Takings and Causation

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Constitutional protection of private property is grounded in a conflict between two legal principles—the government’s power to regulate private property for the common good and the Constitution’s limit on this power in the Takings Clause. The Takings Clause’s check on government power conforms to John Rawls’s philosophy, which rejects the utilitarian beliefs that government may act to achieve the “good” of maximizing human happiness and that government can force people to trade certain political liberties for an improved distribution of wealth. Under Rawls’s theory, the principle of “justice as fairness” limits a government’s ability to require some people to bear burdens in order to advance public goals, and the principle of “equal liberty” eventually leads to Pareto-optimality.

In this Article, Professor Laitos notes that for many years, the United States Supreme Court adopted a utilitarian perspective when it deferred to legislative judgments furthering general public goals. Recently, however, the Court’s Takings Clause jurisprudence has shifted markedly toward Rawlsian theory. Under the Court’s current jurisprudence, a government allocates burdens improperly if it singles out an impacted property owner to bear the cost of a regulation, despite the fact that the owner’s property use did not cause the problem that the regulation addresses. Professor Laitos concludes that this causation test is not a perfect predictor of when laws work unconstitutional takings, but routine application of the test to regulations affecting property should help courts void unfair and unjust government rules that select from the private sector convenient targets to pay for benefits for which the public

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should be responsible.

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I. JOHN RAWLS AND THE TAKINGS CLAUSE

Constitutional protection of private property is grounded in a conflict between two legal principles—the government’s power to regulate private property for the common good1 and the Constitution’s limit on this power in the Takings Clause, which provides that “private property [shall not] be taken for public use, without just compensation.”2 The first principle, government’s power to restrict private property rights for the public good, is consistent with utilitarianism, which condones redistribution of private wealth in order to maximize societal happiness.3 The second principle, reflected in the Takings Clause, prohibits certain regulations.

The Takings Clause’s check on government power conforms to John Rawls’ philosophy.4 A Rawlsian approach to an organized society rejects the utilitarian beliefs that government may act to achieve the “good” of maximizing human happiness and that government can force people to trade certain political liberties for an improved distribution of wealth.5 Under Rawls’s theory, the principle of “justice as fairness” limits a government’s ability to require some people to bear burdens in order to advance public goals, and the principle of “equal liberty” eventually leads to Pareto-optimality.6

For many years, the United States Supreme Court adopted a utilitarian perspective when it deferred to legislative judgments furthering general public goals. To the extent that utilitarianism urges decisionmakers to

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1 See Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962) (noting that the state may interpose its authority on “behalf of the public [if] the interests of the public require such interference”) (quoting Lawton v. Steele, 152 U.S. 133, 137 (1894)).

2 U.S. CONST. amend. V; see Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922) (stating that although “some values are enjoyed under an implied limitation and must yield to the police power . . . the implied limitation must have its limits”).

3 See Berman v. Parker, 348 U.S. 26, 32-33 (1954) (“[T]he legislature . . . is the main guardian of the public needs to be served by social legislation.”); JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 3 (1988) (“An action then may be said to be comfortable to the principle of utility . . . when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.”). See generally JOHN STUART MILL, UTILITARIANISM (1957).

4 See generally JOHN RAWLS, A THEORY OF JUSTICE (1971).

5 Id. at 60-63.

6 Id. at 31, 150-52; see infra note 396 (citing a source that discusses Pareto-optimality).
maximize society's happiness, the Court embraced the theory when it rejected takings claims that arose from three types of governmental action: (1) "a public program that adjusts the benefits and burdens of economic life to promote the common good;" (2) a restriction on private property that furthers "a legitimate state goal" or a "substantial public purpose;" or (3) a government decision "to protect the public interest in health, the environment, [safety], and ... fiscal integrity." Judicial deference to property-restrictive legislation designed to advance the greater public interest followed another utilitarian principle that "the most effective way to increase total happiness [within an organized society] is to increase the average happiness." Consistent with this principle, courts often do not consider takings to be regulations that limit property uses because the property owners subject to the restrictions may enjoy "an average reciprocity of advantage," which allows them to "share with other owners the benefits ... of the [government's] exercise of its police power."

Some leading commentators on the Takings Clause endorsed judicial adoption of utilitarian principles. Recently, however, the Supreme Court...

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7 See, e.g., BENTHAM, supra note 3, at 3; HENRY SIDGWICK, THE METHODS OF ETHICS 411, 415 (7th ed. 1907); J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM: FOR AND AGAINST 7 (1973).
12 SMART & WILLIAMS, supra note 7, at 28.
15 See, e.g., Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 HARV. L. REV. 1165, 1214-15 (1967) (decisionmakers must decide if a proposed measure's "efficiency gains" (the net gain of benefits over costs of government action) are greater than either "demoralization costs" (damage to affected property owners' expectations due to a diminished sense of security) or "settlement costs" (transaction costs incurred in reaching compensation settlements with affected parties)); Joseph L. Sax, Takings and the Police Power, 74 YALE L.J. 36, 67 (1964) ("[W]hen the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.").
Court’s takings jurisprudence has shifted markedly toward Rawlsian theory. The change began in 1960, when the Court held in United States v. Armstrong that the federal government had violated the Fifth Amendment by taking private property without compensating its owners. In Armstrong, the Court did not assume, consistent with utilitarian theory, that the federal government could take property from private parties to improve the public condition without paying just compensation. Rather, the Court adopted a rationale for the Takings Clause that is consistent with Rawls’s idea of “justice as fairness”: “The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”

Since 1960, the Court frequently has cited this statement as an articulation of “[t]he purpose” or “one of the principal purposes” of the Takings Clause. Indeed, the Court has quoted Armstrong so often in takings cases that some commentators believe that the statement “has taken on the quality of a canonical recitation.” The Court’s rationale in Armstrong, however, is not just an oft-repeated summary of why the

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18 The private property interests taken in Armstrong were valid materialmen’s liens that the United States rendered unenforceable. Id. at 44-49.
19 Id. at 49 (emphasis added).
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Takings Clause prohibits the government from affecting private property without paying just compensation. This rationale also reflects and ratifies the two core tenets of Rawlsian theory—"equality" and "justice."

A. Fairness (Equality) and Justice

Rawls's first principle, which Armstrong refers to as "fairness," assumes that laws should conform to the idea of equality—that similarly situated people (and property owners) should be treated similarly under the law. The equality principle has links to the Equal Protection Clause in that it protects horizontal equity by treating like people alike. Rawls's notion of equality also provides a basis for Takings Clause jurisprudence. Rawls's equality principle suggests that a taking occurs if a regulation singles out certain property owners to bear special burdens in order to benefit a larger group or, in utilitarian terms, to maximize that group's happiness.

Rawls and Armstrong explicitly endorse the view that a regulation should not violate the equality principle inherent in "fairness" by singling out certain property owners to bear the burden of achieving a greater good instead of requiring that the public at large share the burden. Rawls argues that "[t]here is no more justification for using the state apparatus to compel some citizens to pay for unwanted benefits that others desire than there is to force them to reimburse others for their private expenses." In Armstrong, the Supreme Court similarly presumes that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens."

Rawls's second principle, which is embodied in the idea of "justice," stems from his fundamental disagreement with the utilitarian notion that through certain persons government may achieve a greater societal

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good. Rawls does not believe that decisionmakers should “impose upon [some members of society] lower prospects of life for the higher expectations of others.” Instead, Rawls’s theory of justice holds that one should not trade or negotiate basic liberties, such as ownership of private property, for changes in the overall economic distribution. Indeed, Rawls asserts that “injustice” is “simply inequalities that are not to the benefit of all.”

Rawls would consider an exercise of the police power unjust if it forced certain property owners to bear the cost of a public good that others primarily enjoy. Under Armstrong, such an economic redistribution would be an uncompensated taking. According to the Court, “the public as a whole” rather than a select class of property owners should bear the cost of “public burdens.” Armstrong essentially holds that the Takings Clause has a “justice” component that tracks Rawls’s theory of justice. The justice principle in the Takings Clause prevents government transfers of land use that damage unwilling property owners. In contrast to tax laws, which can redistribute resources from one class of persons to another for the public good, if the government uses its regulatory power, the Takings Clause provides that it must compensate property owners burdened for “the public as a whole.”

B. Causation

This Article examines the primary exception to both Armstrong’s rule of fairness and justice and Rawls’s principles of equality and justice: Regulated property owners do not merit compensation when their use of property caused or contributes to a societal problem that a regulation seeks to redress. Under this exception, the government may single out the property owner or owners responsible for the problem and may require that they bear the regulation’s cost. This Article argues that a causation requirement ensures that a regulatory action violates neither the fairness (equality) nor the justice (redistribution) principle.

If the owners subject to regulation did not cause the problem, however, then regulating that class of owners likely is an uncompensated taking. Rawls would concur: Most uncompensated takings are inconsistent
with equality because takings target a class of persons to provide a public benefit; takings also are unjust because they force targeted property owners to bear the cost of a public good that others largely enjoy. Absent causation, a lawmaker should spread the costs of creating and maintaining community benefits, pursuant to the tax power, or should compensate property owners subject to the public burden.

This Article considers the manner in which the Takings Clause implicates the causation issue, as well as the principles of fairness/equality and justice espoused by John Rawls and the Court in Armstrong. Part II discusses the Supreme Court's and lower courts' adoption of causation as a relevant test (and sometimes as the relevant test) in takings cases. Part III argues that despite the indeterminacy that arises occasionally when one seeks to identify who is responsible for a societal evil, it is possible to ascertain whether a regulated property caused the problem. Part IV considers the "fairness" rationale for the causation test and suggests that burdening property owners who did not cause the societal problem violates Rawls's equality principle, which Takings Clause jurisprudence recognizes. Part V analyzes the three principal situations in which traditional land-use regulation does not violate the Rawls/Armstrong, equality/fairness requirement. Finally, Part VI exam-

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35 Raymond, supra note 16, at 605.

36 Another threshold Takings Clause causation issue, one that this Article will not address, asks whether a government actor caused the harm to the owner's property. If the government did not cause the harm, the Takings Clause does not apply. See, e.g., Broad v. Sealaska Corp., 85 F.3d 422, 431 (9th Cir. 1996), cert. denied, 117 S. Ct. 768 (1997); Applegate v. United States, 35 Fed. Cl. 406, 417, appeal dismissed, 77 F.3d (Fed. Cir. 1996); Powell v. Powell, 877 F. Supp. 628, 631 (M.D. Ga. 1995), vacated, 80 F.3d 464 (11th Cir. 1996); Department of Transp. v. Hewett Prof'l Group, 895 P.2d 755, 763 (Or. 1995); Ventures Northwest Ltd. v. State, 914 P.2d 1180, 1187 (Wash. App. 1996).


38 Part IV discusses how the Takings Clause reflects the Court's statement in Armstrong that it is unfair to "single out" private property owners to correct a societal evil if the presence of the evil is not attributable to the owners' use of their property. The prohibition against singling-out property owners is consistent with Rawls's equality principle because the Takings Clause requires courts to use a fair burden sharing standard to determine whether government actions are takings.

39 Police power exercises that affect property owners are not takings in the following circumstances: (1) when there is a causal relationship between the property use regulated and the societal problem sought to be corrected; (2) when the owners whom the regulations burden have secured an "average reciprocity of advantage," Pennsylvania
ines the "justice" rationale for the Takings Clause's causation requirement, which holds that redistributive legislation is usually constitutional only when the burdened property owner created the need for the wealth transfer.40

II. THE USE OF CAUSATION IN TAKINGS CASES

A. Origins

During the one hundred years between Mugler v. Kansas41 and Keystone Bituminous Coal Ass'n v. DeBenedictis,42 one of the most commonly used takings tests reasonably assumed that government constitutionally could deploy its police powers to enjoin property owners from using their property in ways that were functionally similar to public nuisances. This "nuisance exception" to the Takings Clause permitted the government to use its police power to prevent harms without triggering the compensation requirement.43 Conversely, the Supreme Court held that a taking occurred when a law merely extracted public benefits from a property owner rather than preventing harm.44 A law that extracted benefits from an individual property owner and conferred them upon the public fell squarely within the Fifth Amendment's prohibition against uncompensated takings of private property "for a public use."45


40 See EPSTEIN, supra note 33, at 208 (asserting that the only way to ensure that the government enacts only efficient measures is to require compensation under the Takings Clause for all measures with a redistributive impact); cf. Frank Michelman, Property as a Constitutional Right, 38 WASH. & LEE L. REV. 1097, 1112-13 (1981) (opining that effective political participation in a democracy can only be advanced by legislative redistributions).

41 123 U.S. 623 (1887).


44 Pennsylvania Coal, 260 U.S. at 415.

45 See, e.g., Allison Dunham, A Legal and Economic Basis for City Planning, 58 COLUM. L. REV. 650, 666 (1958) ("It is unconstitutional to compel an owner to commit
Despite the seemingly attractive distinction between laws that constitutionally restrict uses of private property to prevent harms and those that unconstitutionally burden private property owners in order to provide public benefits, the harm-benefit dichotomy eventually came under attack. Professor Joseph Sax, for example, noted that the property uses for which the Supreme Court had invoked the nuisance exception were, in fact, perfectly lawful and involved no "blameworthiness [or] moral wrongdoing." Professor Frank Michelman also demonstrated that it was difficult to establish a "benchmark of 'neutral' conduct which enables us to say where refusal to confer benefits (not reversible without compensation) slips into readiness to inflict harms (reversible without compensation)."

Eventually, the Supreme Court rejected the distinction between regulation addressing property uses that cause harm and those that extract public benefits. In *Penn Central Transportation Co. v. New York City,* the Court turned the distinction on its head by explaining that a valid exercise of the police power need not prevent a "noxious" property use; rather, it need only reasonably relate "to the implementation of a policy . . . expected to produce a widespread public benefit." After *Penn Central,* a regulation that limited private property use in order to advance a community benefit was not per se invalid; instead, the fact that a regulation furthered a public goal supported its legitimacy.

Utilitarian reasoning is central to the *Penn Central* decision. In *Penn Central,* the Court explicitly rejected the property owner's argument that a landmark designation program had placed an unfair regulatory burden on a select class of property owners: "We find no merit in . . . appellants position . . . that the only means of ensuring that selected owners are not singled out to endure financial hardship . . . is to hold his land to park use in order to meet a public desire for a park . . . ."

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49 *Id.* at 134 n.30.
50 *See* Agins v. Tiburon, 447 U.S. 255, 260 (1980) (holding that a land-use regulation does not effect a taking if it "substantially advances legitimate state interests").
that the [law] is a 'taking.' 52 The Court held that the property owners had no right to compensation because the landmark program's public benefits far outweighed its costs to individual property owners. 53 In contrast, Justice Rehnquist's dissent was distinctly Rawlsian. Citing the Armstrong rationale for the Takings Clause, Justice Rehnquist maintained that the program under attack in Penn Central was unconstitutional because it required only a few property owners to suffer the burden of achieving the public goal of historic preservation. 54 Consistent with Rawlsian theory, Justice Rehnquist concluded that the property owners should be compensated. 55 The law affecting the owners was unfair for violating the equality principle and unjust for effecting an economic redistribution from burdened owners to society. 56

In Lucas v. South Carolina Coastal Council, 57 the Court reiterated its holding in Penn Central that no significant difference existed between a regulation that prevents harmful nuisance-like uses and one that confers public benefits. 58 Justice Scalia's majority opinion cautioned that any distinction between a "harm-preventing" and a "benefit-conferring" regulation was primarily "in the eye of the beholder" and "difficult, if not impossible, to discuss on an objective, value-free basis." 59

The Court's reasoning in Lucas appeals to both utilitarian and Rawlsian principles. The Court held that regulations do not effect takings if they substantially advance legitimate state interests—a utilitarian view. 60 The Court also adopted a rule prohibiting takings claims based on regulation of nuisance-producing uses of private property that inhere in the title. 61 Utilitarians probably would concur with the Court's approach because such uses would be antithetical to the maximization of society's happiness. 62 Rawls likely would agree with Lucas's precise holding, which is that "when the owner of real property has been called upon to sacrifice all economically beneficial use in the name of the

53 Id. at 132-35.
54 Id. at 139-40 (Rehnquist, J., dissenting) (citing United States v. Armstrong, 364 U.S. 40, 49 (1960)); see supra text accompanying note 19.
56 See id. at 139-40 (Rehnquist, J., dissenting).
58 Id. at 1022-24.
59 Id. at 1024, 1026; see also Gerald Torres, Taking and Giving: Police Power, Public Value, and Private Right, 26 ENVTL. L. 1, 23 (1996) ("[T]he harm/benefit distinction is notoriously unstable . . . .").
60 Id. at 1024.
61 Id. at 1029.
62 Raymond, supra note 16, at 614.
common good[,] . . . he has suffered a taking."

The one-hundred-year run of the harm/benefit distinction ended in 1992 with Lucas. The Court also ended its rote reliance on utilitarian theory to sustain regulations that burdened some property owners "in the name of the common good." Lucas prompted the Court to consider adopting an alternative test, and another philosophical basis, for determining when a regulation resulted in an unconstitutional taking. Justice Scalia has suggested a "causation" test, the elements of which developed from Rawlsian premises and the Court’s rationale in Armstrong. In several important takings cases, the Supreme Court adopted Scalia’s causation formula.

