PROPERTY'S TIPPING POINT

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There is a clear tension in the law between exercises of state police power in land-use regulation including zoning laws, on the one hand, and takings under the Fifth Amendment, on the other. Courts have struggled to find a dividing line between the two, but for their efforts what we are left only with is a disjointed array of legal tests, each one as flawed as the next. Legal theorists, for their part, must shoulder some of the blame—no single theory can identify the point at which community need outweighs private property rights. Even well-developed theories thus fail to translate into practical application. But this Article is resolved to bridge that gap.

This Article presents a novel theory that provides a unified normative framework for evaluating government interference with private property. It seeks to identify the tipping point at which private property rights must give way to the needs of the community at large. This approach, which I refer to as Property's Tipping Point, is a burden-shifting framework that accommodates competing theories of property. It builds on landmark Supreme Court cases to provide a unified standard for courts to apply in resolving cases of regulatory takings and exactions.

The approach presented in this Article has both a substantive and a procedural component. It develops two tests that work dynamically to identify the point where community need trumps owner autonomy: the indispensability of needs and the generality of action. The former requires that any government interference with private property is designed to promote community prosperity. The latter test—the generality of action—confines the government to the boundaries of the rule of law. It is only by passing these two tests that a government authority may reach Property's Tipping Point.

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INTRODUCTION

Over the last few years, Mayor Bill de Blasio of New York City has been actively promoting a comprehensive zoning plan named "Zoning for Quality and Affordability" (ZQA) which, according to its sponsors, is targeted to make "the city more affordable to a wide range of New Yorkers" and "diverse, livable communities with buildings that contribute to the character and quality of neighborhoods."[1] In a

[1] *See Zoning for Quality and Affordability*, NYC DEP'T CITY PLANNING, https://www1.nyc.gov/site/planning/plans/zqa/zoning-for-quality-and-affordability.page (updated June 22, 2016). Zoning plans that aim to increase affordable housing have been implemented in many states and localities within the United States and internationally. In what has been termed "inclusionary zoning," cities across the United States, including Los Angeles, Washington, D.C., Chicago, Cambridge, Massachusetts, and others, offer developers incentives in exchange for providing permanently affordable housing for low and moderate-income families. For research about the implications of embracement of inclusionary zoning plans in eleven cities across the United States, see HEATHER L. SCHWARTZ ET AL., RAND CORP., IS INCLUSIONARY ZONING INCLUSIONARY?: A GUIDE FOR PRACTITIONERS (2012), http://www.rand.org/content/dam/rand/

nutshell, the plan requires developers in certain neighborhoods to set aside a percentage of floor space for more-affordable units. The percentage for affordable housing may vary according to the location and state of the neighborhood. Predictably, property owners pushed back against this plan. But, ironically, social activists have objected as well. The main concern of these progressives is that the plan will actually result in *less* diversity because current homeowners and small businesses would be pushed out as property values rise. Inclusionary zoning plans, such as the one adopted by New York City, turn out to be exclusionary.

Mayor de Blasio's plan is but one example of the ever-present tension between private property rights and the needs of a modern city. Most American localities use zoning and land-use regulations to adapt to changes in community need.[2] As communities expand and develop, their need for proper education systems, transportation systems, healthcare institutions, and security increases, which requires local government to respond accordingly. Yet, these government responses necessarily imply changes in the scope of property ownership in the developing area, which lead to tension between ownership rights and community needs.

The legal precepts of property in liberal society have always been challenged by the competing needs of the individual and the community. Historically, property has been recognized as an important element in establishing and fortifying an individual's autonomy.[3] Modern societies have been forced to balance this tradition with the goal of maintaining a growing community. This task is largely carried out by local governments, which are charged with ensuring the wellbeing of the public they serve[4]; but too often, these two aims of property rights

pubs/technical_reports/2012/RAND_TR1231.pdf. Such programs were also subject to judicial review. Recently, the California Supreme Court upheld a residential inclusionary zoning ordinance, ruling that such plan is under the state police power. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974 (Cal. 2015).

2 Zoning plans usually aim to segregate uses that are thought to be incompatible; localities can use zoning plans as a tool to permit or restrict land uses in different areas. Zoning is commonly exercised by local governments such as counties or municipalities to distinguish between different categories of urban lands such as: residential, commercial, industrial, and spatial. For a comprehensive review about the history and scope of American zoning practice and law, see SONIA A. HIRT, ZONED IN THE USA: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION (2014).

3 *See* LAURA S. UNDERKUFFLER, THE IDEA OF PROPERTY: ITS MEANING AND POWER 68 (2003); Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257, 1264 (2014) ("Many, if not most, property theorists identify individual autonomy as an important value that property serves."); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964) ("The institution called property guards the troubled boundary between individual man and the state. It is not the only guardian; many other institutions, laws, and practices serve as well. But in a society that chiefly values material well-being, the power to control a particular portion of that well-being is the very foundation of individuality.").

4 For a detailed recognition of this tension, see Gregory S. Alexander et al., *A Statement of*

directly conflict with one another. The private-property regime is often considered beneficial to individuals as well as to the community at large, as it preserves owner autonomy while promoting efficiency, environmental preservation, and creativity.[5] However, when these various interests clash, the legal scheme applied by courts to resolve disputes proves to be disjointed and cumbersome. Most property theories, ranging in ideology from libertarian to progressive, can identify the tension between owner autonomy and community need; yet, they nevertheless fail to provide a sound remedial structure to address the issue.

In this Article, I propose a new, unified legal theory that could better resolve these tensions. I refer to this theory as Property's Tipping Point (PTP). Broadly speaking, this theory establishes a rebuttable presumption in favor of the private property owner, in line with traditional precepts of property law. The burden is on the government to rebut this presumption, which it can do by proving that the community's needs should supersede the landowner's autonomy. In order to meet this burden, the government must satisfy a two-pronged test; a test designed to address concerns inherent in government interference with private property—namely, misuse of power, discriminatory use of power, and hurried use of power. The first prong of the test attempts to verify the *indispensability* of the community's needs. It includes two subparts: (1) the importance of the need, and (2) an assessment of the proposed action against the needs of the community. The second prong of this test is an inquiry into the *generality* of the government action, in which the government bears the burden to show that its action is general in nature, rather than crafted to target specific individuals. This prong also involves two subparts: (1) a procedural component, and (2) a substantive component. The interplay between these two prongs provides a practical mechanism by which to resolve property disputes between landowners and governments. By passing these two tests, the government action may reach Property's Tipping Point, which recognizes the supremacy of community needs over landowner autonomy. The PTP theory therefore resolves one of the most controversial conflicts within property law—the conflict between state police power and the Takings Clause of the Fifth Amendment. This Article demonstrates how the PTP theory may clean up a muddled array of property law doctrines by providing a long overdue unified standard,

Progressive Property, 94 CORNELL L. REV. 743, 743 (2009) ("Property implicates plural and incommensurable values. Some of these values promote individual interests, wants, needs, desires, and preferences. Some promote social interests, such as environmental stewardship, civic responsibility, and aggregate wealth."); *see also* Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 329–30 (1996) ("[T]he allure of property is that it enhances wealth, both personal and social.").

[5] *See infra* notes 11–13 and accompanying text.

grounded in logical theory and executed by sound practical application of that theory.

This Article proceeds in five parts. Part I addresses the tension inherent in property law between landowner autonomy and community need. It will discuss how most philosophical conceptions of property identify this tension but fail to provide any clear theoretical guidelines or practical models of dispute resolution. Part II develops the PTP theory: it outlines how lawmakers and courts should approach conflicts between landowner autonomy and community need—i.e., by identifying whether a government body has reached Property's Tipping Point. Part III demonstrates how the PTP theory would apply in practice by resolving the tension between state police power and the Takings Clause. In doing so, it will discuss several milestone state supreme court and U.S. Supreme Court decisions on the subject, including *Commonwealth v. Alger*,[6] *Mugler v. Kansas*,[7] and *Pennsylvania Coal Co. v. Mahon*.[8] These decisions form the foundation of the PTP theory, however each case led to a different test for determining how to resolve the tension between individual and community need. The lack of standardized methodology leaves this doctrine quite muddled. Part IV expands the practical implications of the PTP theory in the context of regulatory takings and exactions. In suggesting a new reading of landmark Supreme Court rulings on these issues, the PTP theory provides a unified standard for legislative and judicial bodies to resolve this historical tension in a new, more coherent framework. Part V revisits the new zoning plan of New York City, examining it through the lens of the PTP theory.

I. THE TENSION BETWEEN OWNER AUTONOMY AND COMMUNITY NEED

Property rights are caught in a tug-of-war between private landowners and governmental authorities. For the better part of civilization, property ownership has been highly regarded as a sanctified right of autonomy. But when government recognized the needs of the many, an adjusted view of property rights placed private property owners at odds with communities, and therefore, with government itself. The rapid expansion of housing and development created a patchwork of laws without any logical theoretical underpinnings, which have weighed down the judicial system.

Scholars from across the property law discourse view the right to

6 Commonwealth v. Alger, 61 Mass. 53 (Mass. 1851).
7 Mugler v. Kansas, 123 U.S. 623 (1887).
8 Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

property as an essential part of a person's capacity to become the author of his life story.[9] So it should come as no surprise, that "[m]any, if not most, property theorists identify individual autonomy as an important value that property serves," as posited by Professor Gregory Alexander.[10] At the same time, property is regulated so that communities can flourish and develop. Indeed, both local and national governments are compelled to interfere with private property to provide services such as health, education, and mobility to their citizens. When these dual aims of property rights overlap in liberal societies, prevailing legal schemes generally benefit both individuals and the community at large, as they aim to preserve owner autonomy to the greatest extent possible while also promoting efficiency,[11] environmental preservation,[12] and creativity.[13] However, when there is a conflict between these interests, a determination mechanism is required. Such conflicts usually arise when the government aims to take a parcel of property that belongs to a private owner in order to fulfill an essential community need, such as a new highway or a hospital. In such cases, both decision makers and courts need instruments to determine whose interests control: Should we grant superiority to the owner's autonomy or, alternatively, approve the project out of the recognition of the superiority of the community needs? Should our determination in such cases depend on the purpose behind the government's taking of the

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9 *See supra* note 3 and accompanying text; *see also* Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409, 1423 (2012) (arguing that private law in general, and property law in particular, should be designed to allow people to "be the authors of their own lives, choosing among worthwhile life plans and being able to pursue one's choice").

10 Alexander, *supra* note 3, at 1264.

11 *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 23 (1985) ("Private property could serve the ends of allocative efficiency and of personal security and independence. It is likely that it serves both and that these turn out to be highly interdependent."); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967) ("A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities."); Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244–45 (1968) (discussing private property's efficiency gains).

12 *See* Hardin, *supra* note 11, at 1245 (discussing the private-property solution to the threat imposed to national parks preservation by their being open to all and the private property role in controlling pollution).

13 The idea that the allocation of private-property rights promotes creativity lies in John Locke's property conception, according to which owners gain ownership as a result of investing their work in objects. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 19 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690) ("The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*."). Locke's labor theory of property has become one of the most influential theories of intellectual property. *See, e.g.*, Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 288 (1988) (arguing that the constitutional vision of property was informed by the Lockean "labor theory," which places significance to creativity and efforts; according to Hughes, "this labor justification can be expressed either as a normative claim or as a purely incentive-based, instrumental theory").

property? For example, will our determination be different if it is taken not for the construction of a highway but rather for general economic development purposes?[14] Or should it depend on the extent of emergency in the implementation of these community needs?[15] Is there a difference in our determination between cases in which the threat to the owner's autonomy is a part of a comprehensive zoning plan and cases in which the owner's property is targeted alone?[16] These questions go to the root of property law in modern societies and have occupied most of the scholarly property discourse for decades.[17]

Most of the philosophical theories of property law shared a quest to establish determination mechanisms to allow decision makers and courts to determine the supremacy of either owner autonomy or community needs in such complicated conflicts that represent the everyday life of our modern society.[18] However, most of the suggested

14 *See* Kelo v. City of New London, 545 U.S. 469 (2005).

15 *Id.*

16 *See infra* Section II.B.2.

