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Michael Pappas

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SINGLED OUT

MICHAEL PAPPAS*

ABSTRACT

David has been "singled out." He is the only one in his neighborhood legally prohibited from building a house. In a town full of residences, his lot alone must remain vacant. This is unequal, but is it unconstitutional?

Courts have continually grappled with this sort of question, vigilantly defending against unfair and unjust singling out. So important is this concern that the Supreme Court has emphasized it as the heart of the Fifth Amendment takings jurisprudence, and an entire Equal Protection doctrine has emerged around it.

However, courts and scholars have yet to critically examine the concept of singling-out, and as a result, singling-out protections languish as ineffective and counterproductive. This Article remedies the oversight and presents a solution.

By untangling the different singling-out theories, this Article prioritizes the approaches that best serve their underlying values. Moreover, this Article proposes an easily implementable, though counterintuitive, measure for improving both singling-out protections and Fifth Amendment takings jurisprudence.

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* Associate Professor, University of Maryland Francis King Carey School of Law. Previous drafts of this Article were presented at the Pace Environmental Law Distinguished Junior Scholar Lecture, University of North Carolina School of Law Faculty Workshop, University of Washington Young Environmental Scholars Workshop, University of Denver Environmental Law Workshop, SEALS New Scholars Workshop on Property Law and Theory, Vermont Colloquium on Environmental Scholarship, and University of Maryland Francis King Carey School of Law Faculty Workshop. My thanks go out to all participants at these events, with particular thanks to Bob Anderson, Hanoch Dagan, Nestor Davidson, John Echeverria, Mark Graber, David Gray, James Grimmelmann, Sanne Knudsen, Justin Pidot, and Max Stearns for helpful insights. Thanks also to Ben Cheatham, Emmit Kellar, and Matthew Talmo for excellent research assistance. Finally, my thanks to the members of the *Maryland Law Review*.

INTRODUCTION

It's discrimination. David is the only one in his neighborhood legally prohibited from building a house. In a town full of residences, his lot must remain vacant.[1] All his neighbors can build on their land, but he cannot build on his.

Grace suffers similar treatment regarding her water service. Her municipality has decreed that Grace must pay double what her neighbors do for their water connections.[2] This is not based on the amount of water Grace uses; the fee is simply for a connection. Grace must pay twice as much for the exact same service.

David and Grace have been "singled out." The law subjects them to restrictions and costs that their neighbors do not bear. It's discrimination. But is it *impermissible* discrimination? It is paramountly inequitable, but is it unconstitutional?

1. Facts adapted from the case of David Lucas. *See generally* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

2. Facts adapted from the case of Grace Olech. *See generally* Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000).

Thousands of cases, ranging from the Supreme Court to lower federal and state courts, have asked these questions, expressing the same core concern about individuals being unfairly singled out to bear government-imposed burdens.[3] The inquiry is most common in the Fifth Amendment takings jurisprudence, where the Supreme Court identified the singling-out fairness concern as the very heart of the takings doctrine.[4] Additionally, echoes of the singling-out inquiry reverberate into Equal Protection[5] and Due Process[6] cases, leading to the emergence of the "class-of-one" doctrine.[7]

Across all these cases, courts rally to the cause of "fairness and justice."[8] They seek to protect individuals who find themselves victims of unfair government action, and they police against individual discrimination,[9] government illegitimacy,[10] the mischief of special-interest factions,[11] or majoritarian tyranny.[12] In service of such foundational values, the singling-out inquiry has given rise to powerful judicial rhetoric—unanimously embraced, thoroughly rehearsed, and widely reprinted.[13] When it comes to singling out, the concern is intuitive, the principles are fundamental, and the language is well worn.

However, the singling-out inquiry itself has not been well examined. Aside from broadly agreeing on the importance of fairness and justice, jurists and scholars have paid little attention to the details of how singling-out inquiries actually advance their underlying goals. This Article probes these important, unexamined details and finds both a striking imprecision in what courts mean by "singling out," as well as a perverse mismatch between the singling-out concerns and the measures taken to address them. The primary method courts use to control singling out is a property-based approach undertaken through the Fifth Amendment takings jurisprudence. However, this Article argues that this approach proves poorly suited to some singling-out concerns, outright self-defeating of others, and detrimental to the implementation of the takings doctrine. The secondary protection against singling out embraces an arbitrariness-based approach, typified by the Equal Protection

3. For one early example, see Nashville Ry. v. Walters, 294 U.S. 405, 429 (1935). For a fuller description see discussion *infra* Part I.B.

4. *See* discussion *infra* Part I.B.1.

5. *See, e.g.*, *Olech*, 528 U.S. at 564.

6. *See infra* note 46 (discussing "spot-zoning" cases).

7. *See* discussion *infra* Part I.B.2.

8. *See, e.g.*, Armstrong v. United States, 364 U.S. 40, 49 (1960).

9. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 148–49 (1978) (Rehnquist, J., dissenting).

10. *See, e.g.*, *Olech*, 528 U.S. at 564 (citing Olech v. Vill. of Willowbrook, 160 F.3d 386, 387 (7th Cir. 1998)).

11. *See, e.g.*, THE FEDERALIST NO. 10, at 44 (James Madison) (Colonial Press ed., 1901); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1072 n.7 (1992) (Stevens, J., dissenting).

12. *Cf.* THE FEDERALIST NO. 10, *supra* note 11, at 44 (James Madison).

13. *See* discussion *infra* Part I.B.1.

"class-of-one" doctrine.[14] This Article contends that this approach is actually well suited to address the core singling-out concern, but it is underdeveloped and may suffer from the courts' primary investment of attention in the property-based approach.

In light of these shortcomings, this Article recommends refining these protections to better align them with the goals of the singling-out inquiry. The prescription for doing so is counterintuitive: this Article posits that by removing singling-out language from the takings inquiry, the Court can not only improve singling-out protection, in both the property-based and arbitrariness-based doctrines, but it can also clarify the takings jurisprudence.

The Article proceeds as follows. Part I introduces the core values that animate the singling-out concern, as well as the property-based and arbitrariness-based approaches that courts have used to address singling out. Part II examines the nature of singling out more precisely, finding that under the concept of singling out, courts make four distinct inquiries: 1) arbitrary discrimination, 2) inequality of results, 3) magnitude of burdens, and 4) distributive social justice. It then assesses these different inquiries for consistency with the core singling-out concerns. In light of these observations, Part III reexamines the singling-out doctrines, arguing that the property-based approach actually misses the most important singling-out inquiries and perversely encourages arbitrary government action, facilitates factional mischief, and incentivizes detrimental land management. As such, the property-based approach works against both the principles of the singling-out concern and the administration of the takings doctrine. Part III further determines that the arbitrariness-based approach responds well to core singling-out concerns, but it suffers from a lack of development. Based on this analysis, Part IV recommends expressly eliminating the singling-out language from the takings inquiry to improve the function of both the property-based and arbitrariness-based approaches, as well as the takings doctrine more generally. Part IV also draws upon Supreme Court precedent to detail how the Court might accomplish this change.

I. THE SINGLING OUT CONCERN

Though frequently articulated, the concern with singling out has been underscrutinized. Unlike many other constitutional protections, the singling-out concern is not necessarily tied to specific constitutional guarantees (such as free speech),[15] fundamental rights (such as voting),[16] or systematically disadvantaged groups (such as "discrete and insular minorities").[17] So, it bears

14. *See Olech*, 528 U.S. at 564.
15. *E.g.* U.S. CONST. amend. I.
16. *E.g.* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).
17. *E.g.* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

asking: why and how do courts police singling out? This Part examines those issues. Section A addresses the "why" question, rooting the singling-out concern in government legitimacy and political process values. Section B then examines "how" by discussing the doctrines employed to police singling out. The primary approach courts have taken is a property-based protection against singling out, grounded in the Fifth Amendment takings jurisprudence. Courts have also, though less frequently, addressed singling out through an arbitrariness-based approach typified by the Equal Protection class-of-one doctrine. Together these Sections provide a foundation for assessing the effectiveness of these doctrines as measured against the justifications for the singling-out concern.

A. What's Wrong with Singling Out?

The protections against singling out arise from a concern for the legitimacy of government and a worry about the victimization of individuals at the hands of powerful majorities or factions. These anxieties date back to the framing of the Constitution. The Framers recognized these risks and sought to structure government to prevent majorities or particularly influential interest groups from treating themselves preferentially or their enemies detrimentally.[18] To avoid such abuses, the Constitution reflects a strong preference for the general applicability of laws: "for example, the Bill of Attainder Clauses prohibit certain types of laws that single out individuals for punishment without trial; [and] more generally, the Equal Protection Clause manifests the principle that the law ought to treat like cases alike."[19]

Drawing upon these roots, more modern jurists base singling-out concerns on the same principles that government action should not be wielded as a tyranny of the majority nor be co-opted to serve the whim of powerful interests. For example, Justice Stevens identified the concerns underlying singling out as preventing the "mischiefs of factions"[20] or other "opportunistic highjacking of the political process to benefit some special interest."[21]

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18. *Cf.* THE FEDERALIST NOS. 47–49, 51, *supra* note 11, at 271–284, 289–93 (James Madison); John Hart Ely, Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 344 (1962) ("A careful reading of Federalists 47, 48, 49 and 51 reveals that usurpation on the part of the legislature was what worried Madison and Hamilton most." (emphasis omitted)).

19. Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625, 628 (2014); *see also* Ely, *supra* note 18, at 348 ("It is the peculiar province of the legislature, to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810))).

20. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1072 n.7 (1992) (Stevens, J., dissenting) (quoting THE FEDERALIST NO. 10, at 43 (James Madison) (G. Wills, ed. 1982)).

21. John D. Echeverria, *The Triumph of Justice Stevens and the Principle of Generality*, 7 VT. J. ENVTL. L. 22, 24 (2006).

Then-Justice Rehnquist articulated a similar theory highlighting the majoritarian "discrimination" that could result from the many imposing concentrated costs on the few.[22]

Commentators too, particularly in the Fifth Amendment takings context, have consistently grounded the singling-out principle in terms of governmental legitimacy and functional political process.[23] Moreover, scholars have more broadly asserted that general applicability is necessary to give laws the moral authority and legitimacy that lead societies and individuals to respect law *as* law.[24] For example, Lon Fuller has specifically tied the idea of general applicability of laws to a "principle of fairness" that is key to the morality and legitimacy of law.[25]

Thus, the consistent theme, from the Framers, jurists, and scholars, is that general applicability of laws is necessary both to legitimate government and to prevent political process abuses such as factional mischief and majoritarian tyranny. These are the foundational principles on which the singling-out concern rests.

B. Approaches to Singling Out

The Court takes two approaches to policing singling out. The more common, property-based approach is pursued through the Fifth Amendment takings jurisprudence. This provides the most frequent articulation of the singling-out concern as well as the most robust language to underscore it. Accordingly, it can be considered the primary approach. The Court's other method of policing singling out follows an arbitrariness-based approach, exemplified by the infrequently deployed Equal Protection class-of-one doctrine.

1. The Property-Based Approach

The primary means of policing singling out comes in the context of the Fifth Amendment takings jurisprudence, which announces singling-out concepts as a means for determining whether government regulation amounts to a compensable taking of property under the Fifth Amendment.

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22. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 148–49 (1978) (Rehnquist, J., dissenting).

23. *See, e.g.*, Nestor M. Davidson, *The Problem of Equality in Takings*, 102 NW. U. L. REV. 1, 24–28 (2008) (summarizing scholarly views).

24. *See* J.R. LUCAS, ON JUSTICE 32 (1980) ("A legal system must satisfy certain conditions if it is to count as a legal system at all: the laws must be generally known, and for the most part be of general application . . . ."); *see also* LON FULLER, THE MORALITY OF LAW 41–44 (rev. ed. 1969) (identifying general applicability as part of the "morality that makes law possible").

25. *See* FULLER, *supra* note 24, at 47.

The Fifth Amendment guarantees "private property [shall not] be taken for public use, without just compensation."[26] In the Fifth Amendment regulatory takings context, courts inquire whether a government action sufficiently interferes with property expectations such that the government must compensate the property owner for a "taking" of private property.[27] From the earliest articulation of this doctrine, the core question for identifying such a taking has been whether government action goes "too far" in limiting property expectations.[28] The challenge for courts evaluating these cases "has been—and remains—how to discern how far is 'too far.'"[29]

Courts have announced singling-out inquiries as indications that government action has gone too far, and though the precise means for applying these inquiries have never been clearly delineated, courts tend to introduce the singling-out concept to the takings inquiry in three ways. First, courts have applied the singling-out question as an overarching principle and general tenet of takings law, almost synonymous with the "too far" question.[30] In doing so, courts rely on both express use of the wording "singled out" as well as the oft-quoted expression that the "Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[31] This articulation is frequently termed the *Armstrong* principle, after the case coining the language, but the same sentiment has also been phrased as asking if "individuals are singled out to bear the cost of advancing the public convenience."[32]

Second, courts have incorporated singling-out concepts into the balancing test set forth in *Penn Central Transportation Co. v. City of New York*[33] ("*Penn Central* test"), which is the primary method for analyzing whether a government action amounts to a regulatory taking.[34] In applying the *Penn Central* test, courts examine three factors: "(1) 'the economic impact' of the government action, (2) the extent to which the action 'interferes with distinct

26. U.S. CONST. amend. V.

27. *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

28. *Id.*

29. *See* Lingle v. Chevron U.S.A., 544 U.S. 528, 538 (2005).

30. *See, e.g.*, Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012); *Lingle*, 544 U.S. at 537 (2005); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 (2002); Palazzolo v. Rhode Island, 533 U.S. 606, 617–18 (2001); Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 n.4 (1987).