B. The Supreme Court's Adoption of the Causation Test

In the first Supreme Court case in which the Court applied a causation test, Nollan v. California Coastal Commission, the Court found that an uncompensated taking occurred when a state agency granted a building permit to property owners subject to the owners’ cession of a lateral easement across their beachfront property. The Court invalidated the conditional permit because the easement would not eliminate the problems that the new construction would cause. Justice Scalia, writing for the majority, focused on causation in his takings analysis, noting that it was "impossible to understand how [the permit condition] . . . helps to remedy any additional congestion on [the public beaches] caused by construction of the Nollans’ new house."

In Nollan, the Court tied its causation standard to Armstrong’s “fairness” justification. The fairness requirement presumes that a regulation may not impose on property owners a responsibility for correcting societal problems they did not create. That responsibility would be inconsistent with the notions of equality subsumed within Armstrong’s fairness justification.

If the Nollans were being singled out to bear the burden of

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63 Lucas, 505 U.S. at 1019.
64 Id. at 1026.
65 See supra text accompanying notes 17-31.
67 Id. at 838-39 ("It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new house.") (emphasis added).
68 Id. (emphasis added).
69 Id. at 835-36 n. 4; see supra next accompanying note 19.
California’s attempt to remedy these problems [of congestion on public beaches], although they had not contributed to it more than other coastal landowners, the state’s action . . . might violate either the incorporated Takings Clause or the Equal Protection Clause . . .  

The Court’s decision in *Nollan* does not conform to utilitarian principles. The permit exaction that the state agency demanded is a utilitarian attempt to redistribute resources from a relatively wealthy landowner to less wealthy users of public beaches, resulting in a net societal benefit. In *Nollan*, the Court rejected the utilitarian argument that because society benefits from expanded public lateral easements across beaches, no compensable taking occurred. Instead, consistent with Rawlsian theory, Justice Scalia suggested that the method of delivering that benefit should be a simultaneous easement against all coastal property owners, rather than singling out those who requested building permits.  

In *Dolan v. City of Tigard*, the Supreme Court applied *Nollan*’s causation test to declare unconstitutional a regulation that required a landowner to dedicate a portion of her property to the city for a storm drainage system and a pathway prior to receiving a permit to expand her commercial property. The Court held that the condition was a taking, in large part because of the absence of causation: “[T]he city] has not identified any ‘special quantifiable burdens’ created by her [proposed expansion] that would justify the particular dedications required from her . . . .” The Court concluded that the pathway was a public good and was largely unrelated to the proposed property expansion. Thus, those who wanted the pathway should fund it.  

The *Dolan* rule requires that the government show that an owner’s property use would cause a societal evil and that the government’s use restriction would address that evil. *Dolan* requires that when a government conditions issuance of a permit, a “rough proportionality” must exist between what the property owner gives up and “the impact of the proposed development.”  

Crucial to *Dolan*’s test is “impact”—the Court must expect find that the

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72 *Nollan*, 483 U.S. at 835-36 n. 4.  
74 *Id.* at 386 (emphasis added); see also Douglas Kmiec, *At Last, The Supreme Court Solves the Takings Puzzle, in Takings: Land-Development Conditions and Regulatory Takings After Dolan and Lucas* 112-13 (David L. Callies ed., 1996).  
75 *Dolan*, 512 U.S. at 395-96.  
76 *Id.* at 391.
planned property use will cause a societal problem that the government action intends to alleviate. Absent causation, as in Dolan, a regulation violates Armstrong's notion of fairness and Rawlsian requirements of equality. Without a causal link, some "people alone" bear public burdens. Indeed, Dolan cites Armstrong for the proposition that without a causative nexus between impact and condition, the government effectively selected the burdened owner to cede property to the state for public use. Such action facially violates the Takings Clause.

A land-use regulation that does not meet the causation test is "an out-and-out plan of extortion" that forces certain property owners to bear the cost of a general community benefit. Dolan also marks the Court's adoption of Rawls's theory of justice. Rawls believed that persons should pay their fair share of additional costs their actions created, but not the full price of a public good. In Dolan, the Court reflected this view by holding that it would be a taking to exact from a landowner a concession that was disproportionate to the problems the landowner created.

Although the Court has not decided whether causation is a relevant inquiry in any takings challenge to a law that burdens or restricts an owner's property use, Justice Scalia stated the case for a causation test in a pure regulation-of-property setting in his strongly worded partial dissent in Pennell v. City of San Jose. In Pennell, apartment owners challenged a rent control ordinance that required hearing officers to determine the reasonableness of proposed rent increases in relation to several factors. One of these factors was "the economic and financial hardship imposed on the present tenant or tenants . . . to which such increases apply." Justice Scalia's partial dissent, which Justice O'Connor joined, confronted the merits of this takings claim.

Scalia began by citing Armstrong's justification for the Takings Clause. He then explained why traditional land-use regulation does not violate this rationale:

77 Id. at 384 (citing United States v. Armstrong, 364 U.S. 40, 49 (1960)).
78 Id. Dolan overruled several lower court cases that upheld dedication requirements even when the dedications were not intended to address a societal evil attributable to the property use. See, e.g., Association of Home Builders v. City of Walnut Creek, 484 P.2d 606, 610, 618 (Cal. 1971).
80 Armstrong, 364 U.S. at 49.
81 RAWLS, supra note 4, at 28, 61-63, 112; Raymond, supra note 16, at 615.
82 485 U.S. 1 (1988) (holding that the takings claim was premature).
83 Id. at 5.
84 Id. at 15-24 (Scalia, J., concurring in part and dissents in part).
85 Id. at 19 (Scalia, J., concurring in part and dissenting in part) (citing Armstrong, 364 U.S. at 49).
[T]here is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner’s use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly.86

If a cause-and-effect relationship does not exist, however, then the regulation violates the equality/fairness justification undergirding the Takings Clause.

Scalia argued, consistent with Rawlsian theory and the Armstrong rationale, that the Takings Clause prevents “the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a societal problem that is none of his creation.”87 Because the apartment owners were not responsible for the fact that some renters were too poor to afford reasonably priced housing, the city’s rent control law merely provided an opportunity “to establish a welfare program privately funded by those landlords who happen to have ‘hardship’ tenants.”88 A regulation without compensation, however, cannot be a proper exercise of legislative power because it requires landlords to correct a societal problem they did not cause. This disproportionate burden violates Rawls’s equality principle. As Scalia noted, that burden is inconsistent with “our traditional constitutional notions of fairness.”89 Considering Justice Scalia’s partial dissent in Pennell, his opinion in Nollan, and the majority’s reasoning in Dolan, the Supreme Court appears poised to adopt a causation test as an essential takings inquiry.

C. Lower Courts’ Adoption of the Test

Increasingly, federal and state courts embrace the causation test and the Armstrong rationale in cases in which government action either: (1) imposed regulatory burdens on the use and development of private property, as in Pennell, or (2) conditioned receipt of government permission to change or expand property use on an exaction in the form of dedications, specific performance, or fees, as in Nollan and Dolan.90

86 Id. at 20 (Scalia, J., concurring in part and dissenting in part).
87 Id. at 23 (Scalia, J., concurring in part and dissenting in part).
88 Id. at 21-22 (Scalia, J., concurring in part and dissenting in part).
89 Id. at 22 (Scalia, J., concurring in part and dissenting in part); see Kmiec, supra note 45, at 1652-54.
1. **Burdens on Property Use**

Lower courts have used causation analyses to decide takings claims when the government has prohibited or restricted private property use. Causation also has been determinative when the government requires that a property owner pay for a benefit that either a government entity or a specific class of persons other than the owner will enjoy primarily. These cases generally fall into three categories: (1) the government "takes" property by imposing on an owner a duty to provide a societal benefit to a group of beneficiaries, (2) land-use restriction that supports or subsidizes a distinct government function or enterprise, and (3) the government burdens a property owner with restrictions designed to secure a benefit for neighboring landowners.

a. **Burdens on Property Owners that Address an Identifiable Group's Societal Problems**

State and local governments may seek to provide a benefit to a particular group in order to remedy a societal problem associated with the group. When the government decides that the poor, the homeless, low-income tenants, or the indigent require assistance, and it demands help from property owners, one must determine whether a causative nexus exists between the burdened property owner and the societal problem. Absent a causative link, the idea of fairness incorporated in *Armstrong*91 as well as Rawls's equality principle92 indicates that it should be unconstitutional for government to saddle certain property owners with the burden of correcting the societal harm. All members of a community must contribute to correcting societal problems. Remedial costs cannot be shifted to property owners under the guise of regulation.93

No matter how strong the proffered state interest, if a regulation benefits a societal class whose needs the affected property owners did not create, the regulation constitutes a taking.94 Many lower courts have agreed that the government cannot require that property owners who are not responsible for the plight of low income people bear the costs of alleviating their economic

92 RAWLS, supra note 4, at 60.
94 See Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 484-85 (N.Y. 1994) (holding that a statute requiring that owners provide renewal leases to nonprivate hospitals worked an unconstitutional taking because burdened property owners did not cause the societal harm the statute addressed), *cert. denied*, 115 S. Ct. 1961 (1995)).
problems.  

Courts have relied on two theories when refusing to find a taking with respect to a law that either limits property use or imposes a duty on property owners in order to benefit a particular group. First, courts uphold laws that require landlords and developers to pay a fee or a portion of low-income housing costs when a reasonable relationship exists between the owners' actions and the scarcity of low-income residences. Even when the

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95 See, e.g., Golden Gate Hotel Ass'n v. City and County of San Francisco, 864 F. Supp. 917, 927-28 (N.D. Cal.) (holding that requiring hotel owners to provide relocation assistance for displaced tenants was a taking because it forced the owners to remain in the residential rental business when they were not solely to blame for the societal ills of the homeless), modified, 836 F. Supp. 707 (1993), vacated, rev'd, and remanded, 18 F.3d 1482 (9th Cir. 1994); Aspen-Tarp Springs Ltd. Partnership v. Stuart, 635 So. 2d 61 (Fla. Dist. Ct. App. 1994) (finding that a requirement that mobile home park owners buy tenants' homes or pay relocation costs was unconstitutional because the owners did not cause the tenants' difficulty in finding suitable housing); Property Owners Ass'n v. Township of North Bergen, 378 A.2d 25 (N.J. 1977) (holding that ordinance requiring that landlords subsidize senior citizens' rents was a taking because the landlords did not cause the senior citizens' lack of sufficient economic resources); Seawall Assocs. v. City of New York, 542 N.E.2d 1059, 1069 (N.Y.) (finding that regulatory burdens on the owners of single-room occupancy housing are unconstitutional because the problems of the homeless were not the owners' fault), cert. denied, 493 U.S. 976 (1989); 520 E. 81st St. Assoc's v. Lenox Hill Hosp., 555 N.Y.S.2d 697, 703 (App. Div.) (holding that requiring apartment owners to renew apartment leases for hospital's nurses was a taking when severe housing shortage was attributable to new demand for residential uses and a decreased supply of apartments, neither of which the owners caused, and holding that the burden of creating new residences should have been "borne by society at large"), appeal withdrawn, 560 N.Y.S.2d 278, rev'd, 570 N.Y.S.2d 479 (1990)).

Further, Washington state has looked to causation as a factor in considering whether a law imposing a duty on property owners to assist a special group violated due process. See, e.g., Sintra v. City of Seattle, 829 P.2d 765, 776-77 (Wash. 1992) ("Sintra's property cannot be singled out as contributing to the problem of homelessness in any pronounced way; the lack of low income housing was brought about by a great number of economic and social causes which cannot be attributed to an individual parcel of property."), cert. denied, 506 U.S. 1028 (1992); Presbytery of Seattle v. King County, 787 P.2d 907, 913 (Wash. 1990) (finding that a land-use regulation may be so "unduly oppressive" that it violates substantive due process and that one element of an unduly oppressive law is "the extent to which the owner's land contributes to a public problem"), cert. denied, 498 U.S. 911 (1990).

96 See Commercial Builders v. City of Sacramento, 941 F.2d 872, 874 (9th Cir. 1991) (holding that a development fee intended to offset housing burdens associated with influx of low income workers was constitutional because the developers' activities had caused the increased demand for low income housing), cert. denied, 504 U.S. 931 (1992); Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277, 286-87 (N.J. 1990) (finding that the imposition of development fees was reasonable because a relationship existed between the property owners' penchant for unrestrained nonresidential development and the need for affordable residential development).
government determines that certain property owners helped create a societal problem, however, the regulatory and financial burden imposed on those owners must be proportionate to the negative effect attributed to their property use.97

Second, absent causation, some courts justify special demands or limitations on particular property owners if the owners chose to enter a highly regulated industry and had constructive notice that they could be required to assist a class of needy persons. For example, because the government has always "pervasively regulated" nursing homes, the government could require that a nursing home continue to operate until reasonable alternative arrangements could be made for the patients.98 Similarly, although a court may concede that "[i]t is not easy to see how . . . shifting, to a private group, . . . financial responsibility for the alleviation of a public problem [it] did not create could square with [the Takings Clause],"99 courts nonetheless have justified such burden-shifting when the government did not require that the regulated group participate in the industry that imposed the burden. For example, a court found that a limit on a charge to Medicare patients was not a taking because the doctors, who were not the cause of the Medicare program's difficulties, chose to practice in Medicare hospitals.100

b. Subsidization of Distinct, Governmental Functions or Enterprises

If the government requests that a real estate or commercial property developer support or pay for an activity that is normally the government's

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97 Garneau v. City of Seattle, 897 F. Supp. 1318, 1326 (W.D. Wash. 1995); Divan Builders v. Planning Bd., 334 A.2d 30, 39 (N.J. 1975) (holding that a developer "could be compelled only to bear that portion of the cost [of off-site improvements] which bears a rational nexus to the needs created by . . . the subdivision") (quoting Longridge Builders v. Planning Bd, 245 A.2d 336, 337 (N.J. 1968)).


100 Id. at 113-14 n. 5 (commenting that Justice Scalia's analysis in Pennell "has considerable logical force and may foreshadow a future shift in Supreme Court jurisprudence"); see also Pennell v. City of San Jose, 485 U.S. 1, 20-24 (1988) (Scalia, J., dissenting); Whitney v. Heckler, 780 F.2d 963, 972 (11th Cir.) (holding that temporary fee freeze on physicians' charges to Medicare patients was not a taking), cert. denied, 479 U.S. 813 (1986). Sometimes a court will concede that a law disproportionately burdens a particular class of property owners rather than dispersing the cost of conferring a societal benefit upon society as a whole but will sustain the law out of deference to the legislative decisionmaking process. See Terminal Plaza Corp. v. City & County of San Francisco, 223 Cal. Rptr. 379, 391 (Cl. App. 1986).
A general causation rule operates: The government may require that the developer mitigate direct impacts of the proposed development. Alternatively, when the burdens imposed on a developer result from an accident of land ownership and cost-sharing based on causal responsibility cannot be calculated, then a financial duty levied on a developer resembles a public subsidy. Such requirements are usually unconstitutional takings.

C. Land-Use Restrictions Designed to Secure Direct Benefits to Neighbors

Governments enact some land-use planning regulations that burden particular property owners in order to benefit those owners' immediate neighbors. These regulations, which often restrict use, are unconstitutional takings if the owners' proposed use did not cause the problem that the regulation seeks to correct. For example, Georgia's Supreme Court held that a county ordinance that restricted placement of manufactured homes to manufactured-home parks was unconstitutional because the county could not prove that manufactured homes would devalue neighboring site-built residences.

Among these responsibilities are construction of roads, sewers and sewage treatment plants, parks, and flood control projects.

See, e.g., Third & Catalina Assocs. v. City of Phoenix, 895 P.2d 115, 120-21 (Ariz. Ct. App. 1995) (finding that where building owner was responsible for an asbestos problem in his building, he would have to abate the problem in order to comply with a sprinkler system retrofit ordinance); Circle K Corp. v. City of Mesa, 803 P.2d 457, 464 (Ariz. Ct. App. 1990) (finding that an ordinance may require elimination of nonconforming signs as a condition to permission for the erection of a larger, separate conforming sign).


Further, courts occasionally have struck general "development fees" that help to offset increased costs that would be borne by a locality as a result of the proposed development on the grounds that they are taxes, rather than police power regulations, and therefore are invalid if not legislatively authorized. Hillis Homes, Inc. v. Snohomish County, 650 P.2d 193 (Wash. 1982).

