes emotional distress and is, in fact, intended to harass the occupants of the residence being picketed.

7. *Decision*: Ordinance upheld under First Amendment as not constituting prior restraint on freedom of speech.

8. *Opinion of the Court*: The ban on picketing must be judged against the stringent standards used for restrictions on speech in a traditional public forum because public streets and sidewalks, even in residential areas, have traditionally been used for public assembly and debate. Viewing the ban as a content-neutral time, place, and manner regulation, the Court's inquiry focused on whether the ordinance was narrowly tailored to serve a significant governmental interest and whether it left open ample alternative channels of communication.

Addressing the last question first, the ordinance may be interpreted narrowly as prohibiting picketing only when it is focused on and taking place in front of a particular residence. Under this narrow construction, it becomes apparent that alternative channels of communication are available, including marches in residential areas, door-to-door visits to distribute literature and discuss the abortion question, and mail or telephone contact.

The state's interest in protecting the privacy and tranquility of the home is significant, given the unique nature of one's home as a "last citadel" for escape from the tribulations of life. The ordinance [was] narrowly tailored to serve that privacy interest because it target[ed] picketing only when it focus[ed] on, and thus trie[d] to disrupt the privacy and enjoyment of, an individual residence.

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FW/PBS v. City of Dallas, 493 U.S. 215 (1990).

1. *Type of Regulation:* Comprehensive ordinance regulating "sexually oriented businesses."

2. *Land Use Issue:* Whether the ordinance's licensing scheme violated the First Amendment and whether this scheme was a prior restraint that failed to provide adequate procedural safeguards as required by *Freedman v. Maryland.*

3. *Type of Legal Challenge:* Facial.

4. *Remedy Sought:* Preliminary and permanent injunctive relief as well as declaratory relief that the ordinance was invalid.

5. *Constitutional Issues:* Freedom of Speech and the Due Process Clause (First and Fourteenth Amendments).

6. *Facts:* The City Council of the City of Dallas, in 1986, adopted an ordinance regulating sexually oriented businesses. It was aimed at eradicating the secondary effects of crime and urban blight. The ordinance regulated sexually oriented businesses through a scheme incorporating zoning, licensing, and inspections. The city asserted that it required every business to obtain a certificate of occupancy when it moved into a new location or the use of the structure changed. The ordinance further required sexually oriented businesses to submit to inspections whether or not they had moved or the use of their structure had changed. The ordinance required the chief of police to approve the issuance of a license within 30 days after the receipt of the permit application, but it conditioned the issuance upon the approval of other municipal inspection agencies without setting forth a time limit for when the inspection must occur. The ordinance included a civil disability provision, which prohibited individuals convicted of certain crimes from obtaining a license to operate a sexually-oriented business for a specific period of time. It also prohibited the issuance of a license to an applicant who had resided with an individual whose license application had been denied or revoked within the preceding 12 months. Finally, the ordinance stipulated that motels that rented rooms for fewer than ten hours were sexually-oriented businesses and were, therefore, regulated under the ordinance.

Three separate suits were filed, challenging the ordinance on several grounds. The litigants included individuals and businesses involved in selling, exhibiting, and distributing publications, videos, or motion picture films; adult cabarets or establishments providing live nude dancing or films, motion pictures, video cassettes, slides, or other photographic reproductions depicting sexual activities and anatomy specified in the ordinance; and adult motel owners. The district court upheld most of the ordinance, striking four subsections. The court struck two subsections on the grounds that they vested overbroad discretion in the chief of police. It also struck the provision

imposing the civil disability merely on the basis of an indictment or information, reasoning that there were less restrictive alternatives to achieve the city's goals. Finally, the district court held that the five enumerated crimes on the list of those creating civil disability were unconstitutional because they were not sufficiently related to the purpose of the ordinance. These included striking bribery, kidnapping, robbery, organized criminal activity, and violations of controlled substances Acts. In response to this decision, the city amended the ordinance. The court of appeals affirmed the decision of the district court.

7. *Decision:* Petitioners failed to show standing to challenge the ordinance's provision which prohibited the licensing of an applicant who had resided with an individual whose license had been denied or revoked. They also did not have standing to challenge the civil disability provisions. Petitioners could raise a facial challenge to the licensing scheme. The ordinance failed to minimize the suppression of speech in the event of a license denial. Therefore, the licensing requirement was unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity.

8. *Opinion of the Court:* A scheme that places unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship. The ordinance in this case provided no means by which an applicant could ensure that the business would be inspected within the 30 day time period within which the license was supposed to be issued if approved. This scheme allowed for an indefinite postponement of the issuance of the license. The Court relied on three procedural safeguards set out in *Freedman v. Maryland.* These safeguards are: any restraint prior to judicial review can be imposed only for a specific, brief period during which the status quo must be maintained; expeditious judicial review of that decision must be available; and the censor must bear the burden of going to court to suppress the speech and must bear the burden once in court. The city's scheme did not provide for an effective time limitation within which the licensor's decision had to be made. The city also failed to provide an avenue for prompt judicial review so as to minimize suppressing the speech in the event of a license denial. Citing the difference between this case and *Freedman,*

specifically that the regulation of speech in *Freedman* was presumptively invalid while here the licensing scheme was not, the Court determined that the city did not bear the burden of proof.

Finally, the Court addressed the motel owner petitioner's challenge to two aspects of the ordinance's requirement that motels that rent rooms for fewer than ten hours are sexually-oriented businesses and, therefore, are regulated under the ordinance. In regard to the Due Process claim, specifically that renting rooms for fewer than ten hours resulted in an increase in crime and other secondary effects, the Court agreed with the court of appeals to the effect that it was reasonable to believe that shorter rental time periods indicated that the motels fostered prostitution and that was the type of activity that the ordinance sought to suppress. The second challenge, that the ordinance violated the constitutional right "to be let alone" was not pressed or passed upon in the lower courts, so the Court declined to consider it.

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

1. *Type of Regulation*: Safety ordinance.
2. *Land Use Issue*: Whether a police power regulation may effectively terminate the operation of a previously existing sand and gravel mine for safety reasons.
3. *Type of Challenge*: As applied.
4. *Remedy Sought*: Injunction to prevent continued mining in violation of the ordinance.
5. *Constitutional Issue*: Taking without just compensation (Fourteenth Amendment).
6. *Facts*: Goldblatt had conducted a sand and gravel mining operation on a 38-acre tract of land since 1927. The excavations had reached the water table and had filled with water to a depth of 25 feet, creating a 20-acre lake. Recent population growth had brought 2,200 homes and four public schools with 4,500 pupils within a radius of 3,500 feet of the lake. After unsuccessful attempts to guarantee public safety through zoning, fencing and berm requirements, the town enacted an ordinance prohibiting any new excavation below the water table and requiring the refilling of the

existing excavations below the water table. The ordinance completely prohibited the use of the property as a sand and gravel mine. Goldblatt contended that the ordinance confiscated his property without compensation, since the remaining acreage was used in connection with the mine.

7. *Decision*: Ordinance upheld under the Fourteenth Amendment as a reasonable exercise of the police power.

8. *Opinion of the Court*: There is no set formula to determine where valid regulation ends and a regulatory taking begins. An exercise of the police power which deprives an owner of its most beneficial use does not render such an ordinance unconstitutional. Although a comparison of values before and after is relevant, it is by no means conclusive. Since such ordinances are presumed to be constitutional and there [was] no evidence in the record as to reduction in value or that indicated unreasonableness, the ordinance [was] upheld.

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Gorieb v. Fox, 274 U.S. 603 (1927).

1. *Type of Regulation*: Ordinance establishing minimum setbacks from street.

2. *Land Use Issue*: Constitutionality of setback ordinances or similar provisions within a zoning ordinance.

3. *Type of Legal Challenge*: Facial.

4. *Remedy Sought*: Order to compel the issuance by the council of a permit to allow Mr. Gorieb to build up to the street line.

5. *Constitutional Issues*:

   a. Substantive due process (alleging vagueness and a taking under the Fourteenth Amendment).

   b. Equal protection (Fourteenth Amendment).

6. *Facts*: Mr. Gorieb owned several lots in the residential district of Roanoke, Virginia. He applied to the city council for a permit to erect a brick store building on one of the lots. The council, in rendering its decision, took into account a 1924 ordinance which

stated that the setback line for new buildings in the city had to be at least as far back from the street as that occupied by 60 percent of existing houses in the block. In accord with the ordinance, the council gave him permission to erect a brick store 34-2/3 feet back from the street line. Gorieb then sought an order in state court to compel the council to issue a permit allowing him to build up to the street line, stating that those owners who had been permitted to build closer to the street were afforded greater protection of the laws than he was, and that the portion of the lot not allowed to be built on was in effect taken.

7. *Decision*: Ordinance upheld under the Fourteenth Amendment as reasonable exercise of police power.

8. *Opinion of the Court*: Although the ordinance compel[led] Mr. Gorieb to set his building back from the street line of his lot, it serve[d] as a valid means of providing for the safety, comfort, and welfare of populations in an urban community, and therefore did not constitute a taking under the due process clause of the Fourteenth Amendment. Because it [would be] impossible to anticipate in advance what setback [would be] appropriate in given blocks, the reservation of authority by the council to fashion setbacks by looking at existing patterns of development and to deal in a special manner with exceptional cases [was] valid under the equal protection clause of the Fourteenth Amendment.

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Hadacheck v. Sebastian, 239 U.S. 394 (1915).

1. *Type of Regulation*: Ordinance prohibiting industrial brickmaking within city limits.

2. *Land Use Issue*: Reasonableness of the prohibition given the unique character of plaintiff's land.

3. *Type of Legal Challenge*: As applied.

4. *Remedy Sought*: Judgment declaring the municipal ordinance invalid.

5. *Constitutional Issues*:

a. Substantive due process (taking of property without just compensation under the Fourteenth Amendment).

b. Equal protection (Fourteenth Amendment).

6. *Facts*: Hadacheck challenged the validity of a Los Angeles ordinance which made it unlawful to operate a brickyard or brick kiln within certain areas of the city. He contended that the ordinance violated his Fourteenth Amendment rights because he had purchased and developed the land, containing valuable deposits of clay material suitable for brickmaking, for its only commercially feasible use—as a brickyard. The evidence indicated that Hadacheck's land, which he had purchased and developed before the ordinance was passed, was worth about $800,000 as a brickyard and about $60,000 when used for any other purpose. At the time of purchase, the property was outside the city limits and at some distance from dwellings and other developments. The brickyard was not a nuisance per se or in fact.

7. *Decision*: Ordinance upheld under the Fourteenth Amendment as a reasonable exercise of the police power.

8. *Opinion of the Court*: A municipality may, under its police power, prohibit particular land uses if such prohibition in good faith promotes the health, safety, and general welfare of the public. This police power was validly exercised in that the Los Angeles ordinance promoted these goals, although the prohibition adversely effected the value of Hadacheck's land. The fact that the city [chose] to deal with this area first, leaving other areas for later treatment, [did] not violate equal protection.

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984).

1. *Type of Regulation*: Eminent domain.

2. *Land Use Issue*: Whether a land condemnation program that transfers title to property from lessors to lessees to reduce the concentration of land ownership in the state serves a proper public purpose.

3. *Type of Legal Challenge*: As applied.

4. *Remedy Sought*: Declaratory and injunctive relief.

5. *Constitutional Issue*: Public use requirement in the exercise of the power of eminent domain (Fifth Amendment as applied to the states through the Fourteenth Amendment).

