Average Reciprocity of Advantage:
"Magic Words" or Economic Reality -- Lessons from Palazzolo

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I. Average Reciprocity of Advantage Is a Legal Term of Art Without a Settled Definition

“Average reciprocity of advantage” (ARA) is a legal term of art without a settled definition, a phrase even more vexing to regulatory takings than the Penn Central test. ARA means nothing outside the narrow confines of land use law. Even within the practice of land use law, Supreme Court and lower court decisions have obscured rather than clarified the concept. Law journal articles mostly gloss over the phrase; only...
a handful of articles deal with ARA in depth and only one of these is not polemic. Without a settled meaning for ARA, the contention of some legal scholars that ARA “justifies a law of regulatory takings that is confined to truly extreme cases” has no substantive support. This article will investigate whether average reciprocity of advantage is accurately described by Gideon Kanner as a “triumph of ‘magic words’ over economic reality.”

A. Cases Contain Opposing Descriptions of What the Phrase Means

The phrase has been interpreted narrowly, following Florida Rock IV’s “reciprocity of advantage test” as labeled by the Alaska Supreme Court, and broadly following Justice Brennan’s application of Justice Brandeis’ dissent in Pennsylvania Coal cited, for example, in Andrus v. Allard, as “a burden borne to secure ‘the advantage of living and doing business in a civilized community.’” Practitioners of regulatory takings law struggle to divine the meaning of the two interpretations. Inconsistent applications of average reciprocity of advantage within takings jurisprudence reveal the usefulness of a

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4 Articles representing the polar extremes of disinterested scholarship and polemic discourse, discussed infra, are Lynda J. Oswald, The Role of the ‘Harm/Benefit’ and ‘Average Reciprocity of Advantage’ Rules in a Comprehensive Takings Analysis, 50 VAND. L. REV. 1449, 1489 (1997); and Andrew W. Schwartz, Reciprocity of Advantage: the Antidote to the Antidemocratic Trend in Regulatory Takings, 22 UCLA J. ENVTL. L. & POL. 1 (2004).


7 Gideon Kanner, The Lie that the Regulated Benefit, NAT’L L.J., April 29, 1996, at A17 (“[N]ext time you come across a brief or court opinion going on about ‘average reciprocity of advantage,’ check the context carefully. Chances are that what lurks behind it is a situation that is neither average, nor reciprocal, nor of advantage to the landowner on the short end of the regulation. . . . [I]t is more likely a triumph of ‘magic words’ over economic reality.”) (emphasis added). As Oscar Wilde said to the painter James Whistler after some bon mot, “I wish I had said that.” To which, Whistler responded, “I’m sure you will.” So, thanks to Mr. Kanner for the title.


fresh look at what each version might mean and how each might relate to evidence presented at trial and its evaluation.

B. Benefits of Economic Insight about Average Reciprocity of Advantage

Average reciprocity of advantage will benefit from economic insight because ultimately the phrase calls for an evaluation of the benefits and burdens of a particular regulation. The context of the phrase involves trade-offs in either of its applications in case decisions from Plymouth Coal Co.\textsuperscript{10} to Lingle\textsuperscript{11} and Brace.\textsuperscript{12} What better discipline than economics to evaluate the efficiency and distribution of trade-offs? Executive Order 12,866 requires federal agencies to conduct an economic analysis of all proposed rules:

\[\text{[I]}\text{n choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). . . . Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.}\textsuperscript{13}\]

OMB even issued a guidance document explaining how to conduct the required economic analysis of proposed regulations.\textsuperscript{14} Is it too much to expect that the Supreme Court could explain what average reciprocity of advantage actually means? In the absence of Supreme Court guidance, recent decisions in the Court of Federal Claims

\textsuperscript{10} Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914).
\textsuperscript{11} Lingle, 544 U.S. at 537-38. The decision says nothing about ARA per se but affirms that “the 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.” \textit{Id.} at 539. Just when the Federal Claims Court has figured out how to evaluate interference with distinct or reasonable investment backed expectations, see \textit{Florida Rock Indus. v. United States (Florida Rock V)}, 45 Fed. Cl. 21 (1999), the Supreme Court had to invent another obscure phrase, “interference with legitimate property interests.” This brings to mind “Dwight Merriam’s immortal dictum that when the Supreme Court coins a new term in the land-use field, that means that land-use lawyers will be buying new cars in the next three years.” Gideon Kanner, \textit{Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York}, 13 WM. & MARY BILL RTS. J. 679, 768 (2005).
\textsuperscript{12} Brace v. United States, 72 Fed. Cl. 337 (2006) (relying on the broad version of reciprocity although the decision hinges on the facts of the case largely related to experts’ opposing theories of valuation). The decision never uses the term “reciprocity of advantage,” but echoes the \textit{Andrus/Kirby Forest} language about the general advantages of living in a civilized society. \textit{Id.} at 356.
\textsuperscript{13} Executive Order 12,866.1.b, 58 Fed. Reg. 51735 (October 4, 1993).
\textsuperscript{14} \textsc{Office of Management and Budget, Economic Analysis of Federal Regulations Under Executive Order 12,866,1} (January 11, 1996), \url{http://www.whitehouse.gov/omb/inforeg/riaguide.html}. 