Cannon v. Coweta County, 389 S.E.2d 329, 331-32 (Ga. 1990); see also Vernon
When a particular property use has a causal connection to a specific societal harm to neighboring property, a law restricting that use still may be unconstitutional if it does not regulate similarly other property uses that also contribute to the harm. For example, if both mobile homes and prefabricated dwellings depress property values, a law that regulates only mobile homes might be invalid as underinclusive.\footnote{These discriminatory laws violate Rawls's equality principle and Armstrong's “fairness” justification for the Takings Clause.} Conversely, if no causal link exists between a proposed property use and a problem that a regulated property owner's neighbors will experience, then a restriction on a proposed use is not a taking, despite the fact that the neighbors benefit from the restriction. If, for example, a subdivision developer’s proposed use would hinder access to adjoining property, a rule requiring that the developer help eliminate such problems would not violate the Takings Clause, although neighbors benefit at the developer’s expense.\footnote{Similarity, if a nonconforming use contributes to urban blight and imperils a community plan’s success, imposition of a reasonable amortization period to eliminate nonconforming uses is not a taking, although neighbors benefit from termination of the use.} Thus, causation determines the constitutionality of a property regulation.\footnote{Thus, causation determines the constitutionality of a property regulation.}

2. \textit{Conditioning Receipt of a Government Permit on Dedications, Public Improvements, or Fees}

In \textit{Nollan} and \textit{Dolan}, the Court suggested that government may not employ its police power to extract public benefits unrelated to an owner’s

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Park Realty, Inc. v. City of Mount Vernon, 121 N.E.2d 517, 519 (N.Y. 1954) (holding that land cannot be zoned for a parking lot when similar neighboring property was zoned for commercial use if the proposed property use would not cause a traffic problem that a parking lot would improve).

\footnote{Robinson Township v. Knoll, 302 N.W.2d 146, 154-55 (Mich. 1980); see also Bourgeois v. Parish of St. Tammany, 628 F.Supp. 159, 160-61 (E.D. La. 1986) (holding that an ordinance excluding mobile homes from certain residential zones but not “tar shacks” and buildings of inferior construction was an invalid exercise of the police powers because the ordinance arbitrarily discriminated against one class of dwellings within a larger class of dwellings that generally harmed neighbors' property values).}

\footnote{Not all lower courts presume that causation is relevant in \textit{Pennell}-type land-use regulation cases. Some courts apply a causation test only when the government imposes upon property owners an obligation to deed portions of their land or to pay fees prior to obtaining government permission for a particular use. See, e.g., Harris v. City of Wichita, 862 F. Supp. 287, 293-94 (D. Kan. 1994), aff'd, 74 F.3d 1249 (10th Cir. 1996).}
property use as a condition to property development approval.\textsuperscript{109} To impose such a condition would violate Armstrong's warning against burdening property owners in order to address community problems they did not cause.\textsuperscript{110}

After Nollan and Dolan, government-imposed conditions on receipt of development approval are constitutional only if they address problems the property owners generated.\textsuperscript{111} Conditioned permits effect unconstitutional takings if no causal relationship exists between the property use subject to the condition and the societal problem the condition seeks to remedy.\textsuperscript{112} These permits violate Rawls's equality principle because they select a segment of the population to provide a public good, and they violate Rawls's justice principle because they redistribute resources by forcing some people to bear the cost of a public good.\textsuperscript{113} These conditions also violate the fairness principle embodied in Armstrong. This principle prohibits allocating the costs of public improvements to developers who have not caused the problems targeted for correction, and calls for costs to be spread equally among community members through general revenue-raising devices.\textsuperscript{114} Lower courts have adhered to the Nollan-Dolan causation standard in takings cases involving land dedications, public improvements, and monetary exactions.


\textsuperscript{110} See United States v. Armstrong, 364 U.S. 40, 49 (1960); 2 NICHOLS ON EMINENT DOMAIN § 6.16[3], at 6-109-110 (Julius L. Sackman ed., 3d ed. 1985) ("[W]here, however, the need for [some public benefit] is not created by, nor uniquely attributable to, the development, the [condition] amounts to an exercise of the power of eminent domain."); 5 EDWARD ZIEGLER, THE LAW OF ZONING AND PLANNING § 65.04, at 65-95 to 65-127 (4th ed. 1996).

\textsuperscript{111} See F&W Assocs. v. County of Somerset, 648 A.2d 482 (N.J. Super. Ct. App. Div. 1994) (finding that an assessed traffic impact fee was constitutional as a condition to subdivision and site plan approvals); J.C. Reeves Corp., 887 P.2d at 365 (holding that a condition on property use that benefits adjoining land is constitutional if the burdened owner's "proposed use of [his] property is what will cause the access problem on the adjoining property"); Sparks v. Douglas County, 904 P.2d 738, 745-46 (Wash. 1995) (holding that a condition requiring road-widening and additional rights-of-way is constitutional if development of plats would increase traffic).


\textsuperscript{113} See supra text accompanying notes 23-29.

\textsuperscript{114} See Laurie Reynolds, Living With Land Use Exactions, 11 YALE J. ON REG. 507, 508-09 (1994) (reviewing ALAN ALTSHULER & JOSÉ A. GÓMEZ-IBÁÑEZ, REGULATIONS FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS (1993)).
a. Land Dedications

In both *Nollan* and *Dolan*, the Supreme Court held that a conditionally granted permit, which required that a property owner dedicate private land, could be a taking if no causal link existed between the dedication and a community need. Lower courts also have held that if a property use that requires a permit did not cause the societal problem that a dedication condition addresses, or if a condition is proportionally unrelated to the proposed use's impact, the dedication is an uncompensated taking.\(^\text{115}\) If, however, a property use will create a problem for the community's infrastructure, such as excessive flood drainage, increased sewage, or additional traffic, a government may condition a permit on a dedication tailored to the specific problem attributable to the property use.\(^\text{116}\) Lower courts have held that dedications also may satisfy the causation test if the condition requiring the dedication improves the property of the owner who makes the dedication rather than benefiting the general community.\(^\text{117}\) These cases do not

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\(^{115}\) See, e.g., Del Monte Dunes v. City of Monterey, 95 F.3d 1422, 1432 (9th Cir. 1996) (holding that a taking occurred when the city imposed a dedication requirement disproportional to the impact that the property development caused); Surfside Colony, Ltd. v. California Coastal Comm'n, 277 Cal. Rptr. 371, 376 (Ct. App. 1991) (holding that dedication of a public access to a private beach was a taking because there was no nexus between the dedication and the problem of beach erosion); Rohn v. City of Visalia, 263 Cal. Rptr. 319, 327-28 (Ct. App. 1989) (holding that conditioning issuance of a building permit on a dedication of land for a road improvement was a taking because the development did not cause traffic problems); Lexington-Fayette Urban County Gov't v. Schneider, 849 S.W.2d 557, 559 (Ky. Ct. App. 1992) (holding that development approval conditioned on dedication of land and a bridge was a taking because the proposed development would account for only two percent of bridge use); St. Onge v. Donovan, 522 N.E.2d 1019 (N.Y. 1988) (holding that conditioning a variance on phasing out of another parcel of property was impermissible because the requirement was unrelated to the proposed land use or its impact on neighboring property); Art Piculell Group v. Clackamas County, 922 P.2d 1227, 1236 (Or. Ct. App. 1996) (“[T]he determinative factor [for a takings claim] must be the relationship between the impacts [caused by] the development [rather than] the extent of the public’s need for . . . improvements.”); Schultz v. City of Grants Pass, 884 P.2d 569, 573 (Or. Ct. App. 1994) (holding that a residential development resulting in a traffic increase of eight road trips per day did not justify a 20,000 square foot dedication); *Luxembourg Group*, 887 P.2d at 448 (holding that a taking occurred when a county conditioned a landowner’s rezoning permit on a dedication intended to provide access across adjoining landlocked property because the need for access was caused not by the development but by the isolated property owner’s original location).


\(^{117}\) See, e.g., Sarasota County v. Taylor Woodrow Homes Ltd., 652 So. 2d 1247, 1252 (Fla. Dist. Ct. App. 1995); Nelson v. City of Lake Oswego, 869 P.2d 350, 354
conflict with *Armstrong* because of a “singling-out” to bear a public burden.

b. *Public Improvements*

The government may condition a land-use permit on a requirement that the landowner construct facilities that will be open to or public use. The government also may require a permit seeker to upgrade or repair roads and streets on and off the property to be developed. For purposes of takings causation analyses, the initial question is whether there is a difference between a requirement that a developer convey title to part of the property for a public purpose and a requirement that a developer improve the property and make it available for a public purpose.

Whether the government requires an owner to convey title (a dedication) or allows the owner to retain title (a public improvement), the government imposes equal burdens on the owner by requiring that the public benefit from the owner’s property. Both situations compromise an owner’s near-sacrosanct “right to exclude.”

Further, in both situations, it is unfair for the government to condition an owner’s proposed use on performance of some action that may be unrelated to the nature and effect of that use. The *Nollan-Dolan* causation test should apply to conditions that demand that private property owners construct or enhance a public improvement.

*Dolan* requires that a government-imposed condition reflect a “rough proportionality” between the property use and its external effects. The rough-proportionality standard ensures that public improvements required of a property owner will respond only to the property use’s impacts. If a public improvement that is a condition to land development approval is completely unrelated to the development proposal, causation is absent, and the condition is a taking.

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120 *Dolan*, 512 U.S. at 391.
121 See *Clark*, 904 P.2d at 189; *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360, 365 (Or. Ct. App. 1994).
c. Monetary Exactions

Fee payments do not affect an attribute of real property. Fees simply burden property owners. Originally, local governments relied on "in-lieu-of-fees,"123 which financed off-site facilities, such as schools and open space, when a land dedication would have sufficed.124 "Impact fees" are similar to in-lieu-of-fees in that they are charges that local governments levy against private property owners as conditions to approval of land development. Unlike in-lieu-of fees, the government can levy impact fees even when a dedication of land would not be appropriate.125

Impact fees can take one of three forms. One is "linkage fees," which require that property developers contribute funds toward assisting identifiable groups that the new development adversely affects. This kind of regulation126 may lessen some of the societal costs and dislocations associated with new land uses. A government usually assesses linkage fees to pay for housing for those who will work on a new facility, or for those residents whom a new facility will displace.127

A second type of impact fee is that which the government assesses against new subdivisions, apartments, and commercial developments in order to pay for public facilities that a property use made necessary. These public facilities may include roads, sewers, recreation centers, water systems, schools, parks, drainage systems, waste disposal sites, and police and fire stations. The majority of jurisdictions apply a three-part test to determine the constitutionality of this type of impact fee: (1) the property use must create the need for the facilities;128 (2) the fee must not merely raise

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125 Otto Hetzel & Kimberly Gough, Assessing the Impact of Dolan v. City of Tigard on Local Governments' Land Use Powers, in TAKINGS, supra note 74, at 238.
126 See supra text accompanying notes 76-82.
128 Compare Home Builders Ass'n v. City of Scottsdale, 902 P.2d 1347, 1350 (Ariz. Ct. App. 1995) (finding that an impact fee was constitutional because it directly related to a need for more water, which was attributable to the property development), and Trimen Dev. Co. v. King County, 877 P.2d 187, 194 (Wash. 1994) (finding that impact fees imposed were "reasonably necessary as a direct result of [the] proposed development"), with New Jersey Builders Ass'n v. Mayor of Bernards Township, 528 A.2d 555, 562 (N.J. 1987) (finding that an ordinance requiring that developers help pay for road improvements was unconstitutional because the road improvements were not limited to the needs directly generated by the new development).
general revenue but must enter a segregated fund earmarked for expenditures to address problems caused the property owner who paid the fee caused; and (3) the property owner paying the fee must be likely to benefit from its expenditure.

The third type of impact fee—a "special assessment"—is an exercise of the government's taxing power, rather than its police power. The principle underlying special assessments is that to meet the cost of public improvements, government may tax property owners who particularly benefit from the improvements. Under this theory, the "taxed" owners pay only for the benefit they receive from the improvement. Consistent with the causation test, however, the Supreme Court has held that "the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation." Also, consistent with Rawls's equality principle and Armstrong's notion of "fairness," the government calculates special assessments to equalize the cost of an improvement among the benefiting property owners. Property owners should bear only their fair share of the cost.

Although some authority suggests that the Nollan-Dolan causation standard should apply only to conditions that constitute physical encroachment, many courts have concluded that an impact fee may be a taking if exacted to pay for improvements that are not reasonably necessary as direct results of a proposed development. In the influential Ehrlich v. City of Culver City decision, the Supreme Court of California held that Dolan's rough-proportionality test and Nollan's causation standard may work to void impact fees if a tenuous link exists between the fee and the proposed development. The court grounded its holding in Armstrong's admonition.

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129 See, e.g., Andres v. Village of Flossmoor, 304 N.E.2d 700 (Ill. App. Ct. 1973) (holding that a $1,000 per building assessment that went to a general fund was unconstitutional).


133 See, e.g., Clajon Prod. Corp. v. Petrea, 70 F.3d 1566 (10th Cir. 1995); Commercial Builders, 941 F.2d at 876; Parking Ass'n v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994); Sprenger, Grubb & Assoc. v. City of Hailey, 903 P.2d 741 (Idaho 1995); McCarthy v. City of Leawood, 894 P.2d 836 (Kan. 1995).


136 Id. at 445-49; see id. at 445 n.8 (discussing Justice Scalia's partial dissent in
against "forcing some people alone to bear public burdens."  

III. IS THE CAUSATION TEST TOO INDETERMINATE?

A. Who Caused the Societal Evil?

Before considering the fairness (equality) and justice (anti-redistribution) rationales underlying the causation test, one should attempt to identify the cause of the societal evil that a law seeks to redress. The causation test advanced in Nollan, Dolan, Scalia's Pennell partial dissent, and the other cases discussed above, makes three assumptions: (1) although a law may favor certain public benefits to the detriment of relatively small groups of individuals, the fairness principle suffers only if those singled out to bear the cost of a regulation did not cause the problem the regulation intends to correct; (2) a court can identify the cause of the societal harm a regulation seeks to ameliorate; and (3) if a court cannot trace the cause of a societal problem to the property owner a regulation affects, under Armstrong, the regulation likely works a taking. If the second assumption is incorrect, a causation test is of dubious merit.

Professor Ronald Coase recognized the problem of locating a societal problem's single causative agent in controversies involving multiple parties. Professor Coase showed that it may be impossible to know whether a regulated property owner or those a regulation protects caused the harm the regulation addresses. Other commentators, such as Professors Joseph Sax, Frank Michelman, and Laurence Tribe, similarly have acknowledged an inherent difficulty in deciding who has harmed whom.

The Supreme Court's reflects the shifting analytical approaches to identifying causal responsibility. In Atchison, Topeka & Santa Fe Railway Co. v.
Public Utilities Commission, the Court held that it was not a taking for a state to require a railroad to bear the costs of constructing grade separations between railroad tracks and adjacent streets because "[t]he presence of these tracks in the streets creates the burden of constructing grade separations in the interest of public safety." Eighteen years earlier, however, in Nashville, Chattanooga & St. Louis Railway v. Walters, the Court concluded that increased motor traffic, rather than the railroad's operations, caused a safety problem. In Nashville, the Court fully embraced the Rawlsian-Armstrong rationale for the Takings Clause and stated that the government could not single out the railroad to bear the cost of advancing the public interest unless the costs imposed on the railroad related to the benefits it derived from the improvements.

Three other Supreme Court takings cases demonstrate the problem of finding a single cause of certain societal problems. In Miller v. Schoene, the Court sustained a regulation that required that the plaintiff destroy his cedar trees because they produced a cedar rust that killed nearby apple trees. Although the Court justified its holding on the basis that the cedar trees caused the harm to the apple trees, one could argue persuasively that because of their proximity and susceptibility to cedar rust, the apple trees' owner created an environment in which the rust could damage his trees. In Hadacheck v. Sebastian, the Court upheld an ordinance that required that a brickyard built far beyond the city cease its operations when the city's population grew too close to it. Although the Court held that the ordinance was not a taking because the brickyard's pollution harmed the encroaching city residents, the Court could have reasoned that the residents caused their harm by voluntarily approaching a known nuisance.

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144 346 U.S. 346 (1953).
145 Id. at 353.
146 294 U.S. 405 (1935).
147 Id. at 422-23; see infra text accompanying notes 162-65 (asserting that Atchison and Nashville are reconcilable).
148 Id. at 428-29. For a discussion of how these grade separation cases reflect the relativism of causation in a takings context, see Michael J. Davis & Robert L. Glicksman, To the Promised Land: A Century of Wandering and a Final Homeland for Due Process and Taking Clauses, 68 OR. L. REV. 393, 422 (1989); Arvo Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 S. CAL. L. REV. 1, 50 (1971).
149 276 U.S. 272, 279-80 (1928).
150 See Michelman, supra note 15, at 1198-99.
151 239 U.S. 394, 410 (1915).
152 See Sax, supra note 15, at 50; see also Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (holding that no taking occurred when town prohibited sand and gravel operation from excavating below water level, even though the owner's operation did not produce any problems until the town's population expanded to within 3500 feet of the pit).
Even the Court’s opinion in *Nollan* is susceptible to challenge based on indeterminacy of causation. Writing for the Court, Justice Scalia concluded that the problem the Coastal Commission sought to correct was inadequate lateral access across beaches and therefore held that the Coastal Commission could not require that the Nollans dedicate a lateral easement parallel to the beach. Two factors buttressed the Court’s holding. First, the Nollans’ proposed use of their beach-front property did not cause inadequate lateral access across the beach. Second, because of this lack of causation, the dedication would amount to an interference with the Nollans’ right to exclude others from their land. Ultimately, however, it was the Nollans’ exercise of their right to exclude that prevented the Commission from imposing the dedication requirement. Thus, one could argue that it was the Nollans who caused the lateral access problem by asserting their right to exclude.