6. *Facts*: The Hawaii legislature enacted the Land Reform Act (1967), creating a land condemnation scheme in which title to real property [was] taken from lessors and transferred to lessees in order to reduce the concentration of landownership. The legislature found there was a need for this statute because concentrated landownership in Hawaii, a vestige of an earlier feudal land tenure system, was skewing the state's residential fee simple market, inflating land prices and injuring the public welfare. Under this act, lessees living on single-family residential lots within tracts of at least five acres [were] entitled to ask the Hawaii Housing Authority (HHA) to condemn the property on which they live[d]. Following a public hearing to determine whether acquisition of the tract [would] "effectuate the public purposes" of the act, HHA [was] authorized to designate some or all of the lots for acquisition. HHA then acquires[d] title to the lots, at prices set either by negotiation or by a judicial proceeding, and [could] then sell the land title to the lessees.

After negotiations for purchase of title to Midkiff's land failed, Midkiff refused to comply further with the procedures of the Act and filed suit in federal district court, asking that the Act be found unconstitutional and its enforcement enjoined. The district court found certain of the Act's procedures unconstitutional, but upheld the rest of the act as being in conformance with the public use clause of the Fifth Amendment. The U.S. Court of Appeals for the Ninth Circuit reversed, holding that the Act violated the public use requirement of the Fifth Amendment.

7. *Decision*: Act upheld as satisfying the public use requirement of the Fifth Amendment in the exercise of eminent domain.

8. *Opinion of the Court*: The public use requirement of the Fifth Amendment is co-terminous with the scope of a state's police power, and thus is extremely broad, while the role of the courts in reviewing a legislature's judgment on what constitutes a public use is extremely narrow. The Court cannot substitute its judgment for a legislature's judgment as to what constitutes a public use unless the use is

"palpably without reasonable foundation." In this instance, a rational basis for the condemnation scheme [could] be found in the state's effort to attack the perceived social and economic evils of concentrated property ownership in Hawaii.

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Kaiser Aetna v. United States, 444 U.S. 164 (1979).

1. *Type of Regulation*: Not applicable.
2. *Land Use Issue*: Whether the federal government must provide compensation to the private owner of a navigable marina, made navigable by private means, in order to require the landowner to allow the public access to the waters.
3. *Type of Legal Challenge*: Not applicable.
4. *Remedy Sought*: Injunction to prohibit landowners from denying public access to the marina the public and requiring notice to the public of their navigation rights in the marina.
5. *Constitutional Issues*:
    a. Navigational servitude (Article I Commerce Clause).
    b. Taking without just compensation (Fifth Amendment).
6. *Facts*: Owners of a private pond in Hawaii, with the permission of the Army Corps of Engineers, improved and dredged their land to make a marina. The marina connected the pond to a bay. The landowners denied the public access to the pond and marina and charged a fee for its use. The United States sued the landowners to determine whether the owners must obtain permission from the corps prior to making any further improvements to the marina and to enjoin the landowners from denying the public access to the marina.
7. *Decision*: Owners of private marina that had become a navigable water of the United States through the owners' improvements could not be required to open marina to public access without payment of compensation.
8. *Opinion of the Court*: The fact that water may be navigable and, therefore, subject to federal regulation does not mean that at the time it becomes navigable, the owners of that land do not have a

property interest protected by the Fifth Amendment. Here, the owner of a private pond improved the land in such a way as to make it include navigable waters. The owner's investment in the land includes a reasonable expectation to profit from the improvement itself. The United States, by seeking to physically invade the land by requiring water accessibility for the public, must pay for that invasion.

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Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, (1987).

1. *Type of Regulation*: Subsidence regulations.
2. *Land Use Issue*: Whether a state can prohibit mining that causes subsidence damage to preexisting public buildings, dwellings, and cemeteries.
3. *Type of Legal Challenge*: Facial.
4. *Remedy Sought*: Injunction against enforcement of the statute.
5. *Constitutional Issues*:
    a. Taking without just compensation (Fifth Amendment as applied to the states through the Fourteenth Amendment).
    b. Impairment of contract in violation of the express Constitutional prohibition of state impairment of contract (Article 1, Section 10).
6. *Facts*: Pennsylvania passed a statute prohibiting mining that caused subsidence damage to preexisting public buildings, dwellings, and cemeteries. Regulations under the statute required 50 percent of the coal beneath such structures to be left in place to provide surface support. An association of coal miners sought an injunction against enforcement of the statute. The association claimed that the state was effectively taking without compensation approximately 27 million tons of coal and separately recognized "support estates" which the companies owned. The association also claimed that the statute

impaired contracts the mining companies had entered into with surface landowners, waiving any damages that might be caused by subsidence.

7. *Decision*: Statute upheld under the Fifth Amendment as regulation enacted to prevent public harm and which did not deny mining companies economically viable use of their properties.

8. *Opinion of the Court*: A state can regulate land use without it being a taking of property that requires compensation if the regulation furthers a legitimate state interest and does not deny the owner an economically viable use of his land. This statute [advanced] a legitimate state interest since the statute was not enacted for the private benefit of the surface owners, but was enacted to prevent harm to the public from nuisancelike activity, to enhance the value of the lands for taxation, and to preserve water drainage and public water supplies. Nor [did the] statute deny the mining companies an economically viable use of their properties, since the 27 million tons of coal that [had] to be left unmined constituted less than 2 percent of the total coal and the mines could still be operated profitably. Although the statute [impaired] contracts by not allowing the mining companies to hold the surface owners to their waiver of damages, under the prior interpretations of the Court the state [was] justified in doing so in light of its strong public interest in preventing environmental harm.

9. *Dissenting Opinion*: The regulations have completely extinguished the coal companies' interests, in particular coal deposits which, under state law, are identifiable and separate property interests. Since, for all practical purposes, "the right to coal consists in the right to mine it," the regulations . . . destroyed the companies' interests as effectively as an actual physical appropriation and amount[ed] to a taking.

Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982).

1. *Type of Regulation*: Licensing.

2. *Land Use Issue*: Whether a Massachusetts statute which grants

churches and schools the power to veto liquor license applications for premises located within a 500-foot radius of the church or school violates the establishment clause of the First Amendment or the due process clause of the Fourteenth Amendment.

3. *Type of Legal Challenge*: Facial and as applied.

4. *Remedy Sought*: Invalidation of the statute.

5. *Constitutional Issues*:

a. Establishment clause (First Amendment).

b. Equal protection and substantive due process (Fourteenth Amendment).

6. *Facts*: Appellee's application for a liquor license was denied because of the objection of an adjacent church acting pursuant to a Massachusetts statute which enabled a church or school to object to a liquor license application for a premises located within 500 feet of the church or school.

7. *Decision*: Statute held invalid under the First Amendment as violative of the establishment clause.

8. *Opinion of the Court*: The statute [was] not entitled to the deference normally due legislative zoning because it entrust[ed] a private, nongovernmental entity with power ordinarily vested in governmental agencies. Arming churches with such a veto power violate[d] the nonentanglement principle of the establishment clause. Further, while the statute ha[d] a secular goal, its primary effect [was] to advance religion, and it [could] be used for explicitly religious goals.

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Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

1. *Type of Regulation*: State statute that prohibited interference with installation of cable television lines.

2. *Land Use Issue*: Validity of statute requiring a landlord to permit a cable television company to install its cable facilities upon his property.

3. *Type of Legal Challenge*: Facial.

4. *Remedy Sought*: Injunction to prevent enforcement of statute and damages for the physical invasion of the landlord's property.

5. *Constitutional Issues:*

a. Substantive due process (Fourteenth Amendment).

b. Taking without just compensation (Fifth Amendment as applied to the states through the Fourteenth Amendment).

6. *Facts*: Jean Loretto purchased a five-story apartment building in 1971. The previous owner had granted Teleprompter permission to install a cable on the building. Teleprompter also installed two large boxes along the roof cables. Two years after Loretto purchased the building, Teleprompter connected a cable serving a tenant in her building. The state statute limited the compensation paid to building owners by cable companies for use of their property to a one time payment of $1. Loretto did not discover the presence of the cable until after the purchase. She then brought a class action suit, alleging that the cable company's installation was a trespass, and that the statute constituted a taking without just compensation.

7. *Decision*: Statute invalid under Fifth Amendment as authorizing a taking of property without just compensation.

8. *Opinion of the Court:* A permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied. Any physical invasion of property, regardless of the extent of the occupation, gives rise to a taking. Because the installation of plates, boxes, wires, bolts, and screws resulted in a direct physical occupation, the regulation work[ed] a taking of property.

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

1. *Type of Regulation:* Building regulation.

2. *Land Use Issue:* Whether South Carolina's Beachfront Management Act's effect on the economic value of petitioner's lots equaled a taking of private property, requiring the payment of just compensation.

3. *Type of Legal Challenge:* As applied.

4. *Remedy Sought:* Declaration that the Beachfront Management Act's construction ban effected a taking of petitioner's property without just compensation and damages.

5. *Constitutional Issue:* Takings clause (Fifth and Fourteenth Amendments).

6. *Facts:* In 1988, South Carolina enacted the Beachfront Management Act in an effort to protect its coastline from continued erosion. The Act directed respondent, South Carolina Coastal Council, to establish a "baseline" connecting the landward-most points of erosion during the past 40 years. The council fixed this baseline landward of petitioner's parcels. Under the Act, all construction seaward of a line drawn 20 feet landward of the baseline was prohibited. A 1977 Act had required owners of coastal zone land that qualified as a "critical area" (beaches and immediately adjacent sand dunes) to obtain a permit from the Council prior to committing the land to a "use other than the use the critical area was devoted to." When petitioner bought his parcels of land in 1986 no portion of the lots qualified as a "critical area" and therefore the building of houses on them was permitted. The passage of the Beachfront Management Act had the effect of preventing petitioner from building single-family residences. Petitioner filed suit, arguing that the Act's construction ban was a taking of his property without just compensation. The trial court agreed, but the South Carolina Supreme Court reversed. The court ruled that this regulation was designed to prevent serious public harm and therefore no compensation was owed under the Takings Clause regardless of the regulation's impact on property value.

7. *Decision:* Petitioner properly alleged an injury-in-fact with

respect to the pre-amendment deprivation and the South Carolina Supreme Court erred in applying the "harmful or noxious uses" principle to decide this case. The question must turn, in accord with this Court's "takings" jurisprudence, on citizens' historic understandings regarding the content of, and the state's power over, the "bundle of rights" that they acquire when they take title to property. No compensation is owed if the state's affirmative decree simply made explicit what already inhered in the title itself under the restrictions that background principles of the state's law of property and nuisance already placed upon land ownership.

8. *Opinion of the Court:* When a property owner has been called upon to give up all economically beneficial use of his land for the common good, he has suffered a taking. A state seeking to sustain a regulation that deprives a landowner of all economically beneficial use of his land can resist compensation only by showing that the proscribed use of the owner's estate was not part of his title in the first place. Anything the background principles of state law would recognize as a private or public nuisance may be barred by regulation without the need to compensate the landowner. In this case, the Court emphasized that, for South Carolina to win its case, it had to identify background principles of nuisance and property law that prohibit the uses petitioner intended in the circumstances in which the land was then found. The case was remanded to the South Carolina courts to determine if South Carolina had, under the background principles of the state's law of property and nuisance, the right to prevent the desired use by petitioner.

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

1. *Type of Regulation*: Subdivision regulation.

2. *Land Use Issue*: Whether a denial of subdivision approval that is alleged to be a taking can be the basis of a claim for compensation when the developer has not attempted to obtain permission for other types of development.

3. *Type of Challenge*: As applied.