17 *See, e.g.*, ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 26–35 (1974) (discussing how on the conservative end of the theoretical property spectrum, libertarians place significant value on autonomy as a foundational value of property law); *see also* JONATHAN WOLFF, ROBERT NOZICK: PROPERTY, JUSTICE AND THE MINIMAL STATE 60 (1991); Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187, 189 (1992). Slightly to the ideological left of libertarians, neo-Kantians also place autonomy in the form of self-determination at the core of the rights inherent to property ownership, yet, in stark contrast to the libertarian conception of property, neo-Kantians argue that the tension between owner-autonomy and community-need should not always be resolved in favor of private owners. *See, e.g.*, ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 15–17 (2009); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 124 (2012); Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795, 811 (2003). Welfarist utilitarians also recognize self-determination as a crucial component of their theory of rights, yet most Welfarist utilitarians present no clear guidelines as to when the police power of the state should be limited in consideration of landowner autonomy. *See, e.g.*, JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 73–79 (1988); Alexander, *supra* note 3, at 1264–65. *See generally* Amartya Sen, *Utilitarianism and Welfarism*, 76 J. PHIL. 463 (1979) (discussing the differences between Utilitarianism and Welfarism). Such a discussion also occupies law and economics discourse of property law. *See, e.g.*, Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1849–50 (2007); Frank I. Michelman, *Mr. Justice Brennan: A Property Teacher's Appreciation*, 15 HARV. C.R.-C.L. L. REV. 296, 305–06 (1980). The tension between the community and its needs and the autonomy of the owner also occupied most of the progressive discourse of property. *See, e.g.*, HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS xvii (2011); JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP (2000); Gregory S. Alexander & Eduardo M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES L. 127, 127 (2009); Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1054 (2009); Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 317 (2006) [hereinafter Singer, *The Ownership Society*]; UNDERKUFFLER, *supra* note 3; Dagan, *supra* note 9, at 1423–24.

18 *See, e.g.*, RIPSTEIN, *supra* note 17, at 237 (arguing that one of the important tasks of modern political philosophy was to reconcile the important and ineliminable nature of the police power with the ideas of limited government); UNDERKUFFLER, *supra* note 3, at 85–102 (offering a detailed theoretical model to determine when public interests should override owner

mechanisms left both decision makers and courts quite puzzled, mainly because they provide vague, and at times contradictory, rules and standards to determine cases in which these two aims collide. Thus, a new, more clearly stated framework must be established to resolve such property disputes.

II. IDENTIFYING PROPERTY'S TIPPING POINT

A. *The Starting Point*

The struggle between autonomy and community in property law exists in any property dispute that involves landowners and government authorities. In this Part, I suggest a novel understanding of how property law's inner conflicts should be determined. Consider a continuum, with private property rights and autonomy at one end and community need at the other. When lawmakers intend to create a new property institution or, alternatively, when courts are required to resolve a dispute within an existing scheme, the lawmakers or courts go on to a notional inquiry to locate the proper position on this continuum. This inquiry is nothing new; it is done by lawmakers and courts continually. For example, consider U.S. patent law, as codified in Title 35 of the United States Code.[19] The law recognizes a patent as a right granted to the inventor by which she may exclude others from making, using, selling, offering for sale, importing, inducing others to infringe, and/or offering a product specially adapted for the practice of the patent.[20] However, although Title 35 grants ownership to inventors, it nevertheless requires them not to use this Title in an unreasonable manner.[21] In cases where an inventor unreasonably declines to use a patent she may be denied injunctive relief, meaning that the public would be able to use the patent even though the twenty-year entitlement period has not yet elapsed.[22] This construction of patent law reflects an inquiry initiated by lawmakers when determining the contours of a new

rights); Alexander & Peñalver, *supra* note 17 (discussing the interplay between the individual and the community); Merrill & Smith, *supra* note 17 (denying the utilitarian indifference for owners' rights as well as to distributive justice); Michelman, *supra* note 17, at 305–06 (considering the economic effect of individual participation in the fulfilment of community needs as well as the costs of such participation); Singer, *The Ownership Society*, *supra* note 17 (discussing the tension between the owner and his or her community needs).

19 35 U.S.C. §§ 1–390 (2012).

20 § 154(a)(1). Congress is authorized by the U.S. Constitution to grant this quite strong property right to inventors: "The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ." U.S. CONST. art. I, § 8, cl. 8.

21 *See, e.g.*, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006).

22 § 154(a)(2) (defining the twenty-year period of exclusivity).

property institution. The Patent Act suggests that while owner autonomy is given *a priori* supremacy, it may nevertheless be trumped by community need if the owner fails to reasonably use his right.[23]

The same is true for courts struggling to determine disputes in current property institutions. Consider, for example, the Court's determination about the legitimacy of a zoning law in *Village of Euclid v. Ambler Realty Co.*[24] In *Euclid*, the Court was asked to determine whether the Village of Euclid's zoning ordinance should be considered a taking under the Fifth Amendment.[25] The ordinance was designed to prevent further industrialization and foster the character of the village, but it adversely affected Ambler's property values. Ultimately, the Court ruled that zoning ordinances, regulations, and laws must find their justification in some aspect of police power, and be asserted for the public welfare.[26] Also consider the ruling in two of the most well-known regulatory takings cases, *Nollan v. California Coastal Commission*[27] and *Dolan v. City of Tigard*.[28] In both cases, government authorities conditioned the approval of permits on an owner's willingness to dedicate an easement to the public which, the government claimed, served communal need.[29] In both cases, the Court ruled that the government's imposed conditions constituted takings under the Fifth Amendment. In *Nollan*, the Court found that obtaining easements over landowner property required the use of eminent domain and that the state had to pay for the reasonable value of such easements.[30] In *Dolan*, the Court addressed a narrower question, finding that the government's conditions were not reasonably related to the impact of proposed development and that therefore, there was no essential nexus between the legitimate state interest and the permit condition.[31] Putting aside the *specific* holdings in these three cases, one can see that in each case,

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23 *See eBay Inc.*, 547 U.S. at 391–92 (specifically balancing the public interest against owners' rights in considering whether to issue an injunction pursuant to the Patent Act).

24 Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

25 *Id.* at 379–84.

26 *Id.* at 386–90.

27 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

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

29 *See Dolan*, 512 U.S. at 396 ("Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization, particularly in metropolitan areas such as Portland. The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done."); *Nollan*, 483 U.S. at 841 ("That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose . . . .'").

30 *Nollan*, 483 U.S. at 841–42.

31 *Dolan*, 512 U.S. at 395–96.

government authorities justified the infringement of landowner autonomy in her property using community interest as a vehicle. In each case, the Court engaged in an inquiry to resolve this tension. While conclusions differ in each of these cases, they nevertheless reflect how courts resolve a clash between the community and the individual. However, existing judicial doctrines lack a unifying theme upon which such determination will be based.

In articulating such a unifying theme, let us first recall the continuum of property interests: at one end, complete landowner autonomy; the other, community need. According to the PTP theory, any judicial inquiry related to property should begin by standing on the *autonomy* end of the continuum. The presumption of complete owner autonomy is justified by three primary considerations: (1) our social understanding of private property, (2) the theoretical legal underpinnings of private property, and (3) the risk of government abuse or error in decision making with respect to private property. First, a presumption of owner autonomy reflects a commonplace and common-sense understanding of property ownership, which considers property to be a locus of owner autonomy and liberty. Indeed, all conceptions of property regard owner autonomy as an essential feature, if not an ultimate one.[32] This common notion did not come from nowhere; rather, it represents a strong social understanding that owners *should* be granted autonomy, at least absent extraordinary circumstances.[33] The presumption that individual autonomy should be the starting point of every property dispute therefore grants importance and meaning to our common social understanding, and as a result increases the legitimation of the inquiry.[34] Second, the presumption of owner's autonomous supremacy is appropriate if we take seriously the legal framework that defines our private property regime. The basic idea behind the private property regime—regardless of its underlying social justification—is that property ownership is spread among private owners who in turn enjoy a certain extent of autonomous determination.[35] If we inquire into any property dispute by first recognizing the supremacy of owner autonomy over community need, we express our recognition of the foundational idea underlying private property, which is the allocation of ownership to private individuals.[36] Finally, yet equally important, this

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32 *See* discussion *supra* Part I.

33 *See, e.g.*, Daron Acemoglu & Matthew O. Jackson, *Social Norms and the Enforcement of Laws* (Nat'l Bureau of Econ. Research, Working Paper No. 20369, 2014), http://www.nber.org/papers/w20369.pdf (discussing the importance of creating affinity between the law and social norms).

34 *Id.*

35 This understanding is shared by most private property justifications. *See* Alexander, *supra* note 3, at 1264.

36 *Id.* at 1264–70.

presumption allows a wider margin of error for both authorities and courts. Beginning an inquiry of any property dispute by presuming the supremacy of landowner autonomy reduces the concern that that autonomy will be mistakenly harmed by government authorities. Generally speaking, individuals are less powerful than government authorities. Consequently, they are more vulnerable to mistakes that the government may make in resolving property disputes.[37] Beginning the inquiry with the acceptance of autonomy reduces this concern. Furthermore, the risk of mistake borne by the community is significantly smaller than the risk borne by the individual.[38] While an individual owner may suffer devastating harm if property is taken, the community, as a whole, can shoulder a burden with less severe consequences.[39] This third justification actually mirrors the two factors comprising the costs of error in law and economics: the probability of error and the cost if an error occurs.[40] Due to an individual's inferiority in relation to authorities, the probability that she will bear errors is greater. Due to the individual's financial vulnerability in relation to society at large, the costs of error for the individual are greater. To reduce the costs of error, therefore, we should presume owner autonomy.

Yet, the presumption of the landowners' complete autonomy is not absolute. As the PTP theory suggests, the continuum between autonomy and community contains a tipping point, which, if crossed, defeats the presumption in favor of the community's needs. Crossing the tipping point does not entirely deny a landowner's autonomy, but it does narrow the scope of ownership, excluding from it the uses or features required to fulfill the community's needs.

B. *Identifying the Tipping Point*

Following the notional inquiry, we must next identify the point at which the presumption of individual autonomy is overcome by the needs of the community. In identifying this tipping point, we must first

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37 *See* AM. PLANNING ASS'N, APA POLICY GUIDE ON TAKINGS: LAND USE REGULATIONS AND THE "TAKINGS" CHALLENGE (1995), https://planning.org/policy/guides/adopted/takings.htm ("[G]overnments sometimes make mistakes . . . that may have an unfair impact on a particular property owner. Although the democratic process generally ensures that the purpose of government regulations is a valid one, those regulations sometimes go awry in the implementation. Landowners and other citizens should absolutely have adequate and fair remedies to deal with both mistakes and intentional acts that result in unfair hardship for particular individuals.").

38 *See* James E. Krier & Christopher Serkin, *Public Ruses*, 2004 MICH. ST. L. REV. 859, 874.

39 *Id.*

40 *See* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 401 (1973).

consider the concerns that weigh against treating the community's needs as superior when they require infringing individual autonomy. Indeed, if we accept the notion that for society to thrive it may, at times, be required to use private property, why should we limit the ability of governments to do so? This is not only a theoretical question, but also a practical one.

Current literature suggests several different answers to this question. First, recall that any interaction between authorities and individuals raises concerns over the imbalance of power between the government and the individual as well as the government's abuse of power.[41] This concern underlies most calls for limitation of the authorities' power, mainly through stricter requirements for public scrutiny and transparency.[42] The second concern, which is related to the first, is that government might abuse its power against specific individuals or groups of individuals.[43] This concern comes from the recognition that certain vulnerable populations[44] are more prone to abuse by authorities than individuals that belong to a demographic majority or enjoy significant financial strength.[45] These concerns have

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41 This concern occupied property discourse (and, more broadly, the constitutional discourse) from the very beginning. It was James Madison who raised the concern in the Federalist Papers that an organized "faction" might use its power to enrich itself at the expense of the unorganized public. This concern led property scholars to expand the scope of compensation required in governmental actions. *See* THE FEDERALIST NO. 10, at 56–57 (James Madison) (Jacob E. Cooke ed., 1961); Abraham Bell & Gideon Parchomovsky, *Givings*, 111 YALE L.J. 547, 554–55 (2001); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 853–57 (1983).

42 *See* Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 758–59 (1999) ("For as long as we seek to protect individual liberty and are troubled by possible abuses of governmental power by public authorities, we need to be suspicious of any public attempt to redefine our property—and hence our interpersonal—relations."); Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519 (2008).

43 *See, e.g.*, Patricia Munch, *An Economic Analysis of Eminent Domain*, 84 J. POL. ECON. 473, 487–88 (1976) (studying exercises of eminent domain in Chicago and finding that the indigent—to wit, those with lower-value property—were consistently undercompensated relative to affluent property owners).

