Symbiosis: The "Takings" Regulation and the Future of Public Lands

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SYMBIOSIS: THE "TAKINGS" REGULATION AND THE FUTURE OF PUBLIC LANDS

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I. INTRODUCTION

The challenge of improving the quality of the environment through land use regulation may largely focus on the "taking" clause of the Fifth Amendment: "[n]or shall private property be taken for public use without just compensation." This crucial nexus of constitutional law, environmental quality, and the public lands may speak to many of the grave problems which are now imminent: the draining of our aquifers, the rights to water from streams and rivers, acid rain and the loss of forests and the death of lakes. The destiny of our environment, even our way of life, may depend upon the interpretation of the parameters of land use regulation by the United States Supreme Court.

This examination of the law of eminent domain begins with an analysis of the foundations of judicial review, and ends with a survey of possible future trends. The hope is to gain an overview; the challenge of developing a comprehensive strategy has been left to some future effort. A purely historical or logical explication of the past or current trends is obviated for the reasons set forth in the section dealing with judicial review and stare decisis.

II. THE MANNER OF THE PROCESS

When considering the development of the constitutional law of eminent domain, it is evident that there is no single theoretical formula which can be found to explain the "crazy-quilt pattern of Supreme Court doctrine."1 There are two major problems inherent in this lack of a reasonable pattern which would fit the Court’s decisions. First, there is the problem of predictability, and second, the problem of social and political acceptance of a vital political organ and its function within the structure of our government. Archibald Cox writes that "the legitimacy of the great constitutional decisions rests upon the accuracy of the Court’s perception of this kind of common will and upon the Court’s ability, by expressing its perception, ultimately to command a consensus."2 Cox notes that this ability to command respect is the single strongest element that averted a constitutional crisis during Watergate. It is Cox’s fear that when the Supreme Court fails to extract from a ruling a sufficiently powerful

abstract rule which will rise above the case, the Court may face the crucial problem of failure to command respect, and severe questions of legitimacy. For Cox, the single most important function of law in a free society is the power to command acceptance and support from the community; the Court’s failure to do its job properly may prevent it from performing the vital constitutional role assigned to it.³

Cox is certainly correct when he sees that the perceived legitimacy of the Court is vital in enabling the Court to command respect for the law, and in enabling it to perform its constitutional role. However, is Cox correct in his assumption that a vital exercise of the Court is the production of truly general rules of law? Is the production of a truly general rule of law possible?

Certainly predictability of the law is very important to practicing lawyers as well as governmental bodies. Many commentators believe, as does Cox, that there is a fundamental law, which though often unexpressed, runs deeply beneath Constitution, governmental structure, and statutes. It is the expression of these deeply held values which is the function of the Court, and it is this expression of values which lifts the Court, and our law, to the sublime.

Of course, there are commentators who would not subscribe to such a view. And in this context, although the foundation of jurisprudence is different, there would still be the impetus for a production of general rules, and reasonable patterns of decision-making required of the Court, but for different reasons than those espoused by Cox. This is not to discount the importance of general rule productions per se, but only to assign to that function of the Court a less important role than that of the Court’s constitutional function.

We must be aware of the severity of the position which the judiciary in general has been placed. Structurally the courts are equal partners in a tripartite government. Nevertheless, the courts, unlike the other two branches of government, face gnawing problems of legitimacy and justification. In a society which views democratic governance as the crowning achievement of its values the Court is neither popularly chosen, nor designed to implement the popular will; it is essentially non-majoritarian.⁴ In order to survive and command respect, and to fulfill its structural function, the Court must rely on the popular perceptions of its operation: honesty, fairness, and equity. These are the supposed bases of judicial decision-making. Basic to this popular perception is that we have a government of law, not of men. Our law is considered separate from and

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³. See A. Cox, supra note 2, at 118.
superior to politics, economics, morality, culture, and especially the personal values or preferences of judges.