4. *Remedy Sought*: Declaratory judgment and compensation for inverse condemnation.

5. *Constitutional Issue*: Taking without just compensation (Fifth Amendment as applied to the states through the Fourteenth Amendment).

6. *Facts*: Approval of the tentative subdivision plat was rejected for inadequate street access, no public sewer services, inadequate police protection for the area and no provision of water service. The property owner accused Yolo County and the City of Davis of restricting the property to use for a "public, open space buffer" and did not seek approval of any other use for the property permitted under the zoning ordinances before instituting suit.

7. *Decision*: Case dismissed for lack of ripeness.

8. *Opinion of the Court*: The issue of compensation for a regulatory taking [could not] be reached because it [was] impossible to determine if there ha[d] been a taking at all since the developer, after being denied approval for the subdivision, declined to present other proposals for review by the zoning authorities. In order to make a determination of fact on [a] taking question, there must be a final and authoritative decision establishing what development is permitted and what is prohibited; such a decision has not been made in this case because the developer refused to submit any further proposals for zoning approval. Therefore, the case was not ripe for consideration on the merits.

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Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

1. *Type of Regulation*: Sign and billboard ordinance.

2. *Land Use Issue*: Whether San Diego's ordinance prohibiting most types of signs could withstand a constitutional challenge in light of the restrictions it placed on the petitioner's right to freedom of expression under the First Amendment.

3. *Type of Challenge*: Facial.

4. *Remedy Sought*: An injunction banning enforcement of the ordinance.

5. *Constitutional Issue*:

a. Freedom of expression (First Amendment).

b. Substantive due process (Fourteenth Amendment).

6. *Facts:* In 1972, San Diego enacted a comprehensive zoning scheme which prohibited a substantial number of signs and billboards throughout the city. The ordinance created two categories of exceptions to the general prohibition. First, it permitted certain onsite advertising—those "signs designating the name of the owner or occupant of the premises upon which such signs are placed or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed." Second, the ordinance permitted all signs which fell into 12 express exemptions, including, for example: governmental regulations, historical plaques, religious symbols, for sale/rent signs, and temporary political signs. The purpose of the ordinance was to eliminate hazards to pedestrians and motorists brought about by distracting sign displays and to preserve and improve the appearance of the city.

Outdoor advertising companies challenged the ordinance on its face, alleging that it destroyed their outdoor advertising businesses. They grounded their claim in the First Amendment's freedom of expression. The trial court held the ordinance unconstitutional on two grounds. First, San Diego had exceeded its police power, and second, the ordinance was an abridgment of the companies' First Amendment rights. The California Court of Appeal affirmed solely on the first ground. The California Supreme Court reversed, holding that the ordinance was within the city's police power because the city's interests in enacting the ordinance were legitimate.

7. *Decision*: Ordinance held invalid on its face under First Amendment because it afforded more protection to commercial speech than noncommercial speech.

8. *Plurality Opinion of the Court*: [*Editors' note*: A sharply divided Court rendered five separate opinions, with Justice White writing the plurality opinion, Justice Brennan (joined by Justice Blackmun) writing a concurring opinion, and Justices Stevens and

Rehnquist and Chief Justice Burger each writing separate dissenting opinions.]

The ordinance affects two type[s] of speech—commercial and noncommercial speech. Commercial speech is protected by the First Amendment if (1) it concerns lawful activity and (2) it is not false or misleading. Government regulation of such protected commercial speech is evaluated under a test enunciated in the *Central Hudson* decision. Under that decision, regulation of commercial speech is constitutional if it: (1) serves a substantial governmental interest; (2) directly advances the interest; and (3) reaches no further than necessary to accomplish the given objective. The city's safety and aesthetic goals [were] substantially legitimate, and the ordinance reache[d] no further than necessary because certain types of commercial signs [were] permitted. Also, the ordinance directly advance[d] this substantial governmental interest, which [was] based on the accumulated common-sense judgments of local lawmakers. The distinction between permissible on-site advertising and prohibited off-site advertising [was] justifiable because the municipality could reasonably conclude that there [was] a stronger interest in identifying business locations and the products or services available there, than in allowing off-site advertising.

However, the ordinance [was] unconstitutional in its treatment of noncommercial speech because it provide[d] more protection for commercial than noncommercial speech. The ordinance unconstitutionally restrain[ed] the more highly protected speech by allowing on-site commercial signs while prohibiting on-site noncommercial signs. For example, a store could have a sign advertising items for sale, but was barred from exhibiting a sign that contained a political message. The ordinance [was] not a valid time, place, and manner restriction because it unconstitutionally suppresse[d] noncommercial speech, and it prohibit[ed] all off-site advertising.

9. *Concurring Opinion*: The entire ordinance [was] unconstitutional on its face because the practical effect of the ordinance [was] a virtual total ban on all billboards.

10. *Dissenting Opinions*: Justice Stevens: The issue [was] whether the entire billboard medium [could] be eliminated. This

medium [could] be eliminated, and thus the ordinance [was] constitutional because: (1) the legitimate city interests [were] substantial; (2) the regulation [was] impartial and thereby does not favor one viewpoint over another; and (3) there [were] other ample modes or channels of advertising to the public.

Chief Justice Burger: The plurality's decision leaves the municipality "between two unsatisfactory options: (a) allowing all 'noncommercial' signs, no matter how many, how dangerous, or how damaging to the environment or (b) forbidding signs altogether." The distinction between different types of speech [was] constitutional because "[t]he means chosen to effectuate legitimate governmental interests are not for the court to select." Therefore, a governmental entity can ban a given medium so long as the legislature's approach is content neutral—it does not favor one type of speech over another—and does not suppress a protected form of expression by foreclosing adequate channels of communication.

Miller v. Schoene, 276 U.S. 272 (1928).

1. *Type of Regulation*: An act authorizing the destruction of infectious red cedar trees to prevent communication of plant diseases to other valuable species.

2. *Land Use Issue*: Reasonableness of an uncompensated destruction of one type of property to benefit another type of property.

3. *Type of Legal Challenge*: Facial.

4. *Remedy Sought*: Compensation for the value of standing cedar

trees and for the decrease in the market value of the realty caused by their destruction.

5. *Constitutional Issue*: Substantive due process (taking without just compensation under the Fourteenth Amendment).

6. *Facts*: The Virginia Cedar Rust Act (1924) provided for the destruction of cedar trees to prevent communication of plant disease

to nearby apple orchards. In passing the act, the legislature determined that the apple orchards were of significantly greater value to the public than the cedar trees. Pursuant to the act, the defendant state entomologist ordered Ms. Miller and some of her neighbors to cut down a number of ornamental red cedar trees on their property. Ms. Miller and her neighbors were allowed $100 to cover the exp[e]nse of removal of the cedars, as well as the privilege of using the trees (presumably for firewood) when felled. The statute did not provide compensation for the value of the standing cedars, nor for the decrease in the market value of the plaintiffs' property. Plaintiffs argued this was an unconstitutional taking of their property under the Fourteenth Amendment.

7. *Decision*: Act upheld under Fourteenth Amendment as reasonable exercise of the police power.

8. *Opinion of the Court*: Although the plaintiffs' property values were diminished by the destruction of the cedars, where a major agriculture interest (though private) was threatened, the statute validly protect[ed] public health, safety, and general welfare. The legislative balancing of competing interests and its preference of one interest over another is at the heart of every exercise of police power. If reasonable, as [it was] in this case, it will be sustained. Therefore, the plaintiffs [were] not entitled to compensation for their loss.

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Moore v. City of East Cleveland, 431 U.S. 494, (1977).

1. *Type of Regulation:* Housing code.

2 *Land Use Issue*: Whether an ordinance limiting occupancy of a dwelling unit to members of a single family, but recognizing as a family only a few categories of related individuals, rationally promoted any legitimate government purpose.

3. *Type of Legal Challenge*: As applied.

4. *Remedy Sought*: Reversal of conviction under ordinance and a declaration that the ordinance was invalid.

5. *Constitutional Issue*: Substantive due process (Fourteenth Amendment).

6. *Facts*: Mrs. Moore lived with her son and two grandsons who were cousins rather than brothers. An East Cleveland housing ordinance limited occupancy of a dwelling unit to members of a single family. Because the ordinance defined family in a narrow way, Mrs. Moore violated the ordinance by having grandsons living with her who were not brothers. Mrs. Moore was convicted and sentenced to five days in jail and a $25 fine. She sought to have the ordinance declared invalid for failing to rationally further a legitimate government purpose.

7. *Decision*: Ordinance invalid under Fourteenth Amendment as violative of substantive due process.

8. *Opinion of the Court*: East Cleveland's stated purpose in limiting occupancy to a single family [was] to prevent overcrowding, traffic congestion, and a financial burden on the school system. While this [was] a legitimate goal, the ordinance only marginally serve[d] the goal. Large families which fit within the ordinance's definition of family [could] live together, but smaller numbers of related individuals who [did] not meet the definition of family [could not] live together even if they cause[d] less overcrowding and traffic than the large traditional families. The family receives special protection under the Constitution, and the city's failure to show why only allowing such a limited range of related people to live together further[ed] its legitimate purposes render[ed] the ordinance invalid.

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Mugler v. Kansas, 123 U.S. 623 (1887).

1. *Type of Regulation*: Prohibition on brewing of beer.

2. *Land Use Issue*: Reasonableness of state legislation prohibiting the use of an existing brewery to manufacture beer to be sold for other than medicinal purposes.

3. *Type of Legal Challenge*: As applied.

4. *Remedy Sought*: Compensation for the application of state regulatory legislation to the plaintiff's brewery.

5. *Constitutional Issues:*

a. Substantive due process (Fourteenth Amendment).

b. Privileges and immunities clause.

c. An implicit taking argument.

6. *Facts*: Peter Mugler erected and furnished a brewery in Salina, Kansas, in 1877, which he operated for the manufacture of malt liquor. On May 1, 1881, the Kansas legislature enacted a state constitutional article, which stated that the manufacture and sale of intoxicating liquors would be prohibited, except those sold for medicinal, scientific, and mechanical purposes. Mr. Mugler's property, worth $10,000 as a brewery, was worth no more than $2,500 when used for any other purpose. Mr. Mugler continued to manufacture and sell beer after legislation implementing the constitutional provision was enacted and was indicted for offenses against the statute. He then sued the state, claiming a violation of due process, stating that the amendment violated the privileges and immunities clause and that he had to be compensated for the diminution in the value of his property.

7. *Decision:* State legislation upheld under Fourteenth Amendment and privileges and immunities clause.

8. *Opinion of the Court:* Because the legislative prohibition on the manufacture and sale of liquor for general public consumption may be considered to be fairly adopted to the end of protecting the public's health, welfare, and morals, such state legislation violated neither the privileges and immunities clause nor the (substantive) due process clause of the constitution; nor [did] it effectuate a taking of property. The owner ha[d] full control of the property and [could] use it for any lawful purpose. Therefore, the act [could] be enforced against persons who, at the time, happen[ed] to own property whose chief value consist[ed of] its fitness for manufacturing alcohol, without compensating them for the diminution in the value of the property resulting from the legislation. "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals

or corporations may suffer."

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Nectow v. City of Cambridge, 277 U.S. 183 (1928).