44 Here, "vulnerable populations" means those that are vulnerable in a social, political, or economic sense.

45 *See* Bell & Parchomovsky, *supra* note 41, at 578–79 ("The ability of the politically powerful to extract benefits for themselves invariably comes at the expense of the politically disenfranchised—individuals and groups with insufficient political clout and limited financial resources."); Dagan, *supra* note 42, at 746 ("It must ensure that even temporary imbalances are not unlimited, that the degree of permissible disproportionality is dependent upon the proximity of the benefited community to the injured landowner, and that politically weak or economically disadvantaged landowners are guaranteed proper protection from abuse."); Daphna Lewinsohn-Zamir, *Compensation for Injuries to Land Caused by Planning Authorities: Towards a Comprehensive Theory*, 46 U. TORONTO L.J. 47, 54 (1996) ("Taxes and liability rules have a general and wide application. Therefore, they raise relatively little fear of abuse of legislative power and discrimination against certain groups. Contrarily, planning law is by its very nature 'discriminatory,' because people in similar situations are treated differently.").

led many scholars to argue for higher standards for authorities when the interests and rights of "suspect" groups or individuals are at stake.[46] Finally, there is the concern that authorities will act rashly when it comes to imposing restrictions on, or the expropriation of, private property.[47] This concern is different from the other two described above in that it does not necessarily blame authorities for intentional misuse of power, but rather positively describes the lack of incentives given to authorities and officials to act with care when imposing restrictions on private property.[48]

As I have already suggested, in searching for the Property's Tipping Point, we should be able to identify when the community's needs are so essential as to overcome the presumption of supremacy of owners' autonomy. In order to do so, we should be able to distill these needs from the concerns of abuse of power described above. By reducing concern for misuse of power, we allow a clear view of the tensions underlying property. When the values of landowner autonomy and community needs clash, an impartial and test-based instrument would allow for the determination of the tipping point.

In what follows, I will suggest two tests, which, if integrated, would allow the identification of the PTP. These two tests are the Generality of Action Test—relating to the scope of application of government action—and the Indispensability Test—relating to the relative essentiality of the community's needs. Combining these two tests will allow authorities, courts, and the public to identify the PTP. In what follows, I will elaborate on each test and I will explain their respective roles in identifying the PTP. Afterwards, I will demonstrate how the combination of both tests will allow to us to account for the various concerns enumerated above and to identify the PTP.

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46 *See* Bell & Parchomovsky, *supra* note 41, at 578–79; Dagan, *supra* note 42, at 746; Lewinsohn-Zamir, *supra* note 45, at 54; *see also* Shai Stern, *Just Remedies*, 68 RUTGERS U. L. REV. 719 (2016).

47 This concern is known in the literature that deals with takings as the "fiscal illusion" of governments. Fiscal illusion is the presumed habit of government decision makers of ignoring costs that do not directly affect government inflows and outflows. Governments that do not consider all the costs of takings tend to execute more takings in a hastier manner (especially from the economic perspective). According to some scholars, this is why compensation for takings is due. *See, e.g.*, Abraham Bell & Gideon Parchomovsky, *Taking Compensation Private*, 59 STAN. L. REV. 871, 881–84 (2007); Lawrence Blume et al., *The Taking of Land: When Should Compensation Be Paid?*, 99 Q.J. ECON. 71 (1984); Thomas J. Miceli, *Compensation for the Taking of Land Under Eminent Domain*, 147 J. INSTITUTIONAL & THEORETICAL ECON. 354 (1991).

48 *See* Bell & Parchomovsky, *supra* note 47, at 881–83; Blume et al., *supra* note 47; Miceli, *supra* note 47.

1. Indispensability Test

The Indispensability Test was designed to examine the extent of necessity in imposing restrictions on, or the deprivation of, private property by the community. As mentioned earlier, the initial presumption in property law should be to fully respect owner autonomy.[49] This presumption, as explained above, is a manifestation of both procedural and substantive protections. When an authority supposes that a community's needs justify rebutting this presumption, it should have to prove two cumulative conditions. First, the authority will be required to demonstrate the importance of the project to the community's prosperity. If the authority fails to demonstrate this importance, then the owner's autonomy should go undisturbed. Consider, for example, a municipality that is considering a new land-use regulation or zoning law that restricts beachfront owners from denying others access to the beach. This regulation limits the owner's autonomy by interfering with their use of their property. In identifying Property's Tipping Point, the result should partly depend on the municipality's ability to demonstrate the essentiality of such an act for the community's prosperity. In other words, why and how would beach access contribute to the community's prosperity?[50] The demand that the authority provide an explanation about the importance of the community need is not new to American law. As the Supreme Court has previously stated: "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."[51] Demonstrating the importance of the need for which the authority infringes the property owner's autonomy should therefore be the first step in authorities' quests to rebut the presumption of an owner's superior autonomy in said property.

In addition to the Indispensability Test's essentiality requirement, government authorities must also demonstrate a nexus between the property affected by the regulation and the fulfillment of community need.[52] Consider once again the beach-access regulation discussed

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49 *See* discussion *supra* Section II.A.

50 The exact manner in which the authority will have to demonstrate the importance of the community interest requires a broad discussion, but it seems that when it comes to infrastructure, environmental, and transportation needs, the authority should be required to provide opinions from experts in these fields that would clearly indicate the need and importance of its implementation.

51 Bates v. City of Little Rock, 361 U.S. 516, 524 (1960).

52 *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) ("We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent

above. As long as the access to all or most beaches in a given area requires passage across private property (i.e., as long as all or most beachfronts are held by private owners), the need to regulate for the benefit of the community would be obvious. Yet, if only a small part of beachfront property in a given area is held in private hands (i.e., if citizens may access the beach easily through land that is not held privately), it would be difficult for the municipality to justify these restrictions on private property owners. This condition imports a proportionality requirement into the Indispensability Test, requiring authorities and courts to determine whether the regulations they propose are indeed essential to the community's prosperity, and to examine whether the fulfillment of a community need requires the implementation of restrictions on, or the deprivation of, private property rights.

To take the proportionality requirement from mere theory to actual practice, it would be important to establish a method of determining the proportionality of an action based on three prominent proportionality subprinciples: (1) Suitability—the suitability of the action to achieve the desired end; (2) Necessity—the adoption of the least intrusive, equally efficient alternative; and (3) Proportionality in the narrower sense—which requires that the burden that results from the action would not be excessive in relation to the public interest.[53] These three proportionality principles are currently implicitly applied in a limited array of American legal fields.[54] Their implementation in the quest for Property's Tipping Point not only demonstrates the burden placed on authorities aiming to rebut the presumption of an owner's superior autonomy, but also provides courts with workable instruments in determining authorities' success in reaching Property's Tipping Point.

Therefore, the Indispensability Test provides the substantive motivation to trigger the inquiry about Property's Tipping Point. It also reduces concerns about misuse of power, especially in the unintentional sense in which authorities sometimes act without taking into account the full spectrum of implications of their actions on individuals or society. This test is crucial to justify the reversal of value supremacy for

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to the impact of the proposed development.").

53 These principles are the constituent elements of the German law proportionality principle, which is an unwritten constitutional rule derived from the principle of the rule of law. For an analysis of the German proportionality principle, see E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 28–31 (2009).

54 *See id.* at 51–90 (discussing implicit and explicit implementation of the proportionality principle in the American civil law). One of the fields in which the court explicitly implemented the proportionality principle in the American law is the law of land use exaction, discussed *infra* in Section IV.B.

both law-and-economics and progressive property theories. Law-and-economics conceptions of property often warn against authorities falling into fiscal illusion when taking private property.[55] This potential fiscal illusion may lead authorities to unintentionally misuse their power by failing to take into account the actual harm or costs of the implementation of public projects.[56] By forcing the authorities to account for the true cost of their actions, law-and-economics scholars assume that they will internalize the costs, and only then will an informed decision be made.[57] The Indispensability Test attempts to achieve just that. By requiring authorities and courts to confront both the essentiality of the community's needs and the necessity of interfering with private property ownership for their implementation, authorities will not be able to alter existing property institutions or regulate property without internalizing the implications of those actions.[58] This result should be acceptable and desired by progressive property scholars as well. Though progressive property scholars may reject the financial calculations as the sole basis for determining the allocation of property rights, they nevertheless are concerned with the potential abuse of power by authorities.[59] A demand that both authorities and courts provide justification for limiting owner autonomy is therefore consistent with progressive conceptions of property.

2. Generality of Action Test

Alongside the Indispensability Test, the search for PTP should include an additional test, which I call the Generality of Action Test (Generality Test). The Generality Test is designed to achieve several

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55 *See* Blume et al., *supra* note 47, at 72; Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 567–68 (1986); Thomas J. Miceli & Kathleen Segerson, *Regulatory Takings: When Should Compensation Be Paid?*, 23 J. LEGAL STUD. 749, 753–56 (1994).

56 *See* Kaplow, *supra* note 55, at 567 ("Numerous commentators favor providing compensation for takings to alleviate fiscal illusion: requiring the government to compensate losers ensures that government decisionmakers will give full weight to the costs of their actions. Without compensation, the argument runs, cost-benefit balancing will be biased because policymakers tend to undervalue costs they do not directly bear.").

57 *Id.*

58 If a government acts in defiance of these considerations, a reviewing court will be critical of those acts. Though subsequent review may not prevent the wrong acts of government in the first instance, the end result would be public outrage and government actors would be wise to consider those implications before acting.

59 *See, e.g.*, Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752, 1762 (1988) ("The government has flagrantly abused its monopoly power over an unprotected landowner."); Dagan, *supra* note 42, at 745–46 (suggesting long-term reciprocity to avoid constant misuse of power by authorities, especially toward politically weak or economically disadvantaged property owners).

goals, the most important of which is to keep the PTP inquiry within the rule of law, particularly when it may result in limiting individual autonomy.[60] Put another way, this goal of committing PTP to the rule of law is aimed at limiting the arbitrary use of power by the government. Indeed, as theorists working in divergent political and philosophical traditions have emphasized, the rule of law is vital to the law's ability to sustain both individual autonomy and a prosperous society.[61] One of the major features identified as crucial to the rule of law is generality, or the quest to generate generally applicable rules.[62] Generality, therefore, mitigates the danger of an authority's misuse of power.[63] Indeed, by applying a generality test, one seeks to ensure that authorities' actions do not target any specific individual or group of individuals because of their political or economic weaknesses. By requiring property regulations and zoning schemes to be general in nature, we reduce concerns about intentional misuse of power toward vulnerable segments in the population. While some argue that general applicability does not entirely prevent the misuse of power or intentional infringement of specific individuals or groups,[64] I believe that it reduces this concern

60 For more information on the importance of keeping the actions of authorities within the rule of law, see, e.g., JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 270–71 (1980) (providing eight factors that a legal system should preserve to maintain the rule of law); JOHN RAWLS, A THEORY OF JUSTICE 235–43 (1971) (discussing the rule of law and its connection to equality and individual autonomy); Richard A. Epstein, *Beyond the Rule of Law: Civic Virtue and Constitutional Structure*, 56 GEO. WASH. L. REV. 149, 149–52 (1987) ("There is no question that the rule of law is a necessary condition for a sane and just society. . . . [I]t is a very different question to ask whether it is *sufficient* to achieve that result."); Jeremy Waldron, *The Rule of Law and the Importance of Procedure* 14–16 (N.Y.U. Pub. Law & Legal Theory, Paper No. 234, 2011) (discussing the importance of procedure, particularly in adjudicative settings, for administering the rule of law). For a recent application of the rule of law in property law, see Lee Anne Fennell & Eduardo M. Peñalver, *Exactions Creep*, 2013 SUP. CT. REV. 287 (2013).

61 *See, e.g.*, FINNIS, *supra* note 60, at 273 ("The fundamental point of the desiderata is to secure to the subjects of authority the dignity of self-direction and freedom from certain forms of manipulation. The Rule of Law is thus among the requirements of justice and fairness."); RAWLS, *supra* note 60, at 207 ("Now the rule of law is obviously closely related to liberty. We can see this by considering the notion of a legal system and its intimate connection with the precepts definitive of justice as regularity. A legal system is a coercive order of public rules addressed to rational persons for the purpose of regulating their conduct and providing the framework for social cooperation. When these rules are just they establish a basis for legitimate expectations. They constitute grounds upon which persons can rely on one another and rightly object when their expectations are not fulfilled. If the bases of these claims are unsure, so are the boundaries of men's liberties.").

62 *See* LON L. FULLER, THE MORALITY OF LAW 46–49 (rev. ed. 1969). Fuller presents a list of principles generated to capture formal requirements of the rule of law. According to Fuller, the first principle that may cause the state to deviate from acting in accordance to the rule of law is its failure to generate generally applicable rules, "so that every issue must be decided on an ad hoc basis." *Id.* at 39. In other words, lack of *generality* causes governments to fail to act within the rule of law.