The theoretical social insurance policy is contained in doctrines of subservience to the Constitution, statutory law, and the doctrine of *stare decisis*. The supposed operation of these doctrines takes place in a quasi-scientific, objective, legal analysis on the part of our rigorous and expertly trained legal scholars, judges and lawyers. Any particular case should unfold and be decided thus: some expertly trained judge or lawyer looks at the case, spots the issues, looks to the law (wonderful predictability), and then the evidence relevant to the case is obtained by objective hearings and evidentiary rules that ensure that truth will be found. Then, the proper result comes about through a routine application of the law to the facts. Any reasonably competent judge will reach the proper conclusions.

Of course we know that Legal Realism has long since shown this popular model of judicial decision-making false. The problem lies in the fact that this is essentially the justification which popularly legitimizes judicial review, and this is the model that the judiciary and lawyers use formally in the process of their duties, especially if under popular or political attack. When popular debate over judicial decisions takes place the focus is usually upon perceived deviations from the ideal, rather than on substantive issues, or social significance. In fact, such is the dynamic of revolution: the law has somehow become illegitimate, the law becomes something to be established against the existing law. In turn the judiciary takes refuge in the model by supplying such idealized forms of legal reasoning as "balancing tests," wherein judges decide between conflicting policies or interests as if there were objective or neutral answers available: as if it were possible to perform such a balancing independent of political, social, or personal values.

Therefore, although we may reject the model as a true and accurate description of what the legal process is, we are nonetheless bound to it in order to function. Unlike the popular perception, however, the problem is not that courts deviate from accepted norms of legal reasoning. The problem is that there is no legal reasoning that provides us a methodology for reaching particular, correct results. Judicial decisions are predicated upon a complex soup of social, political, empirical, institutional ingredients but are necessarily expressed in terms of the prevailing popular model.

There can be no doubt that judicial decisions elaborate a distinctly recognizable system of discourse and body of knowledge. The system has its own language and rubric, its own logic and custom, and may be seen as so distinct, and in some cases, all embracing, as to amount to a separate culture. In fact many lawyers' lives are completely circumscribed by their legal habit: their law firm, the courthouse. The style becomes a way of life. Justice, however, has always been committed to the challenge of develop-
ing a process of making proper decisions, and of determining a method to ensure correct results and rules. Here the law becomes a rich and reflexive resource, which provides a conflicting series of stylized rationalizations in which a case may participate in many forms. When facing the welter of choices—the crazy-quilt patchwork of "takings" cases—we may begin to realize that precedent and *stare decisis* will aid us only to the limited extent of the power those conceptions hold upon the legitimizing norms within which we must function. What we may want to say to ourselves is that somehow this is wrong because in areas of judicial discretion the true standards are moral and political validity, and not whether most, or perhaps any judge follows the principles of the popular model. The most crucial problem of our age is the lack of accepted moral theory and authority.

On the one hand we are bound by the manner of the process: working with the old words in our mouths as a veil which masks the socio-political logic at work beneath the veneer. On the other hand we must produce a result which the situation truly requires: judicial review must fulfill a real as well as an ideal function. As noted earlier, the true standards are moral and political validity, and in order to bring these to the case full personal moral participation is as necessary as a deep understanding of the socio-political requirements of the case. Therefore an historical consideration of the problem is necessary on both counts.

III. PUBLIC USE AND JUST COMPENSATION

Prior to the Civil War the Supreme Court held that the Fifth Amendment, as a part of the Bill of Rights, did not proscribe interferences by the states with private property. Nevertheless, the Fifth Amendment was one of the first specific guarantees of the Bill of Rights incorporated into the Fourteenth Amendment due process guarantees. Consequently the states were bound to the same constitutional standards as the federal government. Although the early Supreme Court decisions do not specifically incorporate the compensation clause, they appear to hold that the public use and just compensation requirements are an intrinsic and inherent characterization of due process.

