"Novel" Constitutional Claims: Rent Control, Means-Ends Tests, and the Takings Clause

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Many commentators have criticized the due process roots of the "substantially advance" test, a means-ends test, of current takings jurisprudence. This Note revisits the issue in the context of rent control in Santa Monica Beach, Ltd. v. Superior Court of Los Angeles. *Employing the means-ends test with deference to government actions, the* Santa Monica Beach *majority concludes that Santa Monica's rent control program does not violate the Takings Clause. Several dissenters, applying a less deferential standard of review in takings claims, would have found that a taking had occurred. This Note argues that the majority reached the right conclusion but erred by applying a means-ends test in its just compensation analysis. Such a test is doctrinally inconsistent with takings jurisprudence and potentially expands government liability more than is constitutionally required. Ultimately, as the concurring opinion suggests, the propriety of a means-ends test in the analysis of takings claims must be resolved by the United States Supreme Court, whose recent takings decisions suggest that a means-ends test should not be part of just compensation analysis. This Note further argues that, although rent control may be invalid if it violates a few specific protections, it should as a general matter withstand constitutional scrutiny.*

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INTRODUCTION

Constitutional challenges to rent control have proven difficult for property owners.[1] One of the most recently tested claims—that restrictions on rent increases do not substantially advance a legitimate governmental interest[2]—arises out of the Takings Clause.[3] The plaintiff in *Santa Monica Beach, Ltd. v. Superior Court of Los Angeles County*[4] pleaded that, contrary to the stated goals of Santa Monica's rent control law, census data showed that percentages of the poor, minority, elderly, student, and young-family households declined during the decade in which rent control was in effect, while nearby communities experienced increases in the percentage of these households. By failing to help its intended beneficiaries, argued the plaintiff, rent control did not substantially advance a legitimate state interest and was therefore a regulatory taking.

The California Supreme Court applied the "substantially advance" test, a means-ends test. The fundamental difference between the majority and the dissenters in *Santa Monica Beach* is the degree of deference each accorded the legislature in evaluating the relationship between the legitimate ends government identifies and the means it chooses to accomplish those ends. Arguing that the role of the courts is not to second-guess the wisdom of the legislature, the *Santa Monica Beach* majority adopted a highly deferential standard of review and found that, despite some persuasive evidence, the plaintiff failed to establish a claim for inverse condemnation.[5] The dissenters, however, believe that the legislature is not entitled to such deference in takings claims.

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1. See *infra* Part III for a discussion of constitutional challenges to rent control.

2. The Supreme Court articulated this test in *Agins v. City of Tiburon*, stating that the application of a regulation "effects a taking if [it] does not substantially advance legitimate state interests." 447 U.S. 255, 260 (1980) (citations omitted). The second prong of the *Agins* test would find a taking when a regulation "denies an owner economically viable use of his land." *Id.* (citations omitted). Like the substantially advance test, the second prong of the *Agins* test has also generated considerable uncertainty and criticism over its relationship to the three-factor *Penn Central* inquiry, explained *infra* in note 47, and for its apparent conclusion that a taking can be based on economic loss alone. *See, e.g.*, ROBERT MELTZ ET AL., THE TAKINGS ISSUE 138 (1999); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 104 (1995); Andrea Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 CALIF. L. REV. 1301, 1330-33 (1989).

3. The Fifth Amendment, the constitutional basis for takings claims, provides: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Though the Bill of Rights applies only to the federal government, the Supreme Court has "incorporated" the Fifth Amendment's guarantee of compensation for expropriations into the Fourteenth Amendment's Due Process Clause, which expressly applies to States (and therefore State instruments, including local governments). *See* Chicago, Burlington & Quincy Ry. v. City of Chicago, 166 U.S. 226, 236 (1897).

4. 968 P.2d 993 (Cal. 1999), *cert. denied*, 119 S. Ct. 1804 (1999) [hereinafter *Santa Monica Beach*].

5. The Supreme Court distinguished eminent domain from inverse condemnation claims in *Agins*: "Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. Inverse condemnation is a shorthand description of the manner in which a

This Note asserts that the majority correctly concluded no taking had occurred, but erred by applying a means-ends test in a takings analysis. A substantially advance test asks a court to find that—at some level—a law is not working. However, even if that claim is true, it does not necessarily follow that a taking has occurred. This Note argues that the traditional and proper challenge to an allegedly defective law is on due process grounds. Some commentators have noted the due process roots of the substantially advance test and its doctrinal inconsistency with takings jurisprudence.[6] Others counter that, doctrinal inconsistency aside, there is a need for a means-ends test in just compensation analysis.[7] The U.S. Supreme Court has yet to address the issue directly, but its recent case law[8] suggests that a majority of the Court believes that means-ends testing is inappropriate in most takings claims. This Note further argues that case law indicates that rent control should withstand takings and due process challenges in California.

Part I of this Note describes the facts of the case and the different arguments presented in the majority opinion, the concurrence, and the dissenting opinions. Part II examines the propriety of employing a means-ends test to assess a takings claim. Part III considers the constitutionality of rent control generally in light of *Santa Monica Beach* and other decisions.

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landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." 447 U.S. at 258 n.2 (citation and internal quotation marks omitted).

6. *See, e.g.*, DOUGLASS T. KENDALL ET AL., TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS 229-46 (2000); Byrne, *supra* note 2, at 104; John D. Echeverria, *Does a Regulation That Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 23 ENVTL. L. 853, 857-59 (1999); John D. Echeverria & Sharon Dennis, *The Takings Issue and the Due Process Clause: A Way Out of a Doctrinal Confusion*, 17 VT. L. REV. 695, 698-701 (1993); Jerold S. Kayden, *Land Use Regulation, Rationality, and Judicial Review: The RSVP in the* Nollan *Invitation (Part I)*, 23 URB. LAW. 301, 316-25 (1991); Ross A. Macfarlane, Note, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis*, 57 WASH. L. REV. 715, 729-30 (1982). Members of the Court have also noted this inconsistency. *See* Dolan v. City of Tigard, 512 U.S. 374, 409-11 (1994) (Stevens, J., dissenting) (criticizing the substantially advance test for importing into takings analysis expansive substantive due process considerations that the Court had long since rejected). The doctrinal inconsistency issue is examined *infra* in Part I.B.2 (discussing Justice Kennard's concurring opinion) and Part II.A.2.

7. *See, e.g.*, Jan G. Laitos, *The Public Use Paradox and the Takings Clause*, 13 J. ENERGY NAT. RESOURCES ENVTL. L. 9, 49 (1993) (observing that the substantially advance test is rooted in due process doctrine); *see also* Jan G. Laitos, *Takings and Causation*, 13 WM. & MARY BILL RTS. 359, 426 (1997) (suggesting a nexus test should apply to "regulations affecting property").

8. *See, e.g.*, City of Monterey v. Del Monte Dunes, 119 S. Ct. 1624 (1999) [hereinafter *Del Monte Dunes*]; Eastern Enters. v. Apfel, 524 U.S. 498 (1998) [hereinafter *Eastern Enterprises*]. These cases are discussed *infra* in Part II.A.3.

I
THE CASE

A. *The Facts*

In April of 1979, the City of Santa Monica adopted a rent control charter amendment (Rent Control Law) and created an elected Rent Control Board to regulate rental prices. The stated purpose of the Rent Control Law is "to alleviate the hardship caused by [the] serious housing shortage by establishing a Rent Control Board empowered to regulate rentals in the City of Santa Monica so that rents will not be increased unreasonably and so that landlords will receive no more than a fair return."[9] The Rent Control Law requires that owners register each rental unit and pay annual registration fees to the Board, establishes maximum allowable rents, provides for annual general adjustments and individual adjustments of allowable rents, prohibits evictions except for specific reasons, and prescribes remedies for violations of its provisions.[10]

In March 1992, property owner and landlord Santa Monica Beach, Ltd. (SMB) petitioned for an individual adjustment to increase its rent. The Board's hearing examiner denied SMB's initial petition but acted favorably on its second petition, finding that a permanent increase of three dollars per unit per month and a temporary increase of fifty-eight dollars per unit per month in rents were justified. After an unsuccessful appeal before the full Board of the hearing examiner's findings, SMB filed suit in district court with a combined complaint for inverse condemnation and a petition for writ of administrative mandamus.[11]

SMB's inverse condemnation claim contended that the Board's application of the Rent Control Law to its property had violated its rights under the Fifth Amendment of the U.S. Constitution and under Article I, Section 19 of the California Constitution.[12] SMB alleged that Santa

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9. *Santa Monica Beach*, 968 P.2d at 995 (citing the preamble to SANTA MONICA CITY CHARTER, art. XVIII) (internal quotation marks omitted).

10. *See id.*

11. California requires that a litigant first petition for a writ of administrative mandamus, directing an agency to reverse its decision, before filing a claim alleging inverse condemnation. These claims may also be filed simultaneously. *See* Patrick Media Group, Inc. v. California Coastal Comm'n, 11 Cal. Rptr. 2d 824, 833 (Cal. Ct. App. 1992) (stating that where an inverse condemnation action is based upon a regulatory taking accomplished by a discretionary action of an administrative agency, "the proper procedure is to bring the inverse condemnation action in conjunction with, or after, a petition for administrative mandamus, . . . the procedure generally required when the validity or propriety of an action or determination by an administrative agency is challenged").