31. Armstrong v. United States, 364 U.S. 40, 49 (1960).

32. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 148 n.11 (1978) (Rehnquist, J., dissenting) (citing Nashville Ry. v. Walters, 294 U.S. 405, 429 (1935)).

33. 438 U.S. 104 (1978).

34. *See id.* at 123–28; John D. Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171, 186–99 (2005).

investment-backed expectations,' and (3) the 'character' of the action."[35] Sometimes courts have incorporated the singling-out idea into this final factor analyzing the character of government action.[36]

Third, courts have indicated that the singling-out principle is a standalone takings test that may be used in parallel to the *Penn Central* balancing test. For example, the Supreme Court has stated that in conducting the takings analysis it examines *either* (1) the "*magnitude or character of the burden* a particular regulation imposes upon private property rights" *or* (2) "how any regulatory burden is *distributed* among property owners."[37] The first question is essentially the *Penn Central* test, particularly the first two factors inquiring into economic diminution and interference with expectation. This second question examining the distribution of burdens recasts the singling-out inquiry and the *Armstrong* principle as a self-contained takings test.[38]

Taking these variations together, the Supreme Court, lower federal courts, and state courts have announced this singling-out concept in thousands of takings cases. One of the most enduring articulations has been the specific wording of the *Armstrong* principle,[39] particularly that the "Fifth Amendment[] . . . was designed to bar Government from *forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole*."[40] Since *Armstrong*, "[t]his language . . . has been endorsed in almost every important takings opinion of the last thirty years,"[41] and in quoting *Armstrong*, the Court has emphasized this principle

35. Echeverria, *supra* note 34, at 171 (citing *Penn Central*, 438 U.S. at 124); *see also id.* at 186–99; *Penn Cent.*, 438 U.S. at 123–28, 130.

36. *See, e.g.*, Eastern Enterprises v. Apfel, 524 U.S. 498, 537 (1998) (declaring "the nature of the governmental action in this case is quite unusual" because the statute "singles out certain employers"); B & G Constr. Co. v. Dir., Office of Workers' Comp. Programs, 662 F.3d 233, 262–63 (3d Cir. 2011) (discussing "fundamental principles of fairness" and singling out in the context of the "nature of the governmental action" analysis); Guggenheim v. City of Goleta, 582 F.3d 996, 1028 (9th Cir. 2009), *vacated en banc on other grounds*, 638 F.3d 1111 (9th Cir. 2010) (noting that the "more frequently applied iteration of the 'character of the governmental action' test considers whether the challenged regulation places a high burden on a few private property owners" (citing *Armstrong*, 364 U.S. at 49)); *cf.* Echeverria, *supra* note 34, at 192–93 (noting that the third factor in the *Penn Central* test has been interpreted in a number of ways, including as an inquiry into the general applicability of laws).

37. Lingle v. Chevron U.S.A., 544 U.S. 528, 542 (2005).

38. *See id.* at 544. In criticizing the claimant's failure to articulate a cognizable takings claim in *Lingle*, the Court stated that "[i]n short, Chevron has not clearly argued—let alone established—that it has been singled out to bear any particularly severe regulatory burden," implying that "singling out" is the operable crux of a colorable takings claim. *Id.*

39. *See Armstrong*, 364 U.S. at 49.

40. *Id.* (emphasis added).

41. Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1534 (2006).

as the central guiding concept for its takings jurisprudence.[42] Regardless of slight variations in wording, the questions of singling out landowners, forcing some property owners alone to bear public burdens, or distributing the burdens of regulation all reflect the same basic concern with distribution of burdens and singling out.

Moreover, not only has this singling-out concept appeared in many takings opinions, but it also has been used "both by Justices who contended that the regulations before the Court amounted to takings, as well as by those who disagreed,"[43] so much so that "[t]he parroting of this [sentiment] by judges, both sympathetic and hostile to property owners' claims, has become almost a joke."[44] Further, the singling-out focus is common across ideology as well as case outcome, with Justices from across the political and philosophical spectrum equally willing to incorporate the singling-out language or the *Armstrong* principle.[45] All together, this singling-out language in the takings cases offers the most consistently articulated and hortatorily robust singling-out approach.

2. The Arbitrariness-Based Approach

An alternate means of protecting individuals from being singled out involves inquiries directly into the existence of arbitrary discrimination, and the Equal Protection class-of-one doctrine provides a primary example of protections under this model.[46]

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42. *See Lingle*, 544 U.S. at 537 (quoting *Armstrong*, 364 U.S. at 49). For additional discussion of the *Armstrong* principle and its role in the Court's takings jurisprudence, see generally Michael Pappas, *The Armstrong Evolution*, 76 MD. L. REV. ENDNOTES 35 (2016).

43. Ball & Reynolds, *supra* note 41, at 1534; *see also* Davidson, *supra* note 23, at 21 (noting that the fairness concept has been "embraced in a long line of modern regulatory takings cases ").

44. Barton H. Thompson, Jr., *The Allure of Consequential Fit*, 51 ALA. L. REV. 1261, 1286 (2000).

45. *See* Ball & Reynolds, *supra* note 41, at 1534; William Michael Treanor, *The* Armstrong *Principle, the Narratives of Takings, and Compensation Statutes*, 38 WM. & MARY L. REV. 1151, 1153 (1997).

46. A related arbitrariness-based inquiry arises in "spot-zoning" cases where courts have invalidated land use decisions that arbitrarily single out individual landowners for treatment different than their neighbors. *See generally* Mark S. Dennison, Annotation, *Determination Whether Zoning or Rezoning of Particular Parcel Constitutes Illegal Spot Zoning*, 73 A.L.R. 5th 223 (1999). *See also* Strain v. Mims, 193 A. 754 (Conn. 1937); Michigan-Lake Bldg. Corp. v. Hamilton, 172 N.E. 710 (Ill. 1930); Mueller v. Hoffmeister Undertaking & Livery Co., 121 S.W.2d 775 (Mo. 1938); Linden Methodist Episcopal Church v. City of Linden, 173 A. 593 (N.J. 1934); Page v. City of Portland, 165 P.2d 280, 284 (Or. 1946); Higbee v. Chicago, B. & Q. R. Co., 292 N.W. 320, 323 (Wis. 1940); *cf.* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 132 (1978) ("But, contrary to appellants' suggestions, landmark laws are not like discriminatory, or 'reverse spot,' zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones.").

The Equal Protection Clause's promise that no state shall "deny to any person within its jurisdiction the equal protection of the laws"[47] provides a fitting textual root for a constitutional guarantee against being singled out.[48] Moreover, the Supreme Court has held that the clause not only guards against government classifications based on race, sex, or other immutable characteristics[49] but also protects individuals from arbitrary treatment by the government. This protection stems from the Supreme Court's recognition that "successful equal protection claims [may be] brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment."[50]

This class-of-one protection was announced in *Village of Willowbrook v. Olech*,[51] which arose from Ms. Olech's attempt to connect her property to a municipal water supply.[52] The municipality conditioned the connection on her granting a thirty-three-foot easement, despite requiring only a fifteen-foot easement from other property owners seeking similar connections.[53] Ms. Olech claimed that the municipality's demand of the additional eighteen-feet of easement was irrational and arbitrary, motivated by retaliatory animus from an unrelated lawsuit she had filed.[54] The Court found this sufficient to support a claim for Equal Protection relief, recognizing that arbitrary discrimination is invalid regardless of whether animus is involved.[55]

In announcing this protection from "arbitrary individual administrative decision[s] by a government official,"[56] *Olech* established a constitutional guarantee against arbitrary singling out. However, the class-of-one doctrine has received little subsequent development. Since *Olech* was decided in 2000, lower courts have struggled to apply it,[57] and the Supreme Court has

47. U.S. CONST. amend. XIV, § 1.

48. *See* Robert C. Farrell, *Classes, Persons, Equal Protection, and* Village of Willowbrook v. Olech, 78 WASH. L. REV. 367, 379 (2003) ("The alternate view of equal protection focuses, not on limiting governmental classifications, but on protecting individual rights. This view of equal protection has an obvious contextual basis; the Fourteenth Amendment itself provides that no state shall deny to any person the equal protection of the laws." (emphasis omitted)); *cf.* Thompson, *supra* note 44, at 1287 ("Even assuming that the Constitution embodies some notion of horizontal equity . . . the Equal Protection Clause would seem a more logical basis than the takings protections for enforcing it . . . .").

49. *See generally*, Farrell, *supra* note 48, at 379.

50. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

51. *Id.*

52. *Id.* at 563.

53. *Id.*

54. *Id.*

55. *Id.* at 565.

56. Farrell, *supra* note 48, at 400 n.238.

57. For a description of the "doctrinal morass" that is the current class-of-one doctrine, see Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n, 483 F.3d 1025, 1043 (10th Cir. 2007) (McConnell, J., concurring in part and dissenting in part); *see also* Alex M. Hagen, *Mixed*

heard only one class-of-one case, *Engquist v. Oregon Department of Agriculture*,[58] holding that the government could not be liable on a class-of-one theory in the employment context. As a result, this arbitrariness-based approach is less commonly invoked and may be considered secondary to the property-based approach to singling out.

II. WHAT EXACTLY IS SINGLING OUT, ANYWAY?

For all the concern with singling out, the term is thrown around loosely, even in the doctrines aimed to address it. To date, neither courts nor commentators have examined precisely what singling out means. Rather they have assumed use of the term as a general, unitary concept. However, as Section A discusses, a more precise examination of singling-out concepts reveals that case law and scholarship support at least four different views of what singling out means, not all of which raise the same worry over government illegitimacy or political process failures. Building on this more nuanced view of singling out, Section B then assesses which types of singling out resonate most closely with the legitimacy justification underlying the singling-out concern.

A. Identifying the Different Types of Singling Out

The treatment of singling out in case law and scholarship supports at least four potential types of singling out: 1) arbitrary discrimination, 2) inequality of results from non-arbitrary, generally applicable laws, 3) magnitude of individual regulatory burdens, and 4) distributive social justice of burdens. Each are considered in turn.[59]

Motives Speak in Different Tongues: Doctrine, Discourse, and Judicial Function in Class-of-One Equal Protection Theory, 58 S.D. L. REV. 197, 206–07 (2013) ("[T]he class-of-one landscape is fractious and unsettled and will remain so unless the Supreme Court weighs in on this issue.").

58. 553 U.S. 591 (2008).

59. The examples in the following Subsections are stylized to help separate and probe the different types of singling out. This simplification is useful for isolating variables that inform singling out concerns but, admittedly, the complexities of reality may not follow such clear lines. *Cf.* Ely, *supra* note 18, at 350 ("Of course the distinction between rules of general applicability and the application of such rules to particular persons or groups is not a clear one."). For example, a regulatory burden of particularly great magnitude, that only impacts a few individuals, may evidence arbitrary discrimination. Alternatively, a seemingly non-arbitrary law may in fact have arisen from political process failure but still have some rational justification for unequal results. Such matters of fact will always be difficult to resolve and lead to complex cases, but the simplified hypotheticals at least offer a starting point for identifying, assessing, and prioritizing the different forms of singling out.

1. Arbitrary Government Discrimination

Arbitrary government discrimination among individuals is the prototypical example of problematic singling out, and it represents the most immediate worry for courts seeking to police government legitimacy. As a stylized example, imagine individual *X* is required to pay twice as much as all other residents for a government service, such as connecting to a municipal sewer or obtaining a driver's license. Imagine further that no facts justify the difference in price and that individual *X* is otherwise similarly situated to all her neighbors.

Such a situation is obviously just a small variation on the facts of *Olech*[60] and is the type of singling out addressed directly by the class-of-one doctrine.[61] This arbitrary discrimination strikes at the core of the singling-out worry because *X* appears to be victimized by a non-generally applicable law that smacks of illegitimate government action produced by political process failure. Moreover, such a specifically targeted law also appears to lack moral legitimacy.[62] One might say that this law is both unfair and unequal, and it is exactly the type of abuse that the singling-out concern seeks to guard against.

2. Inequality of Results

In addition to patently arbitrary discrimination, instances of singling out can also arise from non-arbitrary government actions that cause unequal results based on dissimilar individual situations. For example, imagine another stylized hypothetical, in which a municipality requires all citizens with multi-bathroom homes to pay a greater fee for municipal sewer connections because the multi-bathroom homes require larger, more complicated connections than do single-bathroom homes. Or, imagine a municipality requires citizens obtaining commercial driver's licenses to pay a greater fee than those obtaining standard driver's licenses because of the additional certification processes required.

These are seemingly rational and generally applicable laws, but facts may arise under which they single out some small number of individuals, causing inequality of results. For example, if only one resident of the municipality owns a multi-bathroom home, then she has to pay $100 for the sewer tie-in while all other residents pay only $50. Similarly, if only one resident of the municipality wishes to drive commercially, then she must pay $100 for the driver's license whereas all other residents would only pay $50.

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60. *See Olech*, 528 U.S. at 563–64.

61. *Id.* Moreover, such arbitrariness also raises the particular concerns noted by Justice Stevens in his takings jurisprudence. *See* Echeverria, *supra* note 21, at 24.

62. *See, e.g.*, FULLER, *supra* note 24, at 47.

In both cases there is singling out based on the inequality of results from a generally applicable law. However, these cases do not necessarily, or even likely, evidence government illegitimacy or factional mischief.[63] Though not all residents pay an equal amount, the differential fees appear justified by increased costs, and the higher fees are still relatively small in magnitude. So this singling out based on inequality of results appears less worrisome. It does not suggest obvious political process defects or illegitimacy of the law.