"General principles of law, enforceable in a proper forum, had settled that no form of legislative authority could be employed to serve private ends: taking, taxing, and regulation were all linked to the public good and


depended for their legitimacy upon the preservation of that link."\(^7\) And yet, in *Calder v. Bull*, Justice Chase expressed the depth of the moral and political proscription against any law which would "take property from A and give it to B."\(^8\) Although the original impetus was jurisdictional, the substantive aspects of due process subsequently become more significant in later rulings.

The central concern of the Fifth Amendment is simply that private property may not be taken for a public use without just compensation. However, the central issue in most takings cases is whether or not what the government has done is a "taking." In addition, some specialized doctrines have developed concerning the meaning of "just compensation" and "public use," which are not central to the issues of our consideration, but nonetheless deserve some inspection.

As with any constitutional requirement, searching for a single ruling principle is treacherous business.\(^9\) Justice Holmes provided the most basic rule when he wrote that the standard for just compensations was "what the owner lost, not what the taker has gained."\(^10\) Generally the courts look to the market value of the property. As with other aspects of constitutional adjudication, a single principle does not rule and the market value test is not exclusive. In *United States v. Fuller*\(^11\) the Supreme Court used a test based upon "equitable principles of fairness."\(^12\) The recent case of *Penn Central Co. v. New York*\(^13\) develops a novel idea. In hopes of protecting historical landmarks, the owners of the landmarks may participate in a system called "transferable development rights" wherein the owners are

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8. 1 U.S. (3 Dall.) 269, 271 (1798) (seriatim opinion). The Tenth Amendment reserves to the state the powers of eminent domain. For extent of United States powers see Kohn v. United States, 91 U.S. (1 Otto) 367 (1876).
9. Laurence Tribe goes all the way back to Kantian principles (see I. Kant, *Groundwork of the Metaphysic of Morals*) for his rather Christian Natural Law view of the basis of compensation and to Bentham (see J. Bentham, *Theory of Legislation*). For the utilitarian metaphysic see Tribe, supra at 463.

Whether traced to a principle that society simply should not exploit individuals in order to achieve its goals, or to an idea that such exploitation causes too much dissatisfaction from a strictly utilitarian point of view unless it is brought under control, the just compensation requirement appears to express a limit on government's power to isolate particular individuals for sacrifice to the general good."

Tribe, *supra* note 6, at 483.
12. J. Nowak, R. Rotunda and R. Young, *Constitutional Law*, 449 (1978) ("...United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943), where the Supreme Court held that in condemning land the federal government need not take into consideration in valuing the property the loss of business opportunity dependent on the owner's privilege to use the state's power of eminent domain.").
allowed to transfer given "rights" to other property (i.e.—exceeding height restrictions) as compensation for the decreased value of the historic landmarks. Whether the court has thus developed a new concept of "just compensation," remains to be seen.

The early interpretation of what constituted "public use" was whether or not the use was for "the public good, the public necessity, or the public utility." In fact, the prohibition against taking expressed against the federal government's power in the Fifth Amendment, and applied against the states in the Fourteenth Amendment's due process clause became operative only after it was clear that a genuine public purpose was involved. If genuine public purpose was absent, then no amount of compensation would suffice, so great was the vice. By the latter half of the Nineteenth Century, however, such a broad, simplistic view had been abandoned. Because the power of eminent domain had been granted to various private enterprises, a much more discrete view evolved. The modern outlook is contained in the unanimous decision in Berman v. Parker, wherein the Court upheld legislation which authorized the government to take private property and sell it to a private management organization to be redeveloped for private use. The modern view seems to be one of deference to the legislative claims of acting in the interest of public health, safety and welfare, although the Court has retained in theory the power of review. Therefore the prevailing standard would be whether or not the exercise of the taking bears any reasonable relationship of the means to the ends.

IV. PENNSYLVANIA COAL AND STARE DECISIS

The hard cases in eminent domain law occur whenever the government does not physically appropriate or damage the property. Cases of transfer of title or physical damage are usually fairly clearcut and obviously intended to be compensable. The hard cases, however, are where the government regulates the property in some manner, and as a consequence substantially reduces the value of the property. There can be no question about the compensation which occurs when a non-acquisitive regulation impairs the value of property.