1. *Type of Regulation*: Zoning ordinance.
2. *Land Use Issue*: Reasonableness of residential zoning classification applied to a portion of plaintiff's property when the whole of the property is located in close proximity to land zoned for, and actually being used for business, industrial, and railroad purposes.
3. *Type of Legal Challenge*: As applied.
4. *Remedy Sought*: Injunction to prevent the application of the zoning district restrictions to plaintiff's property.
5. *Constitutional Issue*: Substantive due process (taking without just compensation under the Fourteenth Amendment).
6. *Facts*: Saul Nectow owned a 140,000 square foot parcel of land in Cambridge, Massachusetts. The [C]ity of Cambridge adopted a zoning ordinance dividing the city into three districts: residential, business, and unrestricted. Prior to the passage of the ordinance, Mr. Nectow had entered into a contract for the sale of most of the parcel. The ordinance placed most of his parcel in the unrestricted zone, while classifying a 100-foot strip on the west side of his property in the restricted residential district. The property to the south of the strip was devoted to industrial use. Immediately to the east were railroad tracks. Because of the new zoning restrictions, the contract purchaser refused to complete the transaction. Mr. Nectow then sued the city, challenging the reasonableness of the zoning classification as applied to his property.
7. *Decision*: Ordinance invalid under Fourteenth Amendment as applied.
8. *Opinion of the Court*: The facts in this case prove[d] that no practical use [could] be made of the property in question for residential purposes because of its proximity to land zoned for industrial and railroad uses. Judges should not lightly set aside the

determinations of zoning officials. Here, however, the zoning classification ha[d] no foundation in reason and [was] a mere arbitrary or irrational exercise of power having no substantial relation to the public welfare. Therefore, the necessary basis for an exercise of the zoning power [was] lacking. A zoning classification, or any other action of a zoning authority, will be found to violate the due process clause of the Fourteenth Amendment if it does not bear a substantial relation to the public health, safety, and welfare.

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Nollan v. California Coastal Commission, 483 U.S. 825, (1987).

1. *Type of Regulation*: Beach access condition on approval of building permit.

2. *Land Use Issue*: Whether the grant of a building permit can be conditioned on the owner's granting an easement to the public without receiving compensation.

3. *Type of Legal Challenge*: As applied.

4. *Remedy Sought:* Invalidation of the requirement that the receipt of a building permit is conditioned on granting an easement to the public.

5. *Constitutional Issue:*

   a. Taking without just compensation (Fifth Amendment as applied to the states through the Fourteenth Amendment).

   b. Substantive due process (Fourteenth Amendment).

6. *Facts*: The Nollans leased a bungalow on a beachfront lot in Ventura, California, with an option to purchase conditioned on their promise to demolish the bungalow and replace it. Public beaches [were] located, respectively, a quarter of a mile north and 1,800 feet south of the lot. The beach portion of the property [was] separated from the rest of the lot by a concrete seawall approximately eight feet high. The historic mean high tide line determine[d] the lot's oceanside boundary. The Nollans submitted a permit application to

the California Coastal Commission to demolish the existing structure and to replace it with a three-bedroom house. The commission approved the permit conditioned on the Nollans granting an easement across a portion of their property bounded by the mean high tide line on one side, and their seawall on the other side, to make it easier for the public to get to the public beaches located north and south of the Nollans' property.

The Nollans filed an action in the California Superior Court to invalidate the access condition and the court remanded the case to the Coastal Commission for a public hearing. At the hearing the commission reaffirmed its imposition of the condition, finding that the new house would increase blockage of the view of the ocean, thus adding to "a 'wall' of residential structures" that would prevent the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit; that the new home would increase private use of the shorefront; that these effects of the new house when constructed would cumulatively 'burden the public's ability to traverse to and along the shorefront.'"

The Nollans again sought administrative review in the California Superior Court, which concluded that the administrative record did not adequately support the commission's conclusion that the replacement of the bungalow would create a direct or cumulative burden on public access to the sea. The court ordered the permit condition be struck. The commission appealed, and while the appeal was pending, the Nollans, without notifying the commission, tore down the bungalow, built the new house, and bought the property. The California Court of Appeal reversed the Superior Court, holding that the permit condition was sufficiently related to the burdens created by the new house and did not constitute a taking because it did not deprive the Nollans of all reasonable use of their property. The Nollans appealed the taking question to the U.S. Supreme Court.

7. *Decision*: Public access condition on permit approval invalidated under the Fifth Amendment as a taking without just compensation.

8. *Opinion of the Court*: The right to exclude others is one of the essential sticks in the bundle of rights commonly characterized as property. Where government action results in a permanent physical

occupation, the Court's prior decisions have found a taking to the extent of the occupation, regardless of whether the action achieves an important public benefit or has only minimal economic impact on the owner. Where, as here, the commission required that, as a condition of permit approval, the landowners grant an easement [giving] the public a permanent and continuous right to pass across their property, a permanent physical occupation has occurred. Had the commission simply required the conveyance of an easement for public access to the beach outright, without making the requirement a condition of permit approval, the result would have been a taking of a property interest.

The outcome is no different when the conveyance of the easement is made a condition of permit approval. Contrary to the dissenting opinion, the requirement of such an access easement [was] not a mere restriction on the use of the property. The Court has previously recognized that "a use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial government purpose." The standards applied to a takings claim are not the same as those applied to due process or equal protection claims. In assessing the latter claims, the Court has required that "the State could rationally have decided the measure adopted might achieve the State's objective." In assessing a taking claim, the Court requires that the regulation "*substantially* advance" the "legitimate state interest" sought to be achieved. Even though prior cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection (nexus) between the regulation and the state interest satisfies the requirement that the regulation "substantially advance" the legitimate state interest, they have indicated that a broad range of governmental purposes and regulations satisfies these requirements.

Even assuming that the state has legitimate interests in the public's being able to see the beach so as to avoid psychological barriers to its access and in preventing congestion on the beaches, this easement [did] not substantially advance those interests. Being able to walk across the Nollan's property would not reduce the obstacle to seeing the beach created by the new house. Nor would being able to walk across the property lower psychological barriers to use of the

public beaches or remedy congestion caused by the Nollans' activity. Since the condition [did] not remedy the problems caused by the new house, it fail[ed] to substantially advance a legitimate state interest and thus the condition was a regulatory taking, requiring the payment of just compensation.

9. *Dissenting Opinion*: The majority's demand for a precise fit between development restrictions and the public program to be advanced by those restrictions creates an overly narrow conception of rationality for governmental exactions. Such a narrow conception of rationality is an unwarranted judicial usurpation of legislative authority.

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Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978).

1. *Type of Regulation*: Historic landmarks zoning regulation.

2. *Land Use Issue*: Whether the application of a landmark preservation law to property located in a valuable development area constitutes a taking of that property when the regulation prevents development of the property in the most lucrative manner possible and imposes an affirmative duty on the owner to keep the property in good repair.

3. *Type of Legal Challenge:* As applied.

4. *Remedy Sought*: Declaratory and injunctive relief to prevent application of the law to owner's land, and damages for the temporary taking that occurred between imposition of the regulation to the land and [the] time when such application would be lifted.

5. *Constitutional Issues*:

   a. Substantive due process (Fourteenth Amendment).

   b. Taking without just compensation (Fifth Amendment as applied to the states through the Fourteenth Amendment).

6. *Facts*: The [C]ity of New York passed the Landmark Preservation Law as part of a comprehensive measure to preserve

existing historic buildings. The law places an affirmative duty on owners of those buildings designated landmarks under the law to keep the buildings in good repair. The owners of Grand Central Terminal in Manhattan sought to build a multistory office building over the terminal. The building plan was denied by the Landmark Preservation Commission on [the] grounds that such a building would destroy the historic and aesthetic features of the building. The terminal's owners sued the city, alleging that the law, as applied to their property, constituted an unconstitutional taking without just compensation and deprived them of their property without due process of law.

7. *Decision*: Ordinance upheld as not violative of Fifth and Fourteenth Amendments.

8. *Opinion of the Court*: Although the landmarks law effectively prevent[ed] the owners from exploiting the valuable air rights above the terminal, the right to develop land [was] only one property right held by the owners. The character of the regulation [was] not a singling out of certain property owners for restrictive treatment, but rather [was] part of a comprehensive plan which affect[ed] others in positions similar to that of the terminal's owners. Other owners of buildings designated as landmarks [were] similarly burdened and benefited by the ordinance and, therefore, the law [was] not discriminatory, nor [was] it arbitrarily applied to the terminal. Finally, the owners of the property [were] not restricted from carrying on their already prosperous business in the terminal, but instead [could] receive a reasonable economic return from their investment.

9. *Dissenting Opinion*: The regulation applied to the terminal uniquely burden[ed] the owners because they receive[d] no reciprocity of advantage from similarly situated owners in their vicinity. Land use regulation[s] may be used to prevent a harm, not confer a benefit as the landmark law [did]. Therefore, New York City should [have to] pay the terminal's owners compensation for the restrictions place[d] on their right to exploit the air space overhead. The ability of the owners to transfer their development rights [did] not afford them just compensation because the relief [was] not a perfect equivalent of the property taken: other land does not have the

same attributes as the Terminal.

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Pennell v. City of San Jose, 485 U.S. 1 (1988).

1. *Type of Regulation*: Rent control.
2. *Land Use Issue*: Whether a provision in a rent control ordinance that [permits] a hearing officer [to] consider the hardship of the tenant in fixing a reasonable rent renders the ordinance facially invalid.
3. *Type of Legal Challenge:* Facial.
4. *Remedy Sought*: Declaration that the provision of the rent control ordinance allowing the hearing officer to consider the hardship of the tenant was facially invalid.
5. *Constitutional Issues:*
    a. Due process (Fourteenth Amendment).
    b. Equal protection (Fourteenth Amendment).
    c. Taking without just compensation (Fifth Amendment as applied to the states through the Fourteenth Amendment).
6. *Facts*: The [C]ity of San Jose passed a rent control ordinance that allowed a landlord to raise the rent of a tenant in possession by as much as 8 percent. If the landlord wished to raise the rent by more than 8 percent in a given year and the tenant objected, a hearing officer would determine whether the increase was reasonable. The ordinance set forth six objective factors for determining reasonableness, such as the landlord's actual costs and the condition of the rental market. The hardship which would be caused to the tenant was the only subjective factor. A landlord association sought to have the tenant hardship provision declared invalid insofar as it forced landlords to subsidize apartments below objectively reasonable rates.
7. *Decision*: Ordinance upheld under Fourteenth Amendment as not violative of substantive due process and equal protection.
8. *Opinion of the Court*: Because the ordinance ha[d] not . . . been used to reduce rent on the basis of tenant hardship, and the

ordinance only required that hardship be considered, not that it be determinative, the taking claim [was] premature.

With respect to the due process and equal protection challenges, price control is unconstitutional only if arbitrary, discriminatory, or irrelevant to a legitimate government purpose. Under the deferential due process standard for reviewing economic regulation, rent control may reasonably be said to promote the government purpose of "protecting consumer welfare." Furthermore, it is not irrational to treat landlords differently based on whether they have hardship tenants, since this ensures that only legitimate hardship cases are redressed. Since the classification neither implicate[d] a suspect classification[,] like race[,] nor a fundamental right, the [C]ourt must defer to the legislature on the reasonableness of the distinctions made in the legislation.

9. *Dissenting Opinion*: The ordinance [was] facially a taking because the subjective hardship factor placed a burden on an individual landlord, which should [have been] borne by the public generally through the tax system. The key to avoiding a taking challenge is to show a "cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy."

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

1. *Type of Regulation:* Statute limiting the exercise of mineral rights.

2. *Land Use Issue*: Validity of Pennsylvania's Kohler Act, which prohibited coal mining in such a way as to cause the subsidence of houses, industrial structures, streets, or public facilities.