12. The relevant portion of the Fifth Amendment, the Takings Clause, is quoted *supra* in note 3. A similar right is protected in the California Constitution:

> Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner. The Legislature may provide for possession by the condemnor following commencement of

Monica's rent control program did not meet the "substantially advance" test because it failed to advance the Rent Control Law's stated objectives. Specifically, SMB claimed that census data showed that the groups that the Rent Control Law was supposed to benefit—including the poor, minorities, students, young families, and the elderly—had, in fact, been hurt by rent control.[13]

The Board demurred to the inverse condemnation claim, arguing that there was a rational basis for the Rent Control Law and that, as a matter of law, SMB could not prevail. The trial court sustained the demurrer without leave to amend, leaving the administrative mandate petition to be heard at a later date.[14] SMB filed a petition for a writ of mandate with the Court of Appeal, arguing that its inverse condemnation claim was inextricably linked to its administrative mandate petition and that, because the deferential rational basis test did not apply to a regulatory taking, the trial court had wrongly sustained the demurrer. The Court of Appeal agreed with SMB and set aside the trial court's judgment.[15] It held that the heightened standard of scrutiny the U.S. Supreme Court articulated in *Nollan v. California Coastal Commission*[16] should be applied to the Rent Control Law and that the Law's failure to meet its stated objectives meant that it failed to substantially advance a legitimate governmental purpose.

B. The California Supreme Court's Decision

1. Majority Opinion

In a four-to-three decision, the California Supreme Court reversed the Court of Appeal with directions to reinstate the trial court's judgment.

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eminent domain proceedings upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.

CAL. CONST. art. I, § 19.

13. *See Santa Monica Beach*, 968 P.2d at 996. SMB's complaint alleged that the Rent Control Law was actually a cause of, rather than a remedy for, gentrification. It supported this charge with census data that allegedly showed that during the 1980s, while the Rent Control Law was in effect, Santa Monica lost 12 percent of its low-income-renter households, 6 percent of its families with young children, 27 percent of its single-mother-headed households, and 1.7 percent of its elderly population—all in contrast to comparable increases in these demographic groups for the rest of Los Angeles County. *See id.*

A recent report on the effects of removal of rent control, or rent deregulation, in the metropolitan Boston area highlights this debate. Some argue deregulation has resulted in a "'substantial rehabilitation of [the area's] housing stock.'" Dennis Hevesi, *The Boston Area Adjusts to Rent Deregulation*, N.Y. TIMES, July 2, 2000, at 11-7 (quoting the Executive Director of the Greater Boston Real Estate Board). Others, including Boston's Mayor Thomas Menino and its former Housing Director Peter Dreier, suggest poor and working-class families have been hurt by rent deregulation because of rent increases and the lack of construction of affordable housing. *See id.*

14. *See* Santa Monica Beach, Ltd. v. Superior Court, 50 Cal. Rptr. 2d 726, 731 (Cal. Ct. App. 1996), *rev'd*, 968 P.2d 993 (Cal. 1999).

15. *See id.* at 736.

16. 483 U.S. 825 (1987).

Writing for the majority, Justice Mosk first dismissed the Board's argument that SMB's challenge to the Rent Control Law was actually a facial challenge and was thus barred by the statute of limitations.[17] The court acknowledged that the claim resembled a facial challenge—a ruling in favor of SMB's inverse condemnation claim required a finding that the Rent Control Law was unconstitutional on its face, not just that the Law was unconstitutional as applied to SMB's property. Nevertheless, the court proceeded to the merits because "SMB contends that its claim is derived from events occurring after the passage of the Rent Control Law."[18]

Turning to the "novel" inverse condemnation claim, the court first held that the heightened standard of scrutiny advanced by the plaintiff and endorsed by the Court of Appeal did not apply to the Rent Control Law.[19] Justice Mosk cited U.S. Supreme Court case law holding that the standard of review for regulatory takings depends on the nature of the government action: while individuated requirements for permit approval, such as dedications, exactions, and other development fees, receive intermediate scrutiny to police against potential extortion, "generally applicable" legislative acts are subject to highly deferential scrutiny.[20]

The court stopped short of stating that the standard of review for rent control legislation is the same as the substantive due process rational basis test, but it concluded that heightened scrutiny clearly does not apply.[21] In answering the question of how "substantially" the Rent Control Law must "advance" the legitimate governmental interest that justifies it, the majority analogized rent control to price controls and general land use laws (functionally similar categories of regulations), concluding that rent control is valid unless it is "an arbitrary regulation of property rights."[22]

Applying this deferential standard, the court concluded that even if SMB's allegation that the Rent Control Law failed to live up to its stated goal of providing affordable housing for the poor, minorities, students, the elderly, and young families were true, SMB still did not state a claim for

17. *See Santa Monica Beach*, 968 P.2d at 998. California has a five-year statute of limitations for takings challenges. *See* Sandpiper Mobile Village v. City of Carpinteria, 12 Cal. Rptr. 2d 623, 627 (1992).

18. *Santa Monica Beach*, 968 P.2d at 998.

19. *See id.* at 1002.

20. *See id.* Exactions are conditions placed on the government's approval of a property owner's request for a development permit. These conditions may include privately financed on-site and off-site improvements, dedication of land for public purposes, or payment of fees in lieu of either—all intended to address the expected negative impact of the proposed development. *See* MELTZ ET AL., *supra* note 2, at 233-34.

21. *See Santa Monica Beach*, 968 P.2d at 1002 ("We need not decide whether the standard of review for rent control legislation is identical to the rational relationship test . . . . [W]e believe it is clear at least the heightened intermediate scrutiny standard . . . does not apply in this case.").

22. *Id.* (quoting Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994)) (internal quotation marks omitted). Note that the Court further concluded that SMB failed to state an inverse condemnation claim even under heightened judicial scrutiny standard of review. *See infra* text accompanying note 28.

inverse condemnation.[23] SMB had argued that to determine whether legislation substantially advances a legitimate state interest, the court must measure the legislation against its stated purpose.[24] The court rejected this contention: "there is no constitutional requirement that the inquiry into whether the legislation substantially serves legitimate state goals must be limited to stated goals, much less to only some of the stated goals."[25]

The court further disputed SMB's "truncated reading" of the Rent Control Law's purposes.[26] The Rent Control Law's broadly stated purpose is "to alleviate the hardship caused by [the] serious housing shortage" to all Santa Monica tenants, not just "the poor, minorities, students, young families, and senior citizens."[27] SMB had not alleged that the Rent Control Law helped no Santa Monica tenants. Thus, the court concluded, Santa Monica's Rent Control Law would even withstand a heightened standard of scrutiny because it advanced "some" legitimate state purposes.[28] Moreover, SMB did not allege that no poor, minority, or elderly benefited from rent control, but rather that they had not benefited as much, as a class, as they had in other parts of Southern California without rent control. Accordingly, the court found that SMB failed to allege facts sufficient to establish that even the limited goals it identified had been completely frustrated.[29]

The court considered the "novelty" of SMB's claim at various points in its opinion, concluding that it had no authority to strike down a piece of legislation that advanced legitimate goals, albeit not precisely the goals specified in its preamble, as unconstitutional:[30] "In our constitutional system, it is generally assumed that only the legislative body that enacted the statute may exercise a power of repeal if that statute fails to meet legislative expectations."[31] As with other social and economic legislation, legislative bodies, not courts, should decide whether rent control has achieved its goals. According to the majority, the constitutional role of the courts is to invalidate confiscatory features and applications of rent control laws, not to pass judgment on the wisdom of such programs.[32]

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23. *See id.* at 1003.
24. *See id.* at 1004.
25. *Id.*
26. *See id.*
27. *Id.* (quoting the preamble to SANTA MONICA CITY CHARTER, art. XVIII) (internal quotation marks omitted).
28. *See id.*; *see also id.* at 1005.
29. *See id.* at 1004.
30. *See id.*
31. *Id.* at 1000.
32. *See id.* at 1007. The California Supreme Court addressed the confiscatory nature of the Rent Control Law in *Kavanau v. Santa Monica Rent Control Board*, 941 P.2d 851 (Cal. 1997). In *Kavanau*, the Court announced that rent control was not confiscatory so long as the law allowed the owner a "fair return." *See id.* at 865-66.

2. Concurring Opinion

Justice Kennard signed onto the majority opinion's functional approach but wrote separately to explain an additional historical basis for concluding that the substantially advance test is best understood as the rational basis test outside of the narrow context of exactions and dedications.[33] She argued that the *Agins* Court had "imported the substantive due process means-end test of *Nectow* into just compensation law."[34] The means-ends test in *Nectow* was a traditional formulation of the "arbitrary and capricious" standard now used in contemporary rational basis analysis.[35] Thus, the historical derivation of the substantially advance test supports the majority's formulation that a law is constitutional so long as it does not arbitrarily interfere with property rights, because the substantially advance test the *Agins* Court announced was, in fact, the rational basis test used in *Nectow*.

Justice Kennard also noted the confusion the substantially advance test has generated, including the differing definitions of the appropriate standard adopted by the members of the California Supreme Court in the instant case. She further questioned the propriety of employing a means-ends test in takings analysis outside of the context of exactions and dedications, noting a recent U.S. Supreme Court decision casting doubt on means-ends testing in takings analysis.[36] She urged the U.S. Supreme Court, "when the opportunity next arises," to resolve definitively whether a means-ends test should be used to determine if a taking has occurred, or whether the means-ends test should remain within due process jurisprudence.[37]

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33. *See Santa Monica Beach,* 968 P.2d at 1008 (Kennard, J., concurring).