15. The prohibition against a taking applies to the judicial and executive, as well as the legislative branches. See Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring).
Whether or not such a non-acquisitive regulation may be compensable is clear. The Court has ruled that such regulation may constitute a taking. What is not clear is that no general rule exists to describe the conditions that must be met to justify compensation vis-a-vis regulation. To date, the only approximation of a general rule is Justice Holmes' statement in *Pennsylvania Coal Co. v. Mahon*: "The general rule at least is, that which property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Holmes made it clear that he felt that the difference between regulation and physical appropriation or damage was not one of kind, but one of degree. The central question of when regulation reaches the point of compensation is left unanswered, to be decided on an ad hoc basis. Therefore, each ad hoc set of events can be seen as a plot on a continuum between the exercise of eminent domain and the valid regulation by the police power. There have even been studies done on a "bases of percentage relationship" where the upholding of the regulations was correlated to the diminution of value to the owner.

Several commentators believe that the essential polarity is that expressed in the conflicting views of the elder Justice Harlan and Justice Holmes. In *Mugler v. Kansas* Harlan viewed "taking" in a literal, certain sense when upholding a Kansas enactment outlawing the sale of alcoholic beverages, thereby destroying Mugler's brewery business. Harlan clearly believed that no compensation was due absent appropriation for the use of the government. The case of *Pennsylvania Coal v. Mahon* concerned an area of Northeastern Pennsylvania which was rich in coal. The extensive digging of mine shafts and the taking of coal from beneath the surface had caused, and was causing, extensive surface

20. Uncompensated losses in excess of 75% of a property's value caused by regulation have been sustained both before Pennsylvania Coal, *Haddacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (88%) and after Pennsylvania Coal, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (75%). In *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) a town which had expanded around a sand and gravel mining operation amended its zoning laws to "prohibit any excavating below the water table and to impose an affirmative duty to refill any excavation presently below that level. . . . Although the owner had argued that the ordinance totally destroyed the economic value of his property, and although the New York Court of Appeals had found the ordinance was amended as a part of "a systematic attempt to force [the owner] out of business. . . .under the guise of regulation. . . .the Supreme Court found "no evidence in the. . .record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question." Thus the Court saw no need to decide now far regulation may go before it becomes a takings.

21. Bosselman, Callies & Banta, *supra* note 18, at 105-29; and Novak, Rotunda and Young, *supra* note 11, at 441.
22. 123 U.S. 623 (1887).
23. 260 U.S. 393 (1922).
subsidence. The earth was literally falling away beneath the towns and cities in the nine-county 5000 square mile region. To deal with this problem, the Pennsylvania Legislature had passed the Kohler Act which prohibited the mining of coal in any manner which would cause the subsidence of any building, structure, or transportation route within a designated place or municipality. Holmes obviously felt that allowing someone to keep their property, but denying them the use of it was tantamount to transfer of title and an outright appropriation. Although the polar views of Harlan and Holmes are too reductionist, the intuitive grasp of the continuum is valuable. What is at work here is the strife between our idealized popular model of legal reasoning and the value preferences of the judges involved, as well as the shifting socio-economic and political sands of history.

Perhaps Mugler is a case from a more classical era of legal thought when lawyers were less sophisticated. In any event, it will fall to the Court to attempt to assume the posture of value-free arbiters, neutral and independent exponents of the law, unaffected by social and economic relations, political forces, or the culture of our age and people. Traditionally, jurisprudence has chosen to ignore social and historical relations of change and maturation. As a consequence the dominant system of values has been declared value free so that all conflict and inequity is masked by the ideology of objectivity and neutrality.