Nonetheless, the Supreme Court's singling-out language in the takings context suggests that it will police this inequality-of-results singling out. Particularly, the Court's statements that it will base a takings determination on "how any regulatory burden is distributed among property owners,"[64] or that it will find a taking if "individuals are singled out to bear the cost of advancing the public convenience,"[65] suggest that such inequality of results would require takings compensation, regardless of the rationality and general applicability of the laws. This language may overstate the extent to which courts actually find takings based on inequality of results,[66] but it nonetheless is repeated frequently and impacts not only courts' but also landowners' and agencies' interpretation of the takings inquiry.[67]

3. Magnitude of Individual Burden

A third stylized hypothetical set of laws illustrates how a non-arbitrary, generally applicable government action might raise political process or legitimacy concerns based on the magnitude of the burden that it imposes. If there is an excessively high burden imposed on certain individuals, it may indicate some form of government illegitimacy. This magnitude-of-burdens worry is at the heart of the Court's takings jurisprudence, but, strictly speaking, it does not actually require that any individual be singled out.

For example, imagine if only one resident of a municipality owns a multi-bathroom home and has to pay $50,000 for a sewer connection while all other residents, owners of single-bathroom homes, pay $50. Alternatively, imagine if only one resident wishes to drive commercially and has to pay $50,000 for a driver's license whereas all other residents only pay $50 for a standard license. In such cases, individuals are singled out not only

63. One could imagine, however, a scenario where the unequal treatment of the multi-bathroom homeowner or commercial driver was the result of intentional victimization or some majoritarian or factional animus. If there were facts to prove this and no other justification for the increased cost, then this scenario would fit in with the arbitrary government discrimination hypothetical. *See supra* Part II.A.I.

64. Lingle v. Chevron, 544 U.S. 528, 542 (2005) (emphasis omitted).

65. *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 148 n.11 (1978) (Rehnquist, J., dissenting) (quoting Nashville Ry. v. Walters, 294 U.S. 405, 429–30 (1935)).

66. *See* discussion *infra* Part III.A.4.

67. *See* discussion *infra* Part III.A.4.

through inequality of results but also by the magnitude of the burdens they bear, which are one thousand times as much as other residents' burdens in this instance.[68]

Under these two sets of facts, one may be highly concerned about the legitimacy of the law and the political process that led to such a great burden on the multi-bathroom homeowner or the commercial driver—perhaps even more so than under an inequality-of-results perspective discussed in the previous subsection. The fact that this situation is more problematic than the inequality-of-results hypothetical demonstrates an important distinction: it is the *magnitude* of the burden, rather than the *inequality* of results, that more strongly signals potentially illegitimate government action. Between this and the previous Subsection's hypothetical, the unequal distribution of result is held constant, but the magnitude of the burden changes from a two-times differential to a thousand-times differential. If the thousand-times differential raises an even more urgent concern over the legitimacy of government action, that indicates that unacceptably high burdens rather than inequality of results that raises, or at least amplifies, that concern.

Certainly the imposition of a great burden on a very few individuals may cause concern because it triggers a greater intuition of arbitrariness or factional mischief, which might occasion a closer look into whether the high magnitude of the burden was in fact rational or instead arbitrary. But, if a burden of great magnitude is not arbitrary, then the concern arises more from the absolute magnitude of the burden than from the inequality of results. If this is the case, then the concern about the magnitude of the burden is not accurately described as a singling-out concern because it does not require any particular "singling." It can impact many individuals, or even a majority of individuals, and still be too great in magnitude. This does not diminish the nature of the concern, particularly in regard to interference with property rights; rather, it clarifies the appropriate question to ask. An enormous burden is worrisome, whether imposed on many (thus leading to suspicion of factional mischief), or on few (thus leading to suspicion of majoritarian tyranny).

For example, even if a large percentage of residents, say, seventy-five percent of residents rather than just one, were required to pay $50,000 for their sewer connections or driver's licenses, there would persist a concern

68. For simplicity of example, the hypothetical stipulates that this law is non-arbitrary but does not provide a justification for why not. In reality, if the magnitude of a burden is great and lacks facts to justify it, that would likely indicate arbitrariness or factional mischief. However, a great magnitude of burden in and of itself does not necessarily indicate arbitrariness. For example, the landmark regulation at issue in *Penn Central* imposed a great magnitude of burden but was not adjudged to be an arbitrary action or a taking. *See generally Penn Cent.*, 438 U.S. at 132–33.

that the burden of the regulation was simply too great in magnitude and somehow reflected a political process defect (possibly outsized influence by those paying only $50), regardless of the breadth of its applicability.

If this is true and the magnitude of the burden is in fact the key variable driving worry over government legitimacy in a given case, then this situation is less a matter of singling out (such as differential treatment of individuals manifested in inequality of results) than it is of diminished property value (such as amount of imposed cost manifested in magnitude of burdens).

This point may help clarify Justice Rehnquist's dissent in *Penn Central*, which articulates a singling-out concern that, though expressed in terms of inequality of results, appears motivated by magnitude-of-burden suspicion. In arguing that a regulation preventing Penn Central from developing a skyscraper above Grand Central Station amounted to a taking, Justice Rehnquist stressed the magnitude of the cost. Particularly, he emphasized that Penn Central was singled out because it bore a multimillion-dollar burden but received no offsetting benefit.[69] As Justice Rehnquist put it:

> If the cost of preserving Grand Central Terminal were spread evenly across the entire population of the city of New York, the burden per person would be in cents per year—a minor cost appellees would surely concede for the benefit accrued. Instead, however, appellees would impose the entire cost of several million dollars per year on Penn Central. But it is precisely this sort of *discrimination* that the Fifth Amendment prohibits.[70]

Though Justice Rehnquist's analysis is framed in terms of a discriminatory singling out, it repeatedly emphasizes the enormity of the multimillion-dollar cost imposed on Penn Central, and this large burden seems to drive his analysis as much as anything. For example, to adjust the facts and paraphrase, if the regulation imposed "the entire cost of [*one-hundred dollars*] per year on Penn Central," then "this sort of discrimination" would be more likely "a minor cost" that did not trouble sensitivities toward singling out.[71] Such is the importance of magnitude.

As with Justice Rehnquist's dissent in *Penn Central*, much of the singling-out language in the takings context can be described more precisely as concern over magnitude of burdens rather than over inequality of results. For example, in *Eastern Enterprises v. Apfel*,[72] Justice O'Connor's opinion more directly indicated the importance of the magnitude of burden in the singling-out takings inquiry.[73] Justice O'Connor stated that, among other factors,

69. *See id.* at 147–49 (Rehnquist, J., dissenting).
70. *Id.* at 148–49 (emphasis added).
71. *Id.*
72. 524 U.S. 498 (1998).
73. *Id.* at 537.

"[when legislation] *singles out* certain employers to bear a burden that is *substantial in amount* . . . the governmental action implicates fundamental principles of fairness underlying the Takings Clause."[74] Similarly, in *Lingle v. Chevron*,[75] Justice O'Connor's opinion stressed that a successful takings claim should demonstrate that a plaintiff "has been *singled out* to bear [a] *particularly severe* regulatory burden."[76] In both instances, the focus on "substantial" and "particularly severe" burdens indicates that it is magnitude, not mere inequality of results, that drives the inquiry.

This magnitude concern fits well within the context of Fifth Amendment protections of property, but it does not necessarily depend on an entity being singled out for differential treatment, as a few additional hypothetical examples further illustrate. For instance, under an inequality-of-results theory of eminent domain, no compensation would be owed if the government condemned the property in an entire town or large-enough neighborhood because no individual owner would be singled out. Rather, all would share the burden evenly. This result is obviously flawed. In such an instance, every property owner should be owed compensation because the condemnation takes fee simple ownership of property, thereby imposing a great magnitude of burden on all property owners. As a matter of diminution of property expectations, there is a taking of property, regardless of the fact that the burden is distributed among all neighbors.

In the regulatory takings context, the same reasoning would apply. If a regulation involved physical government occupation of all the property in a town, such occupation would be a per se regulatory taking under *Loretto v. Teleprompter Manhattan CATV Corp*.[77] The fact that no one property owner is singled out ought to have no bearing on the analysis. There is a taking of all the owners' rights to exclude, and regardless of how distributed that burden is, the taking exists. Similarly, if the government regulated in such a way to eliminate all economic value in an entire town, the provision would be a taking under *Lucas v. South Carolina Coastal Council*,[78] despite the relatively even distribution of the burden.[79]

Conversely, a regulation causing a small diminution in property expectations, such as banning the burning of trash in one's yard, would not arise to a taking, even if it affected only a single parcel. While such a regulatory burden would be concentrated and create an inequality of results, it is not a

74. *Id.* (emphasis added).

75. 544 U.S. 528 (2005).

76. *Id.* at 544 (emphasis added).

77. 458 U.S. 419 (1982); *see id.* at 441 (holding that a regulation requiring third-party physical invasion of property is a per se taking).

78. 505 U.S. 1003 (1992).

79. *See generally id*. (holding that a regulation eliminating all economic value of a property is a taking).

sufficient reduction in property expectations to require compensation. Similarly, to adopt Justice Scalia's examples from *Lucas* of instances where a taking is *not* present,

> [T]he owner of a lakebed . . . would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault.[80]

In both of these instances, an individual would be singled out to bear the cost of a public burden and would experience inequality of results. The particular hypothetical lakebed owner is not allowed to fill the land, and the particular hypothetical nuclear plant owner must remove the plant. Other lakebed owners may be able to fill land, and other nuclear plant owners may continue operation, but these unlucky two cannot because of their particular situations. These hypothetical property owners acutely experience these respective restrictions on property use, and these restrictions constrain the individuals to benefit the public at large. However, Justice Scalia holds these hypotheticals out as quintessential examples of when a taking has not occurred, explaining that in these instances, the background limits on property rights diminish the property owners' expectations.[81] Justice Scalia explains that in these contexts, the hypothetical property owners never had the right to undertake the discussed activities (filling the lakebed or operating the nuclear plant) because the activities threaten significant harm to neighbors or the public at large, thereby constituting a nuisance.[82] Since no property owner has a right to cause a nuisance, no property right is taken from these hypothetical property owners when restrictions limit nuisance-causing activity.[83]

Justice Scalia's reasoning in these examples is premised on a magnitude of burdens test for determining whether a compensable taking occurs. Justice Scalia first determines the scope of the hypothetical property owners' legitimate expectations and then measures how much the restrictions diminish those expectations. He finds that the magnitude of the burden is low because restrictions on causing nuisance (thereby avoiding lakebed flooding or nuclear accident) do not appreciably diminish property expectations, which never included the right to cause a nuisance. Under Justice Scalia's exam-

80. *See id.* at 1029–30 (citing Frank I. Michelman, *Property, Utility, and Fairness, Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1239–41 (1967)).

81. *Cf. id.*

82. *See id.*

83. *Cf. id.*

ples, even though the hypothetical property owners are singled out, the magnitude of their burdens is simply not sufficient to create a compensable taking.[84]

In sum, the core Fifth Amendment takings inquiry into the magnitude of burdens may have been termed an inquiry into singling out, but it does not precisely examine singling out nor necessarily depend on it. Rather than considering inequality of results, its core focus is on the magnitude of burdens. The line of what constitutes an unacceptably high burden is not easy to define, and that is the central question that the takings inquiry grapples with in defining how far is "too far." However, precisely speaking, such an inquiry into the diminution of property rights is separate and independent from a singling-out question because it does not require that a property owner be treated differently than her neighbor. Put another way, the takings analysis does not require a comparison of one property owner to another.[85] The question of the magnitude of a property owner's burden is not measured by the magnitude of a neighbor's burden; rather it is measured against the property owner's legitimate expectations. Unlike a true singling-out analysis, which requires a comparison of one individual relative to another, the magnitude-of-burdens analysis requires only a comparison of an individual's post-regulation situation to that same individual's pre-regulation rights.

4. Distributive Social Justice

Finally, one additional variation on the singling-out concern can arise from considering the distributive social justice implications of a law, such as any potential disproportionate impact that a regulation may have on certain groups like the impoverished or politically vulnerable. For example, if a nonarbitrary law results in all residents of a municipality having to pay $100 for a driver's license, but if a few residents earn only $100 per month, then the regulation disproportionately impacts those residents, thereby singling them out based on their income level. This reflects a singling-out concern that is distinct from those above. Here the law does not appear illegitimately arbitrary, nor does this present a pure inequality of results, because all residents are subject to the same burden. Finally, the absolute amount of the burden is relatively low, so there is unlikely to be a concern with the magnitude of the burden. However, because the distributive impact of the regulation disproportionately singles out some individuals because of their lack of wealth, this raises a distributive justice concern[86] that incorporates elements of political process failure, inequality of results, and magnitude of burdens. The worry

84. *Cf. id.*

85. For additional discussion see Pappas, *supra* note 42, at 41–46.

86. *See generally* Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 743–44 (1999) (characterizing the concept of distributive justice as at least attempting not to further disadvantage those already disadvantaged in terms of wealth and influence).

is that certain individuals or groups are singled out in a relative sense because the relative magnitude of their burdens is great. As a result, though the fee is equally imposed, it is unequally felt, particularly burdening those unlikely to wield power in the political process. So, though this form of singling out is distinct from those discussed above, it raises political process concerns common to the other inquiries.

Takings jurisprudence provides some traces of support for this distributive social justice approach to singling out through the "parcel as a whole" concept.[87] By considering the parcel as a whole, courts evaluating takings claims give some attention to the relative magnitude of burdens in light of the total amount of property impacted, making compensation somewhat more likely when a regulation impacts an owner of a small parcel rather than an owner of a large parcel.[88] Additionally, the contributions of property and social justice scholars like Jeremy Waldron[89] and Hanoch Dagan[90] argue that property law in general, and takings jurisprudence in particular, *should* incorporate distributive social justice principles. For example, Dagan has argued that, as a normative matter, property doctrines ought to consider limited redistributive compensation in light of egalitarian concerns.[91] Dagan has suggested that the "virtue of social responsibility and the ideal of avoiding any preferential treatment of the better-off" counsel exploring how "progressive distributive considerations [could] be grafted onto takings law" via a "progressive compensation scheme."[92] The upshot of this assertion is the aspirational, normative proposal that takings law ought to consider when an individual is singled out in a distributive social justice sense and ought to adjust compensation accordingly, thereby remedying both social injustice and lack of access to political process.