3. *Type of Legal Challenge*: Facial.

4. *Remedy Sought*: Declaration of invalidity of the Kohler Act so that the Pennsylvania Coal Company could exercise its mining rights without the constraints imposed.

5. *Constitutional Issue*: Substantive due process (taking without just compensation under the Fourteenth Amendment).

6. *Facts*: In 1878 the Pennsylvania Coal Company transferred property to Mr. Mahon, reserving in the deed the right to mine coal on the property. Mr. Mahon waived all of his rights to object to or be paid for any possible resulting damages. In 1921, the Pennsylvania legislature passed the Kohler Act, which forbade the mining of coal in such a way as to cause the subsidence of any human habitation, industrial structures, streets, and public facilities. When the Pennsylvania Coal Company decided to mine coal under his property, Mahon sought an injunction under the Kohler Act to prevent mining that would cause the subsidence of his home. The Pennsylvania Coal Company argued that the Kohler Act's requirement (that pillars of coal be left in place to provide support) violated the Fourteenth Amendment to the Constitution in that it took their property (unmined coal) from them without due process of law.

7. *Decision*: Act held invalid under Fourteenth Amendment as authorizing taking of property without due process.

8. *Opinion of the Court*: Although the value of private property may be diminished by valid governmental regulations, a regulation may be so extensive as to constitute a regulatory taking. The public interest (promotion of health, safety, and welfare) in protecting surface rights does not justify the significant destruction of mineral rights which the Pennsylvania Coal Company had reserved in the deed to Mr. Mahon. The act . . . also [was] violative of preexisting contract rights between the coal company and Mahon.

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Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

1. *Type of Regulation:* Not applicable.

2. *Land Use Issue*: Whether California state constitutional provisions permitting individuals to exercise free speech rights on private property on which the public is invited violate[d] the property owner's right to exclude others from his property under the Fifth and

Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments.

3. *Type of Legal Challenge*: As applied.

4. *Remedy Sought*: Injunctive relief to prevent owner of property from denying individuals access to his property for the purpose of exercising their free speech rights.

5. *Constitutional Issues*:

a. Free speech (First and Fourteenth Amendments).

b. Taking without just compensation (Fifth Amendment as applied to the states through the Fourteenth Amendment).

6. *Facts*: High school students entered the Pruneyard shopping center and set up a booth to solicit support for their opposition to a UN resolution. The students' activities included handing out literature and soliciting signatures of visitors to the shopping center. The students were asked to leave the premises because they were in violation of a Pruneyard policy that prohibited solicitation activities on its premises. Subsequently, the students filed suit, seeking to enjoin Pruneyard from denying them access to the shopping center for solicitation purposes.

7. *Decision*: Solicitation in a private shopping center held not violative of property owner's Fifth, Fourteenth, and First Amendment rights under the California state constitution.

8. *Opinion of the Court*: Pursuant to its police power, a state has the power to adopt guarantees of individual liberties more expansive than those permitted under the federal [C]onstitution. California has interpreted its constitution to permit citizens to exercise free petition and expression rights in a private shopping center open to the public. Although this interpretation of the California constitution essentially destroy[ed] Pruneyard's right to exclude persons from its property, the destruction of that right [did] not unreasonably impair the value or use of Pruneyard's land as a shopping center. Therefore, there [was] no taking of Pruneyard's property; Pruneyard [could] still regulate the time, place, and manner of such exercises of rights to minimize their interference with its commercial functions. Furthermore, Pruneyard [did] not adequately show[] that the demands made by the California constitution—permitting access to citizens for solicitation purposes—[were] unreasonable.

Reinman v. City of Little Rock, 237 U.S. 171 (1915).

1. *Type of Regulation:* Ordinance regulating livery stables.
2. *Land Use Issue:* Whether it was within the police power of the State to regulate the business of a livery stable that was already established within a district.
3. *Type of Legal Challenge:* Facial.
4. *Remedy Sought:* Injunctive Relief.
5. *Constitutional Issue:* Due Process and Equal Protection Clauses (Fourteenth Amendment).
6. *Facts:* The ordinance passed by the city made it unlawful to conduct or carry on the business of livery stables within certain areas of the city. It stated that the conducting of a livery stable was detrimental to the prosperity, health, and interest of the city. Plaintiffs in error included a firm that ran a sale and livery stable business, and a corporation that conducted a general livery stable business within the area defined in the ordinance. The plaintiffs argued that the businesses had been conducted for many years in brick buildings in a careful and proper manner without complaint with regard to sanitary conditions. The plaintiffs had entered into leases for improvements and the money for this would be lost if they were not permitted to continue doing business there. There had been encouragement in the city for this type of business, and plaintiffs relied on this encouragement in constructing the buildings. Plaintiffs had tried to obtain another location, but could not do so without great expense. Defendants demurred, but the trial court overruled the demurrer and granted a temporary restraining order. Defendant answered and plaintiffs excepted and demurred. The trial court sustained the demurrer and made the temporary restraining order perpetual. The Supreme Court of Arkansas reversed and remanded the case with directions to dismiss the complaint for want of equity.
7. *Decision:* The ordinance of the City of Little Rock was not unconstitutional as depriving an owner of a livery stable established

within that district of his property without due process of law or as denying him equal protection of the law.

8. *Opinion of the Court:* The Court found that it was clearly within the police power of the state to regulate the livery stables and to declare that in certain areas and certain circumstances a livery stable shall be deemed a nuisance in fact and in law, provided this power was not exercised arbitrarily, or with unjust discrimination, so as to infringe upon the rights guaranteed by the Fourteenth Amendment. It was well within the range of power of the state to legislate for the health, safety, and general welfare of its citizens.

San Diego Gas and Electric Co. v. City of San Diego, 450 U.S. 621 (1981).

1. *Type of Regulation*: Downzoning; open space zoning.

2. *Land Use Issue*: Whether the U.S. Supreme Court can determine that a taking has occurred before the petitioner obtains a final judgment in the state courts, and whether monetary damages are available for inverse condemnation.

3. *Type of Legal Challenge*: As applied.

4. *Remedy Sought:* Damages for taking of private property without just compensation and injunctive and declaratory relief.

5. *Issues*:

   a. Taking without just compensation (Fifth Amendment as applied to the states through the Fourteenth Amendment).

   b. Substantive due process (Fourteenth Amendment).

   c. Ripeness.

6. *Facts*: In 1966, San Diego Gas & Electric (SDG&E) acquired 412 acres in northwest San Diego with the intent of constructing a nuclear power plant in the 1980s. In 1967, the [C]ity of San Diego adopted its master plan under which the parcel was zoned industrial. In 1973, part of this property was downzoned to agricultural use with a minimum lot size of one to ten acres. At the same time, pursuant to a state mandate, the city established an open space plan which included SDG&E's parcel. Subsequently, the voters rejected a bond proposition that would have provided funds to purchase the SDG&E

parcel, and the city made no further attempt to acquire the property, leaving SDG&E's parcel in an open space zone with little or no potential use.

Rather than attempting to seek approval for any kind of development plan, SDG&E filed suit in superior court alleging that the zoning scheme deprived it of its entire beneficial and economic use, thereby violating the Fifth and Fourteenth Amendments by taking the property without just compensation. SDG&E asserted that the parcel's only beneficial use was as an industrial park, which was prohibited by the zoning scheme. SDG&E sought damages, mandamus, and declaratory relief as a result of the alleged taking.

The superior court found that a taking had occurred as a result of the zoning scheme because SDG&E was deprived of all beneficial and economic viable uses. Further, the submission of any development plan would [have been] futile because of the open space zone. The court of appeal[s] affirmed, holding that SDG&E's failure to seek approval of a development plan did not preclude an award of damages. On appeal, the California Supreme Court vacated the damage award when the city's petition for a hearing was granted, then transferred the case back to the court of appeals for reconsideration in light of its decision in *Agins v. Tiburon*, 598 P.2d 25 (1979), *aff'd,* 447 U.S. 255 (1980), which held that a plaintiff's only remedy for inverse condemnation is invalidation of the regulation.

On reconsideration, the court of appeal reversed, although it did not invalidate the regulation. Rather, the court avoided the takings issue, because factual disputes precluded monetary relief on the existing record. It stated further that plaintiff's exclusive remedy was mandamus and declaratory relief. The California Supreme Court denied review, and SDG&E's appeal to the U.S. Supreme Court was granted.

7. *Decision*: Appeal dismissed for lack of ripeness.

8. *Opinion of the Court*: The appeal [was] dismissed because the California courts had not rendered a final judgment. The judgment of the California Supreme Court to vacate SDG&E's damages award was not final, because it did not address the taking issue; rather, it dealt only with mandamus and declaratory relief.

Thus, the Supreme Court lacked jurisdiction because there was no final judgment or decree rendered by the highest court of the state in which a decision could be rendered.

9. *Dissenting Opinion*: Since the taking issue was addressed in the superior court, the judgment was final and therefore ripe for consideration on the merits, even though it was reconsidered after *Agins* and was then reversed on the issue of proper remedy. Inverse condemnation is equivalent to eminent domain because "[p]olice power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property."

There is nothing within the just compensation clause of the Fifth Amendment that prohibits the granting of temporary damages. Once private property has been taken for public use, whether by eminent domain or inverse condemnation, just compensation is required for the period commencing on the date the regulation first affected the property and ending on the date the government entity chooses to rescind or otherwise amend the regulation. Invalidation of the offending regulation is not the appropriate remedy for two reasons. First, invalidation does not compensate the aggrieved party for injuries sustained as a result of the taking. Second, invalidation merely tells legislators to enact a new regulation without the fear of having to pay damages for taking the property by inverse condemnation. Thus, the imposition of temporary damages puts legislators on notice to be much more cautious when implementing land use regulations in order to prevent infringing the rights of the landowner.

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Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).

1. *Type of Regulation*: Commercial use zoning.

2. *Land Use Issue*: Whether a commercial zoning ordinance construed to prohibit all live entertainment, including nonobscene

nude dancing, violated the rights of free expression guaranteed by the First and Fourteenth Amendments.

3. *Type of Legal Challenge*: As applied.

4. *Remedy Sought*: Reversal of criminal conviction resulting from conduct held violative of the Borough Ordinance.

5. *Constitutional Issues:*

a. Right of free expression (First Amendment).

b. Substantive due process (Fourteenth Amendment).

6. *Facts*: Appellants operated an adult bookstore in a commercial zone which sold adult books, magazines, and films. Subsequently, a permit was obtained permitting the installation of coin-operated adult film viewing booths. Thereafter, the store introduced a coin-operated device which enabled a customer to view a live, usually nude, dancer perform behind a glass panel. Appellant's conduct was found violative of a use ordinance which, while not explicitly prohibiting live nude dancing, excluded all uses not expressly permitted by the ordinance. Appellants claimed the ordinance, as applied, violated their rights of free expression guaranteed by the First and Fourteenth Amendments.

7. *Decision:* Ordinance held invalid under First and Fourteenth Amendments.

8. *Opinion of the Court*: The ordinance, as applied, effectively ban[ned] all live entertainment, thus prohibiting a wide range of expression long held within the protections of the First and Fourteenth Amendments. Where protected First Amendment interests are at stake, zoning regulations do not receive minimal scrutiny under the rational relationship test, but can be upheld only if shown to be narrowly drawn and in furtherance of a sufficiently substantial government interest. The town failed to satisfy these tests. The argument that the ordinance was reasonable because nude dancing was permitted in nearby communities [was] without validity because freedom of expression cannot be limited merely because it may be available in another nearby community. *Young v. American Mini-Theatres,* 427 U.S. 50 (1976) [was] not controlling as that case upheld an ordinance which merely dispersed communicative activity, whereas the Mount Ephraim ordinance . . . resulted in a total ban of all live entertainment.

Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917).

1. *Type of Regulation:* Ordinance governing the erection and maintenance of billboards.

2. *Land Use Issue*: Whether the ordinance, if enforced, would work "a denial to the plaintiff in error of the equal protection of the laws" or would "deprive it of its property without due process of law."

3. *Type of Legal Challenge:* Facial.

4. *Remedy Sought:* Declaration that the ordinance offends the Fifth and Fourteenth Amendments of the Constitution.

5. *Constitutional Issue*: Due Process and Equal Protection Clauses (Fifth and Fourteenth Amendments).

6. *Facts:* Plaintiff in error, a corporation engaged in outdoor advertising, argued that a section of a city ordinance was an arbitrary, unrestrained exercise of power which could be used without regard "to the safety, morals, health, comfort, or welfare of the public." The city ordinance section required that, before any billboard or signboard over 12 square feet in area could be erected in any block in which one-half of the buildings were used exclusively for residential purposes, the owners of a majority of the frontage of the property on both sides of the street on such a block consent to the signboard in writing. Plaintiff in error claimed that this was not an exercise by the city of the power to regulate or control the construction and maintenance of billboards, but rather was a delegation of legislative power to the owners of a majority of the frontage of the property in the block "to subject the use to be made of their property by the minority owners of property in such a block to the whims and caprices of their neighbors." The Supreme Court of Illinois sustained the validity of the ordinance, declaring that the act of the legislature was a clear legislative declaration that the subject of billboard advertising shall be subject to municipal control.

7. *Decision:* The ordinance was valid and the record did not show it to be clearly unreasonable and arbitrary.

8. *Opinion of the Court:* The Court found that there was sufficient evidence to show the propriety of putting billboards, as distinguished from buildings and fences, in a class by themselves, and to justify the prohibition against their erection in residence districts of a city in the interest of the safety, health, morality, and decency of the community. In determining the question of reasonableness, the lower courts found that fires had been started in the accumulation of combustible material which had gathered around the billboards; that they afford a convenient concealment and shield for immoral practices, and for loiterers and criminals; and that offensive and unsanitary accumulations were habitually found about them. The Court further stated that while it had refrained from any attempt to define with precision the limits of the police power, its disposition was to favor the validity of laws relating to matters completely within the territory of the state enacting them; and it would interfere only when it was clear that the restriction had no real or substantial relation to the public health, safety, morals, or to the general welfare. In this case, the Court concluded that this could not be said of this city ordinance. The plaintiff in error also contended that the validity of the city ordinance was impaired by the provision that such billboards could be erected in such districts as were described if the consent in writing was obtained from the owners of a majority of the frontage on both sides of the street in any block in which such billboard was to be erected. The Court disagreed, stating that the plaintiff could not be injured, but rather could benefit by this provision and therefore could not be said to have been deprived of his constitutional rights. Finally, the Court distinguished this case from *Eubank v. City of Richmond*, the case upon which plaintiff in error chiefly relied. In *Eubank*, the ordinance left the establishment of the building line in place until the other lot owners objected, and then made the street committee the mere automatic register of that action, giving it the effect of law. Here, the ordinance prohibited the erection of billboards in the blocks designated, but allowed this prohibition to be modified with the consent of those who were to be most affected by the modification. The ordinance in *Eubank* allowed two-thirds of

the property owners to impose restrictions on the other property on the block, while here the ordinance permitted one-half of the lot owners to remove a restriction from the other property owners. Therefore, the Court found that this was not a delegation of legislative power, but rather it was a familiar provision effectuating the enforcement of laws and ordinance.

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

1. *Type of Regulation*: Denial of rezoning.
2. *Land Use Issue*: Whether proof of a racially discriminatory intent or purpose is required to show a violation of the equal protection clause of the Fourteenth Amendment.
3. *Type of Legal Challenge*: As applied.
4. *Remedy Sought*: Injunctive and declaratory relief.
5. *Constitutional Issue*: Equal protection (Fourteenth Amendment).
6. *Facts*: Metropolitan Housing Development Corporation (MHDC) applied to the village for a rezoning of a 15-acre parcel from single-family to multifamily residential, to permit construction of 190 federally subsidized housing units for low- and moderate-income tenants. After the village denied the rezoning request, MHDC and other plaintiffs brought suit in federal district court, alleging that the denial was racially discriminatory and violated both the Fourteenth Amendment and the federal Fair Housing Act. The district court ruled for the village, but the court of appeals reversed, finding that the ultimate effect of the denial was racially discriminatory and thus in violation of the Fourteenth Amendment's equal protection clause.
7. *Decision*: Petitioners failed to prove racially discriminatory intent or purpose as required in challenging denial of rezoning as racially discriminatory under equal protection clause of the Fourteenth Amendment.
8. *Opinion of the Court*: Official action is not unconstitutional solely because it results in a racially disproportionate impact. To show a violation of the equal protection clause of the Fourteenth

Amendment, it is necessary to prove that racially discriminatory intent or purpose was a motivating factor in the village's rezoning decision. Such a racially discriminatory intent could be shown by evidence of a number of factors. Disproportionate impact, while not conclusive on its own, may be one of the factors; others include: the historical background of the challenged decision, particularly if it reveals "a series of official actions taken for invidious purposes;" departures from the normal procedural sequence or from substantive considerations normally considered important; and the legislative or administrative history, "especially where there are contemporary statements by members of the decisionmaking body." In this case, an examination of these factors fails to show that racial discrimination was a motivating factor in the denial of the rezoning. The case is remanded to the federal district court for a ruling on the Fair Housing Act claim.

Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

1. *Type of Regulation*: Zoning ordinance.
2. *Land Use Issue*: Whether an ordinance restricting land use to single-family dwellings and defining *family* as any number of related people or not more than two unrelated people living together rationally promoted any legitimate government purpose.
3. *Type of Legal Challenge*: Facial.
4. *Remedy Sought*: Declaration that the ordinance was unconstitutional and an injunction against its enforcement.
5. *Constitutional Issues:*
    a. Equal protection (Fourteenth Amendment).
    b. Freedom of association (First Amendment).
    c. Privacy (the penumbras and emanations of the First, Third, Fourth, Fifth, and Ninth Amendments).
6. *Facts*: Belle Terre restricted land use within the village to single-family dwellings. The ordinance defined *family* as any number of related individuals or not more than two unrelated individuals

living together. The Dickmans owned a house in the village and leased it to six unrelated students at a local university. When the village ordered the Dickmans to remedy the violation, the Dickmans brought suit to have the ordinance declared unconstitutional.

7. *Decision*: Ordinance upheld under Fourteenth Amendment as rationally furthering a legitimate governmental purpose.

8. *Opinion of the Court*: Protecting a neighborhood's peace and quiet to help promote family values is a legitimate purpose in zoning. "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs." This legitimate purpose [was] rationally served by prohibiting more than two unrelated persons from living together, since boarding houses, fraternity houses, and the like tend to increase urban problems such as proliferation of crowds and noise. Freedom to associate with people as one pleases and the right to privacy [were] not violated, since unmarried couples [were] not prohibited from living together and a family [could] still entertain guests. Since the ordinance rationally further[ed] a legitimate government purpose, it [was] held valid.

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

1. *Type of Regulation*: Zoning ordinance.

2. *Land Use Issue:* Constitutional validity of zoning ordinances dividing a village into residential, commercial, and industrial areas.

3. *Type of Legal Challenge*: Facial.

4. *Remedy Sought*: Injunction to prevent enforcement of the ordinance.

5. *Constitutional Issues:*

   a. Substantive due process (taking without just compensation under the Fourteenth Amendment).

   b. Equal protection (Fourteenth Amendment).

6. *Facts*: Ambler Realty owned 68 acres of land in the village of Euclid. Euclid instituted zoning ordinances including restrictions

on use, height, and area, which affected Ambler Realty's property. As a result of this zoning, the value of Ambler Realty's property declined from $10,000 per acre if used for industrial purposes to $2,500 per acre if restricted (as per the ordinance) to residential use. Ambler Realty then brought suit, seeking an injunction to prevent the village of Euclid from enforcing the ordinance. Ambler argued that the zoning regulations diminished the value of their property, which in their view constituted a taking of property without compensation or due process of law. After the lower court ruled in favor of Ambler Realty, the village appealed, contending that zoning was a valid means of promoting public health, safety, welfare, and morals.

7. *Decision:* Ordinance upheld under Fourteenth Amendment as having a rational relation to the public health, safety, morals, and general welfare.

8. *Opinion of the Court*: An ordinance is only unconstitutional when it is clearly arbitrary, where its provisions bear no rational relation to the public health, safety, morals, or general welfare. Property rights are not absolute. Modern urban life necessitates the placing of new and increased restrictions on development to ensure the comfort and safety of urban dwellers. The desired end of public welfare and safety [was] sufficient to justify the ordinance as a valid exercise of police power. Therefore, Ambler Realty's request for an injunction [was] denied. [*Editor's note*: The Court also noted with approval the increased national use of zoning as a tool for dealing with a range of urban safety and quality of life problems.]

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Warth v. Seldin, 422 U.S. 490 (1975).

1. *Type of Regulation:* Zoning ordinance.

2. *Land Use Issue:* Whether the city's zoning ordinance, by its terms and as enforced, effectively excluded persons of low and moderate income from living in the town, in violation of petitioners' constitutional rights and of 42 U.S.C. Sections 1981, 1982, and 1983.

3. *Type of Legal Challenge:* Facial and as applied.

4. *Remedy Sought:* Declaratory and injunctive relief and $750,000 in damages.

5. *Constitutional Issue:* First, Ninth, and Fourteenth Amendments.

6. *Facts:* Petitioners included various organizations and individual residents in the Rochester, New York, metropolitan area. They brought this action against the Town of Penfield, an incorporated municipality adjacent to Rochester, and against members of Penfield's Zoning, Planning and Town Boards. Petitioners Metro-Act of Rochester, Inc., and eight individual plaintiffs, on behalf of themselves and others similarly situated, alleged that Penfield's zoning ordinance had the purpose and effect of excluding persons of low and moderate income from residing in the town. The ordinance allocated 98% of the town's vacant land to single-family detached housing and, allegedly, by imposing unreasonable requirements relating to lot size, setback, floor area, and habitable space, the ordinance increased the cost of single-family detached housing beyond the means of persons of low and moderate income. The town and its officials had made "practically and economically impossible the construction of sufficient numbers of low and moderate income . . . housing in the Town of Penfield to satisfy the minimum housing requirements of both the Town of Penfield and the metropolitan Rochester area." By precluding low- and moderate-cost housing, the town's zoning practices also had the effect of excluding persons of minority racial and ethnic groups, since most such persons only have low or moderate incomes.

The individual petitioners further alleged injuries to themselves. The Rochester property owners and taxpayers claimed that because of Penfield's exclusionary practices, the city of Rochester had been forced to impose higher tax rates on them and others similarly situated than would otherwise have been necessary. The low-and moderate-income minority plaintiffs argued that Penfield's zoning practices had prevented them from acquiring, by lease or purchase, residential property in the town, and thus had forced them and their families to reside in less attractive environments. Petitioner Rochester Home Builders Association, an association of firms engaged in residential construction in the Rochester metropolitan area, moved

the District Court for leave to intervene as a party-plaintiff. It claimed that these practices arbitrarily and capriciously had prevented its member firms from building low-and moderate-cost housing in Penfield, and thereby had deprived them of potential profits. Metro-Act and the other original plaintiffs moved to join petitioner Housing Council in the Monroe County Area, Inc., as a party-plaintiff. Housing Council was a not-for-profit New York corporation, its membership comprising some 71 public and private organizations interested in housing problems.