The antithesis of Mugler and Pennsylvania Coal permits a focus on one of the basis constructs of legal reasoning: stare decisis. The notion that judicial review is bound by, or at least deferential to precedent, thus restricting the play of discretion, is at the foundation. If traditional legal reasoning has any meaning, the application of the doctrine of stare decisis should lead to predictable results in specific cases. Nevertheless, every lawyer knows that some precedents are followed while others are not. In addition, there are cases in which the significance of precedent is not clearly defined. How does judicial review accept or reject legal precedent? How is ambiguous precedent assimilated into the system? Does precedent really matter? The truth is that stare decisis conveniently atrophies with disuse whenever the courts so desire, and especially at times when the legitimacy and power of the courts are enhanced by rejecting continuity in favor of a socio-economic shift in policy.

In the early 1800's the long venerated legal principles of property, exchange, and social relations conflicted with the evolving social commitment of the government to economic development. The early American view of land as a source of enjoyment in its natural state rather than as an

instrument of production was at odds with the new needs for construction of the means of the production, such as mills and dams. In that setting, the upstream and downstream land owners had established rights and patterns of life that were inconsistent with the coming socio-economic evolution. Therefore, when the judiciary saw the law as an instrument for the promotion of the socially desirable expansion of laissez-faire capitalism, *stare decisis* was rejected as a tool of adjudication. After the basic transformation had been accomplished, near mid-century, the new legal values were with the re-emergence of legal formalism, enshrined in the renewed operation of *stare decisis*. It was clear, however, that this rebirth of deference to precedent encompassed only the recently transformed legal standards.

Viewing *Mugler* as the product of a more classical era of legal reasoning, and *Pennsylvania Coal* as the exemplary case of the *Lochner* era, may be simplifying somewhat excessively. Our commitment, however, is to the present and future, and our challenge is to divine and understand what "magic phrases" or "magic words" from the past will be determinative today. *Stare decisis*, although an integral part of the legal myth-model, serves primarily an ideological, and not a functional role in legal reasoning. Certainly some strategists will perceive that the Court need never overrule *Pennsylvania Coal* to proceed (*Mugler* has never been overruled), and the Court may continue, unabashed, to ignore *Pennsylvania Coal* and create new law (as it certainly should).

What practical purpose could motivate one to study the development of the takings cases? Ignoring the mythical "functional" role of precedent, understanding the basis of social, economic, and political change, and understanding that when courts determine meanings, facts, and applicability of law to fact, a social and political judgment is also being made, then we must balance these requirements against those of the needed legitimacy of the decision in terms of community respect and acceptance. There is a veil of illusion that must be pierced in order to operate effectively as lawyers within the system. But the myth-model demands of the community must also be left intact: the "magic phrases" and "magic words," although masquerading as neutral and objective explications of the case, are there only to cater to the popular demand for conformity to the as yet unrevolutionized conceptions of legal legitimacy.

*Pennsylvania Coal* is a mass of contradictions in its own right. The two issues argued by the coal company were the impaired obligation of contracts (which had certain merit, as the deed in question clearly waived any claim against the coal company and the mineral rights were clearly severed) and the taking issue, which the Court chose to address. Holmes wrote: "This is the case of a single private house. . .a source of damage to such a house is not a public nuisance even if similar damage is inflicted on
others in different places. The damage was not common or public.”\textsuperscript{25} This is a somewhat astounding view in fact because:

Scranton bid fair to become a second Verdun, her buildings sagged to the ground by shots from below. While every section of the city was more or less affected the worst devastation was in the heart of the business section of West Scranton. Visitors there today \textsuperscript{[1922]} can clamber through pits strewn with broken bricks and rubbish covering great areas formerly improved with handsome business blocks but now permitted, in the words of Governor Sproul \textsuperscript{[of Pennsylvania]}, “to revert to the wilderness of abandon.” Our once level streets are in humps and sags, our gas mains have broken, our water mains threatened to fail us in times of conflagration, our sewers spread their pestilential contents into the soil, our buildings have collapsed under their occupants or fallen into the streets, our people have been swallowed up in suddenly growing chasms, blown up by gas explosions or asphyxiated in their sleep, our cemeteries have opened and the bodies of our dead have been torn from their caskets.\textsuperscript{26}

There were thousands of square miles of Pennsylvania affected including several large cities like Scranton.