34. *Id.* at 1011 (Kennard, J., concurring). In *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), the Supreme Court struck down a Cambridge zoning ordinance as unconstitutional on due process grounds.

35. *See Santa Monica Beach,* 968 P.2d at 1011. (Kennard, J., concurring). The *Nectow* Court held that due process required that a law not be "a mere arbitrary or irrational exercise of power having no substantial relationship to the public health, the public morals, the public safety or the public welfare in the proper sense." *Id.* at 1010 n.1 (Kennard, J., concurring) (quoting *Nectow*, 277 U.S. at 187-88) (internal quotation marks omitted).

36. *See id.* at 1012 (Kennard, J. concurring) (citing Justice Kennedy's opinion concurring in part and dissenting in part and Justice Breyer's dissenting opinion, joined by Justices Stevens, Souter, and Ginsburg, in *Eastern Enterprises*, 524 U.S. 498 (1998)). Commentators have also questioned the continued incorporation of means-ends testing in takings jurisprudence. *See, e.g.*, Echeverria & Dennis, *supra* note 6.

37. *See Santa Monica Beach,* 968 P.2d at 1013 (Kennard, J., concurring). Instead, the U.S. Supreme Court has continued to avoid the issue by denying certiorari to *Santa Monica Beach*, 119 S. Ct. 1804 (1999), and by not addressing the issue in *Del Monte Dunes*, 119 S. Ct. 1624 (1999), even though it was fully briefed on the matter. *See* Brief Amicus Curiae of League for Coastal Protection, et al., for the City of Monterey, City of Monterey v. Del Monte Dunes, 95 F.3d 1422 (9th Cir. 1996), *aff'd* 119 S. Ct. 1624 (1999) (No. 97-1235).

3. Dissenting Opinions

Three justices dissented in separate opinions on different grounds. Justice Baxter argued that the majority erred in holding that the separation of powers doctrine precludes the court from finding the Rent Control Law unconstitutional on the "novel" grounds advanced by SMB.[38] He concluded that the court could not grant deference when deciding a claim for just compensation,[39] and that the majority's discussion of what standard to apply was therefore misguided.[40] Arguing that the substantially advance test is not a standard of review but rather a fact-based inquiry, as demonstrated by its application in *Nollan* and *Dolan*,[41] Justice Baxter concluded that the facts SMB alleged were sufficient to state a cause of action for inverse condemnation.[42] He further argued that because determining the constitutional validity of legislation is "the very essence of judicial duty," the majority misconstrued the proper role of the judiciary.[43] He suggested that that duty includes reviewing a statute's validity under changed conditions, as in the instant case.[44] Finally, he argued that even if a statute passes the substantially advance test, the Court must independently determine whether the law "goes too far."[45] Applying Holmes's "reciprocity of advantage" factor[46] and the *Penn Central* inquiry,[47] Justice Baxter concluded that the Rent Control Law went too far and was therefore a taking.[48]

Justice Chin's dissent provided an extended analysis of how the majority "conflates takings jurisprudence with due process jurisprudence."[49] He also disputed that SMB's challenge was novel: "It is simply applying in the context of economic regulation practices that are already quite standard with respect to social and moral regulation."[50] While skeptical of

38. *See Santa Monica Beach*, 968 P.2d at 1013 (Baxter, J., dissenting).
39. *See id.* at 1028 (Baxter, J., dissenting).
40. *See id.* at 1027 (Baxter, J., dissenting).
41. *See id.* at 1028 (Baxter, J., dissenting).
42. *See id.* at 1030 (Baxter, J., dissenting).
43. *Id.* at 1032 (Baxter, J., dissenting) (quoting Marbury v. Madison, 5 U.S. 137, 176 (1803)).
44. *See id.* at 1033 (Baxter, J., dissenting).
45. *Id.* at 1029 (Baxter, J., dissenting). In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Justice Holmes announced that a regulation that "goes too far" may be a taking of private property. *Id.* at 415.
46. Justice Holmes noted that "an average reciprocity of advantage," in which individuals are both burdened by and benefited from the uniform application of a statute, justifies the validity of a law. *See Pennsylvania Coal Co.*, 260 U.S. at 415.
47. Justice Brennan identified three factors on which the Court focuses to determine whether or not a taking had occurred: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).
48. *See Santa Monica Beach*, 968 P.2d at 1035. (Baxter, J., dissenting).
49. *Id.* at 1036 (Chin, J., dissenting).
50. *Id.* at 1038 (Chin, J., dissenting).

the plaintiff's ability to prove sufficiently what it had alleged, Justice Chin believed standard civil procedure requires that the plaintiff be allowed the opportunity,[51] and that the majority erred by measuring the allegations for a takings claim with a due process yardstick.[52]

Justice Brown's dissenting opinion argued that the majority erred in affording property rights less protection than other fundamental constitutional rights,[53] a view she dismissed as "a historical artifact of the demise of the *Lochner* era."[54] She argued that the U.S. Supreme Court's takings jurisprudence since the 1980s indicates that such a distinction between property rights and other constitutional rights is no longer valid, a point supported by the application of the heightened scrutiny analysis in *Nollan*.[55] The majority's conclusion that heightened scrutiny does not apply in the instant case was, according to Justice Brown, "more wish than fact."[56] Like Justice Chin, she argued that the due process standard that the majority inappropriately applied is "quite dissimilar" to the heightened scrutiny of takings, and she concluded that rent control schemes would not survive a challenge under the latter standard.[57]

II
MEANS-ENDS TESTING IN THE TAKINGS CLAUSE

Santa Monica Beach illustrates the difficulties of applying the substantially advance test in a takings claim. The central dispute is over what level of deference courts should afford the government when reviewing land use decisions. The dissenters rightly characterize the majority's test as ordinary rationality review,[58] even though the majority goes to great lengths to avoid expressly stating what standard applies under the substantially advance test.[59] The court's confusion over what standard of review to use for the substantially advance test is understandable. Since articulating the test in 1980, the U.S. Supreme Court has offered little guidance in its

51. *See id.* at 1040 (Chin, J., dissenting) ("I share some of the majority's skepticism about [SMB's] assertion. Nevertheless, on demurrer, a court must take the properly pleaded material allegations of the complaint as true; [its] only task is to determine, whether the complaint states a cause of action." (citations and internal quotation marks omitted)).

52. *See id.* (Chin, J., dissenting).

53. *See id.* at 1041 (Brown, J., dissenting).

54. *Id.* (Brown, J., dissenting).

55. *See id.* at 1042 (Brown, J., dissenting).

56. *Id.* at 1047 (Brown, J., dissenting).

57. *See id.* (Brown, J., dissenting).

58. *See id.* at 1027 (Baxter, J., dissenting); *id.* at 1036 (Chin, J., dissenting) (charging the majority "conflates takings jurisprudence with due process jurisprudence"); *id.* at 1047 (Brown, J., dissenting) (arguing that the due process standard applied by the majority was "quite dissimilar" to the standard required in the takings inquiry's substantially advance test).

59. *See id.* at 1002 ("We need not decide whether the standard of review is identical to the rational relationship test . . . . [I]t is clear at least that the heightened intermediate scrutiny . . . does not apply in this case.").

application. Commentators have described the use of a means-ends test in takings jurisprudence as the most muddled of all takings issues.[60]

This Part explains why means-ends testing does not belong in takings analysis. The substantially advance test was derived from due process—not takings—cases, and its application is doctrinally inconsistent with the Takings Clause. This Part also responds to the usual defenses for having a means-ends test in takings analysis, concluding that the proffered reasons do not justify the use of a means-ends test to determine whether a taking has occurred. This Part closes by describing the possible implications of the use of a means-ends test in just compensation inquiries.

A. Means-Ends Testing is Inappropriate in Takings Analysis

There are several reasons why the *Agins* means-ends test should not be part of takings analysis. First, the substantially advance test originated in due process cases. Its apparent incorporation into takings jurisprudence occurred when there was little practical difference in outcome between invalidation of a law as a violation of the Due Process or Takings Clause. Second, scrutinizing the relationship between the legitimate governmental purpose and the means chosen to effect that purpose is doctrinally inconsistent with the limitation the Takings Clause places on the government appropriation of private property. Finally, recent cases indicate that the U.S. Supreme Court may now disfavor the use of a means-ends test to find a taking.

1. Historical Roots in Due Process Doctrine

Courts have traditionally reviewed the reasonableness of a regulation under the Due Process Clause.[61] Around the beginning of the Twentieth Century, the Court began applying the Due Process Clause to invalidate substantive state laws.[62] During the New Deal, the Court

60. *See* KENDALL ET AL., *supra* note 6, at 230 (describing the reasonableness review of land use regulations under the Takings Clause as "one of the most vexing issues in takings jurisprudence"); Echeverria, *supra* note 6, at 855 ("The famously muddy doctrine of regulatory takings is as muddy as it gets when it comes to the question of whether the [substantially advance test] is really a takings test at all."). Professor Echeverria also described this as the "most important and controversial question in regulatory takings law today" because its resolution will "go a long way toward determining the scope of regulatory takings doctrine." *Id.* at 853.