B. Clarifying Causal Indeterminacy

Despite evidence that indeterminacy dooms the causation test, application of Rawls’s and Armstrong’s notions of “justice,” coupled with a closer reading of the cases typically cited to establish the indecisiveness of a causation test, suggests that a causation analysis remains viable. Part VI of this Article points out that Rawls’s and Armstrong’s concepts of justice assume that it is unjust for a law to effect a property transfer from one owner to another. This concept of justice requires that the response to occasional causal indeterminacy cannot be to abandon the causation test in favor of deference to legislatures. If that occurs, legislatures would determine preferred property uses as a policy matter.

Some legal commentators advance legislative control as the solution to the problem of causal indeterminacy. The Supreme Court often adopts

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153 Nollan v. California Coastal Comm’n, 483 U.S. 825, 838 (1987) (“It is quite impossible to understand how a requirement that people already on public beaches be able to walk across the Nollans’ property reduces any obstacles to viewing the beach created by the new house.”) (emphasis added). In *Nollan*, Justice Scalia argued that the Commission could have required that the Nollans dedicate a viewing spot on their land because the proposed changes to their house would cause inadequate visual access. *Id.* at 836.

154 *Id.* at 831.


156 See cases discussed supra Part III.A.

157 See Note, supra note 155, at 456 (“The legislature enacts a rule change when it perceives that the existing balance of entitlements is no longer proper in light of changes in conditions or in the legislative judgment of the public welfare. The ‘social evil’ addressed by the change is thus [not caused by one action but is] actually the existing
this choice when considering a conflict between two uses. In *Miller*, for example, the Court addressed a conflict involving cedar trees that harbored a rust fungus dangerous to apple trees.\(^{158}\) The state ordered the cedar trees cut down without compensating the trees’ owner, but the Court did not review the owner’s takings claim by considering whether the cedar trees had caused a nuisance vis-à-vis the apple trees. Instead, the Court’s decision turned on the strictly utilitarian question of whether the benefits to the apple growers outweighed the cedar trees’ value.\(^{159}\) The Court deferred to the legislature for resolution of this issue and permitted it to decide “upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public.”\(^{160}\)

The Court’s failure in *Miller* to address the causation question violates the Rawls-Armstrong justice principle because it authorized a legislative redistribution of private property from the cedar tree owner to the apple tree grower without compensating the cedar tree owner. Not only is the *Miller* result contrary to the purposes of the Takings Clause, it is also wholly inconsistent with any theory of constitutional protection of private property. The Constitution should not provide greater protection for one type of private property than for another merely because a legislature decides that one type is more worthy than another.

In *Miller*, the inquiry should have been whether the cedar tree owners’ possession or use of their private property caused the damage to the apple trees. If so, a law requiring eradication of the cedar trees would not be a taking. If not, the law at issue in *Miller* likely would be a taking because the Takings Clause’s anti-redistributive justice component prevents a legislature from destroying one class of property to benefit another.

One must ask, however, what courts should do in takings cases if justice counsels against resolving close causal questions by deferring to legislative decisions. An initial response is that courts should not abandon a general causation test merely because one can conjure up factual examples that question the test’s usefulness. In the vast majority of takings cases, determining whether a causal link exists between a property owner burdened with a regulation and a problem that a regulation seeks to redress should not be difficult. In *Pennell*, for example, the apartment owners subject to the rent control were not responsible for the fact that certain tenants were too poor to pay higher rents. Therefore, as Justice Scalia noted in his dissent in *Pennell*, the rule exhibits unconstitutional “unfairness” by “making one citizen pay, in some fashion other than taxes, to remedy a social problem that

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\(^{158}\) *Miller v. Schoene*, 276 U.S. 272 (1928); see supra text accompanying notes 149-50.

\(^{159}\) *Miller*, 276 U.S. at 278-79.

\(^{160}\) Id. at 279.
is none of his creation.” 161

*Atchison* and *Nashville*, which arguably produced divergent results under the causation test, are, in fact, reconcilable. 162 In *Nashville*, the government required that railroads pay for a grade separation between the railroad track and the state highway in order to satisfy a statutory condition to receipt of federal aid for the state highway system rather than meet local needs for safe transportation. 163 The requirement was a taking because only the railroads bore the cost of advancing the state’s interest in obtaining the federal funds. 164 In contrast, in *Atchison* it was the presence of railroad tracks in local streets that “creat[ed] the burden of constructing grade separations in the interest of public safety.” 165 Because the railroads caused the problem in *Atchison*, the government could require that they help pay the remedial costs.

The solution to the causal confusion arguably present in *Miller, Hadacheck*, and *Nollan* 166 can be found in Justice Scalia’s analysis of the Takings Clause in *Lucas*. 167 In *Lucas*, Scalia, writing for the Court, stated that in determining whether a property-use restriction is a taking, a critical inquiry is whether the regulation “proscribe[s] a productive use that was previously permissible under relevant property and nuisance principles.” 168 If a proscribed use was not originally part of a title, no matter how burdensome the regulation, it can resist a takings challenge. If, however, a limitation does not “inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership,” 169 then without an adequate causal link, the restriction is likely a taking.

*Lucas* suggests that the initial inquiry should be whether a use of property that is subject to regulation creates a societal problem that state law either forbids or characterizes as a nuisance. If it does either, then state law

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161 Pennell v. City of San Jose, 485 U.S. 1, 23 (1988).
164 *Id.* at 429.
165 *Atchison*, 346 U.S. at 353.
166 *See* Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987); *Miller v. Schoene*, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915); *see also supra* text accompanying notes 149-55.
167 *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); *supra* text accompanying notes 57-65 (analyzing Justice Scalia’s opinion in *Lucas*).
169 *Id.* at 1029. The only Supreme Court decisions emphasizing causation as an element in takings analysis are those authored by Justice Scalia.
has determined that a causal link exists between the property use and the societal harm, and the Takings Clause is not triggered. Upon application of Lucas's reliance on state law to Miller, Hadacheck, and Nollan, any remaining causal indeterminacy largely disappears.

If the Court had decided Miller after Lucas, the question for it would have been whether the cedar trees' owner created a nuisance with respect to the apple trees. If under applicable state nuisance law the cedar trees were a nuisance to the apple trees, then the regulatory burden on the cedar trees' owner was not a taking. Whether the cedar trees were a nuisance is a close question, in large part because the spores moved from cedar to apple trees by their own motion or by the forces of nature, but not by any act of the cedar tree owner. Although the answer to this question is not obvious, the takings question, properly posed, involves causation and should not hinge on a legislative preference for certain classes of property.

Courts address causation in virtually every common law nuisance action. Further, nuisance law survives despite the occasional cases in which it is difficult to pinpoint proximate cause. Causation is also a critical element of standing under Article III. Although it is not always easy to trace an injury to conduct, the Court still analyzes causation when examining whether a plaintiff has standing. Similarly, the fact that a difficult case like Miller might arise should not negate causation as the appropriate takings test when policymakers subject property owners to a regulation after wrongly assuming that the owners were responsible for a societal evil.

Hadacheck is analytically similar to a “coming to the nuisance” case. The Court’s refusal to find a taking in Hadacheck seems justified after Lucas because as a matter of state nuisance law, the brickyard was a nuisance to the residential housing that was built in the brickyard’s vicinity. Although the residents came to the nuisance, that fact operated, at most, as a partial offset to the brickyard’s losses. Indeed, several commentators have concluded that the facts in cases similar to Hadacheck “support the requirement that [a] prohibition or regulation must compel an owner to eliminate a public evil created by him.”

170 See Epstein, supra note 33, at 114.
174 Epstein, supra note 33, at 119-21; see supra text accompanying notes 151-52.
175 Epstein, supra note 33, at 120.
Finally, only in abstract legal commentary can one say seriously that the causation question regarding the lateral beach access problem in *Nollan* was indeterminate and resulted from the willingness of the burdened property owners to exercise their power to exclude. Exercise of a constitutional and common law property right can never in any real sense "cause" a societal evil. *Nollan*’s causation analysis is correct. The problem of inadequate lateral beach access likely had many contributing causes, including too few public easements and too many Californians who wished to traverse the shorefront. The Nollans’ proposed new house, which may have obstructed the ocean view for drivers, could not possibly have caused a lateral access problem for people who walked along the public beach behind their house. Without a causal link to the Nollans, the dedication condition was "an out-and-out plan of extortion," a violation of Rawls’s equality principle and *Armstrong*’s fairness principle, and a taking.

IV. **THE FAIRNESS RATIONALE AND EQUALITY PRINCIPLE**

To the extent that the Supreme Court chooses to articulate the purpose of the Takings Clause, it usually quotes *Armstrong*’s statement that the Clause "was designed to bar Government from forcing some people alone to bear public burdens." This simple statement contains an important rule: It is unfair, and therefore impermissible, for a government to single out a particular property owner, or limited class of property owners, to pay for improving the general public condition when they did not create the need for the improvement. Similarly, John Rawls’s equality principle rejects a legal system that regards persons who did not cause a societal evil as a means of correcting the evil for society’s greater good.

When the Court does not cite *Armstrong*’s Takings Clause explanation, it typically uses language that concurs with the rule in that case. In both *Keystone Bituminous Coal Ass’n v. DeBenedictis* and *Agins v. Tiburon*, the Court explained that the “determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.” Long before *Armstrong*, in *Pennsyl-

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177 See supra notes 153-55 and accompanying text.
180 *RAWLS*, supra note 4, at 179-80.
vania Coal v. Mahon, Justice Holmes confirmed that Armstrong's explanation for the Takings Clause was correct when he noted that in regulatory takings cases "the question at bottom is upon whom the loss of the [regulatory] changes desired should fall."[185]

The manner in which lower courts altered their constitutional analysis of takings claims after Armstrong evidences the influence of its rule. This shift is particularly noticeable in cases in which a government imposed burdens on property owners in the form of conditions and exactions necessary to obtain permission to develop the property. Prior to Armstrong, a common view was that publicly imposed conditions were the price a developer had to pay to have a plat approved and recorded and to receive the benefits and services of being within a local government’s jurisdiction. After Armstrong, lower courts increasingly used Armstrong's causation test when reviewing ordinances and regulations that required a property developer to dedicate land for community needs, such as open space, parks, schools, and sewers, or to pay fees in lieu thereof. The pertinent question is whether the costs of public services and facilities are attributable to changes and growth pressures resulting from new property development. If so, the law properly burdens property owners, it meets Armstrong’s fairness requirements, satisfies Rawls’s equality principle, and does not effect a taking.

A. Fairness and Causation

The Supreme Court repeatedly voiced the "fairness" basis for the Takings Clause long before it decided Armstrong. What, in a takings context, does "fairness" mean? Conversely, what makes a regulation so unfair that it works a taking?

Pre-Armstrong Supreme Court takings cases suggest that the Takings Clause promoted fairness by requiring that property owners receive compensation for loss of economic value of their property due to government action designed to promote the public welfare, especially where the burdened

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184 260 U.S. 393 (1922).
185 Id. at 416.
186 See, e.g., Mefford v. City of Tulare, 228 P.2d 847 (Cal. 1951); Petterson v. City of Naperville, 137 N.E.2d 371 (Ill. 1956).
187 See cases discussed supra Part II.C.
property’s link to that public welfare was tenuous. In United States v. Willow River Power Co., for example, the Court explained that “[t]he Fifth Amendment . . . undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project.” The Court’s apparent willingness to utilize the Takings Clause to protect property owners “who happen to lie in the path” of some government enterprise implies a special sensitivity to property owners whose use did not prompt the government action but were merely convenient targets of opportunity. Justice Scalia’s dissent in Pennell, in which he commented that “the unfairness of making one citizen pay, in some fashion other than taxes, to remedy a social problem that is none of his creation,” reflects this early view.

Legal commentators generally have agreed that to the extent that fairness drives takings jurisprudence, a regulation is more likely to be unfair, and therefore effect a taking, when two conditions are present: (1) the regulation is designed to confer benefits that will advantage the public good, or a group of individuals but not necessarily an affected property owner’s interests, and (2) a regulated property owner is not responsible for the societal problem whose correction will result in the public benefit. For example, two years after Armstrong, Professor Allison Dunham observed that the Takings Clause “involves largely an ethical judgment . . . that compensation must be paid for loss suffered to create a public benefit, but need not be paid for loss suffered when government removes a public harm ‘created’ by an owner or his property.” Professor Arvo Van Alstyne wrote in 1971 that “[w]here the advantage obtained from a mandatory expenditure [forced on a property owner] is enjoyed primarily, if not exclusively, by persons other than the one required to make it, . . . the basic unfairness of [an] imposition seems obvious.”

The question remaining, however, is why is it necessary to have a link between a regulated private property use and a societal problem whose removal will result in a public benefit? Alternatively, why is it unfair and therefore an unconstitutional, uncompensated taking to impose on a property owner, or a single class of owners, the costs of solving a societal problem not caused by the owner(s)? The answer lies in Rawls’s equality principle,
which intertwines with the Takings Clause.

B. Equality and Causation

Unlike "justice," which concerns efficiency and the distributive consequences of public policies, "fairness" reflects on any disparity between how the law treats a regulated property owner relative to other, similarly situated but nonregulated property owners and the public. John Rawls’s concept of equality is grounded, in part, on this notion of fairness. Rawls argues that equality is a societal goal composed of three elements: (1) egalitarianism—“each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others”; (2) the “difference principle”—“social and economic inequalities are to be arranged so that they are . . . reasonably expected to be to everyone’s advantage;” and (3) maximization of a person’s “share”—changes from an equal distribution are permissible so long as these changes seek to maximize the share of minority groups. Rawls’s three conditions roughly correspond to the three components of “fairness” within the Takings Clause: (1) horizontal equity, (2) the singling-out prohibition, and (3) the just-share principle.

1. Horizontal Equity, the Equal Protection Clause, and Takings

Fairness and equality respect “horizontal equity,” which assumes that it is unfair, and therefore improper, for a law to fail to treat similar people alike. Horizontal equity is one basis for the Equal Protection Clause, which requires that no state “deny to any person . . . the equal protection of its laws.” It also helps define the purpose of the Takings Clause, which, as Armstrong explains, is to “bar Government from forcing some people alone to bear public burdens.” Because horizontal equity principles underlie both the Equal Protection Clause and the Takings Clause, it is not surprising that they do not overlap. Indeed, Nollan expressly acknowledges the related nature of the two clauses by pointing out that if the Nollans were required to correct a portion of the lateral beach access problem that they did not cause, “the State’s action, even if otherwise valid, might violate

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196 RAWLS, supra note 4, at 60.
197 Id.
198 Id. at 61; see also Raymond, supra note 16, at 586, 605.
200 U.S. CONST. amend XIV, § 1.
either the incorporated Takings Clause or the Equal Protection Clause.\footnote{\text{202} Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 (1987).} Some lower courts have assumed, consistent with \textit{Nollan}, that a law that singles out certain property owners to bear the burden of correcting a societal problem can be unconstitutional under both the Takings and Equal Protection Clauses.\footnote{\text{203} See, \textit{e.g.}, Christopher Lake Dev. Co. v. St. Louis County, 35 F.3d 1269, 1274-75 (8th Cir. 1994).}

The Court employs quite different levels of scrutiny, however, when it reviews challenges to socioeconomic regulation based on these clauses. Under the Equal Protection Clause, the Court requires only that a law rationally relates to some legitimate state interest.\footnote{\text{204} See, \textit{e.g.}, F.C.C. v. Beach Communications, Inc. 508 U.S. 307, 313-15 (1993) (applying rational basis test to equal protection analysis).} By contrast, takings claims are subject to more exacting scrutiny under intermediate judicial review.\footnote{\text{205} Compare \textit{id. with} Dolan v. Tigard, 512 U.S. 374, 389-90 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1022-31 (1994); \textit{Nollan}, 485 U.S. at 834-35 n.3 ("Our opinions do not establish that these standards [of review for takings claims] are the same as those applied to . . . equal protection claims.").}

The difference between the levels of scrutiny are difficult to explain because the inquiry is often the same when property owners bring challenges under either clause: Has the law imposed a regulatory burden on one class of property owners (or one property owner) that restricted property use and that caused a landowner's property to suffer an economic diminution in value? One possible explanation for the distinction between the two clauses may lie in their slightly different purposes. The Equal Protection Clause seems to protect individual property owners in an economic market from special burdens not imposed upon similarly situated owners operating in the same market. Often, a regulation puts one market actor at a competitive disadvantage with respect to seemingly similar market actors. For example, in \textit{FCC v. Beach Communications, Inc.},\footnote{\text{206} 508 U.S. 307 (1993).} a broadcasting facility brought an equal protection challenge against a federal statute that permitted a federal agency to franchise some facilities but not others. In \textit{City of New Orleans v. Dukes},\footnote{\text{207} 427 U.S. 297 (1976).} the ordinance under attack prohibited pushcart vendor sales in the city's French Quarter, except for sales by vendors who had operated in that area for at least eight years.