63 *See* Fennell & Peñalver, *supra* note 60, at 312–13 (discussing the deficiencies of ad hoc actions).

64 *See* discussion *supra* Section II.B.

significantly, especially if the approval of such generally applicable regulations requires legislation or administrative processes that involve public participation and scrutiny.

Consider once again the municipality that decided to act to provide all citizens with access to its beaches. This goal may be achieved by approving a new land-use regulation or amending the city's zoning law, but also through specific measures imposed on specific beachfront property owners.[65] Is there a difference between these two ways of actions? According to the PTP theory, the answer should be—yes! When authorities aspire to implement a community need, they can choose between acting in a general manner or in a specific manner. These two manners differ in both their procedural and substantive features. An authority that attempts to fulfill a community need by constructing a comprehensive plan (whether by legislation or administrative process) acts in a manner that is transparent, exposed to public scrutiny, and includes inherent procedures for a hearing and consideration of public opposition.[66] These instruments reduce concerns of both an authority's misuse of power, and the internalization of all costs of the project by the authority.[67] Indeed, the Generality Test protects owners from any attempt by the government to disguise its real intentions or motivations behind actions that impose restrictions on private property or result in the deprivation of private property. In addition, such processes are usually spread over a long period, which allows for reference to changes, and thus enables constant reconsideration of the needs and their scope.

Yet, a general determination process also has substantive superiority over imposing restrictions selectively on some property owners but not others. When authorities choose to act in a general way rather than a specific way, they demonstrate the importance that they attribute to the implementation of the community's needs because their actions are geared toward the community and not toward individuals.[68] Thus, their action appears geared toward progress, rather than as a way of targeting certain property owners. Taking into account the inherent political and administrative obstacles that characterize legislative or administrative processes, the authorities' decision to take this path (instead of specific actions) clarifies the importance they attach to the

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65 *See* Fennell & Peñalver, *supra* note 60, at 312–13 (discussing the possibilities of an authority in the exaction context).

66 *See* WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS 31–36 (1985).

67 *Id.*

68 *See, e.g.*, Udell v. Haas, 235 N.E.2d 897, 900 (N.Y. 1968) ("In exercising their zoning powers, the local authorities must act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even majority of the community.").

implementation of these needs. Moreover, a general path of action also provides evidence of the importance of implementing the community's needs, because it provides a comprehensive plan that usually takes into account the overall needs of the community. When authorities decide to present a comprehensive plan for dealing with a community's needs, they prove the importance embedded in the fulfillment of these needs to the community.

To pass the Generality Test, authorities should comply with its two different yet complementary components: one procedural, the other substantive. The procedural component deals mainly with the process by which the community acts to fulfill its needs. In a sense, it requires authorities to act in accordance with a notion of due process, one that will grant owners and other stakeholders with the ability to resist, understand, and realize the importance of community need. The realization of the procedural aspect should be achieved through citizen participation including public hearings to allow owners to present their opposition to the plan. The substantive component, on the other hand, deals more with the scope and scale of the authority's action. It distinguishes between actions that target specific individual owners (such as denial of permits and exactions), and those that encompass a wider section of owners. Inasmuch as government action is more limited in scope (i.e., by targeting individual property owners), the action may not meet the substantive component of the Generality Test. On the other hand, inasmuch as the action is general in nature (meaning that it targets a wider section of owners), the action should meet the substantive aspect of this test.

C. *The Interplay Between the PTP Prongs*

As I have established, to trump landowner autonomy, the authorities should pass both PTP tests: *generality of action* and *indispensability of needs*. But what if one of the two tests is only partly satisfied? Consider, for example, a zoning ordinance that is limited in its scope only to a very specific area, and thus its effect is limited to one or a few owners. In such a case, the Generality Test is only partially realized because, although the ordinance may be promoted in an appropriate procedural manner (by allowing public scrutiny of the action), the fact that it targets specific individual owners raises the concern addressed by the Generality Test—the intentional misuse of power directed toward vulnerable segments in the population. Should such an act pass the PTP test? Or consider another case in which a zoning ordinance indeed realizes both procedural and substantive aspects of the Generality Test. The aim of the ordinance, or the indispensability of its results for the community, is questionable. As mentioned earlier, the indispensability-

of-needs test consists of two subparts: the essentiality of the needs and proportionality. A specific action may realize one of these subparts while failing to realize the other. This would be true in the case of an ordinance that prevents beachfront owners from blocking others from accessing the beach. If unrestricted beach access is understood as an essential community need, and if most of the beachfront is held in private hands, such an ordinance would pass the Indispensability Test. However, if most beachfront is not held privately, save for a limited portion of it, should such an ordinance pass the Indispensability Test?

These imperfect situations challenge the PTP theory, but realistically they represent most of our daily life. To deal with these imperfect situations, in which the prongs of the PTP theory are only partially satisfied, a balancing test should be performed in a way that is consistent with the foundational principles underlying the PTP theory: the test should recognize property's dual aims, in addition to concerns about community supremacy over individual autonomy. In this Section, I argue that in order to determine whether the PTP was reached or not, we must first recognize the interplay between the two subparts in each test, as well as between the tests themselves.

When one of the subparts of either test is not satisfied, we need to raise the standard of the other subpart under the same heading. For example, if the procedural aspect of the Generality Test has some flaws, the substantive aspect should be strictly realized, and vice versa. The same is true for the two subparts of the Indispensability Test: when the importance of the community's needs is questioned or is otherwise debatable, then the proportionality aspect should be strictly enforced, and vice versa.

However, due to the profound harm that the reversal of value supremacy may cause to individual autonomy, we should also raise the standard for satisfying the other test. For example, if satisfaction of the Generality Test is questionable, we should more fully explore the importance of the proffered need and we should require a stricter examination of the proportionality between the action taken by authorities and the need. The contrary is also true. When the importance of the community's needs is debatable, we should require a stricter examination of the two components of the Generality Test. In the following Part, I will demonstrate how the PTP theory, its tests, and the interplay between them find expression in current property law and doctrines.

III. PRACTICAL APPLICATION OF THE PTP THEORY: POLICE POWER VERSUS TAKINGS

The dual tests of PTP theory—indispensability and generality—

ensure that community need will overcome the presumption favoring individual autonomy only after the essentiality of the need has been established and the potential for misuse of power mitigated. In this Part, I will demonstrate how PTP theory can be applied practically. I begin by suggesting that the PTP theory may provide an answer to one of the most controversial distinctions in property law: the tension between state police power and the Takings Clause of the Fifth Amendment.

For centuries now, courts have struggled to find a bright-line rule to distinguish between legitimate exercise of state police power, wherein states can limit landowner autonomy in their property without any form of compensation and the cases in which compensation is required.[69] Several judicial theories were created for this purpose. The three most prominent ones were the noxious-use theory suggested by Chief Justice Lemuel Shaw in *Commonwealth v. Alger*,[70] the physical-invasion theory suggested by Justice John Marshall Harlan in *Mugler v. Kansas*,[71] and the diminution-of-value theory suggested by Justice Oliver Wendell Holmes in *Pennsylvania Coal Co. v. Mahon*.[72] The following Part discusses these three prominent theories and the failure of each to provide guidance to resolve this tension. Indeed, these theories left this tension a muddle.[73] Yet, this conclusion should not lead us to give up in our attempts to resolve this tension. The PTP theory can provide us with nuanced understanding of the tipping point by which a presumed taking, which requires the state to compensate the owner, can become a legitimate exercise of state police power. The second Section of this Part demonstrates how the PTP theory successfully provides a unifying theory to resolve this tension. In doing so, I will apply the PTP theory to each of the three prominent cases that serve as platforms for the establishment of these earlier doctrines. This new application will reveal that these cases are more nuanced than they appear at first reading, and that they provide more than mere hints for the foundations of the PTP theory.

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69 For a comprehensive description of this ongoing legal debate, see ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 546–54 (1904); Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); William B. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980).

70 Commonwealth v. Alger, 61 Mass. 53 (Mass. 1851).

71 Mugler v. Kansas, 123 U.S. 623 (1887).

72 Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

73 *See* Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984).

A. *One Tension, Two Poles, Three Theories*

1. *Commonwealth v. Alger*: Shaw's Noxious-Use Theory

In *Commonwealth v. Alger*, Massachusetts enacted a statute pursuant to the Colony Ordinance of 1647, which limited how far wharves may extend into the Boston Harbor.[74] In this case, Alger, the defendant, built a wharf that extended beyond that line but was otherwise within the geographical limits of the Colony Ordinance of 1647 and did not impede or obstruct public navigation. Chief Justice Shaw of the Massachusetts Supreme Court stated that even though the statute's prohibitions and restraints may diminish the profits of the owner, the owners are not entitled to compensation because these were exercises of police power.[75] Although Shaw's ultimate ruling in *Alger* was based on other facts in the case, as will be demonstrated below, it was Shaw's discussion of "noxious use" that caught the attention of courts and scholars alike. According to Shaw, the government's prohibition against noxious use of property, although it may diminish the owner's profits, is not "an appropriation to a public use, so as to entitle the owner to compensation."[76]

Shaw's noxious-use theory is appealing at first glance. Pinpointing noxious use as the distinguishing factor between state police power and takings provides a bright-line rule that courts may easily employ to resolve such disputes. However, as Professor Barros argues, this theory fails to meet the challenges imposed by changing reality and, particularly, it fails to explain how state police power has come to encompass more than the prevention of noxious uses of private property.[77] Consider, once again, the Court's decision about the legitimacy of zoning law in *Euclid*. In that case, the Court ruled that zoning ordinances, regulations, and laws must find their justification in some aspect of police power and must be asserted for the public welfare.[78] Though certain zoning ordinances or land-use regulations may indeed be imposed to prevent noxious use, others are designed to address a much broader goal—to promote a robust community life for all citizens.[79] This broader aim, as mentioned, had been recognized by

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74 *See Alger*, 61 Mass. at 53.

75 *Id.* at 86.

76 *Id.*

77 D. Benjamin Barros, *The Police Power and the Takings Clause*, 58 U. MIAMI L. REV. 471, 503 (2004) ("As the modern regulatory state developed in the late nineteenth century, and the scope of police regulation increasingly transcended its community-based common law roots, police regulations increasingly restricted uses of private property that were not so inherently harmful that they could be condemned as noxious uses.").

78 Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

79 *See* Barros, *supra* note 77, at 503 ("[A]s the practical scope of police regulation expanded

courts as legitimate under the police-power theory.[80] The noxious-use theory thus fails to provide us with a rule sufficient to distinguish between the zone of police power and takings.

2. *Mugler v. Kansas*: Justice Harlan's Physical Invasion Theory

In *Mugler v. Kansas*, the Court was asked to examine the conviction of Peter Mugler, the owner of a brewery in Salina, Kansas.[81] Mugler had violated a state constitutional amendment that prohibited the manufacture and sale of intoxicating liquors without a permit or license. Mugler had been brewing and selling beer on his property without incident prior to passage of the amendment. The question before the Court was whether the Kansas legislature had the power to take from Mugler the use of his property, except for certain limited and specified purposes, without compensation.[82]

Writing for the majority, Justice Harlan suggested two corollary theories: First, he embraced Shaw's noxious-use theory as presented in *Alger*.[83] Harlan also argued that a "taking" must involve a physical appropriation of property.[84] But, just as Justice Shaw's noxious-use theory was deficient,[85] so too is Justice Harlan's physical-appropriation theory. As others have argued, using physical appropriation of property as the distinguishing factor is problematic because it risks overexpanding the state's police power. Indeed, as Professor Sax argues, "it is obvious that whether the government takes title or possession of the subject property is merely a matter of the form in which it chooses to proceed."[86] Government could depreciate significantly the value of a given property through, for example, zoning laws, which has been recognized as a legitimate police-power instrument, and then buy it at its low market value without having to physically appropriate the

with the evolution of the modern regulatory state, the flaws inherent in the formalistic doctrine that exercises of the police power could never be takings became increasingly apparent . . . .").

80 *See Euclid*, 272 U.S. at 365.

81 Mugler v. Kansas, 123 U.S. 623 (1887).

82 *Id.*

83 *Id.* at 669 ("The power which the states have of prohibiting such use by individuals of their property, as will be prejudicial to the health, the morals, or the safety of the public, is not, and, consistently with the existence and safety of organized society, cannot be, burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community.").

84 *Id.* ("The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law.").

85 *See* Barros, *supra* note 77.