B. Assessing the Different Types of Singling Out

The various singling-out inquiries are effects-oriented in that they examine whether government action has a particular impact (that is, whether it imposes arbitrary discrimination, inequality of results, etc.). Depending on these impacts, the inquiries then derive a conclusion about the legitimacy of government action. However, not all of the singling-out inquiries provide the same level of insight into the legitimacy of laws. Some ask the question

87. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978).

88. *See, e.g.*, Justin Pidot, *Eroding the Parcel*, 39 VT. L. REV. 647, 648 (2015) (discussing how the parcel as a whole rule "provid[es] a kind of rough justice when it comes to allocating burdens based on wealth").

89. *See, e.g.*, JEREMY WALDRON, *When Justice Replaces Affection: The Need for Rights*, *in* LIBERAL RIGHTS: COLLECTED PAPERS, 1981–1991, 370, 373–74, 376, 387 (1993).

90. *See, e.g.*, Dagan, *supra* note 86.

91. *See id.* at 743–44, 752, 759.

92. *See id.* at 741, 743–44, 753.

directly, whereas others look for clues that might indirectly indicate illegitimacy. Thus, depending on the type of singling-out inquiry, the link between the singling-out action and the underlying legitimacy concern can be more or less attenuated. This attenuation, in turn, impacts how well the singling-out inquiry serves the values it is designed to protect. As a result, not all of these singling-out inquiries are equally relevant or compelling, as the hypotheticals in the previous Section help to demonstrate.

This Section assesses how well the different singling-out inquiries match with their underlying legitimacy and process concerns, offering insight about prioritizing the different inquiries. It argues that the arbitrary discrimination inquiry is most responsive to these concerns whereas the inequality-of-results inquiry is least relevant. Moreover, it finds that the magnitude-of-burden inquiry, though not necessarily predicated on singling out, overlaps with legitimacy concerns. Finally, it concludes that the distributive-social-justice inquiry requires further refining of normative commitments before it can be effectual.

Of the singling-out inquiries, arbitrary discrimination most directly addresses political process and legitimacy. It has a clear link to those concepts because it involves a simple, one-step analysis based on whether a non-arbitrary reason justifies differential treatment of an individual. An arbitrary law is illegitimate, even if it does not single out an individual, because the power of government does not extend to arbitrary actions.[93] Further, in the instance of arbitrary discrimination, the singling out itself offers dispositive proof of the arbitrariness, and consequent illegitimacy, of a government action. Arbitrary discrimination is per se an illegitimate government act.[94] Thus, the arbitrary discrimination inquiry directly engages the question of the legitimacy at the core of the singling-out concern.

Unlike arbitrary discrimination, the other types of singling out do not embody illegitimate government action themselves; rather they offer non-dispositive evidence to suggest possible illegitimacy. In a singling-out analysis, courts must examine the effects of rational government actions to see if these effects are so unacceptable as to betray some hidden defect.[95] Essen-

93. *See, e.g.*, Cty. of Sacramento v. Lewis, 523 U.S. 833, 845 (1998) ("The touchstone of due process is protection of the individual against arbitrary action of government . . . ." (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974))).

94. As a general matter, this is the case because individuals are protected against arbitrary government action, and such arbitrary action would contravene due process guarantees. *See id*. Moreover, the Supreme Court has also expressly held that arbitrary discrimination violates equal protection guarantees. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562 (2000).

95. For example, justices have attempted to work backwards from unequal results to uncover majoritarian tyranny or factional abuses. *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 148–49 (1978) (Rehnquist, J., dissenting) (stating a concern about "discrimination"); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1072 n.7 (1992) (Stevens, J., dissenting)

tially, these types of singling-out inquiries identify proxies for hidden illegitimacy buried in non-arbitrary actions. As a result, the key questions for assessing these forms of singling out are: How well do they identify reliable proxies? How much do these singling-out inquiries reveal about government legitimacy or functioning political process? How apt are they for unmasking non-arbitrary justifications as pretense for illegitimate government actions? Do they highlight results that run so contrary to normative commitments that even a rational justification nonetheless demonstrates illegitimacy or failure of political process?

Examined under this set of criteria, the magnitude-of-burden inquiry seems to hold up as a meaningful test for government legitimacy, despite the fact that it is not precisely a singling-out inquiry. Protection of private property can be viewed as a shield against majoritarian abuses[96] (such as uncompensated redistribution of property)[97] or factional mischief[98] (such as costless over-regulation by captured agencies).[99] Either way, the underlying protection overlaps with the singling-out concern for government legitimacy and functional political process. Moreover, the magnitude-of-burden test also taps into normative commitments to stability of property rights for both social peace[100] and utilitarian economic efficiency.[101] Thus, while the magnitude-of-burden inquiry does not truly rest on singling out but rather on the diminution of property expectations,[102] it also engages the legitimacy interests that underlie the singling-out concern.

(quoting THE FEDERALIST NO. 10, at 43 (James Madison) (G. Wills ed., 1982) (stating a concern with factional mischief)).

96. *See, e.g.*, Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1483 (1990) ("[P]roperty is often taken because of pure majoritarian pressure (or even the pressure of politically powerful minorities).").

97. *Cf.* Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984) (discussing "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want").

98. *Cf.* THE FEDERALIST NO. 10, *supra* note 11, at 46 ("But the most common and durable source of factions has been the various and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society.").

99. *See generally* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 264–65 (1985) (discussing how agencies will respond to incentives by overregulating when regulation is too cheap and by falling subject to capture or influence by powerful factions).

100. *Cf.* Stephen Clowney, *Rule of Flesh and Bone: The Dark Side of Informal Property Rights*, 2015 U. ILL. L. REV. 59, 116 (2015) (discussing the violence that results from ill-defined and informal property rights).

101. *See, e.g.*, Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561, 587 (1984) (summarizing support for the conclusion that "[t]he theory that stable property expectations are necessary for productivity pervades legal doctrine").

102. This is consistent with the taking inquiry's textual roots in the Fifth Amendment protection of property.

Conversely, the inequality-of-results inquiry finds no foundation in either the legitimacy justifications animating the singling-out concern or in other strongly held normative commitments. In fact, the inequality-of-results test runs contrary to the singling-out goal of ensuring legitimate government because it results in arbitrary government action to equalize results. Moreover, it also runs contrary to normative commitments to utilitarian economic efficiency as well as distributive social justice.

The legitimacy concerns underlying the singling-out inquiry focus on the importance of general and equal *applicability* of laws,[103] but that principle contains no guarantee of equal *result* under the law. After all, a completely legitimate, generally applicable, non-arbitrary law may occasion different results for different individuals based on their different situations. For example, if a municipality's cost of providing sewer connections rises based on the number of bathrooms in a house, then the municipality is rationally justified in charging the owner of a two-bathroom house more than the owner of a one-bathroom house,[104] even if there is some form of singling out because there is only one two-bathroom house in town. The inequality of results is based on inequality of circumstances, and the rational, generally applicable law creates a differential impact because the individuals are not similarly situated. This may seem obvious or implicit, but it is worth making express for clarification of the singling-out inquiries. In evaluating the legitimacy of government action, the typical focus is on *ex ante* equality in terms of general applicability of laws as opposed to *ex post* equality based on similarity of results.[105]

However, a singling-out inquiry focusing on inequality of results examines only *ex post* equality, and in doing so, it can actually undermine legitimacy by encouraging arbitrary treatment of individuals, such as equalizing results when a rational approach would call for differential treatment. For example, if a municipality's cost of providing sewer connections rises based on the number of bathrooms in a house, but the municipality nonetheless seeks to ensure equality of results and charges the owner of a two-bathroom

103. *See generally* Ely, *supra* note 18, at 350.

104. *See* Dagan, *supra* note 86, at 761 (noting the importance of rational planning-based considerations for government actions, especially when they involve imposing costs).

105. The disparate impact doctrine is a notable exception. *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 577 (2009) ("Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')."). This disparate impact doctrine can be seen as incorporating elements of a social justice concern in looking for legitimacy not just *ex ante* but also *ex post* in regard to the effects on systematically disadvantaged populations.

house the same price as the owner of a one-bathroom house, that action appears arbitrary.[106] Rather than rationally basing the price on the cost of service, the municipality has decided that everyone should pay the same amount regardless of price, which requires either overcharging the less-expensive residents or cross-subsidizing the more expensive residents from another source.

As a rejoinder, one might assert that the goal of equality of results, such as equal pricing for all sewer connections, is not arbitrary and that a government may have valid and legitimate interests in pursuing equality of results for its own sake. Acknowledging that opinions can differ over the normative appeal of blanket equality of results, there appear few—if any—convincing arguments for it in this context. First, pure equality of results has little to do with the legitimacy and political process goals that underscore the singling-out concern. Policing process and legitimacy tends to call for an initial focus on *ex ante* general applicability of laws and an *ex post* inquiry into results for evidence of process malfunctions, such as self-serving or enemy-prejudicing factional mischief, particularly against the less powerful or politically disadvantaged. However, a blanket equality-of-results approach does little to ferret out self-serving mischief or selective disadvantage because it is too blunt an instrument. It just looks at results, but it ignores their context. Because inequality of results is just as likely to arise from a rational law produced by functioning political process as it is from some process malfunction, the inquiry offers no insight into legitimacy. Thus, a pure inequality-of-results inquiry, that looks only to ensure equal result regardless of situation, is simply not attuned to select for political process problems or disadvantages against powerless groups. Quite to the contrary, it appears ripe for factional mischief, with powerful individuals (for example, two-bathroom homeowners) likely to insist on equality of results only in instances that benefit them.[107]

As such, an inequality-of-results inquiry not only fails to detect political process defects, but also may undermine both singling-out concerns and consistently held normative commitments, such as internalizing costs and avoiding regressive burdens. A commitment to pure equality of result serves as a wealth-transfer or subsidy. By fixing one price in the name of equality, the municipality forces the less-costly individuals (here the one-bathroom homeowners) to pay their full share, or possibly more, while subsidizing the more-costly individuals (the two-bathroom homeowners) that pay less than their full share. So, instead of two-bathroom houses internalizing their costs and

106. Though one might imagine some justification for the flat price, such as saving on administrative costs in processing payment amounts. For purposes of simplicity, the hypothetical stipulates arbitrariness.

107. *Cf.* Davidson, *supra* note 23, at 37–42 (discussing how the most politically powerful are often able to receive the greatest judicial protection in the regulatory takings context).

paying the full price of their sewer connections (resulting in a rational inequality of results), two-bathroom homeowners externalize the costs of their sewer connections and others (either the general taxpayers or the one-bathroom homeowners) bear the increased sewer-connection cost. In such a case, there is a wealth redistribution that can be criticized on both economic and social justice grounds. As an economic matter, this subsidy distorts the market for multi-bathroom houses and imposes externalized costs on individuals (either all taxpayers or one-bathroom homeowners) who gain no benefit and are not party to the transaction. As a social justice matter, this not only creates opportunities for factional mischief but also likely creates a regressive system that imposes more costs on less powerful or less wealthy individuals (one-bathroom homeowners) who pay a greater share and a greater percentage of their income relative to the wealthier and more powerful (two-bathroom homeowners). For these reasons, a blanket equality of results approach has not been a consistent normative priority in United States law. There is no fundamental right to general equality of results, and current institutions do not demonstrate a commitment to it. Because this inequality-of-results inquiry works against legitimacy values as well as other normative commitments, it is out of place in the singling-out concern (and should probably be avoided altogether).

Conversely, a distributive-social-justice approach may represent a defensible and even desirable tool for serving the singling-out concern. However, the exact content of a distributive-social-justice inquiry is difficult to determine because normative commitments and priorities in this area can vary. Like an inequality-of-results inquiry, a distributive-social-justice inquiry examines *ex post* results of a non-arbitrary government action. However, instead of broadly searching only for context-blind inequality of results, a distributive-social-justice inquiry combs for particular results most likely to prejudice certain groups, such as the impoverished or politically disenfranchised. By focusing on these groups, this inquiry can more directly grapple with the concerns about political process failures such as majoritarian or factional harm against the vulnerable, thereby informing a core focus of the singling-out concern. Moreover, the distributive-social-justice inquiry, at least more so than the inequality-of-results inquiry, has some consistency with other normative commitments identifiable in United States law and policy, such as the progressive income tax or other needs-based allotments.[108] How-

108. *See, e.g.*, Jim Chen, *Progressive Taxation: An Aesthetic and Moral Defense*, 50 LOUISVILLE L. REV. 659 (2012) ("Differential taxation and targeted spending are the most significant and most effective means by which government can 'gradually and continually . . . correct the distribution of wealth and . . . prevent concentrations of power detrimental to the fair value of political liberty and fair equality of opportunity.'" (quoting JOHN RAWLS, A THEORY OF JUSTICE 277 (1971))).

ever, the major challenge to a distributive-social-justice inquiry is the indeterminate nature of social justice as a concept,[109] as well as the difficulty of establishing exactly who should receive such singling-out protection. To the extent that there can be agreement on the normative content of the social-justice inquiry, the principle of distributive social justice is consistent with singling-out concerns, but achieving this agreement, particularly outside of the realm of fundamental rights, would require a degree of consistent normative commitments not currently evidenced by singling-out jurisprudence.