61. *See Eastern Enterprises*, 524 U.S. 498, 556-57 (1998) (Breyer, J., dissenting) ("[The Due Process Clause, not the Takings Clause] safeguards citizens from arbitrary or irrational legislation."); KENDALL ET AL., *supra* note 6, at 229; *see also* Mugler v. Kansas, 123 U.S. 623 (1887) (upholding a ban on alcoholic beverages against a due process challenge but indicating that legislation would be valid under the states' police powers only if it truly related to the public health, safety, and morals).

62. *See, e.g.*, Adkins v. Children's Hospital, 261 U.S. 525 (1923) (striking down minimum wage law for women); Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating law protecting workers from "yellow dog" contracts); Lochner v. New York, 198 U.S. 45 (1905) (striking down a law prohibiting the employment of bakers for more than ten hours a day); Allgeyer v. Louisiana, 165 U.S. 578 (1897) (invalidating a prohibition on obtaining marine insurance for Louisiana property from a company that

retreated from the exacting scrutiny of the so-called *Lochner* era, and it now generally finds that regulations of economic and social welfare will be upheld as reasonable against a Due Process challenge if the regulation has any rational basis, even one that the court has to hypothesize.[63]

By contrast, the Takings Clause originally protected only against physical invasion or direct appropriation of private property.[64] It was not until 1922 that the Court held in *Pennsylvania Coal Co. v. Mahon*[65] that a regulation of land use could effect a taking of private property without actual appropriation or invasion if it "goes too far."[66] And it was another fifty years before the Court first suggested in *Penn Central Transportation Co. v. City of New York*[67] that there was a reasonableness component to its takings analysis.[68] To support this statement, the Court cited two due process cases.[69] Two years later, as Justice Kennard describes in her *Santa Monica Beach* concurrence,[70] the *Agins* Court invoked the substantially advance test as part of takings analysis, again citing a due process case,[71] without explaining why a traditional due process test should be used to determine if a taking has occurred. Thus, the roots of the substantially

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has not fully complied with Louisiana law). The forty-year period when the Court invalidated economic regulations on substantive due process grounds is widely known as the *Lochner* era.

63. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 488 (1955) (upholding a restriction on the fitting of eyeglasses by finding that due process was satisfied if the court can hypothesize a reason to support the legislature's action); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) (reversing *Adkins* and stating that "[e]ven if the wisdom of the policy be regarded as debatable and its effects uncertain, still the Legislature is entitled to its judgment"); Nebbia v. New York, 291 U.S. 502, 525 (1934) (sustaining a milk price fixing scheme by noting that due process required only that a law not be "unreasonable, arbitrary, or capricious"). Indeed, it is because the Due Process Clause has such lax standards that plaintiffs have challenged the reasonableness of land use regulations under the Takings Clause. *See* KENDALL ET AL., *supra* note 6, at 230.

64. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 ("[I]t was generally thought that the takings clause reached only a 'direct appropriation' of property . . . .") (citation omitted); *see also* WILLIAM MICHAEL TREANOR, THE ORIGINAL UNDERSTANDING OF THE TAKINGS CLAUSE (1998); John Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782 (1995).

65. 260 U.S. 393 (1922).

66. *Id.* at 415.

67. 438 U.S. 104 (1978).

68. *See id.* at 127 ("[A] use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose . . . ."); *see also Santa Monica Beach*, 968 P.2d 993, 1009 (Cal. 1999) (Kennard, J., concurring) ("Before the United States Supreme Court's decisions in *Agins* and *Penn Central*, there had been no means-ends test in just compensation law.").

69. *See Penn Central*, 438 U.S. at 127 (citing to Nectow v. City of Cambridge, 227 U.S. 183, 188 (1928) (invalidating Cambridge zoning ordinance as violation of due process), and Moore v. City of East Cleveland, 431 U.S. 494, 513-514 (Stevens, J., concurring) (invalidating East Cleveland zoning ordinance that limited occupancy of dwellings to members of a single family on due process grounds)).

70. *See Santa Monica Beach*, 968 P.2d at 1007 (Kennard, J., concurring); *see also supra* text accompanying notes 33-37.

71. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (citing to *Nectow*, 227 U.S. at 188 (1928) (quoting the "substantial relation" due process test of Euclid v. City of Ambler, 272 U.S. 365, 395 (1926))).

advance test in due process cases does not support its use in just compensation analysis.[72]

2. *Doctrinal Inconsistency with Takings Clause*

Doctrinally, the rationale for applying a means-ends test in challenges brought under the Takings Clause is suspect.[73] As discussed above, the original understanding of the purpose of the Takings Clause was to guard against uncompensated appropriations of property. One commentator has argued that after the Court expanded takings protection to include overly burdensome restrictions on land use, it limited its finding of regulatory takings to circumstances in which regulations imposed "severe economic burdens" on property owners "[a]t least partly out of deference to the original understanding of the Takings Clause."[74] The substantially advance test extends takings protection to cases where there may be little or no economic impact, in contradiction to the original understanding of the Takings Clause and its subsequent extension to regulations.[75]

Moreover, the substantially advance test adds a restriction to the ability of government to take land that is not supported by the text of the Takings Clause. As Justice Kennard noted,[76] the Takings Clause has historically been understood to limit the government's ability to take private property by requiring it to pay just compensation. Its purpose is "not to limit the governmental interference with property rights per se, but rather to secure compensation in the event that otherwise proper

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72. For a detailed account of the due process lineage of the substantially advance test, see Kayden, *supra* note 6, at 314-316.

Even if the Court ultimately decides that the substantially advance test has a place in takings analysis, its roots in due process doctrine strongly support, as Justice Kennard argues, the conclusion that its application should mimic the rational relationship test and not apply a more exacting standard, as advocated by the *Santa Monica Beach* dissenters. *See Santa Monica Beach*, 968 P.2d at 1009 (Kennard, J., concurring) ("Although the dissents' position is a plausible one if the words 'substantially advance' are viewed in isolation, it collapses once the history of the 'substantially advance' test is examined, for that test originated as a due process rational relationship test."). The limitation of heightened scrutiny to exaction cases in takings analysis that the *Santa Monica Beach* majority and Justice Kennard's concurrence advocated was confirmed by the United States Supreme Court in *Del Monte Dunes*: "Although in a general sense concerns for proportionality animate the Takings Clause . . . we have not extended the rough proportionality of *Dolan* beyond the special context of exactions." 119 S. Ct. 1624, 1635 (1999).

73. Many commentators have noted the doctrinal inconsistencies of having a means-ends test in the Takings Clause. *See, e.g.*, Brief Amicus Curiae of League for Coastal Protection, *supra* note 37, at 8-14; KENDALL ET AL., *supra* note 6, at 237-44; Echeverria, *supra* note 6, at 861-62; Echeverria & Dennis, *supra* note 6, at 704-10.

74. Echeverria, *supra* note 6, at 861 (citing United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985)); *see also* Kayden, *supra* note 6, at 320 ("[T]he more a government action deprives an owner of all, or at least the fundamental, aspects of her property, the more it approximates a traditional taking.").

75. *See* Echeverria, *supra* note 6, at 861.

76. *See supra* note 36 and accompanying text.

interferences amount to a taking."[77] The only substantive limitation the Takings Clause places on government's right to take property is that the property be put to a public use.[78] A means-ends test, however, is used specifically to limit the ability of government to interfere with an individual's rights. The application of such a test places an additional rationality limit on governmental powers that is not justified by takings doctrine.[79] Indeed, Professor Kayden suggests that "the fact that a regulation does not substantially advance a legitimate state interest might paradoxically insulate government from a just compensation challenge because the requisite 'public use' had not been established."[80]

Finally, the use of the substantially advance test potentially conflicts with one of the basic principles of the Takings Clause embodied in the oft-quoted statement from *Armstrong v. United States*:[81] "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."[82] Professor Echeverria has argued that the Takings Clause thus requires compensation when the government takes property for public benefit, but not when there is no public benefit.[83] If a regulation fails the substantially advance test, thereby failing to further a legitimate state interest, the public would logically receive no benefit. No principles of "fairness and justice" require the government to pay where the public receives no benefit.[84] Professor

77. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (italics omitted).

78. In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), the Court adopted an expansive view of public use, virtually foreclosing challenges to regulations on the grounds that the government's reason for taking private property was not sufficiently public. "The 'public use' requirement is thus coterminous with the scope of the sovereign's police powers." *Id.* at 240. A taking of property need only be "rationally related to a conceivable public purpose." *Id.* at 241. Note, however, that the Court has never addressed the issue of remedies for violations of the public use requirement. *First English Evangelican Lutheran Church*, 482 U.S. 304 (1987), suggests that the Court may not be satisfied with the traditional remedy of invalidating the offensive regulation. See *infra* text accompanying note 135 for a description of the effects of *First English* on takings remedies.

79. Justiee Kennard illustrates the implication of this inconsistency when she notes that

> although means-end testing can be used as an argument for expanding the right to compensation, as plaintiff does here, it could also restrict the right to compensation, for it suggests that if the regulation greatly advances the government's purpose, then no taking has occurred even if the invasion of the property owner's interest is also very great.

Santa Monica Beach, 968 P.2d 993, 1012 (Cal. 1999).

80. Kayden, *supra* note 6, at 322; *see also* KENDALL ET AL., *supra* note 6, at 239 (finding it illogical "to invalidate a regulation . . . for failing to advance a public use, and yet deem the regulation compensable . . . for failing to advance a legitimate public interest").

81. 364 U.S. 40 (1960).

82. *Id.* at 49.