86 Sax, *supra* note 69, at 46.

property. If we were to embrace Justice Harlan's physical-invasion theory, we might find ourselves in a situation where the owner loses his property and receives no compensation simply because the government had not physically appropriated his property. The physical-invasion theory, therefore, incentivizes government to achieve its aims without paying compensation, even when compensation should be provided.[87] Due to this undesirable result, many (such as Professor Sax) conclude that the "physical invasion theory should be rejected once and for all."[88]

3. *Pennsylvania Coal Co. v. Mahon*: Justice Holmes's Diminution-of-Value Theory

The third and most influential theory about the distinction between police power and takings was introduced by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.[89] In *Mahon*, the Court addressed the validity of the Kohler Act, which, in relevant part, prohibited certain methods of mining of anthracite coal that could cause the subsidence of any structure used for human habitation. The majority opinion, written by Justice Holmes, found that the Kohler Act was a taking under the Fifth Amendment.[90] According to Justice Holmes, "[t]he general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[91] Holmes's diminution-of-value theory thus establishes the distinguishing line between police power and takings as a matter of *extent*.[92] According to this theory, government may exercise its police power and diminish "to some extent values incident to property" without implicating the Takings Clause because otherwise "[g]overnment hardly could go on . . . ."[93] However, when the regulation goes "too far" (that is, when the diminution of property value is too extensive), the government should pay compensation to the property owners.

In a way, Justice Holmes's theory endeavors to address the critique of Justice Harlan's physical-invasion theory—that the government could avoid paying compensation by achieving its aims without physically

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87 *Id.* at 46–47.

88 *Id.* at 48.

89 Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922).

90 *Id.*

91 *Id.* at 415.

92 This is also true of the dissenting opinion. *See id.* at 416–22 (Brandeis, J., dissenting); *Constitutional Law—Legislative Powers: Impairment of the Obligation of Contracts—Pennsylvania "Cave-in" Statute*, 36 HARV. L. REV. 753 (1923) ("Both majority and dissent concede that the constitutionality of such interference without compensation is a question of degree.").

93 *Mahon*, 260 U.S. at 413.

appropriating property.[94] By focusing on the outcome of government action rather than on the path it chooses, Justice Holmes attempted to preclude government from avoiding payment of compensation for takings. And yet, though this theory provides an answer to the misuse of government power, it carries with it a different set of problems that call into question its capability as the ultimate theory in resolving this ongoing tension. Most of these challenges arise out of the theory's failure to define when a regulation goes too far. This failure not only hinders courts from fairly and predictably resolving disputes, which leaves landowners feeling less than secure in their property investments,[95] it also threatens the government's ability to carry out public projects. In other words, Justice Holmes's theory leads to ad hoc decision making, which undermines both legal certainty and government's commitment to use its powers properly.[96]

For all the reasons explored above, Justice Holmes's diminution-of-value theory, Shaw's noxious-use theory, and Harlan's physical-invasion theory all fail to provide a comprehensive and applicable solution to the tension between state police power and takings. These theories face challenges that go to the root of this tension—their inability to provide both lawmakers and courts with clear enough instruments to determine, continuously and uniformly, when governments go beyond their legitimate zone of police power and execute takings. In what follows, I argue that the PTP theory provides such instruments.

B. *PTP Theory: A Uniform Theory for Distinguishing Between Police Power and Takings*

In a nutshell, the PTP theory suggests that when the Property Tipping Point has been crossed—meaning that the government has succeeded in satisfying both the Generality and the Indispensability Tests—the action should be regarded as within the state's police power and not a taking under the Fifth Amendment. If the government goes forward with its plan—though failing to pass either of the tests, and as this flaw cannot be repaired by the interplay mechanism[97]—the action

94 *See* discussion *supra* Section III.A.2.

95 For the role of certainty in properly incentivizing owners' investment policies, see Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CALIF. L. REV. 569, 619–20 (1984); Blume et al., *supra* note 47; Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

96 *See* Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1697 (1988) ("Whatever the merits of ad hoc balancing in other areas of law, it has special difficulties in the takings area because of the important role of investment-backed expectations.").

97 *See* discussion *supra* Section II.C (explaining the interplay between the generality test and

should be regarded as a taking. To illustrate how the PTP theory may apply to this tension, let us reconsider the three cases that served as platforms for the establishment of the three theories discussed above: *Alger*, *Mugler*, and *Mahon*. This time, we will apply the PTP theory to each.

In *Alger*, Shaw established the noxious-use theory to resolve the tension between police power and takings. Barros argues that, to Shaw, the police power "was simply the government's power to enact such regulations for the good and welfare of the community as it sees fit, subject to the limitations that the regulations be both reasonable and constitutional."[98] Reading Shaw's *Alger* ruling in accordance with the PTP theory, we can see that his conclusions about the legitimacy of Massachusetts's interference with landowner autonomy reflect the logical foundation that forms the basis of PTP's two-prong theory. The law that prevented owners from extending their wharves complies with the Indispensability Test. It satisfies the essentiality requirement because extending the wharves beyond the legislature's defined lines harms the public, and therefore, prohibiting the extension of wharves beyond that line promotes community needs.[99] The law also complies with the proportionality requirement because it did not prohibit any building of wharves by owners, but only limited their length.[100] In other words, the law did not do more than it needed to do to achieve its purpose. Moreover, the law, as Shaw argued, also complied with the Generality Test. Shaw regarded the legislative process as important because it provides owners with a "definite, known and authoritative rule which all can understand and obey."[101] Thus, the procedural aspect of the Generality Test is satisfied. Moreover, the substantive aspect is also satisfied; as Shaw specifically argues, the legislation was general in nature in that it applied to all owners alike[102]:

> [W]here all [property owners] are permitted to extend alike, and all are restrained alike, by a line judiciously adapted to the course of the current, so that all have the benefit of access to their wharves, with

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the indispensability test).

98 Barros, *supra* note 77, at 479–80.

99 *See* Commonwealth v. Alger, 61 Mass. 53, 84 (Mass. 1851) ("The manifest object of these statutes is to prevent injurious obstructions in the harbor of Boston, and to secure the free, common, and unobstructed use thereof, for the citizens of the commonwealth, and all other persons, for navigation with ships, boats, and vessels of all kinds, as a common and public right.").

100 *Id.* at 85 ("The power we allude to is rather the police power, the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.").

101 *Id.* at 96.

102 *Id.* at 102.

> the same depth of water, and the same strength of current at their heads, the damage must be comparatively less.[103]

Thus, applying the PTP theory to *Alger* might have led the court to the same result. The new legislation complied with both prongs of the PTP theory, which led to the conclusion that the Property Tipping Point was reached and the statute was a valid exercise of police power against individual property rights. In such a case landowner autonomy is trumped by community needs, which explains the court's rejection of Alger's demand for compensation.

Would *Mugler* have been decided differently if it were read in accordance with the PTP theory? Although limitations on the production and sale of liquors and alcohol may seem quite puzzling today, one should evaluate the perceived indispensability of this prohibition at the time it was passed. At the time, the Kansas legislators, as well as the public, believed that preventing the production and sale of alcohol was crucial for a functioning society.[104] For that purpose, the Kansas Constitution was amended and laws were enacted.[105] The prohibition was not targeting specific individuals or owners. On the contrary, it was a general prohibition that was enacted over the course of a long and transparent public process.[106] Therefore, if we consider the end result of the *Mugler* case in accordance to the PTP theory, we might conclude that both the Indispensability and Generality Tests were satisfied, Property's Tipping Point was reached, and therefore, no taking occurred.

Yet, although both Justice Harlan's physical-invasion theory and the PTP theory might have led to the same conclusion in *Mugler*, there is a subtle distinction between the two theories that we should note. To illustrate this effect, consider *United States v. Central Eureka Mining Co.*,[107] in which the Court determined that an order of the War Production Board requiring nonessential gold mines, including those of respondents, to cease operating, fell within the police power of the state.[108] In *Eureka*, which was decided almost seventy years after *Mugler*, the Court embraced Justice Harlan's physical-invasion theory and determined that although the order caused significant economic harm

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103 *Id.*

104 Mugler v. Kansas, 123 U.S. 623, 654–55 (1887).

105 *Id.* at 653–56.

106 For example, the Act was enacted by the legislature, took effect on May 1, 1881, and states in its first section, "[a]ny person or persons who shall manufacture, sell or barter any spirituous, malt, vinous, fermented or other intoxicating liquors, shall be guilty of a misdemeanor . . . ." Act of May 1, 1881, ch. 35 § 1, 1881 Kan. Sess. Laws 386.

107 United States v. Cent. Eureka Mining Co., 357 U.S. 155 (1958).

108 *Id.* at 168–69 ("We do not find in the temporary restrictions here placed on the operation of gold mines a taking of private property that would justify a departure from the trend of the above decisions.").

to owners of gold mines, it nevertheless did not constitute a taking of private property for public use within the meaning of the Fifth Amendment and respondents were not entitled to compensation.[109] The order amounted to an exercise of police power under the physical-invasion theory. The PTP theory, on the other hand, does not support the *Eureka* Court's ruling.

It was Justice John Harlan II, the grandson of the Justice Harlan who delivered the dissenting opinion in *Mugler*, who questioned the *Eureka* decision in a dissenting opinion and in doing so he emphasized the importance of the theory underlying such a determination.[110] Justice Harlan II argued that although the government did not physically place a flag over the mines, it nevertheless harmed the landowners in a manner that constituted a taking.[111] On its face, Justice Harlan II's dissenting opinion rejects the physical-invasion theory and embraces the diminution-of-value theory presented by Justice Holmes thirty years earlier in *Mahon*.[112] Yet, a thorough reading of Justice Harlan II's dissenting opinion reveals that he was not only bothered by the economic diminution of value caused by the Board's order, as Justice Holmes was in *Mahon*, he was also concerned by the limited application of the order to specific owners. Indeed, along with Justice Harlan II's adoption of Justice Holmes's economic-diminution theory, he distinguished this case from previously decided cases that involved wartime regulation of prices, rents, and profits, by stating that in all these cases "the Government was administering a nationwide regulatory system rather than a narrowly confined order directed to a small, singled-out category of individual concerns."[113] If we view Justice Harlan II's remarks through the lens of the PTP theory, we can see that he was questioning the government's compliance with the Generality Test—specifically with the substantive aspect. While, as mentioned above, this flaw might be cured by raising the bar for the Generality Test's procedural component, as well as for the Indispensability Test, Justice Harlan II throws cold water on this course. Justice Harlan II also

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109 *Id.* at 160 ("The WPB did not take physical possession of the gold mines. It did not require the mine owners to dispose of any of their machinery or equipment.").

110 *Id.* at 179–84 (Harlan, J., dissenting).

111 *Id.* at 181 ("In these circumstances making the respondents' right to compensation turn on whether the Government took the ceremonial step of planting the American flag on the mining premises is surely to permit technicalities of form to dictate consequences of substance." (citation omitted)).

112 *Id.* at 182 ("[G]overnmental action in the form of regulation which severely diminishes the value of property may constitute a 'taking.' 'The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' In my opinion application of this principle calls here for the conclusion that there was a 'taking,' for it is difficult to conceive of a greater impairment of the use of property by a regulatory measure than that suffered by the respondents as a result . . . ." (citations omitted) (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

113 *Id.*

questioned the order's compliance with the procedural aspect of the Generality Test; the War Production Board issued the order in a specific procedure that is unique to wartime and does not include any form of public participation.[114] He also questioned the order's compliance with the Indispensability Test, indicating his belief that the regulation set by the order went too far, to use Holmesian terminology. Translated into PTP theory terminology, the order fails to comply with the proportionality subpart because there is no sufficient nexus between that order's practical scope and the order's purpose.[115] Justice Harlan II's dissenting opinion in the *Eureka* case, then, demonstrates the importance of the theory underlying the Court's resolution of the tension between owner autonomy and community needs.

But what about Justice Holmes's opinion in *Mahon*? Would *Mahon* be decided differently under the PTP theory? Reading *Mahon* once again in accordance with PTP terminology reveals that although Justice Holmes's opinion may contradict Shaw's ruling in *Alger*, he nevertheless complies with the PTP theory. Justice Holmes questioned the Kohler Act's compliance with the PTP tests, particularly with the Indispensability Test on its two subparts. First, Justice Holmes questioned the importance of the needs that the Act was designed to maximize for the community. While recognizing 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[,]"[116] Justice Holmes concluded that "[t]his is the case of a single private house . . . [and the] source of damage to such a house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public."[117] Justice Holmes not only questioned the importance of this community need, but also questioned the proportionality between the government action and the realization of these needs when he asserted that government action will be recognized as a taking when it goes too far.[118] As mentioned above, Justice Holmes did not set a clear mathematical standard to determine when a regulation goes too far such that it should be considered as a taking. Instead, he proposed a somewhat vague idea of the extent of harm—mainly based on the economic diminution of value of the property—to guide courts on this issue. Yet, if we put aside the

114 *Id.* at 179–80 ("The Court views L—208 as a normal regulatory measure of the WPB, which had authority to allocate critical materials during the late war. . . . I am unable to reconcile the Court's conclusions with the findings of the Court of Claims.").