III. REASSESSING SINGLING OUT DOCTRINES

In light of the four singling-out inquiries and their respective compatibility (or incompatibility) with underlying legitimacy and political process concerns, this Part reassesses the singling-out doctrines. Section A addresses the more prevalent property-based approach and finds it is sorely lacking in terms of coherence and effectiveness. Despite being the main announced protection against singling out, the property-based approach is poorly equipped to police singling out and, moreover, it interferes with administration of the Fifth Amendment takings doctrine. First, the property-based approach cannot address arbitrariness. Second, though it is effective in policing magnitude of burdens, the judicial language and administrative application of this approach have focused on inequality of results, working against legitimacy values and creating perverse incentives. As a result, this approach is not only ill-suited to advance singling-out concerns but is also detrimental to property management, particularly in the case of specially situated properties. Section B then addresses the less-prevalent arbitrariness-based approach, which offers a logical inquiry into arbitrary discrimination that, despite inherent limitations and underdevelopment, is well tailored to the core singling-out concerns.

A. Strengths and Weaknesses of a Property-Based Approach

Though it is the more common and more touted doctrine for addressing singling-out concerns, the property-based approach, as deployed through the Fifth Amendment regulatory takings jurisprudence, underperforms. The doctrine struggles to protect legitimacy and political process values because its imprecise language focuses attention on the wrong inquiries. A central problem is that the property-based takings approach does not and cannot address arbitrary discrimination, meaning that it cannot police an abuse at the heart of the singling-out concern. Nonetheless, the property-based approach can provide some useful contribution by effectively policing magnitude of

109. *See, e.g.*, F.A. HAYEK, *The Mirage of Social Justice*, *in* LAW, LEGISLATION, AND LIBERTY (Routledge 1998) (criticizing the concept of social justice as empty and meaningless).

burdens, which, though not precisely a singling-out inquiry, is complementary to the legitimacy and process values of the singling-out concern. Additionally, the property-based approach facilitates some small inquiry into distributive social justice, though it is minor at best. However, the main failing of the property-based approach is in the imprecise language used in its implementation, which implies that an inequality-of-results inquiry is a central focus of the takings test. This actually undermines government legitimacy and political process by providing perverse incentives for agencies and landowners, particularly in regard to the management of specially situated properties. As a result, the property-based approach creates problems both for singling-out protection and for application of the takings doctrine.

1. Arbitrary Discrimination

The property-based approach does not and cannot address arbitrary discrimination. Thus, it cannot police the type of singling-out that most directly evidences illegitimacy and political process defects. For all its singling-out language, the regulatory takings doctrine has no place for an arbitrariness inquiry. The Court unanimously said as much in *Lingle*, which expressly aimed to delineate which considerations were and were not appropriate for takings claims.[110] The Court held that the "substantially advances legitimate state interests" test, which ultimately was an inquiry into the arbitrariness of a law, was not the proper test for determining whether a regulation constituted a regulatory taking of property.[111] Rather, the Court reasoned that the "substantially advances" formula was a due process inquiry, concluding that the rationality of government actions is not a takings question (or, does not call into question a need for compensation) but rather raises a separate question about the validity of the law. That is, an arbitrary law would presumably be invalid, and thus beyond the remedy of compensation, if it was so deficient in terms of advancing a legitimate state interest that it had no rational basis.[112] As a result, the arbitrariness inquiry is firmly outside of the scope of the takings doctrine.

Moreover, even if the Court were to entertain an arbitrariness test as part of the takings jurisprudence, the remedy available from a takings claim would not be suited to addressing arbitrary government action because a takings claim can only provide compensation, not invalidation. An arbitrary act is beyond the power of government, and it is thus an *invalid* act. However, a regulatory taking arises from a *valid* act of government that happens to go too far in curtailing property rights. The Fifth Amendment provides that a

110. Lingle v. Chevron U.S.A. Inc., 540 U.S. 528, 532 (2005).
111. *Id.* at 531–32.
112. *See id.* at 540.

taking can be remedied by just compensation, but such compensation is sufficient only in the case of an initially valid act.[113] Compensation, however, cannot legitimate an invalid act or extend the government's power to act arbitrarily. As such, a takings claim asks for the wrong remedy to address an arbitrary act.

As a result, the property-based approach, as implemented through the takings inquiry, is not equipped to address arbitrary discrimination.

2. Magnitude of Burdens

Though the property-based approach cannot directly address arbitrariness, it is well suited to analyzing the magnitude of individual burdens. As the Court has observed, the takings test "focuses directly upon the *severity* of the burden that government imposes upon private property rights."[114] In fact, this should be the central function of the takings test, as particularly embodied by the first two *Penn Central* factors, which consider 1) the economic diminution and 2) the interference with investment-backed expectation caused by a government action.[115] Both of these factors engage the magnitude of a burden by comparing the extent of a property owner's pre-regulation property interest with her post-regulation interest. Based on the difference between pre- and post-regulation property interests, courts determine whether a government action goes "too far"[116] and occasions a compensable taking.[117] As discussed above, this property-based magnitude-of-burdens inquiry shares a common goal with the singling-out concern by policing factional or majoritarian abuses, but the magnitude-of-burdens inquiry is not necessarily premised on a singling out. Rather, it polices diminution of property rights, regardless of whether the diminution impacts few or many.

3. Distributive Social Justice

The property-based approach to singling out may also make some small contribution to distributive-social-justice concerns, though the impact is minor and does not appear to be an express focus of courts. For example, the

113. *See id.* at 543 ("Instead of addressing a challenged regulation's effect on private property, the 'substantially advances' inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose."); Echeverria, *supra* note 34, at 201–02.

114. *Lingle*, 544 U.S. at 539 (emphasis added).

115. *See id.* at 540 ("[T]he Penn Central inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.").

116. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

117. *Cf.* Echeverria, *supra* note 34, at 209 (noting that the economic impact factor is the most important and determinative in the *Penn Central* test).

parcel as a whole concept takes some account of burdens relative to a property owner's total amount of property. As a result, the magnitude of the burden is determined in relation to the particular property rather than in absolute terms, which may result in marginally more takings protection to smaller landholders rather than larger ones. However, this provides very limited (and potentially diminishing[118]) protection for distributive social justice, falling far from the redistributive approach advocated by Dagan.[119] This limited protection is unsurprising since distributive-social-justice concerns have not been truly embraced by courts in the property context, and absent a change in normative commitment to such values, a property-based inquiry will likely offer little protection for distributive social justice. Moreover, whatever limited distributive social justice is advanced by the property-based approach may also be offset by the regressive inequality-of-results inquiries discussed in the next Subsection.

4. Inequality of Results

The great irony and perversity of the property-based approach is that the oft-repeated singling-out inquiry in the takings jurisprudence truly represents an inequality-of-results test. As a result, the most robustly articulated singling-out protection actually impedes political process and government legitimacy as well as rational government action and planning-based property-management.

The singling-out language in the takings cases calls for an inequality-of-results inquiry, evidenced by both the Court's articulation and process of elimination. By questioning "how any regulatory burden is distributed among property owners"[120] and "[whether] individuals are singled out to bear the cost of advancing the public convenience,"[121] the Court explicitly phrases its takings test in terms of inequality of results.[122] The language cannot indicate an arbitrary discrimination test, since that inquiry is outside the scope of the takings doctrine. Moreover, since the magnitude-of-burdens inquiry does not actually require singling out, the singling-out language cannot accurately describe that inquiry either. The Court's takings jurisprudence has even distinguished the distributional singling-out test as separate from the magnitude-

118. *See* Pidot, *supra* note 88, at 671 (noting that recent decisions have "dealt serious blows to the parcel-as-a-whole rule and the fairness sensibility contained within it").

119. *See* Dagan, *supra* note 86, at 741, 743–44, 752, 759.

120. *Lingle*, 544 U.S. at 542 (emphasis omitted).

121. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 148 n.11 (1978) (Rehnquist, J., dissenting).

122. *See* discussion *supra* Part II.A.2.

of-burden test.[123] Finally, given the minimal commitment to distributive social justice in the takings jurisprudence, the singling-out language in the takings context is left only to indicate an inequality-of-results inquiry.

Cast as an inequality-of-results test, the singling-out takings language spurs the undesirable consequences discussed above,[124] including irrational government action, factional mischief, and regressive wealth transfers. As noted, a blanket guarantee of *ex post* equality-of-result is likely to create arbitrary redistribution, transferring wealth without regard to need or other shared normative values as well as creating opportunity for regressive burdens and factional hijacking.[125] This is particularly likely and worrisome in the takings context, where propertied factions, which tend to be more politically powerful, can position themselves to take maximum advantage of singling-out protections despite needing the fewest political process protections.[126] To revisit an earlier hypothetical, even if it is rational to charge a multi-bathroom homeowner a greater amount for a sewer connection, that homeowner may nonetheless be considered singled out under an inequality-of-results inquiry. If this multi-bathroom homeowner can receive compensation through a takings claim, then there is a wealth redistribution from the general taxpayers (including single-bathroom homeowners) to the multi-bathroom homeowner, who likely is wealthier and more powerful. Obviously, this example offers a stylized generalization, but the underlying concern has been documented in the takings context. For example, Nestor Davidson has described this as the "inverted political economy of regulatory takings claims: the greatest judicial protection is provided to those most able to protect themselves through the political system."[127] Moreover, Davidson notes that while "[n]o rigorous study of the regulatory takings claimants has been undertaken, . . . what analysis has been done tends to underscore the comparative advantages of typical plaintiffs in such cases."[128]

Further, not even all property holders benefit from the singling-out takings analysis; the benefits inure particularly to those property owners more likely to experience inequality-of-result. Thus, owners of more standard properties, such as run-of-the-mill urban homeowners or owners of small lots, will likely never have access to the property-based singling-out protection because the effects of regulation will be less likely to single out their properties because they are similarly situated and likely to be similarly impacted. Rather, it is owners of large tracts or landowners in less densely populated areas that are more likely to experience inequality of results because

123. *See* discussion *supra* Part I.B.1.
124. *See* discussion *supra* Part II.A.2 and II.B.
125. *See* discussion *supra* Part II.A.2 and II.B.
126. *Cf.* Davidson, *supra* note 23, at 37–42.
127. *Id.* at 37–38.
128. *Id.* at 42.

these properties are likely to be less like their neighbors' and thus experience more differential impacts. Consequently, the singling-out takings inquiry systematically advantages certain types of property owners such as developers of previously agricultural or wild land, rural property owners, extractive interests, and owners of coastal property.[129] Thus, the benefits of the singling-out inquiry are highly concentrated, and this results in an arbitrary boon to a faction of (often wealthier) landowners, frustrating the legitimacy and political process values at the core of the singling-out concern.

This arbitrary redistribution not only offends legitimacy and process concerns, but its regressive redistribution also contravenes other normative values, such as social justice concerns (as contestable as they may be). For example, to the extent that any *ex post* wealth redistribution is justified, it is usually based on "the egalitarian ideal of giving preferential treatment to improvement in the lives of the worse-off, or, at least, of avoiding any structural privileges that favor the better-off."[130] However, the inequality-of-results takings inquiry accomplishes exactly the opposite by overprotecting certain better-offs and thereby contravening the consistently proffered justification for wealth redistribution.

Given all of these problems stemming from the singling-out language in the takings jurisprudence, it is some consolation that courts seem to vastly overstate its influence. In fact, the impact of such language appears minimal in the courts. A comprehensive survey of takings cases in the Supreme Court, lower federal courts, and state courts indicates that despite courts' announced allegiance to a singling-out measure of takings, few, if any, takings cases actually turn on these grounds.[131] However, even if not widely influential in case outcomes, courts' singling-out takings language shapes behavior, particularly among potential litigants.

For example, even if courts vastly overstate the extent that they apply a singling-out inquiry in takings cases, the singling-out language nonetheless has practical impacts. As discussed further below, this is particularly the case for regulatory agencies and property-owners, who take the language at face value and perceive the takings test to incorporate an inequality-of-results in-

129. *Cf.* Dagan, *supra* note 86, at 751.

130. *Id.* at 778–79.

131. While it is exceedingly difficult to prove the negative proposition that courts announce the singling-out inquiry and *Armstrong* principle, together, as a stand-alone takings test but then do not actually use that test to influence case results, a review of all citations to the *Armstrong* principle in the Supreme Court, lower federal courts, and state courts indicates that the *Armstrong* principle is oft-cited but never employed as the ultimate grounds for resolving a case. *See* Pappas, *supra* note 42, at 42–44; Davidson, *supra* note 23, at 44 ("Although equality norms have been recurring background tropes in the doctrine, the Court has never treated the *Armstrong* principle, questions of the generality of a regulation, or average reciprocity of advantage as dispositive or even as a sufficiently significant focus of analysis to yield discernable principles.").

quiry. As a result, agencies follow an illusory and undesirable takings approach that is inconsistent with both the core singling-out concerns for legitimacy and political process, and the results courts actually reach in takings cases. Moreover, agency reliance on the perceived inequality-of-results inquiry has an enormous impact because federal and state regulatory agencies are on the front lines of land use and regulatory decisions, addressing many more of these issues than just those which reach courts through lawsuits.

In addition to guiding regulators, the singling-out takings language also influences landowners who respond to the courts' language as well as to regulatory guidance incorporating the inequality-of-results inquiry. Accordingly, the singling-out language also drives private behavior. Thus, the same problems of arbitrary agency action and factional mischief associated with the inequality-of-results inquiry trickle down and multiply through federal and state agency implementation, leading not only to process failures but also normatively undesirable land-use incentives and regulatory management. This is especially true for specially situated properties likely to experience inequality of results, such as those with rare environments and species, historic buildings, or unique cultural resources. All said, the singling-out takings language is bad for singling-out concerns and bad for administration of the takings doctrine.