In the equal protection context, the Court asks two questions: (1) Does the classification affect a suspect class, a quasi-suspect class, or an exercise of a fundamental right?; and (2) If not, is the classification "rationally" related to a proper state goal?\footnote{\text{208} See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).} If the answer to the latter query is yes, neither the Equal Protection Clause nor the principle of horizontal equity is
violated.\(^{209}\) This result seems correct because the Equal Protection Clause should not prevent inequalities caused by government regulation between market actors within a relevant market system when an arguable distinction explains why the regulation treats some actors differently than others. In \textit{Beach Communications} and \textit{Dukes}, the Supreme Court sustained the classifications under attack because it found a rational distinction among broadcasting facilities in \textit{Beach}\(^ {210}\) and among pushcart vendors in \textit{Dukes}.\(^ {211}\) So long as the government advances a valid state interest, a classification that favors one market participant over another, similarly situated participant, should withstand an equal protection challenge.\(^ {212}\)

In contrast, the Takings Clause does not prevent the government from singling out individual property owners from similarly situated owners, but it does protect a property owner who the government singles out from the community at large. In this situation, the consequence of burdening a property owner is not to place that owner at a competitive disadvantage in the marketplace. Rather, the consequence is to benefit the public by requiring that a private party either supply a public facility, service, or function or correct a general societal evil. If a burdened property owner did not cause the societal need the government sought to remedy, a court should conclude that the regulation effected a taking because that circumstance violates the principle of horizontal equity within the Takings Clause.

Unlike horizontal equity within equal protection, which involves inequalities among actors in the market system, horizontal equity within the Takings Clause protects against inequalities caused by government regulation outside the market system.\(^ {213}\) A nonmarket-based equality principle is consistent with \textit{Armstrong}'s explanation of the Takings Clause. It is both unfair and unconstitutional for a regulation to discriminate invidiously between a property owner and the public in order to bring about some public nonmarket-based benefit. "[Members of the] public as a whole"\(^ {214}\) should bear equally the costs of those benefits. This principle is also consistent with Rawls's view of equality, which requires that permissible inequalities benefit everyone.\(^ {215}\) If property owners who are not the cause of a problem must correct it, they supply a benefit to the public and are not treated equivalently to similarly situated members of the public.


\(^{210}\) \textit{Beach Communications}, 508 U.S. at 313-15.

\(^{211}\) \textit{Dukes}, 427 U.S. at 303-05.

\(^{212}\) See Note, \textit{supra} note 70, at 1036.


\(^{214}\) \textit{Armstrong v. United States}, 364 U.S. 40, 49 (1960).

\(^{215}\) Raymond, \textit{supra} note 16, at 604-05.
2. Takings and the Singling-Out Prohibition

Although the Takings Clause’s “fairness” requirement involves horizontal equity, and although it is related to (though not identical to) the purposes underlying the Equal Protection Clause, it demands more from a regulation than general equality between the public and a burdened property owner. Both the Supreme Court and legal commentators have acknowledged that fairness requires that regulations of private property evenly distribute a burden among similarly situated landowners. To avoid a taking, a law must not “localize” the burdens of a public policy if no causative relationship exists between a regulated, privately owned location and an otherwise valid public policy.\(^{216}\)

This component of fairness questions whether a private property regulation is discriminatory and thus produces a result equivalent to “reverse spot” zoning, which arbitrarily burdens a particular parcel for different, less favorable treatment than similar neighboring parcels. This kind of discrimination violates the “singling-out prohibition,” which stems from Rawls’s requirement that minority populations receive protection and that any inequalities ultimately benefit all.\(^{217}\) The prohibition also derives from the Court’s observation that an uncompensated taking results from requiring that individual property owners bear the cost of advancing the public interest, especially if targeted owners have not, in comparison to other property owners, uniquely contributed to the addressed societal problem.\(^{218}\) Nollan explicitly recognized the singling-out prohibition when it warned,

> If the Nollans were being singled out to bear the burden of California’s attempt to remedy [the problem of congestion on public beaches], although they had not contributed to it more than other coastal landowners, the State’s action . . . might

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\(^{216}\) See Torres, \(supra\) note 59, at 17 (“The Takings Clause was designed to prevent the government from localizing all of the burdens of a particular public policy.”).

\(^{217}\) RAWLS, \(supra\) note 4, at 60-62.

\(^{218}\) See; e.g., Pennell v. City of San Jose, 485 U.S. 1, 20 (1987) (Scalia, J., concurring in part and dissenting in part) (“[I]f the owner’s use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly.”); Raymond R. Coletta, Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence, 40 AM. U. L. REV. 297, 351 (1990) (commenting on how the Court in Armstrong recognized a constitutional limitation to singling out “isolated individuals [to] . . . subsidize general social programs”).
There are two dimensions to the prohibition within Armstrong’s fairness rationale for the Takings Clause. First, for a regulation to avoid the prohibition, a nexus must exist between the burden a regulation places on a particular property owner (or owners) and the contemplated property use that triggered the regulation. This nexus exists, and an owner is not unfairly singled out, if the causation test is satisfied. Causation demands that a proposed property use uniquely contribute to the societal problem targeted by the regulation that burdens the property owner.

Second, the prohibition helps ensure that the government does not unfairly select property to bear losses that should be distributed among the public generally or among similar but otherwise unregulated parcels of property. Without the prohibition, a law may seek to force individual property owners to subsidize general societal programs in a manner contrary to Rawlsian theory and Armstrong. Pennell exemplifies the first situation, in which the public should bear the cost of the public improvement. In his partial dissent, Justice Scalia cautioned that the “existence of... renters who are too poor to afford even reasonably priced housing” was a “problem caused by the society at large.” Therefore, imposing an economic burden, such as rent restrictions, on one class of property owners, such as landlords, to correct this problem unfairly singles them out and effects a taking.

Nollan also involved the second situation, in which the cost of the benefit should be shared among similar properties. In Nollan, the Court identified the societal problem as beach congestion. The Court noted, however, that the Nollans had “not contributed to it more than other coastal landowners.” Therefore, the dedication requirement imposed on the Nollans was an example of the state singling them out to bear the burden of the government’s attempt to remedy the problem. The Court determined that the requirement was unfair and violated the Takings Clause.

\[\text{References:}\]
\[\text{\textsuperscript{219} Nollan v. California Coastal Commission, 483 U.S. 825, 835 n.4 (1987) (emphasis added).}\]
\[\text{\textsuperscript{220} See John J. Costonis, Presumptive and Per Se Takings: A Decisional Model for the Taking Issue, 58 N.Y.U. L. REV. 465, 488 (1983) (noting that fairness within the Takings Clause requires “connection between a measure’s goals and the burdened property’s use”); Kmiec, supra note 45, at 1651 (arguing that a nexus requirement should be applied to measure “whether the burden of the regulation is properly placed on this landowner”).}\]
\[\text{\textsuperscript{221} See Costonis, supra note 220, at 487.}\]
\[\text{\textsuperscript{222} Pennell, 485 U.S. at 21 (Scalia, J., concurring in part and dissenting in part).}\]
\[\text{\textsuperscript{223} Id.}\]
\[\text{\textsuperscript{224} Nollan, 483 U.S. at 835.}\]
\[\text{\textsuperscript{225} Id. at 835 n.4.}\]
C. Takings and the Just-Share Principle

The "just-share" principle is another element of fairness that shares certain characteristics with the idea of equality but which does not actually demand that a regulation treat property owners equally in order to avoid the Takings Clause. That principle holds that it is a presumptive taking when an individual property owner has borne more than a just share of the cost of furthering the general public interest.\footnote{See Coletta, supra note 218, at 351-52; Susan Rose-Ackerman, Against Ad Hocery: A Comment on Michelman, 88 COLUM. L. REV. 1697, 1708 (1988).} The principle is consistent with Rawls's belief that variations from an equal distribution of wealth are permissible if they benefit minority groups by maximizing their share of society's resources.\footnote{RAWLS, supra note 4, at 61-62.} The just-share principle originated in the 1893 Supreme Court decision Monogahela Navigation Co. v. United States,\footnote{148 U.S. 312 (1893).} which foreshadowed the rationale for the Takings Clause set out in Armstrong:

[The Takings Clause is designed to] prevent[] the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.\footnote{Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922).}

This statement of the just-share principle recognizes lawful imposition of some losses and burdens without compensation. Justice Holmes conceded this point in Pennsylvania Coal Co. v. Mahon\footnote{Id. at 325; see also Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 512 (1987) (Rehnquist, C.J., dissenting); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 83 n.7 (1980).} when he noted that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."\footnote{Id. at 413.} The burdens that government cannot constitutionally impose and that violate Monogahela's just-share principle are those that require that property owners "surrender[] to the public something more and different from that which is exacted from other members of the public."\footnote{Monogahela, 148 U.S. at 325.} The "more-and-different-from" test is simply a version of the dispropor-
tionate-impact rule applied to regulation. The disproportionate-impact rule assumes that although laws, particularly exercises of the police power, can impact individuals, that impact should be proportionate to the individual’s activity that triggers the need for regulation. The rule thereby prevents policymakers seeking regulation from enjoying benefits in excess of costs \(^{233}\) or from requiring that regulated property owners bear costs in excess of benefits. \(^{234}\) Indeed, the disproportionate-impact rule and the just-share principle are the essence of *Dolan*’s “rough-proportionality” test. This test permits courts to find a taking if no reasonable relationship exists between an exaction imposed as a condition of government permission for private property development and the impact of the proposed development. \(^{235}\)

The just-share principle does not compel *equality* of burden sharing. \(^{236}\) Rather, it only demands only that regulations burden property owners with their “just” or fair share of the costs of advancing the public good. If property owner A contributes more to creating a societal problem than neighboring owner B, the law may impose a greater regulatory burden on A than B. For example, if the Nollans had wanted permission to build a dock connecting their house to the ocean, that obstruction to the public’s lateral access along the beach would be “more and different from” other neighboring coastal landowners who do not have, nor desire, such docks. In this situation, the Nollans also would have caused a societal problem by blocking lateral movement along the beach. Thus, the Nollans’ just share of their burden of promoting the public’s interest in lateral beach access would not be equal to their neighbors’.

When the government requires that one property owner shoulder more than a fair or just share of a public burden, the Takings Clause remedy—compensation—redistributes economic cost from property owners to the public. If a land-use regulation violates the just-share principle, the primary exception to the Constitution’s compensation remedy is the situation in which a regulation provides an owner with offsetting benefits. Part V discusses this “reciprocity of advantage” exception.

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\(^{233}\) Such policymakers become, in effect, free riders, because they experience a benefit paid by a third party rather than by the beneficiaries.


\(^{236}\) For a contrary and incorrect view, see Note, *supra* note 70, at 1045 (commenting on “[t]he equality of burden sharing promoted by Armstrong”).
V. SATISFYING THE FAIRNESS-EQUALITY STANDARD

When the Rawlsian-Armstrong fairness and equality standard is not met, it is typically because the regulation fails to meet two takings tests. First, an unconstitutional regulation is one that does not require a causal nexus between a proposed property use and a societal problem that it addresses. Second, an unconstitutional regulation is one that is inconsistent with horizontal equity, the singling-out prohibition, or the just-share principle. Conversely, the standard may be satisfied, and compensation unnecessary, if a regulation satisfies one of three conditions: (1) the use of property subject to regulation caused the problem that the regulation seeks to correct; (2) if causation is absent or attenuated, the burdened property owner received an offsetting reciprocal benefit from the regulation; or (3) if causation is marginal, the regulation arises from a public program that adjusts the benefits and burdens of economic life to promote the common good.

A. The Presence of Causation

Traditional land-use regulation satisfies the fairness-equality principle when there is some causal relationship between the private property use restricted by the regulation and the societal evil that the regulation intends to remedy. So long as an owner's property use is, or may be, the source of a societal problem, no violation of Armstrong's "singling out" prohibition occurs. The presence of two conditions precedes finding a causation nexus sufficient to permit, without compensation, either restrictions on property use or affirmative obligations on property owners. First, the societal problem a regulation addresses must originate with some current or projected property use by its owner. The easiest way to meet this nexus test is for a government regulator to (1) identify an existing or proposed property use that will result in, or has produced, a negative consequence that a specific class of people will experience, and (2) select a regulation of that use that will eliminate or ameliorate the consequence. For example, consider the case of a new subdivision


238 Id. at 20.

239 Id. at 20 (noting that there must be "a cause-and-effect relationship between the property use [subject to] the regulation and the social evil that the regulation seeks to remedy").

240 Id. at 20-21.

whose population will increase traffic on an existing highway leading to the subdivision. A local government may require that the subdivision’s developer help widen that highway by dedicating land adjacent to the highway, paying fees to the government for road-widening purposes, or constructing and paying for additional traffic lanes. These requirements would not be takings because they simply compel an owner to eliminate a public problem directly created by the owner’s property use. The government would be able to meet the two conditions necessary to establish a causative nexus: (1) the developer’s decision to build the subdivision caused the societal problem of increased traffic, and (2) the regulation that will burden the property owner (dedication, fees, or construction obligations) will likely remedy the problem.242

Conversely, a regulation would be a taking if the police power addressed a societal problem that neither caused nor was capable of being corrected, through the chosen regulation.243 If a local government imposed a fee on a developer to help build new government offices in order to replace outdated existing offices, this action would be a taking. The problem of outdated offices would not be attributable to the subdivider, and the societal evil that the subdivider caused—the increased traffic volume on the existing highway—would not be remedied by the fee-for-new-offices requirement. This particular fee suffers from an additional defect: the fee aids neither an identifiable class of persons nor the community-at-large; rather it affects the government.

If the primary beneficiary of a regulation is not a discrete group but instead the general public, the rule is the same—a regulation may compel an owner to eliminate a public evil created by an owner’s property use, but cannot require the owner to “act only to promote the public interest by pro-


243 See, e.g., Pioneer Trust and Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961); Coronado Dev. Co. v. City of McPherson, 368 P.2d 51 (Kan. 1962); Divan Builders Inc. v. Planning Bd., 334 A.2d 30 (N.J. 1975). Many of the cases striking down exactions as violating the Takings Clause did so after adopting the strict “specifically and uniquely attributable” causation test. In Dolan, the Supreme Court rejected this test as commanding a too “exacting correspondence” between the exaction and the need created by the property use. Dolan, 512 U.S. at 389.
viding without cost something the public wants.”

If a restriction addresses a problem whose removal will benefit the public, a targeted property owner may be burdened. The burden, however, may extend only to that owner’s fair share of the public benefit. Furthermore, that fair share must arise from the specific use of property that contributes to the problem.

In *Keystone*, the Court sustained the Pennsylvania Subsidence Act’s restrictions on private coal production because the state was “acting to protect the public interest in health, the environment, and the fiscal integrity of the area” from “subsidence . . . caused by the extraction of underground coal.” Moreover, the Act required that the coal company keep in place only that quantity necessary to prevent subsidence, which entailed less than two percent of the total coal the company owned.

Similarly, the Court rejected a takings challenge to a federal statute imposing liability on employers withdrawing from a multi-employer pension plan in *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, mainly because the plaintiff could not show “its withdrawal liability . . . to be ‘out of proportion to its experience with the plan.’” Laws authorizing a government to take property without compensation in the face of compelling necessity will be upheld only if the restriction “extends no further than the emergency which creates it.”

A combination of the fair-share and causative-link requirements likely will prevent governments from requiring land to be left substantially in a natural state in order to secure legitimate but diffuse public environmental benefits. Although earlier cases upheld orders by government agencies prohibiting private development of ecologically sensitive lands, such as wetlands, alluvial valleys and shorelines, recently, parties successfully

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244 See Fred BosseLMAN ET AL., THE TAKING ISSUE 206, 292 (1973); Dunham, *supra* note 176, at 75.

245 See Monongahela Navigation Co. v. United States, 158 U.S. 312, 325 (1893) (stating that the Takings Clause should prevent “the public from loading upon one individual more than his just share of the burdens of government”); Costonis, *supra* note 220, at 487 (noting that “compensable takings will still be found when government is unable to establish the linkage required of the just-share principle”).

246 Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470 (1987); see *supra* Part II.A.

247 *Keystone*, 480 U.S. at 488.

248 *Id.* at 474 (emphasis added).

249 *Id.* at 498.


251 *Id.* at 645.


253 See, e.g., Tabb Lakes, Ltd. v. United States, 10 F.3d 796 (Fed. Cir. 1993);
have asserted that the Takings Clause protects the right of private parties to develop their property, despite the threat posed to these sensitive lands. In *Lucas*, the Court voided a prohibition against building certain residences along a shoreline, irrespective of the conceded public interest in shoreline protection that the restriction would further. The Court of Appeals for the Federal Circuit has found the United States liable for compensation under the Takings Clause when a federal law (1) prevented a mining company from developing a coal field under an otherwise protected alluvial valley floor, or (2) blocked land development and reclamation projects affecting environmentally fragile wetlands. In these situations, the fact that the restriction would further the general public interest in environmental quality could not justify government action that "single[d] out a few property owners to bear burdens, while benefits are spread widely across the community."