83. *See* Echeverria, *supra* note 6, at 861-62.

84. *See id.* at 862; *see also* KENDALL ET AL., *supra* note 6, at 239 (finding it bad public policy to require just compensation when a regulation advances no public interest). This does not mean,

Kayden has noted that a regulation that passes a means-ends test may nevertheless unfairly distribute public burdens.[85]

3. *The Supreme Court Disfavors Means-Ends Testing in Takings Analysis*

Even though the substantially advance test has purportedly been a takings test since 1980, the Supreme Court has never directly considered the appropriate scope of means-ends review in takings analysis. Indeed, the Court did not even mention the substantially advance test in takings cases following *Agins*,[86] focusing instead on the second prong of the *Agins* test.[87] In fact, only two cases, *Nollan*[88] and *Dolan*,[89] have expressly relied on the substantially advance test,[90] and both involved a distinct category of exaction[91] cases that supports the use of a means-ends test and even, arguably, of heightened scrutiny.[92] In the context of exactions, a heightened-scrutiny means-ends review is justifiable to prevent a land use regulation from being transformed into "an out-and-out plan of extortion."[93] Two recent cases—*Eastern Enterprises v. Apfel*[94] and *City of Monterey v. Del Monte Dunes, Ltd.*[95]—indirectly address the issue.[96] Justice Kennard identified *Eastern Enterprises* as grounds for doubting the use of the substantially advance test in the takings analysis.[97] *Del Monte Dunes* was decided after *Santa Monica Beach,* and further suggests that means-ends testing may be

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however, that the burdened property owner would be without recourse. As argued in the text accompanying *supra* notes 61-63, the Due Process Clause has traditionally protected property owners from such irrational and unreasonable regulations.

85. *See* Kayden, *supra* note 6, at 322.

86. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 296 (1981); Hodel v. Indiana, 452 U.S. 314, 335 (1981).

87. *See supra* note 2.

88. 483 U.S. 825 (1987) [hereinafter *Nollan*].

89. 512 U.S. 374 (1994) [hereinafter *Dolan*].

90. *Del Monte Dunes* makes frequent reference to the substantially advance test, but there the Supreme Court merely affirmed that "the trial court's instructions are consistent with our previous general discussion of regulatory takings." 119 S. Ct. 1624, 1636 (1999). As discussed *infra* in the text accompanying notes 109-118, four of the Justices disavowed the means-ends inquiry as a takings test, and the others refused to consider the matter on procedural grounds.

91. *See supra* note 20.

92. For a eritique of the heightened scrutiny required by *Nollan* for exactions, see Kayden, *supra* note 6, at 314 (asserting that Justice Scalia's "novel conclusion" that the Takings Clause has always required greater scrutiny than the rational relationship test was based on "shoddy scholarship and shallow analysis").

93. *Nollan*, 483 U.S. at 837 (quoting J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)) (interual quotation marks omitted).

94. 524 U.S. 498 (1998).

95. 119 S. Ct. 1624 (1999).

96. For an extended discussion of these cases, their implications on means-ends analysis in takings claims, and the seemingly contradictory opinions of the Justices, see KENDALL ET AL., *supra* note 6, at 232-35, and Echeverria, *supra* note 6, at 866-76.

97. *See Santa Monica Beach*, 968 P.2d at 1012 (Kennard, J., concurring).

a disfavored takings inquiry for the majority of the Court, at least outside of the exactions context.

Eastern Enterprises involved takings and due process challenges to the Coal Industry Retiree Health Benefit Act, which imposed retroactive liability on Eastern Enterprises and other companies that were no longer involved in coal mining.[98] The Court issued five opinions, with five justices finding the Act unconstitutional. Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, found that the Act violated the Takings Clause,[99] and found no reason to address the due process issue.[100] In a separate opinion, Justice Kennedy concurred in the result to invalidate the Act, but unlike the plurality, he found that the Act violated the Due Process Clause and not the Takings Clause.[101]

Justice Kennedy noted that "[t]he imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions. This sort of analysis is in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the Government's power to act."[102] Justice Kennedy would keep takings inquiries limited to the requirement of compensation when property is taken, and let due process police against government actions that are arbitrary or capricious.[103] The clear implication is that, for Justice Kennedy, means-ends testing is an inappropriate test for a taking.[104]

Justice Breyer's dissenting opinion, joined by Justices Ginsburg, Souter, and Stevens, agreed with Justice Kennedy that the Due Process Clause, not the Takings Clause,[105] was the appropriate test for guarding against unfair or arbitrary governmental actions.[106] Unlike Justice Kennedy, the dissenters found that the Act did not violate the Due Process Clause.[107] Thus, a majority of the Court agreed that the Act was not a taking and,

98. *See Eastern Enterprises*, 524 U.S. at 536 (plurality opinion).

99. *See id.* at 529-37 (plurality opinion).

100. *See id.* at 537-38 (plurality opinion) (declining to return to the *Lochner*-era due process test).

101. *See id.* at 539-50 (Kennedy, J., concurring in the judgment and dissenting in part).

102. *Id.* at 545 (Kennedy, J., concurring in the judgment and dissenting in part) (citations omitted).

103. *See id.* at 546-47 (Kennedy, J., concurring in the judgment and dissenting in part).

104. *See* Echeverria, *supra* note 6, at 867.

105. *See Eastern Enterprises*, 524 U.S. at 554 (Breyer, J., dissenting) ("[A]t the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes private property . . . .") (internal quotation marks omitted).

106. *See id.* (Breyer, J., dissenting) ("As a preliminary matter, I agree with Justice Kennedy . . . that the plurality views this case through the wrong legal lens. The Constitution's Takings Clause does not apply.").

107. *See id.* at 553 (Stevens, J., dissenting); *id.* at 558-68 (Breyer, J., dissenting).

more importantly, that means-ends analysis is not an appropriate test for a taking.[108]

Del Monte Dunes presented the Court with a case in which the non-exaction requirements of the City of Monterey were found by a jury not to substantially advance a legitimate state interest.[109] The owners of a parcel filed numerous iterative applications, each proposing less intensive development in response to increasingly rigorous demands made by the city when it rejected their previous applications.[110] On the matter of liability, the jury was instructed that it was to decide whether the "city's decision here substantially advanced any . . . legitimate public purpose."[111] On appeal, the Court was asked to consider whether issues of liability in takings claims can be submitted to juries, and whether the Court of Appeals had erred in basing its decision on a standard—*Dolan*'s rough-proportionality standard—that allowed the jury to reweigh the reasonableness of the city's land use decision.[112]

The bulk of the opinion was devoted to the liability issue, in which the Court held that questions of liability could be presented to the jury in federal takings cases.[113] The Court devoted little time to the use of the

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108. *But see* Echeverria, *supra* note 6, at 867 n.111 (stating that Justice Kennedy's reasoning that the Takings Clause was inapplicable where there is a lack of any specific property right or interest, a position endorsed by the four dissenters, was a departure from earlier decisions and thus represents "an important new limit on the scope of regulatory takings claims").

109. *See Del Monte Dunes*, 119 S. Ct. 1624, 1634 (1999).

110. *See id.* at 1631-34. The City of Monterey, however, described a very different, and less abusive, version of the facts. *See* Petitioner's Brief, City of Monterey v. Del Monte Dunes, 95 F.3d 1422 (9th Cir. 1996), *aff'd* 119 S. Ct. 1624 (1999) (No. 97-1235), at 2-13.

By changing the conditions it placed on granting entitlements, the city was following an updated version of the strategy one California City Attorney recommended to fellow City Attorneys at a conference, as described by Justice Brennan in a footnote to his dissent in *San Diego Gas & Electric Co. v. City of San Diego*:

> If all else fails, merely amend the regulation and start over again. If . . . you . . . receive a claim attacking the land use regulation, or if you try the case and lose, don't worry about it. All is not lost. [A California Supreme Court case] appears to allow the City to change the regulation in question, even after trial and judgment, make it more reasonable, more restrictive, or whatever, and everybody starts over again. . . . See how easy it is to be a City Attorney. Sometimes you can lose the battle and still win the war.

450 U.S. 621, 655 n.22 (Brennan, J., dissenting) (quoting James Longtin, *Avoiding and Defending Constitutional Attacks on Land Use Regulations (Including Inverse Condemnation)*, 38B NIMLO MUNICIPAL L. REV. 175, 192-93 (1975) (internal quotation marks and original emphasis omitted)). The constitutional landscape for takings claims has changed a great deal since 1975; such a practice today would likely produce a "temporary" taking under *First English Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

111. *Del Monte Dunes*, 119 S. Ct. at 1634 (quoting district court's jury instructions).

112. *See id.* at 1635.