For instance, takings jurisprudence can have a profound impact on regulatory agencies, and the perceived inequality-of-results inquiry incentivizes regulators to make land-use decisions on grounds other than non-arbitrary, planning-based[132] considerations. Instead it drives them to take arbitrary measures that avoid the natural inequality resulting from rational, generally applicable regulations. A number of commentators have explored how takings protections influence regulatory behavior,[133] positing that, on the one hand, a lack of takings protection will invite overregulation by making regulation too cheap.[134] On the other hand, an overly expansive view of takings protection will create excessive barriers to regulation and cause other perverse incentives.[135] The singling-out takings language falls into the latter

132. Planning-based decisions can be seen as the opposite of arbitrary decisions. *Cf*. Dagan, *supra* note 86, at 743 & n.8 (conceiving of "planning considerations as the aggregated preferences of the members of the pertinent community" and suggesting that planning-based concerns "are, or, at least, should be, dominant in land use law").

133. *See, e.g.*, *id.* at 756 (positing that "inducing public officials to base their decisions solely on planning considerations" is one of the major efficiency-based concerns underpinning the takings doctrine).

134. *See* Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 999 (1999); *see also* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 41–42 (2002).

135. *See, e.g.*, Saul Levmore, *Takings, Torts, and Special Interests*, 77 VA. L. REV. 1333, 1368 (1991).

category, inflating agencies' perceived takings liability and magnifying bureaucratic risk aversion. This pushes decisionmaking away from a non-arbitrary, planning-based approach and chills otherwise rational, non-compensable regulatory efforts. Moreover, it particularly prejudices desirable regulation of specially situated properties,[136] which are more likely to be considered singled-out through an inequality-of-results inquiry.

In assessing the takings risks of their actions, federal and state agencies have assimilated the singling-out takings language into administrative requirements and agency guidance, thereby entrenching an inequality-of-results approach as a barrier to planning-based decisionmaking. Most prominently, federal agencies have incorporated the singling-out inquiry into the mandatory Taking Implications Assessment ("TIA")[137] required by Executive Order 12630 ("the Order").[138] Aimed at "reduc[ing] the risk of undue or inadvertent burdens on the public fisc . . . ," the Order requires agencies to "review their actions carefully to prevent unnecessary takings" and to "[e]stimate, to the extent possible, the potential cost to the government in the event that a court later determines that the action constituted a taking."[139] Moreover, the Attorney General's Guidelines for implementing the Order ("the Guidelines")[140] echo this concern with takings costs, specifically requiring "an estimation of potential financial exposure."[141]

The Order and the Guidelines take an expansive view of potential takings liability[142] that extends even further because of the singling-out takings

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136. There are many arguments for regulating specially situated properties. To survey a few that focus on protecting rare environments, habitats, and species, see generally ALDO LEOPOLD, A SAND COUNTY ALMANAC vii–ix (1968); RASBAND, SALZMAN, & SQUILLACE, NATURAL RESOURCES LAW AND POLICY 330–32 (2d. 2009); SALZMAN & THOMPSON, ENVIRONMENTAL LAW AND POLICY 269–70 (3d ed., 2010); Holly Doremus, *Patching the Ark: Improving Legal Protection of Biological Diversity*, 18 ECOLOGY L.Q. 265, 269–82 (1991).

137. *See* Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings (unpublished) (issued June 30, 1988) [hereinafter Attorney Gen. Guidelines] (requiring "a Takings Implication Assessment (TIA) before undertaking any proposed action or implementing any policy . . . and . . . the identification and discussion of significant takings implications . . . in notices of proposed rulemaking").

138. Exec. Order No. 12,630, 3 C.F.R. § 554 (1989) ("Governmental officials should be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions so that they do not result in the imposition of unanticipated or undue additional burdens on the public fisc.").

139. *Id.*

140. The Order requires the Attorney General to promulgate Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings. *Id.*

141. *See* Attorney Gen. Guidelines, *supra* note 137.

142. *See* Lynda L. Butler, *The Politics of Takings: Choosing the Appropriate Decisionmaker*, 38 WM. & MARY L. REV. 749, 795 (1997) (criticizing the Guidelines for directing agencies to "take an expansive view of regulatory takings, interpreting some Supreme Court cases more broadly than may be necessary . . . [and] therefore err[ing] on the side of property rights in defining regulatory takings"); James P. Downey, *Environmental Cleanup Actions, the Valuation of Contaminated Properties, and Just Compensation for Affected Property Owners*, 8 J. LAND USE & ENVTL. L. 325, 339

language. For example, they require TIAs to include inequality-of-results inquiries such as whether regulatory burdens fall "disproportionate[ly]" on certain property owners[143] or whether regulations "forc[e] some people alone to bear public burdens."[144] On top of this, the Guidelines use the singling-out principle to further expand the scope of possible takings liability, directing agencies to, when government action does not clearly fall under takings precedents such as *Penn Central*, *Loretto*, or *Lucas*, "analyze the justice and fairness, in the context of *Armstrong*, . . . of the burden placed on the property owner."[145] Thus, by relying on the *Armstrong* inequality-of-results inquiry,[146] the Guidelines extend the scope of potential takings liability to include instances that would otherwise fall outside the ambit of core takings cases. In broadening the sweep of takings impact analyses, the Guidelines lead agencies to overestimate potential takings liability due to singling-out concerns, thus overprotecting against takings liability and chilling regulation of specially situated properties in particular.

While the internal nature of the TIAs makes it difficult to definitively assess their impacts,[147] commentators have observed that they have influenced regulatory behavior toward greater wariness of potential takings.[148] For example, an analysis of agency action under the Endangered Species Act

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(1993) ("The burdens imposed on agencies by this Order have been criticized as being disproportionate to the takings threat presented by environmental health and safety regulations." (citing Kirsten Engel, *Taking Risks: Executive Order 12,630 and Environmental Health and Safety Regulations*, 14 VT. L. REV. 213, 214 (1989))).

143. Exec. Order No. 12,630, 3 C.F.R. § 554 (1989) ("(b) When a proposed action would place a restriction on a use of private property, the restriction imposed on the use shall not be disproportionate to the extent to which the use contributes to the overall problem that the restriction is imposed to redress."); U.S. FISH AND WILDLIFE SERVICE, *Excerpt from Guidance on "Takings" from the Department of Justice*, https://www.fws.gov/policy/library/rgtakingsguidance.pdf ("Regulation of an individual's property must not be disproportionate, within the limits of existing information or technology, to the degree to which the individual's property use is contributing to the overall problem.") (last visited Sept. 23, 2016).

144. Attorney Gen. Guidelines, *supra* note 137.

145. *Id.*

146. *See* discussion *supra* Part II.A.4. and II.B.

147. Butler, *supra* note 142, at 792–93; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-120T, AGENCY COMPLIANCE WITH EXECUTIVE ORDER ON GOVERNMENT ACTIONS AFFECTING PRIVATE PROPERTY USE 8 (2003), http://www.gao.gov/assets/120/110436.pdf ("[A]gency officials said that they fully consider the potential takings implications of their regulatory actions, but . . . [the agency officials stated] that such assessments were not always documented in writing or retained on file."); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-1015, IMPLEMENTATION OF EXECUTIVE ORDER ON GOVERNMENT ACTIONS AFFECTING PRIVATE PROPERTY USE 5, 7, 13, 16–18 (2003), http://www.gao.gov/new.items/d031015.pdf.

148. Butler, *supra* note 142, at 782, 792–93, 795–96 (1997); *cf.* U.S. FISH AND WILDLIFE SERV., *National Policy Issuance No. 96-06: The Administration's 10-Point Plan for the Endangered Species Act* (Mar. 6, 1995), http://www.fws.gov/policy/npi96_06.html (listing the following three principles related to private property rights and takings concerns: "2. Minimize social and economic impacts[;] 3. Provide quick, responsive answers and certainty to landowners[;] 4. Treat landowners fairly and with consideration").

suggests that "[t]he Supreme Court's takings cases do shape the contours of habitat conservation at the margin."[149] Further, given that the Guidelines "make clear that the TIA requires selection of the alternative that poses the '*least risk' to private property*"[150] and that the Order "provides the basis for *restricting or even preventing* . . . agencies from implementing actions having takings implications,"[151] there is an indication of the Order's practical chilling effects on regulation. While the Order would likely have this effect regardless of the singling-out language, the fact that the Order embraces the inequality-of-results inquiry institutionalizes this approach and adopts, as a matter of agency policy, some measure of sacrificing planning considerations in favor of blanket equality of results.

The federal regulatory requirements are not alone in this regard, as state-level guidance has also taken the courts' singling-out takings language to heart and adopted the inequality-of-results approach. Attorney general guidance from Idaho,[152] Montana,[153] and Washington[154] all repeat an inequality-

149. Barton H. Thompson, Jr., *The Endangered Species Act: A Case Study in Takings & Incentives*, 49 STAN. L. REV. 305, 338 (1997). *But see id.* at 336 ("A review of a crosssection of TIAs prepared by the FWS in connection with the designation of critical habitat suggests that the FWS does not believe current takings law significantly constrains their actions under the ESA.").

150. Michael C. Blumm & D. Bernard Zaleha, *Federal Wetlands Protection Under the Clean Water Act: Regulatory Ambivalence, Intergovernmental Tension, and a Call for Reform*, 60 U. COLO. L. REV. 695, 759 (1989) (emphasis added).

151. Butler, *supra* note 142, at 784 (emphasis added).

152. *See* OFFICE OF THE ATTORNEY GEN., IDAHO REGULATORY TAKINGS ACT GUIDELINES, Appendix B-1 (2012), http://www.ag.idaho.gov/publications/legalManuals/RegulatoryTakings.pdf (providing a "Request For Takings Analysis" form that includes the question "Are You the Only Affected Property Owner" as an important piece of information).

153. *See* MONT. DEP'T OF JUSTICE, ATTORNEY GENERAL'S GUIDELINES 2 (2011) https://dojmt.gov/wp-content/uploads/2011/06/agguidelines.pdf (incorporating the *Armstrong* singling out inquiry in stating, "[t]he Takings Clauses are intended to bar the government from forcing some people (whose property is taken) to bear burdens that, in fairness and justice, should be borne by the public as a whole (whose taxes would be used to pay just compensation)"); *see also* Kelly A. Casillas, *'Takings Primer—An Overview of Takings Law*, 'http://mtplanners.org/media/2011%20Conference/Presentations/TakingsPrimer%20%5BCompatibility%20Mode%5D.pdf (last visited Sept. 23, 2016) (describing the *Penn Central* analysis in *Guggenheim v. City of Goleta*, 582 F.3d 996 (9th Cir. 2009), as "favor[ing] the claimants because the ordinance singled out relatively few mobile home park owners to bear the public burden of providing affordable housing").

154. *See* WASH. ATTORNEY GEN., ADVISORY MEMORANDUM: AVOIDING UNCONSTITUTIONAL TAKINGS OF PRIVATE PROPERTY 15 (2006), http://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/About_the_Office/Takings/2006%20AGO%20Takings%20Guidance(1).pdf ("Because government actions often are characterized in terms of overall fairness, a taking or violation of substantive due process is more likely to be found when it appears that a single property owner is being forced to bear the burden of addressing some societal concern when in all fairness the cost ought to be shared across society.").

of-results approach to takings, and the California Governor's Office of Planning and Research[155] as well as the American Planning Association[156] have advanced similar interpretations of singling-out takings inquiries. In each instance, federal and state regulators have adopted this inequality-of-results takings measure despite courts rarely—if ever—actually applying it.[157] Moreover, to avoid creating inequality of results, regulators are incentivized away from their otherwise rational planning-based actions in contravention of the underlying singling-out concerns of government legitimacy through rational action.

This adoption of the inequality-of-results takings inquiry impacts regulatory behavior not only through official TIAs and guidance but also by triggering risk aversion in individual agency bureaucrats. While regulators may not directly pay the price of additional regulatory costs that arise from perceived takings liability,[158] a public choice analysis illustrates how individual incentives will nonetheless deter agencies from undertaking non-arbitrary, planning-based regulations that could create an inequality of results and lead to a takings challenge. Public choice scholars have observed that government agencies and agency bureaucrats tend to be "risk averse"[159] and "defensive, threat-avoiding, [and] scandal-minimizing."[160] As a result, agency personnel resist actions that might invite criticism, harm the agency's public reputation, alienate important constituencies, or heighten scrutiny from the public or Congress.[161] So, even though a risk-neutral, planning-based approach to regulation would be preferable from a social welfare perspective,[162] both public

155. *See* CAL. GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, STATE OF CAL. GEN. PLAN GUIDELINES 232 (2003), http://opr.ca.gov/docs/General_Plan_Guidelines_2003.pdf (noting "the Supreme Court's concern over regulations that attempt to place an unfair burden on a single property owner").

156. *See* AM. PLANNING ASS'N, *Policy Guide on Takings* (Apr. 11, 1995), https://planning.org/policy/guides/adopted/takings.htm (characterizing the takings cases as mandating that regulations "apportion fairly the burdens and benefits of land development").

157. See Pappas, *supra* note 42, at 42–44.

158. *Cf.* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 346–48 (2000) (arguing that regulators do not respond to market forces in the same way that private actors would).

159. James Q. Wilson, *The Politics of Regulation*, *in* THE POLITICS OF REGULATION 357, 376 (James Q. Wilson ed., 1980).

160. *Id.* at 378; MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 358 (2009) ("Economists have predicted that the incentive structure faced by bureaucrats will lead to unduly risk-averse decision-making.").