115 *Id.* at 182 ("In my opinion application of this principle calls here for the conclusion that there was a 'taking,' for it is difficult to conceive of a greater impairment of the use of property by a regulatory measure than that suffered by the respondents as a result of L—208.").

116 *Mahon*, 260 U.S. at 413.

117 *Id.*

118 *Id.* at 415.

uncertainty that such a vague standard creates, we can see that Holmes imports the proportionality subpart into a court's determination process. Holmes calls on courts to estimate—though without providing them any set of decisive instruments—the proportionality between the action and the fulfillment of community needs.

At a glance, the three theories discussed in Section III.A seem to conflict with one another. The noxious-use theory from *Alger*, the physical-invasion theory from *Mugler*, and the diminution-of-value theory from *Mahon* each seem to approach property disputes between individuals and government from strikingly different directions. Nevertheless, upon closer inspection, it becomes clear that they all represent a coherent understanding of limitations on state police power. These limitations can be more concisely expressed and understood through the PTP theory, which offers a streamlined alternative to the disjointed array of rules that currently defines that understanding.

IV. FURTHER IMPLICATIONS: REGULATORY TAKINGS AND EXACTIONS

A. *Regulatory Takings and the PTP Theory*

In this Part, I turn to discuss how the PTP theory should affect current examinations conducted by courts when resolving regulatory-takings cases. As discussed above, the PTP theory suggests a unified theory to determine whether a government action falls within the state's legitimate police power or whether it should be considered a taking. Current treatment of regulatory cases is based on two prominent rulings: *Penn Central Transportation Co. v. New York City*[119] and *Lucas v. South Carolina Coastal Council*.[120] These two cases, which govern inverse-condemnation claims, will now be examined through the lens of PTP theory. Ultimately, we will see that both holdings implicitly base their conclusions on the same foundation as the PTP theory.

In *Penn Central Transportation Co. v. New York City*, the Penn Central Railroad Company argued that the New York City Landmarks Law took its air rights above Grand Central Terminal, which had been designed to accommodate a twenty-story building on top of it.[121] The Court in *Penn Central* rejected the company's claim that the regulation constituted a taking, as well as its entitlement to compensation. The Court suggested "several factors that have particular significance" when

119 Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).
120 Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).
121 *Penn Cent.*, 438 U.S. at 115.

"engaging in these essentially ad hoc, factual inquiries . . . ."[122] Specifically, the Court reasoned that such determinations should be based upon examination of (1) "[t]he economic impact of the regulation on the claimant . . . [(2)] the character of the governmental action . . . [and (3) the occurrence of] physical invasion by government . . . ."[123] The *Penn Central* ruling, therefore, resembles the goals of PTP theory and PTP's process for resolving disputes. First, the Court in *Penn Central* calls for an analytical inquiry rather than the categorical application of a rule. Such a fact-based inquiry is precisely what the PTP theory recommends as well.[124] Second, a thorough reading of the factors suggested by the Court in *Penn Central* reveals it aims to achieve the same goals as the PTP theory's tests. The examination of the economic impact of the regulation as well as the physical invasion, attempts to identify the proportionality between the action and the fulfillment of community need. As discussed above, the Indispensability Test's proportionality subpart intends to verify that the regulation does not impose too heavy of a burden on owners.[125] Since the *Penn Central* ruling calls for analytical inquiry, no result in either of the factors should commit the court to reach one conclusion or the other absent further consideration of the strength of each test. Therefore, these factors should be considered as proxies to determine the scope of harm, or in the PTP theory's terminology: the proportionality of the action. As the economic impact on owners increases and as a physical invasion occurs, a court should be convinced that such intrusive measures are indeed required to fulfill the need in question.[126] The third factor—the examination of the character of the government action—resembles the Generality Test. As the PTP theory suggests, when the government decides to fulfill an indispensable community need, it nevertheless should avoid doing so in a reckless manner; any attempt by government to provide for a community's needs should be general, both in the procedural and in the substantive aspects of the Generality Test. Justice William J. Brennan specifically stated that, though a particular (mainly physical) interference with property might more readily constitute a taking, an "interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[127] To support this claim, Justice Brennan echoes *Mahon* in recognizing that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such

122 *Id.* at 124.

123 *Id.*

124 *See* discussion *supra* Section III.A.

125 *See supra* text accompanying notes 95–96.

126 The PTP theory provides courts with workable instruments to determine the proportionality of the action. *See supra* text accompanying notes 95–96.

127 *Penn Cent.*, 438 U.S. at 124.

change in the general law."[128]

Reading *Penn Central* in light of the PTP theory reveals that the Court rejected the company's claim for compensation because in that case the PTP was indeed reached and, therefore, community need trumped landowner autonomy. Again, for the government to defeat a claim for compensation under the Takings Clause, it must prove that its action complied with both of the PTP tests. The ruling in *Penn Central* clearly demonstrates that because the air-rights regulation was both procedurally and substantively general in nature, and because it served an essential community need without going too far, no taking occurred and thus, no compensation was due. The Court's decision reveals the crucial role of the two PTP tests. In rejecting the company's argument that the regulation targeted them with particularity, the Court stated, "[t]his contention overlooks the fact that the New York City law applies to vast numbers of structures in the city in addition to the Terminal—all the structures contained in the [thirty-one] historic districts and over 400 individual landmarks, many of which are close to the Terminal."[129] The general character of the regulation led the Court to determine that while it is "true that the Landmarks Law has a more severe impact on some landowners than on others, but that in itself does not mean that the law effects a 'taking.'"[130] The regulation's general character was due not only to its broad application, but also because it guaranteed owners due process mechanisms by which they could apply to the Landmarks Preservation Commission and argue their claims.[131] By doing so, the regulation reduced concerns of misuse of power by authorities. The Court also addressed the regulation's compliance with the Indispensability Test. In the beginning of his opinion, Justice Brennan noted the indispensable need of the community to preserve buildings and areas with historic or aesthetic importance.[132] Reading the *Penn*

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

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

130 *Id.* at 133. Even where the government prohibits a non-injurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross-section of land, and thereby "secure[s] an average reciprocity of advantage . . . ." *Mahon*, 260 U.S. at 415. It is for this reason that zoning does not constitute a "taking." While zoning at times reduces *individual* property values, the burden is shared relatively evenly, and it is reasonable to conclude that, on the whole, an individual who is harmed by one aspect of the zoning will be benefited by another.

131 In its decision, the Court specified the long procedures made by the Commission in reaching its own decision, as well as the public hearings held in these proceedings. *Penn Cent.*, 438 U.S. at 115–17 ("On August 2, 1967, following a public hearing, the Commission designated the Terminal a 'landmark' and designated the 'city tax block' it occupies a 'landmark site.' . . . After four days of hearings at which over 80 witnesses testified, the Commission denied this application as to both proposals.").

132 *Id.* at 107–08 ("Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These nationwide legislative efforts have been precipitated by two

Central decision in light of the PTP theory explains why the Court denied the company's claim under the Takings Clause. Since the property tipping point was reached, the community's need for preservation gained supremacy over the company's autonomy.[133]

More than twenty years later, *Penn Central*'s analytical inquiry was partially called into question by *Lucas v. South Carolina Coastal Council*. David Lucas sought compensation for the diminution of his property that occurred as a result of South Carolina's Beachfront Management Act. The Act prevented him "from erecting any permanent habitable structures" on two beachfront parcels, which he had purchased in 1986.[134] The question before the Court was whether a state regulation that deprives a property owner of all economically beneficial use of that property should be considered a taking.[135] The Court answered this question in the affirmative.[136] It concluded that when a state regulation deprives the entire economic value of private property, it constitutes a taking because a "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."[137] This comparison made by the Court between physical appropriation of property and deprivation of beneficial use is questionable. *Lucas* may certainly be criticized for its end result, but its more central flaw was its call for categorical application rather than an analytical inquiry as suggested in *Penn Central*.

If we examine the determination in *Lucas* through the eyes of the Court and based on its assumptions, we might find that the decision complies with the PTP theory's conditions for recognizing takings. The *Lucas* decision may be read as complying with the PTP theory, since the Court explicitly questioned the regulation's compliance with either of the PTP tests. The Court's opinion, delivered by Justice Antonin Scalia, questioned the general character of the regulation, noting that:

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concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today.").

133 *Id.*

134 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1007 (1992).

135 *Id.* at 1015 ("The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land.").

136 *Id.* at 1016 ("As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land.'" (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980))).

137 *Id.* at 1017.

> The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition []though changed circumstances or new knowledge may make what was previously permissible no longer so. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.[138]

It also questioned the indispensability of the need as presented by South Carolina legislators. Although Lucas himself "neglect[ed] to dispute the findings enumerated in the Act or otherwise to challenge the legislature's purposes" (and thus "concede[d] that the beach/dune area of South Carolina's shores is an extremely valuable public resource"),[139] the Court expressed its doubts as to the indispensability of the community need. The Court thus questioned one of the Act's aims[140] and also commented that such regulations "carry with them a heightened risk that private property [will be forced] into some form of public service under the guise of mitigating serious public harm."[141] However, the Court's attempt to establish a categorical application, rather than an analytical inquiry, places it in juxtaposition with the PTP theory as well as the foundational concerns underlying the theory, even though *Lucas* recognized those foundational concerns in its reasoning. To mitigate these concerns, especially the misuse of power by authorities and their hasty decision making with respect to interference in private property, an analytical inquiry should be conducted on the factual merits of each case. The PTP theory lays the foundation for such an inquiry.

B. *Exactions:* Nollan, Dolan, *and* Koontz *Through the Lens of the PTP Theory*

The last Section of this Part addresses a specific aspect of the tension between state police power and takings: exactions. Exaction is a concept in U.S. real property law where government imposes conditions for land development that require the developer to mitigate anticipated negative impacts of the development. Court decisions about exactions deal mainly with the tension between the legitimacy of the requirement imposed on the owner as part of the state's police power and the harm that such requirements may cause the owner. My decision to dedicate a distinct Section on exactions is due to its unique features—namely, its

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138 *Id.* at 1031 (citation omitted).

139 *Id.* at 1021–22.

140 *Id.* at 1035 ("The promotion of tourism, for instance, ought not to suffice to deprive specific property of all value without a corresponding duty to compensate.").

141 *Id.* at 1018.

particular application to specific owners. It is this characteristic of exactions that casts doubt on their ability to comport with the PTP theory's tests, particularly with respect to the Generality Test. Indeed, the application of an exaction to a particular owner raises questions as to its ability to fulfill the substantive aspect of the Generality Test. However, this is not to say that exactions will always constitute takings.

Accordingly, when an exaction would pass the PTP theory's two tests—or, when one of them is only partially realized, would pass the higher bar of the other—it should be considered as falling within the state's police power. On the other hand, when the exaction fails to meet both tests it should be considered a taking, which entitles the property owner to just compensation. To illustrate the applicability of the PTP theory to exactions, I will discuss three prominent exactions cases that stand at the core of courts' treatment of exactions: *Nollan v. California Coastal Commission*,[142] *Dolan v. City of Tigard*,[143] and the recently decided *Koontz v. St. Johns River Water Management District*.[144] Each of these cases contributed to the establishment of the current treatment of exactions, and each one aims to achieve the same balance offered by the PTP theory.