A government regulation can impose on property owners their proportionate share of the costs of correcting a societal problem that their property use caused if the primary beneficiaries of the correction are a discrete group of persons or the general public. What seems completely impermissible is a situation in which a regulation causes a transfer of private property rights to the government itself in order to benefit specially or augment a real property interest owned by the government. For example, in *Connolly v. Pension Benefit Guaranty Corp.*, the Supreme Court denied a takings challenge against a federal law that required that an employer withdrawing from a multiemployer pension plan pay the employer’s proportionate share of the plan’s unfunded vested benefits. The Court found it important that "the United States has taken nothing for its own use." Conversely, several state courts have found takings when local laws restricting private property uses worked to benefit land owned by the government.

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254 *Lucas*, 505 U.S. 1003; *see supra* Part II.A.

255 *Lucas*, 505 U.S. at 1018 (stating that regulations that “requir[e] land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm”).


257 Creppel v. United States, 41 F.3d 627 (Fed. Cir. 1994); Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994).

258 *Creppel*, 41 F.3d at 631.

259 *See Stoebuck, supra* note 242, at 1092-94.


261 *Id.* at 224 (emphasis added).

262 *See, e.g.*, Hageman v. Board of Trustees, 251 N.E.2d 507 (Ohio Ct. App. 1969) (finding that a regulation benefiting an air force base was a taking); Miller v. City of
TAKINGS AND CAUSATION

When the effects of a regulation benefit a governmental entity in the use of land in which it holds incidents of ownership, one need not address the causative issue in order to determine if a taking occurred. This is because the regulation requires that the burdened property owner furnish a government benefit rather than a public benefit. The plain language of the Takings Clause demands compensation in this case, in which the government literally took private property for "public use."\textsuperscript{263}

B. When Causation Is Absent or Attenuated

1. Reciprocity of Advantage

One exception to a causation requirement of the Takings Clause occurs when a regulation abridges ownership rights while addressing a societal problem that an owner's exercise of a property right did not cause but instead, it secures for the owner an "average reciprocity of advantage."\textsuperscript{264} Reciprocity of advantage may be present when a law offsets a decrease in property value that results from the law's application to a particular parcel with an increase in value that stems from its general application to similar properties.\textsuperscript{265} Reciprocity of advantage also may be present when a property owner who has suffered burdens as a result of a regulation receives certain benefits from the same law.\textsuperscript{266}

The genesis of the reciprocity defense lies in nineteenth century cases that calculated just compensation subject to exercise of eminent domain. These early state courts assumed that when the government exercised eminent domain to acquire part of a parcel of private land, payment for that property could be reduced by the increase in value that accrued to the remainder of the parcel as a result of the condemnation.\textsuperscript{267} When municipal

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\textsuperscript{263} See Sax, \textit{supra} note 15, at 63.

\textsuperscript{264} Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922) (Holmes, J.).


\textsuperscript{266} United States v. Sperry Corp., 493 U.S. 52, 60 (1989); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.21 (1987); Student Loan Mktg. Ass'n v. Riley, 104 F.3d 397, 402 (D.C. Cir. 1997). There is some conflict over whether there should be a balance between the benefits and burdens of a regulation or whether a regulation's benefits may be considerably less than its burdens. See, e.g., Jackson v. Rosenbaum, 260 U.S. 22, 30 (1922).

governments imposed comprehensive land-use-planning regulations, especially zoning, throughout the early twentieth century, landowners' property values theoretically increased because of a regulation that segregated incompatible uses. These benefits served two constitutional functions in a regulatory context by providing: (1) a justification for the exercise of the police power, and (2) sufficient compensation under the Takings Clause that justified reductions in value from the restrictions on land use.

a. The Holmes-Brandeis Paradigms

i. Justice Holmes's Limited View of Reciprocity

Justice Holmes conceived the reciprocity-of-advantage defense as blocking constitutional challenges to a land-use restriction when two conditions were present. First, the regulated property owner must have caused the problem subject to the regulation. Second, because the burden the regulation imposed equaled the benefit derived therefrom, there was no uncompensated taking of the owner's property. For example, in the 1914 case of Plymouth Coal Co. v. Pennsylvania, coal mine owners challenged a state law that required that a pillar of coal remain along the border of adjoining property. Speaking for the Court, Holmes concluded that this law was not an unconstitutional taking because the problem the law addressed—worker safety in adjoining mines—was a direct result of the mining activities of coal mine owners subject to the regulation, and all of the coal miners burdened by the regulation also would receive an in-kind "average reciprocity of advantage" from it because adjacent mines would not threaten their mines.

In contrast, in Pennsylvania Coal, Holmes found that the law at issue had worked an uncompensated taking because the second of the two conditions was unmet. The anti-surface subsidence statute attacked in Pennsylvania Coal required some coal to remain in situ to protect surface dwellings from the effects of underground coal extraction. The coal mine owners caused the surface subsidence, but unlike the owners in Plymouth Coal, Holmes thought that the coal mine owners in Pennsylvania Coal did not receive any benefit from the law. Instead, the surface owners were

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266 See HFH, Ltd. v. Superior Court, 542 P.2d 237, 246 (Cal. 1975), for a modern explanation of the reciprocity of advantage rationale. Earlier cases relying on the rationale include Cockran v. Preston, 70 A. 113 (Md. 1908), and Piper v. Ekern, 194 N.W. 159 (Wis. 1923).

269 See Coletta, supra note 218, at 302.

270 232 U.S. 531 (1914).

271 Id. 232 U.S. at 540.


273 See id. at 412.

274 Id. at 413-14.
the beneficiaries. In effect, the law transferred property from coal mine owners to surface owners, which prevented coal mine owners from securing an average reciprocity of advantage. Read together, Holmes's opinions in *Plymouth Coal* and *Pennsylvania Coal* limit application of the defense. In order for a reciprocity-of-advantage defense to defeat a takings challenge, burdened parties must have caused the harm that the regulation addresses and have received in-kind benefits for their losses in the transaction.

ii. **Brandeis's Expansion on the Notion of Reciprocity**

Justice Brandeis's dissent in *Pennsylvania Coal* argues for significantly broadening the scope of the reciprocity-of-advantage defense. Brandeis argued that the defense could justify a law whose purpose was to confer a benefit upon the general neighborhood or to protect the public from "detriment or danger." In the latter case, when the public interest was implicated, Brandeis suggested that there need be no nexus between the burden and the benefit. His notion of average reciprocity would be satisfied if a property owner affected by a regulation received in return only "the advantage of living and doing business in a civilized community" subject to property restrictions that furthered the general public welfare. Brandeis's position is a classic utilitarian view of government.

This attenuated connection between restrictions on property use and public advantages gained thereby could, in theory, justify regulations that would fail under the Holmes model. Brandeis was unconcerned about whether there is a causative link between the property subject to regulation and the goal of the regulation. The primary issue under Brandeis's formula is whether a regulation accomplishes a public purpose. If it does, it is irrelevant that the affected owner experiences intangible and diffuse benefits. It is enough that the restriction will provide the owner with the advantages of living in a society in which the police power restricts property for the good of the general community to which the owner belongs.

The contrasting Holmes- and Brandeis-reciprocity paradigms have played a significant role in takings jurisprudence since 1978. Between 1978 and 1987, the Brandeis-utilitarian view dominated the Court's deci-
sions. In 1978, in *Penn Central*, the Court sustained a landmark preservation law despite the fact that the law not only deprived the property owner of its right to build on its property but also did not impose similar restrictions on all properties within a particular location. What was important to the Court was that the law benefited the entire community "by improving the quality of life." This is the Brandeis notion of reciprocity of advantage. According to *Penn Central* (and Brandeis), governments can assert the reciprocity defense to takings challenges if the benefits were public, rather than in-kind or private, and inured to the affected property owner simply by its membership in the community where the regulation applied.

In subsequent takings cases, the Supreme Court reaffirmed the utilitarian belief that reciprocity sufficient to defeat a takings claim could be present if a law conferred benefits on society and the burdened property owner lived in that society. In *Andrus v. Allard*, the Court justified a restriction on property by referencing Brandeis’s explanation in *Pennsylvania Coal* that property owners must "bear the . . . burden [of regulation] to secure the advantage of . . . doing business in a civilized community." In *Agins v. City of Tiburon*, the Court upheld a restrictive land use law, in part, because it believed that the landowner and the public benefited from a law that "serve[d] the city’s interest in assuring careful and orderly development."

Two 1987 cases pushed the outer boundaries of the reciprocity of advantage concept. In *Keystone*, the Court upheld an anti-subsidence statute virtually identical to the one deemed to be a taking in *Pennsylvania Coal*. The Court assumed that the government could assert successfully the reciprocity defense even when the benefits received and the burdens imposed did not originate in the same legislation and were grossly unequal such that regulatory burdens far outweighed benefits the coal owners experienced. In *Hodel v. Irving*, the Court voided a federal statute that abolished the right of members of an American Indian tribe to transfer property to their heirs. The court found that the law destroyed an essential property right—the right of descent and devise. Nonetheless, apart from this defect, the majority noted that the statute would have encompassed an average reciprocity of advantage sufficient to sustain the law because it was intended

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285 Id. at 67.
287 Id. at 262.
289 Id. at 491 n.21; Coletta, supra note 218, at 338-39.
291 Id. at 716.
to benefit the tribe as a whole.\textsuperscript{292} Similarly, in \textit{Penn Central} and \textit{Andrus}, the Court considered that the property owners impacted by the regulations received sufficient advantage through their citizenship in a community that the regulation benefited.\textsuperscript{293}

These decisions not only embrace the Brandeis-utilitarian view of reciprocity, they also advance an argument that even Brandeis did not endorse—that restrictions on property that confer \textit{any benefit on society} provide affected property owners with an average reciprocity of advantage. Under this view, virtually all legislation that somehow advances public health, safety, or welfare supplies to an affected property owner sufficient compensation to stop a takings challenge because the owner is a member of the general public. Moreover, under \textit{Keystone}'s variant of reciprocity, the advantage that the burdened property owner experienced need not result from the legislation that created the burden.

If this had remained the Court's position, the causation requirement would have been gutted. Causation requires some linkage and proportionality between private use of property, a resulting societal problem, and a regulation designed to address the problem. A broadened reciprocity of advantage defense permits a court to uphold a law that largely destroys the value of an owner's property so long as the law provides diffuse benefits to the entire community. It is then largely irrelevant whether the owner's use of property would have prevented the community from experiencing this benefit but for the regulation.

\textbf{iii. Readoption of the Holmes Model}

Throughout the period when the reciprocity of advantage defense dominated, some Justices continued to voice strong disagreement with the expansion of that doctrine. In vigorous dissents, often by Chief Justice Rehnquist, a minority of the Court argued that the two conditions first articulated by Justice Holmes defined the scope of the reciprocity defense: (1) the burdened property owner must have caused the societal problem that precipitated the need for the regulation, and (2) the regulation must provide to the owner direct, in-kind benefits like those exemplified in \textit{Plymouth Coal}.\textsuperscript{294}

The dissent in \textit{Penn Central} questioned the majority's failure to adopt or apply either condition. First, the dissent argued that under the challenged landmark designation law, only a handful of properties designated official landmarks, but these properties were only marginally responsible for any possible threat to the historical and aesthetic character of New York

\textsuperscript{292} \textit{Id}. at 715-16.
\textsuperscript{293} \textit{See supra} notes 283-85 and accompanying text.
\textsuperscript{294} \textit{See supra} notes 230-34 and accompanying text.
Therefore, relying on Armstrong, the dissent concluded that the plaintiff’s property was unfairly “singled out and treated differently from surrounding buildings.” This meant that the law improperly had imposed “the cost associated with the city of New York’s desire to preserve . . . ‘landmarks’ . . . on the owners of . . . individual properties [instead of on] all of its taxpayers.”

Second, the dissent maintained that the reciprocity of advantage defense should not have applied because “the landmark designation impose[d] upon [the plaintiff] a substantial cost, [and there was] little or no offsetting benefit except for the honor of the designation.”

To satisfy the reciprocity of advantage defense, the Penn Central dissent rejected the Brandeis rationale, which assumes that “the advantage of . . . doing business in a civilized community” is sufficient. It instead adopted Holmes’s view, which permits the reciprocity defense only if “[a]ll property owners in a designated area are placed under the same restrictions, . . . for the benefit of . . . one another.” This statement is fully consistent with John Rawls’s belief that “social and economic inequalities are to be arranged so that they are . . . reasonably expected to be to everyone’s advantage.

In his dissent in Keystone, Rehnquist again criticized the majority for its failure to address Holmes’s two conditions. The challenged anti-surface subsidence legislation had “load[ed] upon [the coal companies] more than [its] just share of the burdens of government.” Therefore, the legislation failed to satisfy both the “fair-share” and causation requirements. Moreover, the Keystone dissent warned of the possible consequences of the majority’s broad interpretation of reciprocity of advantage. If lawmakers successfully could invoke the defense simply by acting in pursuit of broadly applicable health, safety, or welfare protection, government surely would have “much greater authority than we have recognized to impose societal burdens on individual landowners.”

Justice Rehnquist’s admonitions commanded a majority of the Court in

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296 Id. at 140.
297 Id. at 139.
298 Id.
299 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting).
300 Penn Central, 438 U.S. at 140.
301 RAWLS, supra note 4, at 60 (emphasis added).
303 Id. at 513.
Nollan. As discussed in Part II,\textsuperscript{304} the Court in Nollan found a taking after applying Armstrong’s causation requirement.\textsuperscript{305} It also refused to adopt the Brandeis notion of reciprocity of advantage. The Court conceded that a regulation protecting lateral beach access advanced a legitimate state interest.\textsuperscript{306} Nevertheless, it was not enough that the burdened property owner might, as a member of the general public, indirectly share in this benefit by having marginally more access across state beaches.\textsuperscript{307} For reciprocity to exist, the property owner must enjoy some direct, private, in-kind compensation as a result of the regulation. The benefit to the Nollans was public and indirect, and there was no nexus between the proposed use and a societal problem created by that use that the regulation removed.\textsuperscript{308} Although in his dissent Justice Brennan justified the regulation by applying Brandeis’s expanded model of reciprocity,\textsuperscript{309} the majority adopted Holmes’s more narrow definition.

Nollan signaled that the Court would no longer use broadened, utilitarian reciprocity principles to justify property regulation. Justice Scalia’s dissent in Pennell\textsuperscript{310} and the Court’s opinions in Lucas\textsuperscript{311} and Dolan\textsuperscript{312} all point to a return to Holmes’s version of reciprocity. In Pennell, the burdened property owners (landlords) contended that a rent control regulation was a taking because they did not receive direct, in-kind, or indirect benefit from the regulation.\textsuperscript{313} The only possible gain that accrued to them was in their capacity as citizens in a larger community where poor tenants were not made worse off by high rents.\textsuperscript{314} Although the majority did not address the merits of this claim, Scalia did. He agreed with the landlords and rejected the Brandeis-utilitarian—“living-in-a-civilized-community” notion of reciprocity as too tenuous where the burdened property owner did not cause the a priori poverty some tenants experienced, and the real consequence of the rent control law was redistribution of a landlord’s property to a hardship

\textsuperscript{304} See supra Part II.B.


\textsuperscript{306} Id. at 841.

\textsuperscript{307} Id.

\textsuperscript{308} See id. at 838.

\textsuperscript{309} Id. at 847-48 (Brennan, J., dissenting) (arguing that the Nollans received benefits sufficient to satisfy reciprocity demands because, as California citizens, they might enjoy additional access to the state’s beaches).

\textsuperscript{310} Pennell v. City of San Jose, 485 U.S. 1, 15-24 (1988) (Scalia, J., concurring in part and dissenting in part); see supra Part II.B.

\textsuperscript{311} Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); see supra Part II.B.

\textsuperscript{312} Dolan v. City of Tigard, 512 U.S. 374 (1994); see supra Part II.B.

\textsuperscript{313} Pennell, 485 U.S. at 9.

\textsuperscript{314} Id. at 13.
tenant. Indeed, the regulation in *Pennell* was more similar to the law found to effect a taking in *Pennsylvania Coal*. In both cases, the government actions did not bring about reciprocity because they transferred wealth from the burdened property owner to a limited class of beneficiaries rather than working toward accomplishing some broad public purpose. This type of wealth transfer also violates Rawls's principles of equality and justice.