161. STEARNS & ZYWICKI, *supra* note 160, at 346–48.

162. *Id.* at 359 ("Strict cost-benefit analysis suggests that social welfare is maximized when regulators act in a risk-neutral manner."); *see also* Dagan, *supra* note 86, at 756 (discussing planning-based decision-making).

choice theory and empirical studies[163] indicate that agencies are systematically biased toward making decisions that invite less public criticism.[164] For example, agencies may avoid actions that result in easily traceable or identifiable impacts,[165] or regulators may choose whether or not to regulate in certain areas based on considerations such as media attention.[166]

The risk of takings litigation and its attendant publicity are particularly likely to trigger agency risk aversion responses, and the singling-out takings inquiry maps onto agency risk aversion to create a situation where agencies are particularly unlikely to regulate based on planning considerations. First, regulation of specially situated properties often draws the attention of important constituencies and Congress. For example, there is empirical evidence that influential constituencies, such as groups of large property owners, have influenced regulation under the Endangered Species Act.[167] Relatedly, regulations of property under the Endangered Species Act are a lightning rod for congressional scrutiny and heated rhetoric, even prompting Senators to publicly castigating agency actions as "[an] assault on private property rights through abusive tactics."[168] Takings issues are also likely to draw media attention since "the occasions on which it is judicially enforced tend to be dramatic and highly visible."[169]

All of these combine to play on regulators' risk aversion, making them less likely to impose regulation that could possibly invite takings claims. In the case of land use, this can lead to systematic under-regulation, which is more anonymous than regulation and thus less traceable to particular agency action and less likely to generate agency publicity. Moreover, with singling-out language increasing the likelihood of takings claims regarding specially situated property, the risk aversion and under-regulation is exacerbated. The ultimate result is that agencies base decisions on the preference of groups of large property owners or avoidance of media attention, and this is exactly

163. *See* STEARNS & ZYWICKI, *supra* note 160, at 359.

164. *Id.*

165. *Id.*

166. *See id.* at 361 (citing STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 19–29 (1993)).

167. *See, e.g.*, Barton H. Thompson, Jr., *People or Prairie Chickens: The Uncertain Search for Optimal Biodiversity*, 51 STAN. L. REV. 1127, 1153 (1999); Thompson, *supra* note 149, at 320–21.

168. *See, e.g.*, David Vitter, Opinion, *Abuse of Endangered Species Act Threatens American's Private Property Rights*, FOX NEWS (Dec. 28, 2013), http://www.foxnews.com/opinion/2013/12/28/abuse-endangered-species-act-threatens-american-private-property-rights/ (criticizing agency "assault on private property rights through abusive tactics under the [Endangered Species Act]"); *see also GOP to Propose Changing Endangered Species Act*, CBS NEWS (Feb. 4, 2014), http://www.cbsnews.com/news/gop-to-propose-changing-endangered-species-act/; Julian Hattem, *GOP Gangs Up On Endangered Species Law*, THE HILL (Dec. 13, 2013), http://thehill.com/regulation/energy-environment/192965-gop-gangs-up-on-endangered-species-law.

169. Dagan, *supra* note 86, at 791.

contrary to the underlying singling-out concern for legitimate government and avoidance of the mischief of factions. Thus, the singling-out takings inquiry becomes wholly untethered from its roots and defeating of its own enterprise.

Consistent with this public choice theory, there is evidence of agency action to avoid regulation that might spur singling-out takings claims. For instance, an agency may choose to buyout certain property rights rather than regulate them and risk takings litigation. One example is the Bureau of Reclamation's ("BoR") recent approach to augmenting flows in the Snake River for the benefit of endangered salmon and steelhead, as required by a 2008 Biological Opinion under the Endangered Species Act.[170] As part of the strategy for augmenting flows, BoR purchased water storage contract entitlements from a landowner.[171] As an alternative to purchasing the water, BoR could have instead imposed a regulation, such as restricting water withdrawals, limiting water contract deliveries, or cancelling water delivery contracts. All of these regulatory approaches have been used in other instances where additional water was needed to protect endangered species, and all have been found valid and non-compensable.[172] The decision to buyout the water instead of relying on such tried regulation may have been motivated by fear of a takings claim and its attendant publicity.[173]

Of course, some would argue that this buyout represents a triumph of agency decisionmaking rather than a defect. Under such a view, the preferable policy for protecting specially situated properties would be for government actors to buy them out, and prospective buyouts may indeed be the preferable course in some instances. But to the extent that such a decision is motivated by fear of takings claims arising from inequality-of-results inquiries, then regulatory choices appear unnecessarily and arbitrarily constrained. Court decisions do not support property expectations so robust that buyouts are required for every inequality of results, and, as the well-worn saying goes, "[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

170. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276, 1296 (Fed. Cir. 2008).

171. *See* U.S. DEP'T OF THE INTERIOR, BUREAU OF RECLAMATION, FINDING OF NO SIGNIFICANT IMPACT AND ENVIRONMENTAL ASSESSMENT: PURCHASE OF CONTRACT ENTITLEMENT IN DEADWOOD RESERVOIR FOR SALMON FLOW AUGMENTATION (2011), http://www.usbr.gov/pn/programs/ea/idaho/dwwater/dwpurchFONSI.pdf.

172. *See, e.g.*, David N. Cassuto & Steven Matthew Reed, *Water Law and the Endangered Species Act* (July 28, 2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1650241 (summarizing Endangered Species Act cases allowing for cancellation of water contract rights and finding no takings liability).

173. Another example is the case of buyout programs for properties that are vulnerable to coastal and riverine flooding. *See, e.g.*, ANNE SIDERS, COLUMBIA CTR. FOR CLIMATE CHANGE LAW, MANAGED COASTAL RETREAT: A LEGAL HANDBOOK ON SHIFTING DEVELOPMENT AWAY FROM VULNERABLE AREAS 109–26 (2013), https://web.law.columbia.edu/sites/default/files/microsites/climate-change/files/Publications/Fellows/ManagedCoastalRetreat_FINAL_Oct%2030.pdf.

general law."[174] Thus, regulators must retain the ability to make a choice, based on the context and immediate situation, about whether to regulate or compensate to protect specially situated properties. The singling-out takings language erodes that aspect of choice, pushing agency actors toward buyouts or inaction. Moreover, suggesting to property owners and regulators that buyouts are the only option will drive the price of these buyouts up, both by inflating property expectations about value of development rights and by taking away bargaining power from the regulators. This systematically leads to higher prices for these buyouts and to regulators either overpaying or not protecting specially situated property at all. Even those in favor of minimal regulation and strong property rights should have no reason to support government overpaying and granting arbitrary windfalls to owners of specially situated property. Moreover, even if these windfalls and their draw on the public fisc were limited by the relative rarity of specially situated properties, other societal concerns can be marshalled to argue against buyouts as a sole approach. For example, an expectation of compensation for all unequal burdens "underplays the significance of belonging to a community . . . [and] commodifies both our citizenship and our membership in local communities."[175]

In addition to the impacts on regulators, the singling-out takings inquiry also influences the behavior of property owners,[176] and by giving the impression that property owners are protected from inequality-of-results singling out, it leads to overinvestment in specially situated properties as well as skewed expectations about regulation of those properties. Scholars have noted the incentive effects of takings protections, observing that perception of insufficiently robust takings protections can lead to underinvestment by landowners,[177] and overly robust takings protection will lead to overinvestment by landowners.[178] As with the chilling of regulation, current singling-out language may amplify overinvestment, particularly in the case of owners of specially situated properties. Properties, such as those with rare environmental habitats or species, wetlands, important historic resources, or unique cultural elements, are notable and particularly regulated because they are uncommon. By the same token, precisely because they are uncommon and particularly regulated, such properties are also more likely to be singled out by regulation creating inequality of results. Takings jurisprudence gives the impression that such properties will receive heightened scrutiny and protection

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

175. Dagan, *supra* note 86, at 771–72.

176. *See, e.g.*, *id.* at 774, 791.

177. *See, e.g.*, *id.* at 749–50; Butler, *supra* note 142, at 765 & n.73 (discussing relevant scholarship).

178. *See, e.g.*, Dagan, *supra* note 86, at 749; Levmore, *supra* note 135, at 1346 n.18; Christopher Serkin, *Passive Takings: The State's Affirmative Duty to Protect Property*, 113 MICH. L. REV. 345, 387 (2014).

against regulation, but this leads to perverse incentives and unrealistic expectations for owners of specially situated property. The singling-out language encourages property owners to expect less regulation and to develop more intensively on the very land that is most likely to be regulated and may have more limits on intense development.

Moreover, the singling-out takings language distorts how property owners might otherwise use their land. As market actors, property owners can be guided by market signals in decisions about the use or sale of land. Singling-out language in takings cases sends a market signal that property rights are more expansive than they actually are, particularly in the case of specially situated property, leading to overinvestment based on artificially high valuations of the development potential of such properties.[179] Such pricing signals can also stand in the way of would-be voluntary measures to protect specially situated property. For example, if a landowner erroneously believes she has unlimited development potential free of regulation on her specially situated property, she may be less likely to enter into conservation easements or other conservationist market transactions because of her artificially inflated view of the prospective development value. The same distortion impedes voluntary market measures by owners of historic buildings or other culturally important properties. Finally, the singling-out language influences not only those who already own specially situated land but also decisions to buy such land for development, leading to future disputes and litigation regarding land uses. Thus, singling-out takings language effectively subsidizes private acquisition and alteration of specially situated properties despite countervailing policies aimed at preservation or public access to these resources.

As a result, the singling-out language in the takings inquiry also raises the price of regulating such properties by encouraging takings claims that might not be filed absent such language. The owners of specially situated properties may seize upon the singling-out test and argue that because they suffer inequality of results from a generally applicable law, they have been singled out to bear a public burden.[180] Litigating this marginal increase in claims imposes costs by requiring the additional expenditure of resources, and even though such cases are unlikely to succeed, "so long as any prospect of liability remains, the mere risk of litigation can have an outsize impact on governmental decisionmaking,"[181] frustrating the agency incentives discussed above.

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179. Christopher Serkin has noted a similar moral hazard risk of overinvestment in vulnerable property if the government acts as a de facto "insurer of last resort" through passive takings liability. *See Serkin*, *supra* note 178.

180. *Cf.* Thompson, *supra* note 44, at 1301 (proposing a hypothetical singling-out takings challenge to the Endangered Species Act); *see also* Thompson, *supra* note 167.

181. Serkin, *supra* note 178, at 398; *see also* Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1671–74 (2006) (discussing how takings liability can lead to government risk aversion).

* * *

In sum, the main positive contribution of the property-based approach to policing singling out comes from its ability to address magnitude of burdens, which is not truly a singling-out concern but does advance legitimacy and political process values. Beyond the magnitude-of-burdens inquiry, though, the property-based approach does little to address singling-out concerns. It is unable to address arbitrary discrimination and has a very small impact on distributive social justice.

The property-based approach also has substantial negative impacts because the singling-out takings language reflects an inequality-of-results inquiry that steers courts, agencies, and landowners away from rational, nonarbitrary decisionmaking and empowers factional mischief. As a result, the singling-out language in the property-based approach works against its own goal. The language is unnecessary to provide the magnitude-of-burden protection and only serves to undermine the legitimacy and process values by promoting an inequality-of-results inquiry.

B. Strengths and Weaknesses of an Arbitrariness-Based Approach

The arbitrariness-based approach, exemplified by the class-of-one doctrine, is simple in its focus and aims, and its simplicity provides both its greatest strength as well as its limitation. By focusing directly on arbitrary discrimination, the approach addresses core singling-out concerns. However, it has no ability to address magnitude-of-burdens or distributive-social-justice inquiries, and the degree of deference built into the inquiry also potentially allows some instances of disguised illegitimacy and political process failure to survive review.

The arbitrariness-based approach takes direct aim at arbitrary discrimination, confronting core singling-out concerns head on. For instance, by asking whether an individual "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment,"[182] the class-of-one doctrine looks for direct evidence of manifest illegitimacy or political process failure. Further, unlike the property-based approach, the arbitrariness-based approach operates as articulated, offers a suitable remedy for invalidating illegitimate actions, and does not promote behavior contrary to its goal. As a result, it provides a simple inquiry suited to its ends.

The major shortcoming of this simple approach, however, is that its fairly limited, face-value analysis will likely miss any legitimacy or political process defects not obvious at the surface level. The arbitrariness-based in-

182. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

quiry is really just a specialized version of rational basis review, which provides a great deference to governmental actors and thus a high hurdle for aggrieved parties to overcome. As a result, it is not gauged for detecting factional mischief or majoritarian abuses that are disguised behind proffered rational and non-arbitrary justification. Moreover, the arbitrariness-based approach has no means of inquiring into magnitude-of-burdens or distributive-social-justice concerns unless they evidence some arbitrariness. As a result, the arbitrary discrimination approach may be underprotective of legitimacy and political process concerns, particularly if strategic factions or majorities make even a minimum effort to mask abuses.

Moreover, the simplicity of the arbitrariness-based inquiry may be deceptive, as its indeterminate nature can prove difficult for courts to apply and unpredictable for litigants to follow.[183] In determining whether an individual "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment,"[184] a court must define a class of similarly situated comparators and must assess the rationality of treatment. The highly factual nature of these two questions means that they are not easy to answer in a consistent or predictable manner. Courts may differ on how broadly to define "similarly situated" and on what factors to stress.[185] Additionally, even with a deferential rationality review, judges have a great deal of latitude—especially those that seek to ferret out potentially hidden political process failures. These challenges are frustrated by the current lack of precedential development for the arbitrariness-based approach, and while this will always be a case-specific inquiry, additional precedential development can only assist in clarifying the analysis for the similarly situated class, giving information on how probing the rationality review actually is, and adding overall predictability.

In the end, the arbitrariness-based test may serve best as a backstop against obvious, non-nuanced singling out, but it will not catch every (or even most) instance of hidden process defects. It may function, then, to police the relatively rare instances of blatant arbitrary discrimination, such as in *Olech*, thereby upholding a minimum standard of legitimacy that, thankfully, will frequently be met. This may be all the arbitrary-discrimination test can hope to accomplish,[186] so setting the expectations commensurate with the abilities of the arbitrariness-based approach may be all that can be asked for.

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183. To be fair, the takings doctrine too is highly fact specific, difficult to apply, and unpredictable, so the property-based approach may be no better in this regard than the arbitrariness-based approach.