113. *See id.* at 1637-45; *id.* at 1645-50 (Scalia, J., concurring in part and concurring in the judgment); *id.* at 1651-61 (Souter, J., concurring in part and dissenting in part). Ironically, even though it was the most contested issue of the case, the liability ruling—that a takings claimant suing on a Section 1983 claim is entitled to a jury trial in federal court—is of little practical significance. The Court's ripeness doctrine requires that a claimant cannot bring a Section 1983 claim "unless and until [it] has been denied adequate postdeprivation remedy." *Id.* at 1644. Del Monte Dunes was excused

substantially advance test. The majority, in an opinion authored by Justice Kennedy, declined the invitation of amici[114] to clarify whether the substantially advance test is an appropriate takings inquiry because the city had failed to object to the jury instructions at trial and had therefore waived its right to challenge them.[115] However, Justice Kennedy did acknowledge that the Court had never provided "a thorough explanation of the nature or applicability of the [substantially advance test] outside the context of required dedications or exactions."[116] In a separate concurrence, Justice Scalia agreed with the majority that Monterey had "forfeited any objection to [the substantially advance] standard," and "expressed no view as to its propriety."[117] Justice Souter's dissenting opinion, joined by Justices O'Connor, Ginsburg, and Breyer, also declined to address the propriety of means-ends testing in takings claims,[118] implicitly questioning means-ends testing in takings analysis.[119]

B. Defenses for Keeping Means-Ends Testing in Takings Analysis

These arguments notwithstanding, there are reasons supporting the presence of a means-ends test in the Takings Clause. However, these justifications are unpersuasive. One argument is based on the plain and explicit language of Court decisions. In its unanimous *Agins* decision, the Court did, by error or intent, explicitly state that the substantially advance test was part of takings jurisprudence: "[t]he application of a [regulation] . . . effects a taking if the [regulation] does not substantially advance legitimate state interests."[120] Moreover, as Justice Kennedy pointed out in

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from this requirement because at the time its action was initiated, it was not clear that California had such a remedy. *See id.* After *First English*, most states have adopted procedures for obtaining compensation for such temporary takings. Moreover, the holding does not apply to state inverse condemnation claims. *See Del Monte Dunes*, 119 S.Ct. at 1643.

114. *See, e.g.*, Brief Amicus Curiae of League for Coastal Protection, et al., for the City of Monterey, City of Monterey v. Del Monte Dunes, 95 F.3d 1422 (9th Cir. 1996), *aff'd* 119 S. Ct. 1624 (1999) (No. 97-1235).

115. *See Del Monte Dunes*, 119 S.Ct. at 1636, 1644. However, as mentioned *supra* in note 72, the Court did rule that the rough proportionality nexus requirement was limited to exaction cases. *See id.* at 1635 ("[T]he rough-proportionality test of *Dolan* is inapposite to a case such as this one."); *id.* at 1650 (Souter, J., dissenting) ("I agree in rejecting extension of 'rough proportionality' as a standard for reviewing land-use regulations generally . . . .").

116. *Id.* at 1636.

117. *Id.* at 1650 n.2 (Scalia, J., concurring). Justice Scalia's position is ironic, since his majority opinion in *Nollan*, as discussed *supra* in the text accompanying note 88, was the first to apply the substantially advance test to find a taking.

118. *See id.* at 1660 n.12 (Souter, J., dissenting) ("I offer no opinion here on whether *Agins* was correct in assuming that [means-ends testing] of liability was properly cognizable as flowing from the Just Compensation Clause . . . , as distinct from the Due Process Clause[ ] . . . .").

119. KENDALL ET AL., *supra* note 6, at 235, points out the irony of the *Del Monte Dunes* decision: "It stands as the first ruling in which the Supreme Court affirmed an award of just compensation for a regulatory taking in a land use case, and yet no Member of the Court was willing to embrace the means-ends theory of liability included in the jury instruction that gave rise to the award."

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

an extended string cite in *Del Monte Dunes*,[121] this test has been quoted in many U.S. Supreme Court takings cases since *Agins*.[122] This subsequent adherence to the *Agins* formulation for a takings violation seems to cast doubt on the theory that the inclusion of a means-ends test was simply a flyer. However, while oft-repeated, the test has been applied rarely by the Supreme Court, as noted above,[123] and "largely ignored" by lower courts.[124] In particular, the U.S. Claims Court (the predecessor to the U.S. Court of Federal Claims)[125] concluded eight years after *Agins* that no court had found a taking solely because a regulation failed to advance a legitimate state interest.[126]

Even the use of a means-ends test in the exaction context, which courts have generally accepted as a necessary check on potentially extortionist practices by government agencies,[127] can be justified on alternate grounds. One commentator has argued that *Nollan* and *Dolan* are "best read as grounded in the special rules that govern unconstitutional conditions and permanent physical occupations of property."[128] And the Court has now expressly confined the application of the *Nollan-Dolan* standard to exaction cases,[129] arguably limiting the use of means-ends analysis under the Takings Clause.[130]

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121. *See Del Monte Dunes*, 119 S. Ct. at 1636.

122. *See, e.g., id.*; *Eastern Enterprises*, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *Dolan*, 512 U.S. 374, 388 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 (1992); Yee v. City of Escondido, 503 U.S. 519, 534 (1992); Pennell v. City of San Jose, 485 U.S. 1, 18 (1988) (Scalia, J., concurring in part and dissenting in part); *Nollan*, 483 U.S. 825, 834-35 (1987); Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 485 (1987); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985). The substantially advance test has also been mentioned in innumerable circuit and district court opinions.

123. *See supra* text accompanying notes 88-90.

124. KENDALL ET AL., *supra* note 6, at 235-36.

125. The Tucker Act, 28 U.S.C. § 1491 (1999), grants jurisdiction to the U.S. Court of Federal Claims for takings challenges to any federal regulation or action, with appeals taken to the Federal Circuit. Because few takings cases from the Federal Circuit are granted certiorari, it plays a prominent role in articulating takings law in areas in which the Supreme Court has not yet spoken. *See* MELTZ ET AL., *supra* note 2, at 43.

126. KENDALL ET AL., *supra* note 6, at 235-36 (quoting Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 390 (1988)). The U.S. Court of Federal Claims subsequently decided not to extend the substantially advance test beyond exaction cases. *See* Bamber v. United States, 45 Fed. Cl. 162, 166 (1999) (quoting Justice Breyer's dissent in *Eastern Enterprises*, 524 U.S. at 554.

127. *See, e.g., Santa Monica Beach*, 968 P.2d 993, 1012 (Cal. 1999) (Kennard, J., concurring) ("There is good reason for using heightened means-end scrutiny in the *Nollan/Dolan* context because of the danger of government engaging in extortion by permit.").

128. KENDALL ET AL., *supra* note 6, at 241; *see also id.* at 315-325 (arguing generally that a city retains the right to deny a permit request outright rather than conditioning its approval on the dedication of land for public use).

129. *See Del Monte Dunes*, 119 S. Ct. 1624, 1635 (1999); *id.* at 1650 (Souter, J., concurring in part and dissenting in part); *see also Santa Monica Beach*, 968 P.2d 993, 1002 (Cal. 1999); Erhlich v. City of Culver City, 911 P.2d 429, 438 (Cal. 1998) ("In our view, the intermediate standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address just such indicators in land use 'bargains' between property owners and regulatory bodies—those in which the local

Finally, the *Eastern Enterprises* plurality suggests that fears of a return to the *Lochner* era animate the Court's reluctance to examine the reasonableness of government regulations under substantive due process review.[131] The same concerns should be just as prevalent in a means-ends review under the Takings Clause.[132] The typical rationales offered in defense of means-ends testing in takings jurisprudence are generally unpersuasive.

C. *Significance of Using the Wrong Test to Find a Taking*

Before examining the risks of improperly using means-ends analysis to determine whether a taking has occurred, it is worth considering how the Court seemed to incorporate carelessly the substantially advance test without a more reasoned analysis. One commentator has noted that the 1970s and 1980s were marked by ongoing judicial debate about the proper vehicle for challenging overly burdensome regulation of property.[133] Furthermore, at the time the substantially advance standard was introduced into takings jurisprudence, a law that was declared unconstitutional, either as a violation of the Takings Clause or of the Due Process Clause, was invalidated.[134] Because the outcomes under both were similar, it made little difference either how the plaintiff argued, or on which grounds a court decided, a claim.

The parallel between the outcomes of due process and takings violations ended in 1987, when the U.S. Supreme Court promulgated the "temporary" takings doctrine in *First English Evangelical Lutheran*

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government conditions permit approval for a given use on the owner's surrender of benefits which purportedly offset the impact of the proposed development.").

130. *See* Echeverria, *supra* note 6, at 876.

131. *See Eastern Enterprises*, 524 U.S. 498, 537-38 (1998) (expressing concern over the use of the "vague contours" of the Due Process Clause to review economic regulations).

132. *See* Echeverria, *supra* note 6, at 868.

133. *See id.* at 858-59.

134. In successful takings ehallenges, the government has the option of paying just compensation, but in most instances the offensive law was simply revoked. A claimant seeking compensation under either clause could recover damages for state and local government actions by filing a claim under 42 U.S.C. § 1983, which states in its entirety:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

42 U.S.C. § 1983 (1994 & Supp. 1999).

Damages would flow under Section 1983 for any violation of the Takings Clause, including a violation of the public use requirement discussed *supra* note 78, so long as the action were carried out under eolor of state law. A full discussion of Section 1983 claims is beyond the scope of this Note. For a detailed treatment of Section 1983 and its increasing use in takings litigation, see MELTZ ET AL., *supra* note 2, at 87-92, and Kenneth Bley, *Use of the Civil Rights Acts to Recover Damages for Undue Influence with the Use of Land*, SB14 ALI-ABA 261 (1996).