The Court's *Lucas* and *Dolan* opinions underscored the relevance of causation and the relative irrelevance of reciprocity after *Nollan* and Scalia's *Pennell* dissent. In *Lucas*, Justice Stevens, the author of the majority opinion in *Keystone*, dissented. In attempting to resurrect *Keystone*’s expanded notion of reciprocity, Justice Stevens used the utilitarian argument that the law in question was valid because it served an important public purpose and was a *general* statewide policy. The legitimate environmental goal of shoreline protection therefore would benefit an owner whose property was subject to the regulation because the owner would be a citizen of a state with less eroded shorelines. According to Stevens, the generality of the law prevented the state from violating the fair share principle because it could not load "upon one individual more than his just share of the burdens of government."

The majority in *Lucas* rejected this argument. After *Lucas*, if a regulation "specifically directed to land use" deprives land of all economically viable use, it is still a taking, regardless of the importance of its purpose or its generality. By ignoring Brandeis's vision of reciprocity, which Justice Stevens advanced, and by discounting generality as a justification for oppressive laws, *Lucas* served notice that reciprocity of advantage likely

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315 Id. at 21-22.
316 See *Pennsylvania Coal* v. Mahon, 260 U.S. 393 (1922); *supra* notes 2, 193 and accompanying text.
317 The parallels between the regulations challenged in *Pennsylvania Coal* and *Pennell* are striking. The critical point in *Pennsylvania Coal* was that the statute caused a transfer of rights from one finite class of property interests (coal owners) to another (surface owners). See Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 So. Cal. L. Rev. 561, 580-81 (1984). Apart from lacking a causative nexus between the societal problem and the affected property owners, the problem with the rent control law in *Pennell* was that it also caused a wealth transfer—between the property owners (the landlords) and a limited class of beneficiaries (poor tenants).
318 See *supra* notes 23-33 and accompanying text.
321 See *Lucas*, 505 U.S. at 1075 (Stevens, J., dissenting).
322 Id. (Stevens, J., dissenting).
323 Id. at 1071-72 (quoting Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893)).
324 Id. at 1027 n.14 (emphasis added).
would be a successful defense only if the benefits to a burdened owner are private, direct, and in-kind.

*Dolan* completed the Court’s return to a more modest Holmesian notion of reciprocity. The city’s regulation of Mrs. Dolan’s property was a taking because the city failed to demonstrate that her proposed property use would cause a public evil (flooding and traffic congestion) that was proportionate to the burden imposed on her (requiring her to dedicate property for a storm drainage system and a bicycle and pedestrian pathway). Two aspects of the opinion strongly indicate that the Court no longer accepts Brandeis’s argument that a regulation could still impose these burdens on Mrs. Dolan because she received certain reciprocal benefits from it. First, the majority explicitly noted that no matter how “laudable” (and general) the city’s goals of reducing flood and traffic hazards, it was still improper to saddle Mrs. Dolan with more than her fair share of the cost of attaining these goals. Second, Justice Stevens’s dissent, rather than the majority, made the case for Brandeis’s view of reciprocity. With the *Dolan* decision, it appears that the Court has readopted the limiting conditions to the reciprocity defense that Justice Holmes first advanced in *Pennsylvania Coal*.

b. *The Proper Scope of the Reciprocity Defense*

There are two views of the reciprocity of advantage defense. Holmes’s version permits a government regulation to survive a takings challenge if there is some evidence that a party whom the regulation burdens caused the societal problem that the regulation addresses, and that party received direct, in-kind compensation. The alternative, Brandeis’s version, is less concerned with causation and focuses instead on whether the regulation produces a general benefit that the burdened property owner will share. This model assumes a more expansive definition of reciprocity. If the benefits are purely public, a property owner, as a member of the public, will receive sufficient compensation from those diffuse benefits to prevent a successful takings challenge. One early Supreme Court decision summarized Brandeis’s notion of reciprocity when it concluded that even if a landowner experienced a financial loss from a regulation, the regulation was not a taking if the owner was “compensated for it by sharing in the general benefits which...
the regulations are intended and calculated to secure.”

One policy justification for Brandeis’s view of reciprocity lies in the argument that private property derives value from the legal rules that provide the security necessary for the property market to operate. Property owners benefit from these rules, which permit them to increase the worth of their property in a marketplace in which the law enforces property transactions. If property depends on law, regulations of property based on law offer regulated owners reciprocal advantages because such regulations are merely part of a larger legal regime that already has benefited the owners.

A utilitarian would argue that private-property value is closely linked to its societal context. Without a healthy socio-economic structure, private property would yield little economic return. Therefore, when a regulation affects property rights in order to bring about a better society, the property owner already has gained from being in an organized, civilized society and will gain additional benefits if the regulation further improves the general societal setting. For example, an environmental rule restricting property uses may limit the economic potential of a parcel of property, but by supplying the entire community with improved environmental quality, the rule allows an owner to enjoy the benefit of a clean environment. In the long run, property rights may be more valuable if they exist in a clean, rather than a degraded, environmental context.

Although the argument that property owners occasionally must sacrifice their economic self-interest in order to enjoy the benefits of a governed and organized society is superficially appealing, this utilitarian view of the reciprocity defense suffers from several serious defects. First, a regulation that appears to benefit the public may mask a wealth transfer from one class of property owners to another. As Part VI discusses more fully, private sector reassignments of ownership rights are constitutionally suspect because they often result from a rule that compels certain targeted individuals to receive privately subsidized societal programs. This result is inconsistent with the “justice” principle that Rawls and Armstrong advance.

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331 See generally Coletta, supra note 218, at 362-64.
334 But see John A. Humbach, Constitutional Limits on the Power to Take Private Property: Public Purpose and Public Use, 66 OR. L. REV. 547, 585-86 (1988) (stating that regulatory transfers from private persons to other private persons are noncompensable).
335 See supra notes 24-33 and accompanying text.
Second, Brandeis's version of reciprocity risks removing causation as an element in the takings calculation. If reciprocity exists because a regulation benefits society generally by removing a societal evil, the government may require that a property owner with only a tenuous connection to that societal problem help furnish the public benefit without receipt of compensation. Causation should not be irrelevant, however. If the burdened property owner did not cause the societal problem that a regulation intends to remedy, that owner is being singled out to bear the cost of advancing the public interest. Armstrong's fairness rule and Rawls's equality principle correctly demand that a government not force these private property owners to contribute more than their fair share of the public burden. 336

Third, Brandeis's model, taken to its logical extreme, as in Keystone, effectively would swallow the Takings Clause so long as a regulation burdening private property in some fashion advanced the public interest. In Keystone, the “advantage” the property owner enjoyed did not result from the statute that created the burden. 337 So long as a statute confers any benefits on the society in which an owner exists, reciprocity would be present, and no taking would result. The government could then circumvent its just-compensation duty simply by providing some reciprocal benefits to the general community, even if the reciprocal value to the property owner was far less than what just compensation requires. This would lead to the anomalous result that a property regulation reasonably related to a public purpose could never be a taking.

It would be inconsistent with the text and purpose of the Takings Clause to adopt this approach. Pennsylvania Coal held that a government’s otherwise proper exercise of regulatory authority does not, and should not, preclude a finding that such action is a compensable taking. 338 Indeed, the Takings Clause already assumes that the government is acting in the public interest. A broad application of reciprocity of advantage improperly would give lawmakers essentially free rein to affect adversely property values while pursuing the traditional police power ends of health, safety, and welfare. 339

Although a government defendant can raise a reciprocity-of-advantage defense, the reciprocity should be Holmes’s version. A government should not require particular property owners to subsidize desired public programs

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336 See Rose-Ackerman, supra note 226, at 1707-08.
337 See supra notes 303-04 and accompanying text.
unless the targeted owners have somehow uniquely contributed to the need for the regulation. Reciprocity sufficient to defeat a takings claim requires that the owners receive a direct in-kind benefit rather one due solely to their membership in the general community. This is the better rule, and the one that the Supreme Court and many lower courts have now endorsed.\footnote{340}

2. Adjusting the Benefits and Burdens of Economic Life

Two other situations exist in which a missing or tenuous causal link between regulation and private-property use may not be constitutionally fatal under the Takings Clause: (1) where a rule serves an important public interest, or (2) a regulated property owner has actual or imputed knowledge of a regulatory scheme that might impact the property in the future. When either of these factual predicates is present, the Court often rejects takings challenges because the “interference with the property rights of an [owner] arises from a public program that adjusts the benefits and burdens of economic life to promote the common good.”\footnote{341}

The “adjusting-burdens-and-benefits” rationale permits the Court to sustain legislation that ordinarily would fail Rawls’s equality principle or the “fairness” component of Armstrong’s test because it promotes general welfare by uniquely burdening some people more than others.\footnote{342} The rationale also validates certain regulations that otherwise would be uncompensated takings because they “unjustly” caused transfers of property rights from one class of persons to another class. If regulations adjusting benefits and burdens of economic life take private rights for the private use of others, those regulations typically are immune from invalidation under the Takings Clause.


\footnote{342} See Penn Central, 438 U.S. at 133.
so long as the transfer of rights was designed to bring about some larger public purpose or was a reasonably foreseeable risk that the burdened property owner assumed.

a. Promotion of the Public Good

Both *Lucas* and *Nollan* state that "land-use regulation does not effect a taking if it ‘substantially advance[s] legitimate state interests." Similarly, the "adjusting-benefits-and-burdens" exception to the Takings Clause applies if the "adjustment" of private rights promotes the public good. Taken literally, these two government defenses to takings claims would remove virtually all chance of success in challenging a burdensome regulation if the regulation simply advanced a legitimate state interest or promoted the public good. To prevent this result, the Court has circumscribed the nature and definition of a public benefit that will justify an uncompensated taking. Three public interests in particular allow uncompensated adjustment of private rights even when causation is largely absent and the law reassigned ownership rights from one private owner to another.

First, a countervailing fundamental constitutional interest may outweigh the exercise of a private property right. For example, in *Kirchberg v. Feenstra*, the Court approved an uncompensated taking of a mortgagee’s lien. The lien was an encumbrance on a wife’s interest in community property, but her husband created the lien under a Louisiana community law that gave a husband, as “head and master,” exclusive control over the disposition of community property. The Court found that the lien was a taking and invalidated it. The lien was invalid, however, because the “head and master” rule was a form of unconstitutional gender-based discrimination. Similarly, in *PruneYard Shopping Center v. Robins*, the Court held that a California state court ruling that required owners of private shopping centers to permit “speech and petitioning” on shopping center premises did not constitute a taking. As in *Kirchberg*, in which a redistribution of property rights was tolerable because of equal protection concerns, in *PruneYard*, the First Amendment interest outweighed the shopping center owners’ property right of exclusion.

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343 See Humbach, supra note 334, at 585-86.
345 *Lucas*, 505 U.S. at 1024; *Nollan*, 483 U.S. at 834.
346 See supra note 289.
347 See infra notes 351-53 and accompanying text.
348 See generally Humbach, supra note 334, at 587-88.
350 *Id.* at 459-60.
Second, in times of imminent peril, emergency, or war, the government may destroy private property without compensating its owners in order to respond to the crisis. In United States v. Caltex, Inc., the Court considered whether compensation was due when the retreating United States Army ordered the destruction of private oil storage facilities in Manila to prevent their capture by the invading Japanese. In United States v. Central Eureka Mining Co., the issue was whether the Takings Clause was triggered by the War Production Board’s order that gold mining cease so as to ensure that hard-rock miners produced ore essential to the war effort. In both cases, the Court determined that compensation was unnecessary, even though the property taken did not create the emergency. In these situations, the government actions furthered a public interest far more important than economic property loss.

Third, legislative redistribution of wealth may be acceptable when a statute’s purpose is to release assets frozen by an existing legal regime. This type of legislation rejects the assumption that common law arrangements of property rights are entitlements; rather, legislation that rearranges the distribution of rights and liabilities presumes that proper reallocations of wealth can result either from private, socio-economic competition or from legal institutions. When property rights and assets have been locked up so long that they are not in play in the marketplace, the law should not protect the status quo; instead, it should change the rules to render the property available for market transactions. Texaco, Inc. v. Short, for example, shows how the Supreme Court validates this type of legislation in the face of a takings challenge. The statute at issue in Texaco provided that unused mineral interests existing at the time of its enactment would be extinguished and merged into the surface interest out of which they were carved unless their owner filed a claim in the county recorder’s office. Although the law redistributed mineral interests from subsurface to surface owners, it did not work a taking because it furthered the “legitimate state goal” of “encourag[ing] owners of mineral interests to develop the potential of those interests.”

352 344 U.S. 149 (1952).
354 Id. at 168-69; Caltex, Inc., 344 U.S. at 154-55.
355 See Central Eureka, 357 U.S. at 168. It is far more difficult to find an emergency of such overwhelming necessity as to negate a taking when a government helped create the circumstances causing the emergency. See Colman v. Utah State Land Bd., 795 P.2d 622, 629 (Utah 1990).
356 See Torres, supra note 59, at 3-4, 12-13.
357 454 U.S. 516 (1982).
358 Id. at 518.
359 Id.
360 Id. at 529 (emphasis added).
The Court employed a similar rationale in *Demorest v. City Bank Farmers Trust Co.*

In *Demorest*, the Court considered legislation that permitted use of a remainderman’s interest in a trust estate in order to make payments to the life tenant in excess of the trust income. Despite this redistribution from remainderman to life tenant, there was no unconstitutional taking because, as with in *Texaco*, the purpose of the law was to end the unnecessary rigidity [surrounding] the whole cluster of vexatious problems arising from uses and trusts . . . and testamentary directions for accumulations . . . . [The legislature should be able] to make further reasonable rules which in its opinion will expedite and make more equitable the distribution of millions of dollars of property *locked in testamentary trusts*, even if they do affect the values of the various interests and expectancies under the trust.

**b. Notice and Assumption of Risk**

Another theory permits the government to adjust the benefits and burdens of economic life absent causation if the property owner had an opportunity to avoid a taking but nonetheless chose to enter a market or participate in a program in which there was a foreseeable risk that the owner’s property interest might be affected by a change in the law. In this situation the law presumes that the owner accepted the risk of subsequent regulation and therefore may not complain when a rule interferes with a property interest placed at risk.

This assumption-of-risk rebuttal to takings challenges is most successful when the burdened property owner has ample notice of the possibility that the property interest might be burdened by regulation or subject to future liability. If there is notice, the property owner has no reliance interest and is said to have assumed the risk of future economic loss. The market also has discounted for the possibility of a subsequent restraint, so neither an owner

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362 *Id.* at 37 n.1.
363 *Id.* at 48-49 (emphasis added).
364 See, e.g., *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 639-40 (1993) (holding that employers accepted the foreseeable risk that they could be liable for withdrawing from a multiproject pension plan); *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935) (holding that a claim to a particular form of money was subject to an uncompensable risk that Congress would regulate the money to the detriment of the claimant); *Garelick v. Sullivan*, 987 F.2d 913, 916-17 (2d Cir. 1993) (holding that physicians who voluntarily chose to participate in the Medicare program cannot claim that the program’s price regulation is a taking).
nor a purchaser can claim a loss in investment.\textsuperscript{365}

Often this notice is actual, particularly if existing legislation explicitly warns that subsequent retrospective interference with property interests is possible.\textsuperscript{366} Sometimes notice may be constructive. For the situation of a property owner who does business in a highly regulated field, for example, the Court has held that such an owner "cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end."\textsuperscript{367} In either case, the owner's complicity effectively estops a takings claims when noticed legislation produces an adverse impact on property interests.

VI. TAKINGS AND "JUSTICE": WHEN GOVERNMENT REGULATION REDISTRIBUTES WEALTH

"Fairness" and "equality" implicate the question of whether a law singles out a property owner to bear a burden to correct a problem that the owner did not create; "justice" addresses the effect of the law on those who will benefit from it. Justice is absent if a law redistributes privately owned resources from one property owner or owners to a recipient who has needs that likely will be improved by the redistribution but are not attributable to the impacted owner. Armstrong reminds us that a forced redistribution of property from "A" to "B" is precisely what the Takings Clause intends to prevent.\textsuperscript{368} The Clause uses the adjective "just" because forced redistributions without compensation do not serve the purposes of justice.\textsuperscript{369} John Rawls concurs. He argues that redistributions of wealth that force an individual to bear the cost of a public good are unjust.\textsuperscript{370} The only intentional redistributions of wealth permitted are through taxation and inheritance laws.\textsuperscript{371}

Part VI explores the kinds of state-mandated wealth transfers which, absent causation, are so unjust as to give rise to successful takings claims.

\textsuperscript{365} Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994); Bowles v. United States, 31 Fed. Cl. 37, 51 (1994).


\textsuperscript{368} See William Michael Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 YALE L.J. 694, 711-12 (1985).

\textsuperscript{369} BRUCE ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 28 (1977).

\textsuperscript{370} RAWLS, supra note 4, at 282-83.

\textsuperscript{371} Id. at 277.
These transfers encompass redistributions from either a property owner or a class of property owners to government, the public, individuals, or a discrete group. In each case, the question under the Takings Clause is whether some individuals can be made to shoulder more societal costs than others.