184. *Olech*, 528 U.S. at 564.

185. For examples of how courts can differ on these issues, see *supra* note 57 and accompanying text.

186. Some have argued for changing the law to offer a stricter standard of review in this area. *See, e.g.*, Zoldan, *supra* note 19, at 693–96.

IV. REFINING SINGLING OUT PROTECTIONS

As the previous Parts discussed, the singling-out doctrines are not perfectly aligned to advance the underlying singling-out concerns. The more common property-based approach leads to perverse outcomes that actually undermine singling-out protection, and the less common arbitrariness-based approach, though well suited to policing arbitrary discrimination, suffers from a lack of development. This Part offers a counterintuitive suggestion for improving both approaches. It suggests that refining the property-based approach to eliminate its singling-out language can actually aid both doctrines to better serve singling-out concerns without sacrificing substantive protections or creating precedential upheaval. Moreover, it will aid in the administration of the takings doctrine.

The core shortcoming of the property-based approach is the singling-out language in the takings jurisprudence, which implies that courts will use an inequality-of-results inquiry in addition to a magnitude-of-burden inquiry. This leads to the counterproductive result that, in the name of policing government illegitimacy, the property-based approach encourages arbitrary government action rather than planning-based action. The ironic solution is that courts can better serve core singling-out concerns over political process and legitimacy by eliminating the singling-out language from the property-based approach. As a practical matter, this means excising the singling-out language from the takings inquiry and expressly limiting the takings doctrine to policing magnitude of burdens, without the additional regard for inequality of results.

Such a clarification would eliminate the perverse incentives of the property-based approach while maintaining the same protection of private property. For example, by removing the inequality-of-results language, the Court could curtail opportunities for factional influence and regressive redistribution. It would also reconcile courts' announced and applied takings standards as well as rectify the problem of agencies acting arbitrarily to avoid inequality of results. As a result, there would be no distorted treatment and inflated expectation in specially situated properties. All the while, courts could continue applying the takings inquiry as they have to date, which has protected property rights from high-magnitude burdens with little or no actual attention to inequality of results. With the effectively hollow singling-out takings language eliminated, landowners would still be protected as before, and Executive Order 12630 would still foster a regulatory sympathy toward property rights.

Moreover, all of the reasons offered to justify including singling-out language in the takings inquiry would still be satisfied even with the language removed. For example, Justice Stevens championed the singling-out takings language based on the related concepts of reciprocity of advantage and of

generality.[187] The idea of reciprocity of advantage is that a regulation may not only burden a property owner but also benefit her, say, by restricting other owners. In such a case, the benefit may offset the burden and prevent a taking from arising.[188] The concept of generality builds on this reciprocity of advantage notion by incorporating two considerations: 1) the reciprocity of advantage idea that takings determinations should account for both benefits and burdens of regulation, and 2) the political process idea that general regulations offer some protection against special interests hijacking the regulatory process and unfairly concentrating burdens.[189]

Eliminating the singling-out language from the takings inquiry sacrifices neither of these values because the takings inquiry, even absent the singling-out language, accounts for reciprocity of advantage while the arbitrariness-based approach polices hijacking. First, the takings inquiry is well-suited to incorporate reciprocity of advantage considerations in calculating the magnitude of individual burdens. The takings inquiry compares the situation of a property owner pre- and post-regulation, and an accurate post-regulation measure would include not only the regulatory costs but also any benefits from the regulation.[190] Second, an arbitrariness-based approach addresses hijacking concerns through policing arbitrary discrimination,[191] and it can do so more effectively than a takings-based approach which is disabled from addressing arbitrary action.[192]

Moreover, eliminating the singling-out language from the property-based approach could also benefit the precedential development of arbitrariness-based approaches such as the class-of-one doctrine. To date, the property-based approach to singling out has received more judicial attention and

187. *See* Echeverria, *supra* note 21, at 24; *see also* Echeverria, *supra* note 34, at 193.

188. *See* Echeverria, *supra* note 34, at 192–93; *see also* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987).

189. *See* Echeverria, *supra* note 21, at 24; *see also* Echeverria, *supra* note 34, at 193.

190. It may be difficult to calculate the exact "public value of government action" attributable to the specific reciprocity of advantage from a particular regulation as well as the general reciprocity of advantage from a broader set of regulations. Echeverria, *supra* note 34, at 205; *see also* JOHN D. ECHEVERRIA, GEORGETOWN ENVTL. LAW & POL'Y INST., PROPERTY VALUES AND OREGON MEASURE 37: EXPOSING THE FALSE PREMISE OF REGULATION'S HARM TO LANDOWNERS 10, 31–32 (2007); Mark W. Cordes, *Fairness and Farmland Preservation: A Response to Professor Richardson*, 20 J. LAND USE & ENVTL. L. 371 (2005).

191. *Olech* provides an example of policing such hijacking. When the municipality demanded from Ms. Olech a thirty-three-foot easement, despite requiring only a fifteen-foot easement from other property owners seeking similar connections, the court protected against the arbitrary individual burden, and the demand of the additional eighteen feet in *Olech* could be described as regulatory hijacking or failure of the political process, and the class-of-one doctrine offered sufficient protection against just such occurrences. *See* Vill. of Willowbrook v. Olech, 528 U.S. 562, 563–65 (2000).

192. *See* discussion *supra* Part II.A.1.

repetition, and this potentially diverts litigants and jurists toward the property-based approach through precedential path dependence,[193] thereby limiting development of arbitrariness-based singling-out doctrines. As a general matter, curtailing precedential development can result in loss of great public value. As Owen Fiss has observed, doctrinal development allows judges "to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them."[194] Such precedential development creates "public value"[195] and a "public good" in the form of judicial opinions[196] that provide "guidance for future conduct,"[197] "impos[e] order and certainty on a transactional world that would otherwise be in flux and chaos,"[198] and "[create] legal norms that should inform people of the acceptable limits on their behavior."[199] Moreover, "legal rules and precedents are valuable not only as a source of certainty, but also as a reasoned elaboration and visible expression of public values."[200] Accordingly, measures that reduce precedential development "impoverish[] the development of law" by preventing judges from explicating and developing constitutional and statutory texts.[201] When precedential development is stifled, then stifled also are the law's functions of "providing norms," "providing future guidance for others similarly situated," and "building a body of decisions for use both directly and by analogy."[202] Additionally, "[t]he loss of substantive law from the public realm distorts the legal landscape, limits public testing and debate of legal norms, and devalues or destroys institutional competencies."[203]

The property-based singling-out language can limit doctrinal development of the arbitrariness-based approach, particularly when the property-based approach is so much more frequently invoked. Thus, the frequent repetition of the singling-out language in the takings context not only results in perverse incentives and fails to guard against arbitrary discrimination but also

193. *See* Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 234 (1999); Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1349 & n.121 (1995).

194. Owen M. Fiss, Comment, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984).

195. Lederman, *supra* note 193, at 222 (citing Fiss, *supra* note 194, at 1073).

196. *See id.* at 227.

197. *Id.*; *see also, e.g.*, H. Lee Sarokin, *Justice Rushed Is Justice Ruined*, 38 RUTGERS L. REV. 431, 433 (1986).

198. David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2623 (1995).

199. Rex R. Perschbacher & Debra Lyn Bassett, *The End of Law*, 84 B.U. L. REV. 1, 2 (2004).

200. Luban, *supra* note 198, at 2626.

201. Courtney R. McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, 39 HARV. ENVTL. L. REV. 191, 214 (2015).

202. Perschbacher & Bassett, *supra* note 199, at 14.

203. *Id.* at 2.

risks curtailing development of the class-of-one doctrine.[204] For example, the class-of-one doctrine shows signs of being starved of precedential development in the Supreme Court. Though lower courts have struggled to apply the class-of-one doctrine,[205] since *Olech* was decided in 2000, the Supreme Court has heard only one class-of-one case, *Engquist v. Oregon Department of Agriculture*.[206] During that same time period, the Court has decided ten takings cases[207] and endorsed the *Armstrong* singling-out principle in four of them.[208] While these four takings cases did not turn on *Armstrong's* singling-out takings language, and it would be overly simplistic to say that each of these could have deeply developed the class-of-one doctrine, the difference between the Court's attention to the two doctrines offers some indication of a tendency by the Court to address singling out in the takings context at the expense of the equal protection context.[209]

For all of these benefits, expunging singling-out language from the takings inquiry comes with little cost. In fact, the Court could accomplish this without causing much doctrinal change at all. The Court could simply announce that the singling-out language that has been used in the takings context was a misarticulation and that the singling-out principle more properly belongs in an arbitrariness-based inquiry. This would not cause a major shift in practice since the singling-out language, while often repeated, is not the linchpin for takings decisions.[210] Nor would this disturb the primary magnitude-of-burden inquiry that the takings decisions rely on because that inquiry

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204. For an argument about similar stifling of doctrinal development, see Mark A. Graber, *Subtraction by Addition?: The Thirteenth and Fourteenth Amendments*, 112 COLUM. L. REV. 1501, 1505 (2012) (suggesting that the *Slaughter-House Cases* cut off the jurisprudential development of the Privileges and Immunities Clause by displacing fundamental rights protections into the Due Process Clause).

205. *See supra* note 57.

206. 553 U.S. 591 (2008).

207. Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586 (2013); Horne v. Dep't of Agric., 133 S. Ct. 2053 (2013); Arkansas Game & Fish Comm'n v. United States, 133 S. Ct. 511 (2012); Stop the Beach Renourishment, Inc. v. Florida Dep't of Envtl. Prot., 560 U.S. 702 (2010); San Remo Hotel, L.P. v. City & Cty. of San Francisco, 545 U.S. 323 (2005); Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005); Brown v. Legal Found. of Wash., 538 U.S. 216 (2003); Verizon Commc'ns, Inc. v. FCC, 535 U.S. 467 (2002); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002); Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

For a summary of the cases decided as of December 2013, see ROBERT MELTZ, CONG. RESEARCH SERV., TAKINGS DECISIONS OF THE U.S. SUPREME COURT: A CHRONOLOGY 3–4 (Jul. 20, 2015), http://fas.org/sgp/crs/misc/97-122.pdf.

208. *Arkansas Game & Fish Comm'n*, 133 S. Ct. at 518; *Lingle*, 544 U.S. at 537; *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 303–04; *Palazzolo*, 533 U.S. at 618. While *Koontz v. St. Johns River Water Mgmt. Dist.* cites *Armstrong*, it is in reference to its underlying facts rather than for the *Armstrong* principle. 133 S. Ct. 2586, 2599 (2013).

209. *Cf.* Davidson *supra* note 23, at 37–38; Pappas, *supra* note 42, at 37, 39 (discussing cases in which the Court has incorporated "discrimination" or equal protection reasoning into its takings analysis).

210. *See* discussion *supra* Part III.A.4.

is not premised on singling out. Additionally, it would not appreciably alter the application of the major takings tests from *Penn Central*, *Loretto*, or *Lucas*, and it would even help to clarify the third prong of *Penn Central*, which has caused much confusion in terms of whether it incorporates a singled-out inquiry and, if so, how that is to be applied.[211] In the end, such a change would not call for an overhaul of takings law, just a tune-up.

In fact, the Court provided a similar doctrinal clarification to the takings inquiry in *Lingle*, which distinguished an arbitrariness-based inquiry from the takings inquiry and provides a model for excising imprecise singling-out language from takings law. In *Lingle*, the Court held that the substantive due process inquiry was distinct from the takings inquiry and that past precedent conflating the two, particularly *Agins v. City of Tiburon*,[212] was "not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation."[213] The Court could follow a similar course by expressly announcing that singling-out inquiries are distinct from the magnitude-of-burden focused takings measure and that past precedent conflating the two incorrectly states the test for identifying regulatory takings for which the Fifth Amendment requires just compensation.[214]

Administering doctrines to address singling-out concerns is a challenging undertaking. The nature of policing for illegitimate government actions is inherently difficult because it involves second-guessing political results and searching for more or less hidden political process failures. This will always run up against questions of deference to proffered justifications for government actions and uncertain, fact specific inquiries will abound, whether under the property-based inquiry or the arbitrariness-based inquiry. Bright-line predictability may be impossible in this area.[215] Nonetheless, eliminating singling-out language from the takings inquiry will add needed precision to the singling-out approaches and go a long way to addressing avoidable shortcomings that result from the currently confused inquiry. Moreover, the change would be relatively simple to execute since the blueprint for doing so already exists in *Lingle*. Removing the singling-out language from the takings inquiry would allow the respective property-based and arbitrariness-based approaches to play to their comparative advantages, add clarity, make for easier and more consistent administration by courts and

211. *Cf. Lingle*, 544 U.S. at 545 ("We emphasize that our holding today—that the 'substantially advances' formula is not a valid takings test—does not require us to disturb any of our prior holdings.").

212. 447 U.S. 255 (1980).

213. *Lingle*, 544 U.S. at 545.

214. Davidson similarly "argues for situating the concerns addressed by the equality dimension of regulatory takings in the equal protection jurisprudence as clearly as the *Lingle* Court reconciled regulatory takings and substantive due process." Davidson, *supra* note 23, at 38.

215. It may never be possible.

agencies, remove perverse land-use incentives, and better protect specially situated properties.

V. CONCLUSION

Concerns over government legitimacy and functional political processes underscore the protection of individuals from being singled out, however, the implementation of singling-out protection has done these concerns a disservice. Currently, singling-out doctrines give center stage to a misleading property-based approach that regurgitates hollow language, promotes arbitrary decisionmaking, distorts property management, and hampers the development of more appropriate arbitrariness-based doctrines. As a solution, this Article urges the Supreme Court to explicitly abandon the singling-out language from the takings inquiry to clarify that its protections shield individuals from arbitrary discrimination and high-magnitude burdens, but not from general inequality of results.