The District Court held that: 1) the original plaintiffs, Home Builders and Housing Council lacked standing to prosecute the action; 2) the original complaint failed to state a claim upon which relief could be granted; 3) the suit should not proceed as a class action; and 4) in the exercise of discretion, Home Builders should not be permitted to intervene. The Court of Appeals affirmed, reaching only the standing questions.

7. *Decision:* None of the petitioners met the threshold requirement that to have standing a complainant must clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.

8. *Opinion of the Court:* The question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations in federal-court jurisdiction and the prudential limitations on its exercise. As an aspect of justiciability, the standing question is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy" as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf. Even when the plaintiff has alleged an injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.

In this case, the Court determined that none of the petitioners had standing. The petitioners who were persons of low or moderate income failed to show that they personally had been injured by the zoning ordinance. The taxpayer petitioners did not assert any

personal right under the Constitution or any statute to be free of action by a neighboring municipality that may have some incidental, adverse effect on Rochester. Finally, the Court concluded that Metro-Act of Rochester, Inc., Housing Council of Monroe County Area, Inc., and Rochester Home Builders Association, Inc., failed to allege that their respective members were suffering immediate or threatened injury, as a result of the challenged action, of the sort that would make out a justiciable case had the members themselves brought suit.

Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116 (1928).

1. *Type of Regulation:* Zoning ordinance.

2. *Land use Issue:* Whether the delegation of power to owners of adjoining land to make inoperative the permission was repugnant to the due process clause.

3. *Type of Legal Challenge*: As applied.

4. *Remedy Sought:* Judgment and writ commanding the superintendent to issue the permit.

5. *Constitutional Issue:* The Due Process and Equal Protection Clauses (Fourteenth Amendment).

6. *Facts:* Petitioner, Seattle Title Trust Company, owned and maintained a philanthropic home for the aged poor. Petitioner proposed to remove the old building and in its place, for $100,000, erect a two and a half story fire proof home large enough for 30 people. According to the amended zoning ordinance, petitioner first had to obtain the written consent of two-thirds of the property owners within 100 feet of the proposed building. Petitioner applied for a permit to build the new home without having obtained the required consents. Respondent Roberge subsequently denied the application solely because of petitioner's failure to secure the necessary consents. Petitioner brought suit in the Superior Court of King County, and the court held that the amended ordinance, construed to prevent the erection of the proposed building, was valid. The highest court of the state affirmed the judgment.

7. *Decision:* The condition requiring consent of property owners was repugnant to the Due Process Clause of the Fourteenth

Amendment and petitioner was therefore entitled to a permit.

8. *Opinion of the Court:* Legislature may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. The Court found that the city ordinance violated the Due Process Clause, concluding that it was an unwarranted delegation of power to other property owners to arbitrarily prevent the use of land for its proposed purpose without any standard or rule prescribed by legislative action. The Court further noted that nothing in the record showed that this proposed building would be a nuisance, or that its construction or maintenance was liable to work any injury, inconvenience, or annoyance to the community, district, or any person. The restriction sought to be placed on the permission is arbitrary and repugnant to Due Process and, therefore, the superintendent must issue the permit to the petitioner.

Welch v. Swasey, 214 U.S. 91 (1909).

1. *Type of Regulation*: Building regulation.

2. *Land Use Issue*: Reasonableness of building height regulations as applied in residential and commercial districts of Boston.

3. *Type of Legal Challenge*: As applied.

4. *Remedy Sought*: Order to compel the building commissioner to issue a building permit to the plaintiff to enable him to build above the height limit imposed on buildings in that district.

5. *Constitutional Issues*:

   a. Substantive due process (taking without just compensation under the Fourteenth Amendment).

   b. Equal protection (Fourteenth Amendment).

6. *Facts*: The Massachusetts legislature enacted a statute in 1904 which separated the city of Boston into "A" (business) districts and "B" (residential) districts, imposing 125-foot height restrictions on buildings in "A" districts and 80 to 100-foot restrictions on those in "B" districts. Francis Welch applied for, and was denied, a permit to erect a 124.5-foot building in a "B" district. He then sued the building commissioner, alleging that the regulations were only

imposed for aesthetic reasons and that he was denied equal protection of the laws by the state's discrimination between "A" and "B" zones.

7. *Decision*: Regulations upheld under the Fourteenth Amendment as reasonable.

8. *Opinion of the Court*: The statutes passed by the Massachusetts legislature under an exercise of the state's police power [had] a real, substantial relation to the objectives of fire safety, comfort, and the convenience of the people of Boston. Although considerations of an aesthetic nature also entered into the legislative decisionmaking, they were not a primary motive and [did] not render the statutes invalid. The building limitations, while discriminatory, [were] not so unreasonable as to deprive Mr. Welch of the profitable use of his land without justification, and, therefore, [did] not deprive him of either due process (no taking) or the equal protection of the laws.

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Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985).

1. *Type of Regulation*: Subdivision regulation.
2. *Land Use Issues:*
   a. Whether damages are available for an alleged temporary taking of a landowner's property due to denial of subdivision approval;
   b. What constitutes a final administrative decision necessary to satisfy ripeness requirements for judicial review; and
   c. Whether a claimant may seek just compensation for an alleged taking in federal court without first utilizing the procedures available under state law to obtain such compensation.
3. *Type of Legal Challenge*: As applied.

4. *Remedy Sought*: Damages for a temporary taking and injunctive relief requiring approval of the subdivision.

5. *Constitutional Issues*:

a. Taking of property without just compensation (Fifth Amendment as applied to the states through the Fourteenth Amendment).

b. Ripeness.

6. *Facts*: A developer received approval of a preliminary subdivision plat for a large clustered development in 1973, with the provision that it would seek reapproval as it phased in additional portions of the development. Although the zoning regulations required that land located on steep slopes not be included in calculating permissible density for the development, no such deduction was made.

Development continued for a number of years, during which the zoning ordinance was amended to reduce allowable densities; however, the commission continued to apply the 1973 ordinance to this development and regularly renewed its approval of the preliminary plat. In 1979, the commission reversed its position and began to evaluate the plans submitted for approval under the amended zoning ordinance, although still granting renewed approvals.

In 1980, the commission asked the developer to submit a revised preliminary plat before it sought final approval for the remaining sections of the subdivision. The commission found this request necessary in light of a number of changes that had occurred since the project was first approved and because of errors and omissions in the originally approved plat. The commission found several problems with the revised plat and declined to approve further development. The developer appealed the commission's decision to the county board of zoning appeals, which determined that the commission should apply the 1973 zoning ordinance and subdivision regulations in evaluating the plat.

The commission declined to follow the board's decision, stating that the board lacked jurisdiction to hear appeals from the commission. The commission disapproved a new plat submitted by Hamilton Bank, which had acquired the original developer's

remaining interest in the property in a foreclosure proceeding. The bank then filed suit in federal district court, claiming that the commission had taken its property without just compensation. The jury awarded the bank $350,000 in damages for a temporary taking of its property, but this verdict was set aside by the judge on the ground that a temporary deprivation of a property right could not, as a matter of law, constitute a taking. The court also required the commission to evaluate the subdivision plat using the 1973 zoning ordinance and subdivision regulations. A federal court of appeals reinstated the jury's verdict, finding that there had been a temporary taking of the bank's property and that this required compensation.

7. *Decision*: Case dismissed for lack of ripeness.

8. *Opinion of the Court*: The basic question presented in this case [was] whether government must pay money damages to a landowner whose property allegedly has been taken by the application of government regulations. However, this question [could not] be answered because the bank's claim [was] premature . . . .

A taking claim is not ripe until a government entity has reached a final decision regarding the application of its regulations to the property claimed to have been taken. In this case, the bank failed to seek variances that would have allowed it to meet several of the regulatory requirements imposed by the commission. The commission's decision [could not] be considered final while the bank still had the right to request variances; without a final determination regarding the effect of the regulations on the bank's property, it [was] impossible to determine whether a taking had occurred.

The fact that this claim was brought under 42 U.S.C. § 1983 does not alter the requirement that the bank seek variances from the commission. While it is true that a plaintiff does not have to exhaust administrative remedies before bringing a Section 1983 action, exhaustion of administrative remedies is distinct from the requirement that an administrative action must be final before it is judicially reviewable. The exhaustion requirement refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy for unlawful or otherwise improper decisions; finality requires that the administrative agency has arrived at a definite position on the prop-

erty in question, and that the decision causes actual injury to the property owner.

The bank's failure to seek compensation through the inverse condemnation procedures provided by state law [was] a second reason why the claim was not ripe. A plaintiff cannot seek just compensation for an alleged taking under federal law unless it can show that it has sought and not obtained just compensation under the state's inverse condemnation procedure, or that the procedure is either unavailable or inadequate.

Yee v. City of Escondido, 503 U.S. 519 (1992).

1. *Type of Regulation:* Rent control ordinance.

2. *Land Use Issue:* Whether a local rent control ordinance, when viewed against the background of California's Mobile Home Residency Law, amounted to a physical occupation of petitioners' property entitling them to compensation under the Takings Clause.

3. *Type of Legal Challenge:* Facial.

4. *Remedy Sought:* Damages of $6,000,000; declaration that the rent control ordinance is unconstitutional; and an injunction barring the ordinance's enforcement.

5. *Constitutional Issue:* Takings Clause (Fifth Amendment).

6. *Facts:* California enacted the Mobile Home Residency Law in 1978. This law limited the bases upon which a mobile home park owner may terminate a mobile home owner's tenancy. The legislature concluded that, because of the high cost of moving a mobile home and the damage that can occur, the owners should be provided with protection from actual or constructive eviction. In 1988, after the passage of this law, voters of Escondido approved a rent control ordinance, setting rents back to their 1986 levels and prohibiting rent increases without the approval of the city council. Petitioners, owners of two mobile home parks, filed suit, complaining that the rent control law deprived them of all use and occupancy of their real property, and granted to the tenants of mobile homes presently in the

park, as well as the successors in interest of such tenants, the right to physically, permanently occupy and use the property of the petitioners. The Superior Court sustained the city's demurrer and dismissed the Yees' complaint. Eleven other park owners filed suit and all were dismissed. These eleven cases were consolidated with this case for appeal. The court of appeals affirmed and the California Supreme Court denied review.

7. *Decision:* The rent control ordinance did not amount to a physical taking of petitioners' property; whether the ordinance violated petitioners' substantive rights and whether the ordinance constituted a regulatory taking was not properly before the Court.

8. *Opinion of the Court:* The government effects a physical taking only when it requires the landowner to submit to the physical occupation of his or her land. The Court found that the rent control ordinance, on its face, did not authorize this. The petitioners voluntarily rented their land to mobile home owners; the government did not force these tenants upon them. Instead, the laws at issue merely regulated petitioners' use of their land by regulating the relationship between landlord and tenant. There had been no compelled physical occupation in this case.

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

1. *Type of Regulation*: Zoning ordinance.

2. *Land Use Issue:* Whether zoning ordinance requiring adult theaters to be geographically dispersed [was] invalid for classifying on the basis of the content of communication protected as free speech.

3. *Type of Legal Challenge*: As applied.

4. *Remedy Sought*: Declaration that the ordinance was unconstitutional and an injunction against its enforcement.