In *Nollan*, the Court reviewed a regulation under which the California Coastal Commission (CCC) required that an offer to dedicate a lateral public easement along the Nollans' beachfront lot be recorded on the chain of title to the property as a condition of approval for a permit to demolish an existing bungalow and replace it with a three-bedroom house.[145] The CCC had asserted that the public-easement condition was imposed to promote the legitimate state interest of diminishing the "blockage of the view of the ocean" caused by construction of the larger house. The Court held that in evaluating such claims, it must be determined whether an "essential nexus" exists between a legitimate state interest and the permit condition.[146] Understood through the PTP theory, the Court in *Nollan* recognized the inherent flaw in the CCC's action in relation to the Generality Test's substantive aspect. The CCC's permit condition—even if it was presented in the proper procedural manner—is still particular in nature. So, the Court raised the bar on the Indispensability Test. By requiring an essential nexus between the legitimate state interest and the permit condition, the Court toughened the standards of proportionality that the government must comply with to avoid paying compensation to owners. In *Nollan*, the Court held that the CCC did not meet these

142 Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).
143 Dolan v. City of Tigard, 512 U.S. 374 (1994).
144 Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013).
145 *Nollan*, 483 U.S. at 827–28.
146 *Id.* at 828, 837.

standards.[147]

In *Dolan*, the City Planning Commission conditioned approval of Dolan's application to expand her store and pave her parking lot upon her compliance with dedication of her land: (1) for a public greenway along Fanno Creek to minimize flooding that would be exacerbated by the increases in impervious surfaces associated with her development; and (2) for a pedestrian/bicycle pathway intended to relieve traffic congestion in the City's Central Business District.[148] The Court, once again, did not question the importance of needs but it did engage in the proportionality subpart. It engaged in a test additional to the one offered in *Nollan*, which requires the authorities to determine "rough proportionality" between the action and the fulfillment of community needs. The Court specifically stated that "[n]o precise mathematical calculation is required, but the city must make some" sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.[149] As in *Nollan*, the Court in *Dolan* held that the city failed to make an individualized determination that the required dedications were related, in both nature and extent, to the proposed impact. Further, the Court held that the requirement for a public greenway was excessive and that the city failed to meet its burden of establishing that the proposed pathway was necessary to offset the increased traffic that would be caused by the proposed expansion. Again, since the Generality Test is only ever partially realized in exactions—as the action often targets individual owners—courts toughen the standards of proportionality with which the authority must comply. The city, according to the Court in *Dolan*, failed to meet these standards, and therefore, did not reach Property's Tipping Point. As a result, the city was required to pay compensation to Dolan because the action constituted a taking.

Another recent ruling on exactions was handed down by the Supreme Court in *Koontz v. St. Johns River Water Management District*.[150] While the core issue in *Koontz* was whether a condition on the issuance of development permits that was based on a requirement to pay money to the government infringed the owners' constitutional property rights, it nevertheless reinforced the stricter proportionality standards as established in *Nollan* and *Dolan*.[151] Delivering the opinion of the Court, Justice Samuel Alito explained that the heightened proportionality requirement imposed on authorities when conditioning permits is due to owners' need for "protection against the misuse of the

147 *Id.* at 841–42.
148 *Dolan*, 512 U.S. at 379–80.
149 *Id.* at 395–96.
150 Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595 (2013).
151 *Id.* at 619.

power of land-use regulation."[152] This need is due to the fact that "land-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take."[153] While also recognizing the need of owners to internalize the costs of their actions, Justice Alito argued that the heightened proportionality standard imposed on authorities in such cases is designed to prevent them from leveraging their legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts. This view of the heightened proportionality standard, as set by *Nollan* and *Dolan* and confirmed once again in *Koontz*, is compatible with the PTP theory. According to the PTP theory, exactions bear an inherent flaw in their inquiry to reach Property's Tipping Point. This flaw stems out of exactions' particular nature and their application to individuals rather than to the public at large. However, this flaw is reparable if the authorities may comply with heightened standards imposed on them in passing the other PTP tests, especially the proportionality subpart. As Justice Alito provided in *Koontz*, these heightened standards of proportionality are indeed required to avoid the main concerns regarding authorities' misuse of their power. By recognizing the interplay between the two PTP tests, these concerns can be mitigated.

V. REVISITING MAYOR DE BLASIO'S ZONING PLAN

At the beginning of this Article, I discussed Mayor Bill de Blasio's New York zoning plan, "Zoning for Quality and Affordability" (ZQA),[154] which requires developers in certain neighborhoods specified in the plan to set aside a percentage of floor space for more affordable units.[155] Recall that the plan's mandated percentages for affordable housing may vary according to the location and state of neighborhood, and that the plan has—perhaps surprisingly—faced criticism from low-income families and social activists who argue that its scope is too narrow and that it fails to satisfy the needs of the most vulnerable populations of New York City. Property owners are concerned that the plan incentivizes real-estate developers in a way that would hurt the owners' property rights, or even lead to their displacement.[156]

The ZQA plan may affect property rights in two manners.

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152 *Id.* at 599.
153 *Id.* at 604–05.
154 *See* discussion *supra* Introduction.
155 *See* discussion *supra* Introduction.
156 *See* discussion *supra* Introduction.

Inclusionary plans, like the ZQA, allegedly interfere with a developer's ability to maximize profits from their property by requiring that they dedicate a portion of residential structures to low-income or moderate-income families.[157] The question is whether such a limitation should be considered as an infringement of a developer's property rights, or whether it should be considered as a legitimate exercise of the municipality's police power.

This question was ruled on recently by the California Supreme Court, which held that inclusionary zoning plans, even if they limit a developer's property rights, are legitimate exercises of a municipality's police powers.[158] The court rejected the argument that these sorts of restrictions qualified as exactions because the restrictions were produced by the legislative process rather than by administrative action.[159] This distinction led the court to determine that the standard of review over the municipality action should be more lenient than in the case of administrative action, where the municipality might have to demonstrate a reasonable relationship between the new zoning plan and the aim of affordable housing.[160] Would the PTP theory lead to the same result?

I argue that the court's decision comports with the PTP theory. The argument that the municipality had not proven a reasonable relationship between the ordinance and the aim to provide affordable housing is essentially an argument over the second subpart of PTP's proportionality test. This challenge, however valid, is not the end of the inquiry under PTP. Because the tests operated dynamically, the partial realization of this proportionality subpart means that the bar has been raised for satisfying the second indispensability-of-need subpart (i.e., the importance of needs), and the second PTP test, the generality of action.[161] The distinction drawn by the California Supreme Court between administrative action and legislative action suggests that the generality of the action, on both its substantive and procedural aspects, had a significant role in the court's decision.[162] The complete realization of the other three subparts of the PTP theory thus leads to the conclusion that the municipality's action did indeed reach Property's

157 *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974 (Cal. 2015).

158 *Id.* at 996.

159 *Id.* at 987–88.

160 *Id.* This ruling had been criticized for not taking into account the potential harm to property rights. *See, e.g.*, Kristoffer James S. Jacob, California Building Industry Association v. City of San Jose*: The Constitutional Price for Affordable Housing*, 7 CAL. L. REV. CIR. 20 (2016); *Takings Clause—Affordable Housing—California Supreme Court Upholds Residential Inclusionary Zoning Ordinance.* — California Building Industry Ass'n v. City of San Jose, *351 P.3d 974 (Cal. 2015)*, 129 HARV. L. REV. 1460 (2016) [hereinafter California Building Industry Ass'n].

161 *See* California Building Industry Ass'n, *supra* note 160.

162 *See Cal. Bldg. Indus. Ass'n*, 351 P.3d 974.

Tipping Point.

Consequently, we need to consider how PTP theory would help a court resolve a potential dispute between New York City residents and Mayor de Blasio. Does the PTP theory offer a practical solution? In examining the ZQA plan, as any other zoning plan, we start with the supremacy of owner autonomy.[163] Thus, we should evaluate whether the plan passes the PTP theory's tests to determine whether community need should trump owner autonomy, or alternatively, whether owner autonomy should retain its primacy.[164] In the case of the ZQA plan, the inquiry is somewhat more complicated than an ordinary zoning plan; the plan does not explicitly or immediately harm property rights, but instead presents only a future and somewhat speculative threat to these rights.[165] The fundamental concern of property owners in the neighborhoods subject to the plan is that the expected development of their neighborhoods (as a result of the incentives given in the plan to developers) would end up with their displacement as a result of rising property values.[166] Renters are also concerned that landlords would increase rent or take measures to evict them from their homes.[167] Business owners, on the other hand, are apprehensive about how the plan is expected to affect the socioeconomic makeup of certain neighborhoods, potentially hampering their business.[168] Though these somewhat speculative concerns are not entirely groundless,[169] it is

163 *See* discussion *supra* Part I.

164 *See* discussion *supra* Part I.

165 For an attempt to conceptualize the harm caused by inclusionary zoning plans, see California Building Industry Ass'n, *supra* note 160.

166 *See, e.g.*, Editorial, *Affordable Housing vs. Gentrification*, N.Y. TIMES (Nov. 27, 2015), https://www.nytimes.com/2015/11/28/opinion/affordable-housing-vs-gentrification.html; Mireya Navarro, *Segregation Issue Complicates de Blasio's Housing Push*, N.Y. TIMES (Apr. 14, 2016), http://www.nytimes.com/2016/04/15/nyregion/segregation-new-york-city-and-de-blasio-affordable-housing.html?_r=0; *see also* Carol E. Rosenthal & Theodore D. Clement, Commentary, *Community Boards: For Affordable Housing but Against Administration's Solutions—What's Going on?*, CITYLAND (Dec. 10, 2015), http://www.citylandnyc.org/community-boards-for-affordable-housing-but-against-administrations-solutions-whats-going-on ("New development often seems like the physical manifestation of gentrification. As Zoning for Quality and Affordability and Mandatory Inclusionary Housing promote development, many community members perceive them to be a Trojan horse, initially appearing as a gift, but ultimately letting in more gentrification. Accordingly, community boards may seek to curtail development or to restrict development to primarily affordable housing. Some community board resolutions, while supporting the general idea of making Inclusionary Housing mandatory, argued that the administration's proposal was not stringent enough to combat gentrification.").

167 *See, e.g.*, Steven Wishnia, *What Does "Affordable Housing" Really Mean in de Blasio's New York? We're About to Find out,* GOTHAMIST (Feb. 10, 2016, 1:30 PM), http://gothamist.com/2016/02/10/affordable_housing_battle.php.

168 *See, e.g.*, Shaye Weaver, *Mom-and-Pop Shops, Affordable Housing Threatened by Development: UES Group*, DNAINFO (Oct. 19, 2015 2:37 PM), https://www.dnainfo.com/new-york/20151019/upper-east-side/mom-and-pop-shops-affordable-housing-threatened-by-development-ues-group.

169 *See, e.g.*, Keith Aoki, *Race, Space, and Place: The Relation Between Architectural*

questionable whether the alleged harms should be regarded as an intrusion on private property rights at this stage of the plan, particularly because property values are expected to increase under the plan. However, due to the scope and scale of the potential harm to owner autonomy—mainly, the potential for displacement—it would be beneficial to examine the plan's compliance with the PTP theory now to estimate its position on the property spectrum.

Having identified a potential harm to owner autonomy, the inquiry shifts to the legitimacy of the government action. According to the PTP theory, we begin with the Indispensability Test.[170] The government should first prove the importance of the community need that triggered its action. In the case of the new plan, Mayor de Blasio has explained that it is required to resolve New York City's current housing crisis. According to de Blasio, this crisis is:

> in many ways built on New York City's success. We are a safer, more welcoming city than we were decades ago. People from all over the world come to study, to work or to start a business here. And that success story has put pressure on our housing stock. Coupled with ever-rising economic inequality, it has created a painful reality where more and more New Yorkers are spending more and more to cover their housing costs, and entire neighborhoods have lost their affordability. Affordable housing is part of the bedrock of what makes New York City work. It's what underpins the economically diverse neighborhoods New Yorkers want to live in. It's critical to providing financial stability for working families, helping them get ahead and build a better life.[171]

Taking the plan at face value, few might dispute the proffered need to help disadvantaged members of the community find decent housing, employment, and security. But declarations are one thing and actions are another. As mentioned earlier, American history is replete with examples of purportedly progressive zoning plans that led to opposite outcomes.[172] In the case of the ZQA, the concern of owners and business

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Modernism, Post-Modernism, Urban Planning, and Gentrification, 20 FORDHAM URB. L.J. 699, 797–810 (1993); Andrew G. Dietderich, *An Egalitarian's Market: The Economics of Inclusionary Zoning Reclaimed*, 24 FORDHAM URB. L.J. 23 (1996); Peter Marcuse, *To Control Gentrification: Anti-Displacement Zoning and Planning for Stable Residential Districts*, 13 N.Y.U. REV. L. & SOC. CHANGE 931 (1985).

170 *See* discussion *supra* Section II.B.

171 BILL DE BLASIO & ALICIA GLEN, CITY OF NEW YORK, HOUSING NEW YORK: A FIVE-BOROUGH, TEN-YEAR PLAN 3 (2014), http://www1.nyc.gov/assets/housing/downloads/pdf/housing_plan_hires.