Church v. County of Los Angeles.[135] The Court held that if a law were found to effect an unconstitutional taking of private property, the government could either pay the owner full compensation or invalidate the law. If it chose to invalidate the law, it would be required to pay the owner just compensation for the period during which the offensive statute was in effect.[136] After this decision, the outcome under each test has become dramatically different. If the government loses a takings claim, it now must pay the plaintiff at least for the loss of value during the period the ordinance was in effect; it would not, however, have to pay for an ordinance that unconstitutionally deprived a plaintiff of property without due process.[137]

Finding a regulation invalid on due process or takings grounds is more than just a labeling issue.[138] First, holding a regulation that fails to substantially advance a legitimate state interest as a taking of private property expands the historical scope of government liability.[139] Next—as outlined above[140]—after *First English*, liability for the federal and state governments is expanded to situations in which monetary remedies were traditionally not required.[141] Finally, one commentator argues that "the label may also matter because it might significantly influence the degree of deference given to government decision making."[142] Courts are generally highly deferential in modern due process doctrine, but since the 1980s, the Court has shown an increasing willingness to scrutinize property restrictions on takings grounds. The impacts associated with the constitutional labeling of the substantially advance test are significant.

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135. 482 U.S. 304 (1987).

136. *See id.* at 317-19.

137. However, a plaintiff could seek damages for a violation of its due process rights by bringing a Section 1983 action. *See supra* note 134. In this sense, Section 1983 claims could equalize the remedial effects of takings and due process violations for plaintiffs, seemingly a more consistent doctrinal approach to the compensation issue than grafting a means-ends test into takings analysis. But Section 1983 has some limitations that keep it from being a completely fungible remedy for takings that require just compensation. *See infra* note 141 and accompanying text.

138. See *supra* Part II.B.2 for problems resulting from doctrinal inconsistency.

139. *See supra* text accompanying notes 81-85; *see also* KENDALL ET AL., *supra* note 6, at 239 (stating that a means-ends standard for takings liability would result in compensation awards "whenever the government acted arbitrarily," regardless of the significance of the economic impact on the claimant of the similarity to expropriation); Echeverria, *supra* note 6, at 877-78 (noting that claimants could gain "substantial windfalls at public expense" by invoking the "expanded takings doctrine").

140. *See supra* text accompanying notes 133-137.

141. *See* Echeverria, *supra* note 6, at 878. State and local governments are subject to Section 1983 claims, *see supra* note 134, so the distinction is not as important. However, it is not meaningless either, as the measure of damages may vary depending on the grounds for constitutional invalidity. *See* Echeverria, *supra* note 6, at 878.

142. *See* Echeverria, *supra* note 6, at 879 (calling it "nonsensical" that "identical" means-ends test would be applied with varying degrees of deference depending on whether the claim is a takings or due process action).

D. Summary

This Part has questioned whether the means-ends test is a takings test by arguing that Justice Kennard correctly pointed to the historical roots of the substantially advance test in due process cases;[143] by highlighting the doctrinal inconsistencies between means-ends testing and traditional takings rationale;[144] and by considering statements made, and questions left open, by the Supreme Court in its recent takings cases.[145] Because no persuasive reasons support the incorporation of the substantially advance test in just compensation analysis,[146] and because the constitutional label has significant impacts on government liability,[147] Justice Kennard rightly invited the Court to decide the matter as soon as an opportunity to do so arose.[148] The *Santa Monica Beach* majority correctly concluded that no taking had occurred, but the better reason for that decision is that the substantially advance test is not a takings test.

III
IMPACT OF THE COURT'S DECISION

The California Supreme Court's decision in *Santa Monica Beach* has important implications for potential challenges to rent control and, as discussed in Part II, for takings cases in general. The decision closes off what was one of the few remaining constitutional challenges to rent control, virtually assuring that a sensitively designed rent control program will withstand constitutional scrutiny. While the *Santa Monica Beach* majority denied that it was applying a rational relationship test,[149] the dissenters were not fooled.[150] However, as Justice Kennard argued in her concurring opinion,[151] the lineage of the substantially advance test in due process cases belies any contention that a more exacting standard of review was required simply because the words "substantially advance" appear to be more exacting than rational relationship. The majority applied a rational relationship test and concluded that Santa Monica's rent control program passed constitutional review—but the correct constitutional lens was due process, not takings. A rent control program such as the one in *Santa Monica Beach* was not, and should not, be found to violate the Due Process Clause.

This Part examines the various types of takings challenges that have been raised and considers how rent control has stood or would be likely to

143. *See supra* Part II.A.1.
144. *See supra* Part II.A.2.
145. *See supra* Part II.A.3.
146. *See supra* Part II.B.
147. *See supra* Part II.C.
148. *See supra* text accompany note 37.
149. *See supra* note 21.
150. *See supra* note 58 and accompanying text.
151. *See supra* note 72.

stand up to such claims.[152] It concludes by noting two actions that may make a rent control program vulnerable to a takings challenge.

A. *Takings Challenges to Rent Control*

Early challenges to rent control cases involved regulations that were put in place to prevent price gouging during and after the World Wars.[153] The rent control programs in question withstood these challenges, though many have argued that these cases are distinguishable as special exceptions justified by emergency circumstances.[154] The U.S. Supreme Court, however, has shown great reluctance to address directly the validity of rent control.[155] Since the 1940s, only two cases have been granted review. One challenge, *Pennell v. City of San Jose*,[156] was dismissed on ripeness grounds, and the other, *Yee v. City of Escondido*,[157] involved the peculiar case of mobile home parks. The development of takings jurisprudence, particularly in the past two decades, has given rise to various types of challenges that can be launched against rent control. As the following cases demonstrate, absent special circumstances, most challenges have been unsuccessful.

The Court held in *Loretto v. Teleprompter Manhattan CATV Corp.*[158] that a regulation resulting in a physical invasion constitutes a per se taking.[159] After *Loretto*, landlords subject to rent control filed suit alleging that vacancy-decontrol components that accompany many rent control programs prevented the landlords from exercising their right of exclusion, thereby constituting a taking. The landlord plaintiff in *Yee* raised this

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152. *But see* R.S. Radford, *Why Rent Control is a Regulatory Taking*, FORDHAM ENVTL. L.J. 755 (1995); R.S. Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?*, 21 SW. U. L. REV. 1019 (1992).

153. *See, e.g.*, Bowles v. Willingham, 321 U.S. 503 (1944); Charleston Corp. v. Sinclair, 264 U.S. 543 (1924); Block v. Hirsh, 256 U.S. 135 (1921).

154. Justice Baxter's dissent forcefully argues this point and provides a survey of the High Court's rent control jurisprudence. *See Santa Monica Beach*, 968 P.2d 993, 1021-24 (Cal. 1999) (Baxter, J., dissenting).

155. See, for example, Justice Rehnquist's dissent to the denial of certiorari in *Fresh Pond Shopping Center, Inc. v. Callahan*, 464 U.S. 875 (1983). This reluctance may be due to the Court's unwillingness to second-guess the wisdom of legislative decisions.

156. 485 U.S. 1 (1988).

157. 503 U.S. 519 (1992). Rent control for mobile home parks involves regulation of the rental price for the land the mobile home occupies—the pad. The true price of occupying a mobile home includes both the rent for the pad and the sale price of the mobile home; mobile homes in fact rarely move. When pad rents are regulated, the long-term benefits of rent regulation are captured by the incumbent tenants as they vacate the unit. *See* MELTZ ET AL., *supra* note 2, at 301-02; *see also* Petitioners' Brief for Yee v. City of Escondido, 224 Cal. App. 3d 1349 (1990), *aff'd* 503 U.S. 519 (1992) (No. 90-1947), at 25-27. Because the benefits of mobile home rent control plainly accrue to incumbent tenants, it provides an additional problem that general rent control programs do not.

158. 458 U.S. 419 (1982).

159. *See id.* at 426.

argument.[160] The Supreme Court, in rejecting the rent control challenge, found that the landlords gave up their right of exclusion by voluntarily entering the rental market.[161] Once an owner decides to enter the rental market, the right to exclude is limited, and rent control is simply one of many laws that regulate the relationship between landlords and tenants.

In another per se takings case, *Lucas v. South Carolina Coastal Council,*[162] the Court held that a regulation resulting in a total wipeout of economic value is usually a taking.[163] But it is unlikely that any rent control program (or any other regulation, for that matter) would ever result in a one-hundred percent wipeout in the value of property.[164] In California, the restrictions that the State Supreme Court announced in *Kavanau v. Santa Monica Rent Board*[165] would give rise to a takings claim long before a *Lucas* taking would arise. Under *Kavanau,* however, as long as rent control allows the owner a reasonable rate of return, the program is not "confiscatory" and not a taking.[166]

Rent control does not tread on any other core rights that the Supreme Court has recognized as a per se taking. In particular, rent control does not implicate the right to devise property[167] or to receive interest earned on principal.[168]

The Court in *Penn Central* announced three factors to be weighed when deciding if a regulation effected a taking: the economic impact of the regulation, the investment-backed expectations of the owner, and the character of the governmental action.[169] Nevertheless, historically the *Penn Central* test has not been particularly helpful to rent control challengers because in balancing benefits and burdens, the landlord is almost never burdened beyond the point at which the Court's precedent would support a taking.[170]

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160. *See Yee,* 503 U.S. at 527.

161. *See id.* at 532. But note that programs that force landlords to stay in the rental business, should they choose instead to go out of the rental market, may be held confiscatory. *See infra* text accompanying note 177.

162. 505 U.S. 1003 (1992).

163. *See id.* at 1009, 1028-30 (providing two exceptions based on "background principles" to the "categorical" total wipeout rule for uses proscribed by: (1) traditional notions of state and federal property law; or (2) nuisance law).