5. *Constitutional Issues*:

   a. Due process (Fourteenth Amendment).
   b. Prior restraint on speech (First Amendment).
   c. Equal protection (Fourteenth Amendment).

6. *Facts:* The Detroit Common Council determined that a concentration of adult theaters and adult bookstores in an area was

injurious to the neighborhood and therefore adopted an ordinance prohibiting concentration of such establishments. Two operators of adult theaters were denied certificates of occupancy because they had located their theaters in violation of the zoning ordinance.

7. *Decision:* Ordinance upheld under First Amendment as not regulating content or constituting prior restraint.

8. *Opinion of the Court*: The ordinance neither place[d] a total ban on adult theaters nor so limit[ed] the number of adult theaters as to deny the public access to adult films. The ordinance [did] not regulate the content of the films that can be shown but merely the location of adult theaters. Thus, the ordinance [was] not an impermissible prior restraint, under the First Amendment. The city ha[d] an important interest in protecting the character of its neighborhoods, and this interest [was] rationally furthered by requiring the dispersal of adult theaters.

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Zahn v. Board of Public Works, 274 U.S. 325 (1927).

1. *Type of Regulation:* Zoning ordinance.

2. *Land Use Issue:* Whether a city ordinance that divided the city into five building zones and prescribed the kinds of buildings that may be erected in each zone was constitutional in its general scope and whether it was violative of due process or equal protection.

3. *Type of Legal Challenge:* As applied.

4. *Remedy Sought:* Order compelling defendants to issue building permit.

5. *Constitutional Issue:* Due Process and Equal Protection Clauses (Fourteenth Amendment).

6. *Facts:* Plaintiff's lot was situated in Zone "B", a zone limited by the ordinance to buildings for residential purposes, private clubs, churches, educational and similar purposes. All buildings for private businesses were excluded, except for offices of persons practicing medicine. If plaintiff's property was available for business purposes, its market value would have increased greatly. Plaintiff applied for a

writ of mandate compelling the Board of Public Works of the City of Los Angeles to issue him a permit for the construction of a business building. The district court of appeals, on an alternate writ, found in favor of the plaintiff, holding that the city zoning ordinance was unreasonable and discriminatory. The Supreme Court of California reversed.

7. *Decision:* Ordinance upheld as being constitutionally valid as applied to these facts.

8. *Opinion of the Court:* The Court relied on *Euclid v. Ambler Co.* in determining that the zoning ordinance in its general scope was constitutionally valid. The Court recognized the Common Council's conclusion that the public welfare would be promoted by constituting the area, including the property of plaintiff in error, a Zone "B" district. The Court stated that it would not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.

APPENDIX B

1. *Agins v. City of Tiburon*
   Majority-**Powell**

2. *Barnes v. Glen Theatre, Inc.*
   Majority-Rehnquist
   Concurring-Scalia
   Concurring-Souter
   Dissenting-White, Marshall, Blackmun, Stevens

3. *Berman v. Parker*
   Majority-**Douglas**

4. *Block v. Hirsh*
   Majority-**Holmes**
   Dissenting-**McKenna,** White, Van Devanter, McReynolds

5. *City Council of Los Angeles v. Taxpayers for Vincent*
   Majority-**Stevens,** Burger, White, Powell, Rehnquist, O'Connor
   Dissenting-**Brennan,** Marshall, Blackmun

6. *City of Cincinnati v. Discovery Network, Inc.*
   Majority-**Stevens,** Blackmun, O'Connor, Scalia, Kennedy, Souter.
   Concurring-**Blackmun**
   Dissenting-**Rehnquist,** White, Thomas

7. *City of Cleburne v. Cleburne Living Center*
   Majority-**White**
   Concurring-**Stevens,** Burger
   Concurring/Dissenting-**Marshall,** Brennan, Blackmun

8. *City of Eastlake v. Forest City Enterprises, Inc.*
   Majority-**Burger**
   Dissenting-**Powell**
   Dissenting-**Stevens,** Brennan

9. *City of Ladue v. Gilleo*
   Majority-**Stevens**
   Concurring-**O'Connor**
10. *City of Lakewood v. Plain Dealer Publishing Co.*
    Majority-**Brennan,** Marshall, Blackmun, Scalia
    Dissenting-**White,** Stevens, O'Connor

11. *City of New Orleans v. Dukes*
    Majority-Per Curiam

12. *City of Renton v. Playtime Theatres, Inc.*
    Majority-**Rehnquist,** Burger, White, Powell, Stevens, O'Connor
    Dissenting-**Brennan,** Marshall

13. *County Board of Arlington County v. Richards*
    Majority-Per Curiam

14. *Dolan v. City of Tigard*
    Majority-Rehnquist
    Dissenting-Stevens, Blackmun, Ginsburg
    Dissenting-Souter

15. *Erznoznik v. City of Jacksonville*
    Majority-**Powell,** Douglas, Brennan, Stewart,
    Marshall, Blackmun
    Concurring-**Douglas**
    Dissenting-**Burger,** Rehnquist
    Dissenting-**White**

16. *Eubank v. City of Richmond*
    Majority-**McKenna**

17. *First English Evangelical Lutheran Church v. County of Los Angeles*
    Majority-**Rehnquist,** Brennan, White, Marshall, Powell, Scalia
    Dissenting-**Stevens** (Parts I and II), Blackmun, O'Connor

18. *Frisby v. Schultz*
Majority-**O'Connor,** Rehnquist, Blackmun, Scalia, Kennedy
Concurring-**White**
Dissenting-**Brennan,** Marshall
Dissenting-**Stevens**

19. *FW/PBS v. City of Dallas*
Majority-**O'Connor,** Rehnquist (Parts I, III, IV), White (Parts I, III, IV), Stevens (Parts I, II, IV), Scalia (Parts I, III, IV), Kennedy (Parts I, II, III, IV).
Concurring-**Brennan,** Marshall, Blackmun
Concurring/Dissenting-**White,** Rehnquist
Concurring/Dissenting-**Scalia**
Concurring/Dissenting-**Stevens**

20. *Goldblatt v. Town of Hempstead*
Majority-**Clark**

21. *Gorieb v. Fox*
Majority-Sutherland

22. *Hadacheck v. Sebastian*
Majority-**McKenna**

23. *Hawaii Housing Authority v. Midkiff*
Majority-O'Connor

24. *Kaiser Aetna v. United States*
Majority-Rehnquist
Dissenting-Blackmun, Brennan, Marshall

25. *Keystone Bituminous Coal Ass'n v. DeBenedictis*
Majority-**Stevens,** Brennan, White, Marshall, Blackmun
Dissenting-**Rehnquist,** Powell, O'Connor, Scalia

26. *Larkin v. Grendel's Den, Inc.*
Majority-**Burger,** Brennan, White, Marshall, Blackmun, Powell,

Stevens, O'Connor
Dissenting-**Rehnquist**

27. *Loretto v. Teleprompter Manhattan CATV Corp.*
Majority-**Marshall,** Burger, Powell, Rehnquist, Stevens, O'Connor
Dissenting-**Blackmun,** Brennan, White

28. *Lucas v. South Carolina Coastal Council*
Majority-**Scalia**
Concurring-**Kennedy**
Dissenting-**Blackmun**
Dissenting-**Stevens**
Separate Statement-Souter

29. *MacDonald, Sommer & Frates v. Yolo County*
Majority-**Stevens,** Brennan, Marshall, Blackmun, O'Connor
Dissenting-**White,** Burger, Powell (Parts I, II, III), Rehnquist (Parts I, II, III)
Dissenting-**Rehnquist,** Powell

30. *Metromedia, Inc. v. City of San Diego*
Majority-**White,** Stewart, Marshall, Powell
Concurring-**Brennan,** Blackmun
Dissenting-**Stevens**
Dissenting-**Burger**
Dissenting-**Rehnquist**

31. *Miller v. Schoene*
Majority-**Stone**

32. *Moore v. City of East Cleveland*
Majority-**Powell,** Brennan, Marshall, Blackmun
Concurring-**Brennan,** Marshall
Concurring-**Stevens**
Dissenting-**Burger**
Dissenting-**Stewart,** Rehnquist

Dissenting-**White**

33. *Mugler v. Kansas*
Majority-**Harlan**
Separate Opinion (Dissent)-**Field**

35. *Nectow v. City of Cambridge*
Majority-Sutherland

36. *Nollan v. California Coastal Commission*
Majority-**Scalia,** Rehnquist, White, Powell, O'Connor
Dissenting-**Brennan,** Marshall
Dissenting-**Blackmun**
Dissenting-**Stevens,** Blackmun

37. *Penn Central Transportation Co. v. City of New York*
Majority-**Brennan,** Stewart, White, Marshall, Blackmun, Powell
Dissenting-**Rehnquist,** Burger, Stevens

38. *Pennell v. City of San Jose*
Majority-Rehnquist
Concurring/Dissenting-Scalia, O'Connor

39. *Pennsylvania Coal Co. v. Mahon*
Majority-**Holmes**
Dissenting-**Brandeis**

40. *Pruneyard Shopping Center v. Robins*
Majority-**Rehnquist,** Burger, Brennan, Stewart, Marshall, Stevens, White (Parts I, II, III, IV), Powell (Parts I, II, III, IV), Blackmun (all but one sentence).
Concurring-**Marshall**
Concurring (in part and judgment)-**White**
Concurring (in part and judgment)-**Powell,** White

41. *Reinman v. City of Little Rock*
Majority-**Pitney**

42. *San Diego Gas and Electric Co. v. City of San Diego*
Majority-**Blackmun,** Burger, White, Rehnquist, Stevens
Concurring-**Rehnquist**
Dissenting-**Brennan,** Stewart, Marshall, Powell.

43. *Schad v. Borough of Mount Ephraim*
Majority-**White,** Brennan, Stewart, Marshall, Blackmun, Powell
Concurring-**Blackmun**
Concurring-**Powell,** Stewart
Concurring-**Stevens**
Dissenting-**Burger,** Rehnquist

44. *Thomas Cusack Co. v. City of Chicago*
Majority-**Clarke**

45. *Village of Arlington Heights v. Metropolitan Housing Development Co.*
Majority-**Powell,** Burger, Stewart, Blackmun, Rehnquist
Concurring/Dissenting-**Marshall,** Brennan
Dissenting-**White**

46. *Village of Belle Terre v. Boraas*
Majority-**Douglas,** Burger, Stewart, White, Blackmun, Powell, Rehnquist
Dissenting-**Brennan**
Dissenting-**Marshall**

47. *Village of Euclid v. Ambler Realty Co.*
Majority-Sutherland

48. *Warth v. Seldin*
Majority-**Powell**
Dissenting-**Douglas**
Dissenting-**Brennan,** White, Marshall

49. *Washington ex rel. Seattle Title Trust Co. v. Roberge*

Majority-**Butler**

50. *Welch v. Swasey*
Majority-**Peckham**

51. *Williamson County Regional Planning Commission v. Hamilton Bank*
Majority-**Blackmun,** Burger, Brennan, Marshall, Rehnquist, O'Connor
Concurring-**Brennan,** Marshall
Concurring-**Stevens**

52. *Yee v. City of Escondido*
Majority-O'Connor

53. *Young v. American Mini Theaters, Inc.*
Majority-**Stevens,** Burger, White, Powell (except Part III), Rehnquist
Concurring-**Powell**
Dissenting-**Stewart,** Brennan, Marshall, Blackmun
Dissenting-**Blackmun,** Brennan, Stewart, Marshall

54. *Zahn v. Board of Public Works*
Majority-Sutherland