172 *See* Bus. Ass'n of Univ. City v. Landrieu, 660 F.2d 867, 874 n.8 (3d Cir. 1981) ("Gentrification is a term used in land development to describe a trend whereby previously 'underdeveloped' areas become 'revitalized' as persons of relative affluence invest in homes and begin to 'upgrade' the neighborhood economically. This process often causes the eviction of the less affluent residents who can no longer afford the increasingly expensive housing in their neighborhood. Gentrification is a deceptive term which masks the dire consequences that

owners is that the new developments would eventually displace them in favor of a more affluent crowd. This concern goes to the heart of the plan's goal: if the plan ultimately displaces current owners, already characterized as low-income, it is questionable whether the plan should be regarded as one that would address the needs of community members.

According to the PTP theory, when one of the tests is only partially realized the interplay between the theory's tests comes into action.[173] Given the questions about whether the plan can achieve its goals, we should evaluate more strictly the other tests, i.e., the other subpart of the Indispensability Test—the proportionality of the action—as well as of the two components of the Generality Test.[174]

Does the ZQA plan satisfy the second subpart of the Indispensability Test? Should the plan be considered a proportional method to fulfill the proffered needs? To answer this question, we should investigate the plan in accordance to the three subprinciples of the proportionality test: suitability, necessity, and proportionality in the narrower sense.[175] The suitability subprinciple requires an examination of whether the action is suitable to achieve the desired end.[176] Given the importance that Mayor de Blasio attributes to the expansion of affordable housing throughout New York City, it seems that a comprehensive zoning plan that has the ability to consider the uniqueness of each borough and neighborhood is indeed a suitable action, specifically if compared to limited actions that impose heavy burdens on certain areas.[177] The necessity subprinciple requires an examination whether the adopted action is the least intrusive, yet equally efficient, alternative to achieve the community need.[178] What alternatives are available to a municipality seeking to renew old, decayed neighborhoods, as well as to increase affordable housing within city limits? It could use its eminent domain power; blight condemnations have been used in several areas across the United States and even in New York City.[179] Is this alternative less harmful than the ZQA plan?

'upgrading' of neighborhoods causes when the neighborhood becomes too expensive for either rental or purchase by the less affluent residents who bear the brunt of the change."); *see also* Dietderich, *supra* note 169, at 97–98.

173 *See* discussion *supra* Section II.C.

174 *See* discussion *supra* Section II.C.

175 *See supra* text accompanying notes 53–54.

176 *See supra* text accompanying notes 53–54.

177 *See supra* text accompanying note 171.

178 *See supra* text accompanying note 53.

179 For the legal discourse on blight condemnations, see David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After* Kelo, 101 NW. U. L. REV. 365 (2007); Steven J. Eagle, *Does Blight Really Justify Condemnation?*, 39 URB. LAW. 833 (2007); Gideon Kanner, *Condemnation Blight: Just How Just Is Just Compensation*, 48 NOTRE DAME L. REV. 765 (1973); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003); Ilya Somin, *Let There Be Blight: Blight*

I believe that the answer should be no. The forced evacuation of decayed neighborhoods is much more harmful to private property rights as it displaces property owners from their communities while providing them with compensation that reflects the current (rather low) market value of their property.[180] In such condemnations, the owners are left without property and with compensation that does not help them to regain their ownership status once again.[181] Another alternative is to abstain from utilizing any use of its governmental powers and to allow the market to act undisturbed. This alternative has two major flaws: First, it unjustly removes the burden imposed on all governments to provide citizens with their basic necessities. Total privatization of urban renewal is a major retreat of the municipality from its governmental functions.[182] Second, and equally important, leaving property owners in decayed neighborhoods at the mercy of the free market is expected to harm them even more than in the case of blight condemnations.[183] With blight condemnations, the municipality may at least ensure that owners receive the fair market value of their property; such a result is not guaranteed if these owners—most of whom are low income and are not repeat players in the market or in the law—would be left to bargain alone with market experts.[184]

So, is the ZQA plan a more proportional response to community need? I believe that the answer is—yes! Though there can be no dispute about the potential harm that the plan poses to private property rights, it nevertheless provides a more balanced and proportional approach. First, unlike in blight condemnations where the displacement of owners is guaranteed, and unlike the free-market alternative where displacement is almost guaranteed, this outcome is not inevitable under the ZQA alternative. Indeed, past evidence provides that even inclusionary zoning plans fail to achieve their declared goals.[185] Yet, it seems that the ZQA plan is aware of past precedents and aims to overcome them.

Condemnations in New York After Goldstein *and* Kaur, 38 FORDHAM URB. L.J. 1193 (2011); Shai Stern, *Takings, Community, and Value: Reforming Takings Law to Fairly Compensate Common Interest Communities*, 23 J.L. & POL'Y 141 (2014).

180 *See* Stern, *supra* note 179.

181 *See* Stern, *supra*, note 46.

182 *See* PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT (2007); Harold J. Sullivan, *Privatization of Public Services: A Growing Threat to Constitutional Rights*, 47 PUB. ADMIN. REV. 461 (1987).

183 *See* Brian R. Lerman, Note, *Mandatory Inclusionary Zoning—the Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383, 386–90 (2006).

184 *See, e.g.*, Donald C. Bryant, Jr. & Henry W. McGee, Jr., *Gentrification and the Law: Combatting Urban Displacement*, 25 WASH. U. J. URB. & CONTEMP. L. 43, 50 (1983) ("Without significant governmental intervention in urban revitalization, the plight of the poor can only continue to worsen, and a system will evolve enabling the privileged to manipulate the economic order to their own exclusive interests.").

185 *See* sources cited *supra* notes 166–69.

Under the plan, New York City will commit to provide current homeowners and business owners with instruments to stave off the threat of displacement. The City has expressly recognized the threat posed to low- and moderate-income homeowners, and has stated that "[t]he City will continue to support aggressive neighborhood-based efforts to prevent foreclosure and combat predatory practices targeted at homeowners and homebuyers."[186] The City has thus committed itself to provide owners with legal assistance to fend off unduly aggressive attempts of developers and potential buyers to displace them from their property. The City has also committed to provide business owners with training and financial support to accommodate the new situation.[187] By doing so, the City demonstrates the plan's proportionality by not only recognizing the potential harm to owners, but also providing them with assistance to prevent these potential harms from becoming reality. Further evidence of the ZQA plan's proportionality is its superiority over a previous plan proposed by former New York City Mayor Michael Bloomberg. Not only does the ZQA plan aim to build or preserve 200,000 residential units over ten years (compared to Bloomberg's plan to build or preserve 165,000 units over eleven years), the ZQA plan also seeks to provide affordable housing to more low-income families than Bloomberg.[188] By doing so, the ZQA plan should lead to a more diverse population (socioeconomically diverse in particular) in the targeted neighborhoods.[189]

Finally, the plan should be examined to determine its compliance with the third proportionality subprinciple: proportionality in the narrower sense.[190] This third subprinciple requires that the burden caused by the action would not be excessive in relation to the community need.[191] The ZQA complies with the third subprinciple as it provides a balanced action to resolve one of New York City's most urgent needs, which is to deal with the housing crisis in the city. As mentioned above, the municipality had several options to accommodate

186 DE BLASIO & GLEN, *supra* note 171, at 50.

187 *See, e.g.*, *PLACES: East New York Neighborhood Plan*, NYC PLANNING, http://www1.nyc.gov/site/planning/plans/east-new-york/east-new-york-1.page (last updated Oct. 30, 2017); *Zoning for Quality and Affordability*, *supra* note 1.

188 *See* REAL AFFORDABILITY FOR ALL EXEC. COMM., A TALE OF ONE HOUSING PLAN: HOW BILL DE BLASIO'S NEW YORK IS ABANDONING THE SAME LOW-INCOME NEW YORKERS LEFT BEHIND DURING THE BLOOMBERG YEARS (2016), http://alignny.org/wp-content/uploads/2016/09/onehousingplan-20160126-1-2.pdf (discussing the portion of the New York population which would be ignored under the new housing plan proposed by Mayor de Blasio); *see also* Peter Moskowitz, *The Best Affordable Housing Plan in the U.S. Isn't Good Enough*, SLATE (Jan. 29, 2015, 11:44 AM), http://www.slate.com/articles/business/moneybox/2015/01/nyc_affordable_housing_plan_de_blasio_s_efforts_are_ambitious_and_laudable.html (arguing for a national rather than state-specific housing reform); Navarro, *supra* note 166.

189 *See* Navarro, *supra* note 166.

190 *See supra* text accompanying note 53.

191 *See supra* text accompanying note 53.

this urgent need.[192] Most of them place a much more significant burden on the owners' shoulders and would involve a broader infringement of owners' property rights.

Against this background, the municipality decision to act through a comprehensive zoning plan, and especially its awareness to the potential threats to owners' rights and its readiness to prepare in advance to prevent their realization, demonstrate the ZQA's compliance with the third proportionality test subprinciple.[193] But this evaluation of the plan's proportionality is not the end to the inquiry under PTP. It must pass the second test, which aims to verify the general character of the action. Recall that the Generality Test includes two subparts, both of which should be strictly applied given that the importance-of-need test may not be fully satisfied. To pass the Generality Test, the plan should satisfy both the substantive aspect, which is intended to ensure that government does not use its powers to improperly target specific, individual owners; and the procedural aspect, which aims to ensure that government functions in accordance to the rule of law. The ZQA plan is comprehensive as it applies to all five New York City boroughs.[194] The scope of the program is therefore wide enough to alleviate any concern that the City is targeting individual property owners. The procedures by which this plan was approved further support this conclusion.

The ZQA plan has gone through the City's full public-land-use review process as required under New York zoning law. The public review process began in September 2015 when the Department of City Planning introduced the plan for review by Community Boards, Borough Presidents, Borough Boards, the City Planning Commission, and City Council. The Planning Commission held a public hearing about the plan in December 2015 and only after amendments were made to the original plan, did the City Council approve it in March 2016.[195] This complicated, yet transparent and participatory process—taken together with the City taking responsibility to support current owners—further supports the conclusion that the City had not been targeting individual property owners, but rather has initiated a wide and comprehensive plan to promote the City's needs. These procedures also fulfill the procedural subpart of the Generality Test as all stakeholders, including community leadership and property owners, had the opportunity to participate in the process.

Under the PTP theory, the ZQA plan falls within the municipality's police power to provide for community need; the plan passes both PTP theory's Indispensability and Generality Tests. As demonstrated, even

192 *See supra* text accompanying notes 177–79.
193 *See supra* text accompanying note 53.
194 *See* DE BLASIO & GLEN, *supra* note 171.
195 *Id.*

though one of the Indispensability Test's subparts may not be fully realized, the interplay suggested in the theory tipped the scale in favor of recognizing the ZQA plan has having crossed Property's Tipping Point. Applying the PTP theory to policies like the ZQA plan is superior to other mechanisms suggested by courts over the years because in contrast to these mechanisms,[196] the PTP theory's dual tests, as well as the interplay between them, allow authorities to overcome flaws in their action, without losing their legitimacy on the one hand, and their ability to provide community needs on the other.

CONCLUSION

This Article provides a novel theory to account for one of property law's inherent tensions—between private property rights and autonomy on the one hand, and community need on the other. Out of the recognition that property, as a liberal legal institution, aims to ensure a prosperous society in which each individual is self-determined, this Article presents the PTP theory, which at its core is an inquiry for Property's Tipping Point. The theory presumes value-superiority of owner autonomy over community need, and it conditions the rebuttal of this presumption by government's compliance with two tests: the indispensability of needs test, and the generality of action test. By passing these two tests the actions of government authorities reach Property's Tipping Point, at which community need trumps owner autonomy. The PTP theory may provide explanation to current property law and doctrines. As this Article demonstrates, it helps us solve one of the most conflicting property puzzles between the state's police power and property takings. It also provides a unifying theory to resolve cases of regulatory takings and exactions.

196 Consider, for example, Justice Holmes's suggested mechanism in *Mahon*. Examination of the ZQA plan in the *Mahon* mechanism would require determining whether the action went too far, so as to diminish the financial value of the property. The answer to this question, if examined solely, would have been—no! Not only is the ZQA plan not expected to reduce the value of the current property, but these properties are actually expected to enjoy an increase in value after the development takes place. Acting upon the *Mahon* mechanism, a court should reject any claim to infringement of owners' rights. Such a conclusion, so I argue, is inferior to the one achieved by the PTP theory. The reason is that under the *Mahon* mechanism, New York City might not have offered any assistance to current owners to prevent foreclosure and combat predatory practices targeted at homeowners. In addition, the City was relieved of its commitment to assist business owners in accommodating the new situation. These actions taken by the City have an important role in determining the compliance of the plan with the PTP theory's tests and, therefore, its perception as a legitimate exercise of the municipality's police power.