164. Note that the *Lucas* case was found to constitute a taking based on an uncontested finding by the trial court that the application of South Carolina's Beachfront Management Act had deprived the landowner of any reasonable economic use of his land and "render[ed] [it] valueless." *Id.* It is doubtful that the land in question actually had zero value.

165. 941 P.2d 851 (Cal. 1997); *see also supra* note 32.

166. *See id.* at 861-62.

167. *See* Babbitt v. Youpee, 519 U.S. 234 (1997).

168. *See* Phillips v. Washington Legal Found., 524 U.S. 156 (1998).

169. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 123 (1978); *see also supra* note 47.

170. *See, e.g.,* Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 496 (1987) (holding 50 percent reduction in value not a taking); *see also* Hadacheck v. Sebastian, 239 U.S. 394,

After the Court foreclosed challenges to the asserted public use of property in *Hawaii Housing Authority v. Midkiff*,[171] the means-ends analysis of the *Agins* substantially advance test stood as one of the few untested attacks available to rent control plaintiffs. Assuming the substantially advance test is an appropriate test for a taking, *Santa Monica Beach* illustrates that a challenge to rent control under this test depends on whether or not the heightened scrutiny of *Nollan* and *Dolan* applies.[172] The U.S. Supreme Court in *Del Monte Dunes* conclusively announced that heightened scrutiny review is limited to exaction cases.[173] *Santa Monica Beach* demonstrates that without heightened scrutiny, rent control laws should withstand challenges under the highly deferential, rational basis-like standard of the substantially advance test.

B. Is Anything Left for Rent Control Plaintiffs in California?

A well-designed rent control program should withstand a constitutional challenge in California. There are, however, two pitfalls of which designers of rent control should be aware. The *Santa Monica Beach* majority mentions several times that applications of rent control and sections of ordinances that are inherently "confiscatory" will be held to be takings.[174] Two cases, one from California and one from New York, provide some indication as to what courts might consider a constitutional violation.

In *Kavanau*, the California Supreme Court opined that rent control must allow property owners a reasonable rate of return.[175] The determination of what constitutes a reasonable rate of return and whether or not this return has been denied to a property owner are questions of fact. This requirement is of little benefit to takings litigants today because most

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413 (1915) (holding a zoning ban's 90 percent reduction of property value not a taking); William C. Haas & Co. v. City of San Francisco, 605 F.2d 1117, 1120 (9th Cir. 1979) (holding 95 percent reduction in value not a taking).

171. 467 U.S. 229 (1984); *see also supra* note 78.

172. Notably, the New York Court of Appeals held in *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479, 483 (N.Y. 1994), that New York City's vacancy decontrol provisions of its rent control provisions did not further its stated goal of resolving a housing shortage, a challenge similar to that raised in *Santa Monica Beach*. The New York Court of Appeals applied the heightened scrutiny standard of review, not a deferential rational basis test. *Manocherian* is further distinguishable from *Santa Monica Beach* because the court explicitly held that the application of vacancy decontrol to this landlord, who had leased apartments to a nonprofit hospital, did not benefit tenants, but instead helped the hospital. Inasmuch as the hospital used the units for short-term housing for visitors, the application of vacancy decontrol to an entity with a perpetual corporate existence would allow a virtually permanent lease of the units, thereby depriving the landowner of its reversionary interest. *See infra* note 179 (commenting on confiscatory applications of rent control).

173. *See supra* note 115.

174. *See, e.g.*, *Santa Monica Beach*, 968 P.2d 993, 999 (Cal. 1999).

175. Kavanau v. Santa Monica Rent Board, 941 P.2d 851, 865-66 (Cal. 1997); *see also* Birkenfeld v. City of Berkeley, 550 P.2d 1001, 1027 (Cal. 1976) (stating that rent control laws must be "reasonably calculated to . . . provide landowners with a just and reasonable return on their property").

rent control ordinances provide for, and most rent control boards allow, a reasonable rate of return for the owner.[176]

The New York courts examined another circumstance that would likely be considered confiscatory by the California courts as well. In *Seawall Associates v. City of New York*,[177] owners of a single room occupancy hotel challenged a New York City ordinance that compelled owners to be residential landlords and required them to rehabilitate and offer their properties for rent. The New York Court of Appeals held this to be a per se physical taking (by requiring owners to rent their properties)[178] and a facially invalid regulatory taking (by compelling owners to rehabilitate their buildings). Key to both parts of the decision was the lack of a previous landlord-tenant relationship. Thus ordinances that avoid forcing landlords to rent to tenants,[179] or to remain in the rental housing market, should withstand physical and regulatory takings claims.

CONCLUSION

This Note has argued that the substantially advance test is an inappropriate measure for takings violations. While the Supreme Court has never explicitly addressed this issue, its recent decisions suggest a majority of Justices believe that means-ends testing does not belong in takings analysis. This conclusion is strengthened by an examination of the source of the substantially advance test and of the doctrinal inconsistency of the test with the underlying principles supporting the Takings Clause. This note has further asserted that the distinction between Due Process and Takings Clauses as grounds for a violation of the substantially advance test is more than a mere label. Indeed, the real impact of using the test to find a taking

176. *See Kavanau*, 941 P.2d at 855 ("In order to satisfy [the reasonable return] standard, rent control laws incorporate any of a variety of formulas for calculating rent ceilings."). The requirement of a reasonable return, rather than the highest return, is supported by the fact that the Supreme Court has made it clear that the Takings Clause does not guarantee the highest and best—or most profitable—use of property. *See* Andrus v. Allard, 444 U.S. 51, 66 (1979).

177. 542 N.E.2d 1059 (N.Y. 1989).

178. The vitality of this holding is in doubt after *Yee v. City of Escondido*, 503 U.S. 519 (1992). *See* text accompanying *supra* notes 160 and 161.

179. *But see* Nash v. City of San Francisco, 688 P.2d 894 (Cal. 1984) (upholding a rent control program that allowed owners a fair return and that permitted owners to withhold rental units from the market as they became vacant against takings and due process challenges). In response to *Nash*, the California Legislature enacted the Ellis Act, CAL. GOV'T CODE § 7060 (West 1995 & Supp. 1999), in 1985. The Ellis Act allows owners of rental property to go out of business by evicting existing tenants, subject to strict limitations. However, the ordinance in *Seawall* is distinguishable from that in *Nash* because the New York City ordinance compels rental even when there is no prior landlord-tenant relationship.

Note also that the application of a rent control program that effects a permanent lease to a corporate tenant may also be deemed confiscatory because it denies the landlord its reversionary interest and because it denies the owner the usual opportunity to increase rent upon the natural vacancy of an individual, as opposed to a corporate, tenant. *See* Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 485-86 (N.Y. 1994); *see also supra* note 172.

of private property is to expand government liability beyond its traditional bounds.

Rent control provides a good test for this principle. Most economists today believe that outside of temporary, emergency shortages, rent control programs exacerbate housing shortages rather than alleviate them.[180] Indeed, SMB's claim, supported by census data, seems to support that hypothesis. Even the majority is careful to qualify its holding that the Santa Monica Rent Control Law is constitutional as in no way endorsing the wisdom of such programs.[181] But under the framework of the U.S. Constitution, the *Santa Monica Beach* majority correctly noted, making policy is not a proper role for courts. By upholding the constitutionality of the Rent Control Law, the California Supreme Court "affirm[ed] the constitutional propriety of having the political process, through state and local legislative bodies, determine that policy."[182] What the majority fails to note, however, is that it uses the wrong constitutional lens to apply the means-ends test. The conclusion from *Santa Monica Beach* and other takings cases is that a sensitively designed rent control program should withstand constitutional scrutiny under both the Takings Clause and the Due Process Clause.

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180. *See* Paul Krugman, Editorial, *A Rent Affair*, N.Y. TIMES, June 7, 2000, at A31 (arguing that the analysis of rent control is among the "best understood" and "least controversial" issues in economics and that 93 percent of the members of the American Economic Association agreed in 1992 that "a ceiling on rents reduces the quality and quantity of housing"). For a more scholarly treatment of rent control, see, for example, ROLF GOETZE, RENT CONTROL: AFFORDABLE HOUSING FOR THE PRIVILEGED, NOT THE POOR (1994); John C. Moorhouse, *Long-Term Rent Control and Tenant Subsidies*, 27 Q. REV. ECON. & BUS. 3 (1987); *see also* Richard Epstein, *Rent Control and the Theory of Efficient Regulation*; 54 BROOK. L. REV. 741 (1989). Ironically, the research funded by the Santa Monica Rent Control Board suggests the largest financial benefits of rent control accrue to renters of the City's more expensive rental units. *See* Ned Levine et al., *Who Benefits from Rent Control?*, 56 J. AM. PLANNING ASS'N 140, 144 (1990). But others, including respondents to Krugman's Op-Ed piece in the *New York Times*, point out that the poor and working-class families often have no other alternatives. *See A War on Rent Control, on Two Coasts*, N.Y. TIMES, June 10, 2000, at A14 (five letters to the editor); *see also* Hevesi, *supra* note 13, at 11-7 (reporting on the effects of rent deregulation on the poor in the Boston area).

181. *See Santa Monica Beach*, 968 P.2d 993, 999 (Cal. 1999) ("We emphasize that a decision affirming the constitutionality of a particular rent control law is not in any sense an endorsement of its soundness.").

182. *Id.* at 1007.