A. Transfers to the Government

Transfers in which a government acquires private rights in its corporate capacity for its own use or by its designees for public service and utility use always require compensation.\(^{372}\) The government must pay just compensation if it takes private title and transfers to itself easements for flood control, drainage, and access.\(^{373}\) There is almost certainly a taking if a law benefits a government entity in the use of land in which it holds incidents of ownership\(^{374}\) and if the interest transferred is of the type that a burdened private property owner might transfer to another private person.\(^{375}\) For example, it likely would be a taking if a city passed either an excessively stringent noise ordinance to benefit a nearby public hospital or a single-family residential zoning classification in order to prevent private competition with a public housing project.\(^{376}\)

A taking also occurs if a government action causes a transfer of possession to some government beneficiary.\(^{377}\) In *Griggs v. Allegheny County*,\(^{378}\) the Court found a taking because a harm to private land resulted from congressionally authorized use of air space by jet airplanes.\(^{379}\) The Court recognized that an airplane approach path over the plaintiff’s land served Allegheny County’s airport’s interests.\(^{380}\) Nonetheless, the Court required that the county compensate the plaintiff because the noise, vibration, and danger resulting from airplane use of the county airport damaged the

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376 Stoebuck, supra note 242, at 1094.


378 369 U.S. 84 (1962).

379 Id. at 89; see also United States v. Causby, 328 U.S. 256 (1946).

380 Griggs, 369 U.S. at 81.
plaintiff’s property, and the county’s action effected a transfer of possession from the plaintiff to the air travelers, which in turn benefited the county airport. The Court also found significant that the landowner in *Griggs* did not cause the problem that the government action intended to correct by building the airport and permitting airplanes to fly over the plaintiff’s property. The transfer of possession to a government beneficiary plus the absence of a causal relationship did produce an uncompensated taking.

An important exception to the normal rule against redistributive legislation that benefits primarily the government is the situation in which tax laws take money from taxpayers to pay for the government. Such tax laws can be justified by two characteristics of tax legislation. First, the taxes produce benefits for the taxpayer, creating an average “reciprocity.” Second, taxes generally do not violate the singling-out prohibition because they typically spread the burden throughout the entire class of persons whose wealth, property, or income level meet the standard for tax liability. Rawls agrees that a government may redistribute wealth through taxation.

B. Transfers to the Public

The redistributive consequences of regulation become more complex if a regulation’s beneficiary is not the government and if the regulation does not redistribute wealth from one group to another but rather the state takes the wealth or property of some people for public benefit. The Takings Clause applies to these situations because, as the Court has reminded us, “The Fifth Amendment . . . undertakes to redistribute certain economic losses inflicted by public improvements so that they fall upon the public rather than wholly upon those who happen to lie in the path of the project.”

Most land use and environmental laws burden certain private property owners in order to bring about a public benefit. These laws include setback requirements, height regulations, lot and building size controls, restraints on use by zoning classifications, landmark preservation restrictions, pollution abatement requirements, wildlife and habitat protection laws, and open-space preservation rules. Although such laws do not transfer title to the government, they do transfer to the public an attribute of private property. Further, they impose a servitude on private property in which the government, not other owners, retains the discretion and power to enforce the regulations by legal action or to rescind the restrictions. A regulatory transfer thereby grants to the public some general land use or environmental improvement,
and to the government, it grants a negative easement in gross.\textsuperscript{386}

The core question, of course, is whether these regulatory transfers require just compensation. One would not want to proffer a rule that made all regulatory transfers compensable, for this would not only ignore the benefits secured by the burdened property owner as a member of the public but also likely would halt the execution of many worthwhile exercises of the police power.\textsuperscript{387} On the other hand, from the property owner’s point of view, it matters little whether the government condemns the land, floods it, or restricts it by an open-space regulation so that it may be used only in its natural state. All of these government actions take private property for public use and thereby place the transfer squarely within the language of the Takings Clause. Moreover, the Court has repeatedly emphasized that it is “the deprivation of the former owner rather than the accretion of a right or interest to the sovereign [that] constitutes [a] taking.”\textsuperscript{388}

In the case of regulatory transfers, these conflicting pressures are reconciled best by reference to the factors that underscore Rawls’s equality principle and the \textit{Armstrong} admonition against laws that unfairly and unjustly single out individuals to bear public burdens.

First, a property owner should not be required to bear the cost of a regulatory transfer unless a court finds that the owner’s use of the property that a regulation affects is either the sole or a contributing cause of the problem that the regulation seeks to address, and there is a substantial likelihood that the regulation will correct the problem.\textsuperscript{389}

Second, a regulation effecting a wealth transfer that benefits the public should fail if there is no (or little) linkage between the owner’s use of property and the goal a regulation seeks to achieve, and the government entity

\begin{itemize}
\item Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922) (“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.”).
\item Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1004-05 (1984) (quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945)) (“Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of . . . most of his interest in the subject matter, to amount to a taking.”).
\item Nollan v. California Coastal Comm’n, 483 U.S. 825, 834 n.4 (1987) (holding that the Nollans cannot be “singled out to bear the burden of California’s attempt to remedy these problems [if] they had not contributed to it more than other coastal landowners”); \textit{see also id.} at 837 (“[C]onstitutional propriety disappears . . . if the [regulation] utterly fails to further the end advanced as the justification for the [regulation]”). Alternatively, if private property is connected to a societal need, a law that imposes an economic burden on that class of private property is not a taking if the law addresses the need. \textit{See} United States v. Frame, 885 F.2d 1119, 1138 (3d Cir. 1989); Goetz v. Glickman, 920 F. Supp. 1173, 1179 (D. Kan. 1996).
\end{itemize}

Finally, a regulatory transfer is an uncompensated taking if a relatively small group of property owners uniquely experience a legal burden, persons other than the affected property owner primarily enjoy the public gain resulting from the law, and in-kind benefits flowing directly from the law's implementation do not offset the burden.\footnote{\textit{Pennell v. City of San Jose}, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part) (noting that such "off budget" wealth transfers occur with "relative invisibility and thus relative immunity from normal democratic processes"); \textit{Surfside Colony v. California Coastal Comm'n}, 277 Cal. Rptr. 371, 376 (Ct. App. 1991) (holding that an agency cannot require a dedication of public access through a private beach as a condition for permission to build a rock revetment if construction of the revetment did not cause the need for additional public access); \textit{Torres}, \textit{supra} note 59, at 15 (asserting that although the government may arbitrate disputes between private actors, it may not "aggrandize" its own position in relation to private actors) (citing \textit{Sax}, \textit{supra} note 15, at 62-64). If there is a substantial connection between a proposed development of property and a problem that will be addressed by imposing some exaction on a developer, a wealth transfer to the public is permissible, especially if correction of the problem is not funded solely by the developer. \textit{Commercial Builders v. Sacramento}, 941 F.2d 872, 875 (9th Cir. 1991).} Such a law is inconsistent with the notion of fairness.\footnote{\textit{Penn Cent. Transp. Co. v. New York City}, 438 U.S. 104, 147-48 (1976) (Rehnquist, J., dissenting); \textit{Great N. Ry. v. Cahill}, 253 U.S. 71 (1920); \textit{Delaware, L. & W.R. Co. v. Town of Morristown}, 276 U.S. 182 (1928).} Under these doctrines, if a government requires that a property owner surrender to the public some incident of property ownership that is more, and different, from that exacted from other members of the public, the government action may be an uncompensated taking unless the burdened property owner enjoys a proportionate share of the benefits.\footnote{\textit{Pennell v. City of San Jose}, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part) (noting that such "off budget" wealth transfers occur with "relative invisibility and thus relative immunity from normal democratic processes"); \textit{Surfside Colony v. California Coastal Comm'n}, 277 Cal. Rptr. 371, 376 (Ct. App. 1991) (holding that an agency cannot require a dedication of public access through a private beach as a condition for permission to build a rock revetment if construction of the revetment did not cause the need for additional public access); \textit{Torres}, \textit{supra} note 59, at 15 (asserting that although the government may arbitrate disputes between private actors, it may not "aggrandize" its own position in relation to private actors) (citing \textit{Sax}, \textit{supra} note 15, at 62-64). If there is a substantial connection between a proposed development of property and a problem that will be addressed by imposing some exaction on a developer, a wealth transfer to the public is permissible, especially if correction of the problem is not funded solely by the developer. \textit{Commercial Builders v. 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App. 1991) (holding that an agency cannot require a dedication of public access through a private beach as a condition for permission to build a rock revetment if construction of the revetment did not cause the need for additional public access); \textit{Torres}, \textit{supra} note 59, at 15 (asserting that although the government may arbitrate disputes between private actors, it may not "aggrandize" its own position in relation to private actors) (citing \textit{Sax}, \textit{supra} note 15, at 62-64). If there is a substantial connection between a proposed development of property and a problem that will be addressed by imposing some exaction on a developer, a wealth transfer to the public is permissible, especially if correction of the problem is not funded solely by the developer. \textit{Commercial Builders v. Sacramento}, 941 F.2d 872, 875 (9th Cir. 1991).}

C. Transfers to Another Property Owner or Identifiable Group

Another class of redistributive legislation that produces takings questions is governmentally imposed wealth transfers of private property from one private party or group of private parties to another. For example, rent control laws transfer wealth from landlords to tenants by reducing a landlord's income and the tenants' monthly payments.\footnote{\textit{Dolan v. City of Tigard}, 512 U.S. 374, 389-92 (1994); \textit{Pennell v. City of San Jose}, 485 U.S. 1, 22 (1988); see also \textit{Pennell v. City of San Jose}, 485 U.S. 1, 22 (1988) (Scalia, J., concurring in part and dissenting in part) (noting that such "off budget" wealth transfers occur with "relative invisibility and thus relative immunity from normal democratic processes"); \textit{Surfside Colony v. California Coastal Comm'n}, 277 Cal. Rptr. 371, 376 (Ct. App. 1991) (holding that an agency cannot require a dedication of public access through a private beach as a condition for permission to build a rock revetment if construction of the revetment did not cause the need for additional public access); \textit{Torres}, \textit{supra} note 59, at 15 (asserting that although the government may arbitrate disputes between private actors, it may not "aggrandize" its own position in relation to private actors) (citing \textit{Sax}, \textit{supra} note 15, at 62-64). If there is a substantial connection between a proposed development of property and a problem that will be addressed by imposing some exaction on a developer, a wealth transfer to the public is permissible, especially if correction of the problem is not funded solely by the developer. \textit{Commercial Builders v. Sacramento}, 941 F.2d 872, 875 (9th Cir. 1991).} Similarly, legislation de-
signed to prevent surface subsidence from mining may cause the value of the mine property to decline while raising the value of surface properties. The government may act to bring about this kind of reallocation of private rights when it believes that the existing private market will not support transactions that will lead to a state in which no possible change in position would make one party better off without making another worse off. Market conditions supporting redistributive legislation occur if policymakers perceive that an existing distribution of wealth is not optimal. If these policymakers reject the notion that an existing distribution of wealth is an entitlement, and if they believe that the current allocation of property is so stagnant that normal private transactions will not move the society closer to optimality, then redistributive legislation will be likely. A regulation that rearranges an extant distribution of rights, assets, and liabilities intends to supersede normal market mechanisms in order to force a transaction that will benefit one party, and harm no one.

Wealth transfers that take property from one category of private party and give it to another category of private party likely violate the Rawls-Armstrong "justice" component of the Takings Clause. Such laws have two debilitating characteristics: (1) they deprive a property owner of an incident of property ownership that otherwise would provide some benefit to the owner, and (2) they transfer this incident of property ownership to someone else who, as a consequence of the law, exercises property rights in it. Both the deprivation and the transfer are unjust if a party deprived of property did not cause the societal problem that a transfer seeks to alleviate.

1. Deprivation

If a class of property owners faces a possible regulation that will take their property and give it to others, they likely will expend resources to resist adoption of the redistributive legislation. This resistance may be par-
ticularly fierce if those who a proposed regulation will burden do not believe that they are responsible for the condition that precipitated the political demand for regulation. This expenditure by property owners dissipates overall wealth, reallocates resources away from economic investments, and encourages litigation and lobbying efforts.\footnote{See Richard A. Epstein, \textit{Taxation, Regulation, and Confiscation}, 20 Osgoode Hall L.J. 433, 441 (1982).} Wealthy property owners then are in a lose-lose scenario: If they do nothing, government action will deprive them of their property; if they resist, they will have to tap into their wealth in order to pay for the costs of litigation and/or lobbying.

This result is completely inconsistent with the Locke-Madison belief that a country will survive if its citizens have the opportunity to acquire wealth, but that this opportunity exists only if the law assures some reliance and continuity in property expectations.\footnote{JOHN LOCKE, \textit{SECOND TREATISE OF GOVERNMENT} § 34 (P. Laslett ed. 1963); \textit{THE FEDERALIST} No. 10, at 78 (James Madison) (Clinton Rossiter ed. 1963).} A legal system that requires continuous property transfers among private parties thwarts planning, investment, and security, and discourages wealth production.\footnote{Rose, \textit{supra} note 317, at 586. \textit{But see} Rubenfeld, \textit{supra} note 139, at 1141.} The resulting demoralization is particularly acute if the class of property owners saddled with the exaction did not cause the societal evil that the government is addressing through use of their property.

2. \textit{Transfer}

Apart from the harm that the loss or threatened loss of private property engenders, the coerced transfer itself also has two negative consequences. First, compulsory redistribution of wealth assumes that need alone generates an entitlement.\footnote{See Epstein, \textit{supra} note 401, at 441.} An institution of welfare based upon this premise ignores the wishes of donors who may not consent to a forced transfer and perpetuates a class of needy donees who, because they can rely on intervention by the state, do not need to seek benefits directly from the rich. Second, this type of wealth transfer permits governments to avoid the normal political processes that make decisionmakers accountable for their actions. If a government does not use taxes to support the benefited class, and instead singles out certain property owners for this burden, it can proceed with relative invisibility.\footnote{See Pennell v. Tri-County Apartment House Owners Ass'n, 485 U.S. 1, 22 (1988) (Scalia, J., dissenting).}

In several cases, laws that effected a transfer of wealth from one class of private parties to a limited class of private beneficiaries troubled the Supreme Court, especially if a causative link between the beneficiaries' need...
and the transferor's property was missing, and the transferor did not receive a reciprocal benefit from the transfer. *Pennsylvania Coal*406 is perhaps the most obvious example of a case in which the Court found a law unconstitutional in large part because it sought to transfer property rights from a class of private parties (the coal companies whose mining resulted in surface subsidence) to private beneficiaries (the surface owners). The statute hurt mine owners as a class and helped surface owners as a class. Also, because the beneficiaries of the statute were no more than a collection of private interests, the law served no broad public interest. As a result, the burdened mine owners failed to secure an average reciprocity of advantage.407 Further, a question exists as to whether the miners caused the harm associated with surface subsidence: if surface owners built residences on the surface after underground mining began, these surface dwellers may have caused their own difficulties.

More recently, the Court explicitly has acknowledged that the Takings Clause "is not necessarily limited to outright acquisitions by the government for itself, [but may extend to a] case [in which] the Government has simply imposed a general economic regulation which in effect transfers the property interest from a private [owner] to a private [party]."408 Other cases confirm that the just-compensation requirement may be triggered by a transfer of private property to private beneficiaries, despite the language of the Takings Clause that seemingly limits its applicability to takings for a "public use."409 Justice Scalia argued in his partial dissent in *Pennell* that an unconstitutional taking occurs when a regulation produces a wealth transfer to a private party or parties, especially if the transfer singles out one group of property owners to address an economic problem that is not their creation.410 The preferable, and constitutional, manner in which government should correct the problem of economic inequities caused by society is

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If the transferor is “losing” a property interest that was not originally part of the title (i.e., use of property to endanger public health and safety), a law that takes away that use in order to benefit another group of private parties is not an uncompensated taking of private property. Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470, 491 n.20 (1987); M & J Coal Co. v. United States, 47 F.3d 1148, 1153 (Fed. Cir. 1995).


410 *Pennell*, 485 U.S. at 21-22 (Scalia, J. dissenting); see also Azul Pacifico, Inc. v. City of Los Angeles, 948 F.2d 575, 583 (9th Cir. 1991) (holding that a wealth transfer from mobile park landlord to tenant constitutes a taking), withdrawn, 973 F.2d 704 (9th Cir. 1992).
through redistribution of wealth from the public to those in need. This approach squares with Armstrong's admonition that "public burdens... should be borne by the public as a whole."411

VII. CONCLUSION

The traditional test for an unconstitutional taking of property has two prongs. The first asks whether the regulation prevents economically viable use of the property subject to regulation, and the second considers whether there is a sufficiently close fit between the regulatory means and ends.412 Recent lower court and Supreme Court cases have suggested that the second prong's nexus requirement also should apply to a determination of whether a regulated property owner should bear a regulatory burden. Under the Takings Clause, a government allocates burdens improperly if it singles out an impacted property owner to bear the cost of a regulation, despite the fact that the owner's use of property did not cause the problem that the regulation addresses. Although this causation test is not a perfect predictor of when laws work unconstitutional takings,413 its routine application to regulations affecting property should help to prevent the unfairness and injustice of government rules that select from the private sector convenient targets to pay for benefits for which the public should be responsible.

413 See Note, supra note 70, at 455-65.