Two things of importance can be taken from \textit{Pennsylvania Coal}: First, the balancing test and, second, the dissent of Justice Brandeis.

The balancing test eschews the test of reasonable relationship to a valid public purpose and instead weighs the social value of the regulation against the loss in property value to the property owner.\textsuperscript{27} This is a test that no longer seems historically justified. Admittedly, values should be balanced, but perhaps a more viable approach would be through the Fourteenth Amendment due process guarantees. Historically, this body of law seems a sufficient safeguard for the property owner.

In fact, when reading Brandeis’ dissent the truly anomalous nature of \textit{Pennsylvania Coal} becomes apparent:

Coal in place is land; and the right of the owner to use land is not absolute. He may not so use it as to cause a public nuisance; and uses, once harmless, may owing to changed conditions seriously threaten the public welfare. Whenever they do, the legislature has power to prohibit such uses without paying just compensation; and the power to prohibit extends alike to the manner, the

\textsuperscript{25} 260 U.S. at 413.
\textsuperscript{26} Brief on Behalf of the City of Scranton, Intervenor, in the Supreme Court of the United States, October term, 1922, at 1. \textit{See also} BOSELMAN, CALLIES & BANTA, \textit{supra} note 18, at 124f.
\textsuperscript{27} 260 U.S. 412 (1922).
character and the purpose of the use.\textsuperscript{28}

And again,

If by mining anthracite coal the owner would necessarily unloose poisonous gases, I suppose no one would doubt the power of the state to prevent the mining, without buying his coal fields. And why may not the state, likewise, without paying compensation, prohibit one from digging so deep or excavating near the surface, as to expose the community to like dangers? In the latter case, as in the former, carrying on the business would be a public nuisance.\textsuperscript{29}

Holmes had certainly declared the mineral estate to be the dominant estate with a vengeance.

V. AVERAGE RECIPROCITY AND NOXIOUS USE

In order to answer the question “when can regulation be considered a taking,” one needs to study the challenges to zoning and environmental laws in state and lower federal courts, for such challenges have rarely come to the Supreme Court in recent years.\textsuperscript{30} The following is a quick overview of the few recent Supreme Court cases. In \textit{Agins v. Tiburon},\textsuperscript{31} the power of zoning to diminish the “value” of the appellants’ property was upheld. However, the controversial issue that remained unanswered was whether a state may refuse to grant damages for inverse condemnation and restrict the remedy to invalidation of the unconstitutional regulation. Four justices\textsuperscript{32} harkened back to \textit{Pennsylvania Coal} when reproaching the California court for not recognizing “the essential similarity of ‘regulatory takings’ and other ‘takings.’”\textsuperscript{33}

In \textit{Kaiser Aetna v. United States}\textsuperscript{34} a pond, considered private property, was converted into a marina and a channel was dug allowing ships to travel into a bay, and thence to the ocean, thereby becoming a navigable waterway and falling under regulation of the Army Corps of Engineers. The Court held that Corps regulations pertained to the waterway, but that the government could not require the lessees of the marina to allow free public access. The Court could not simply convert private property into public property without just compensation.\textsuperscript{35}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{28} 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting).
\item \textsuperscript{29} 260 U.S. at 417.
\item \textsuperscript{30} See \textit{Bosselman, Callies & Banta, supra} note 18, parts I, II, and III.
\item \textsuperscript{31} 447 U.S. 74 (1980).
\item \textsuperscript{32} Justices Brennan, Stewart, Marshall and Powell.
\item \textsuperscript{33} \textit{Agins v. Tiburon}, 447 U.S. 255 (1980).
\item \textsuperscript{34} 444 U.S. 164 (1979).
\item \textsuperscript{35} \textit{Id.} at 177-81.
\end{enumerate}
\end{footnotesize}
In *Pruneyard Shopping Center v. Robbins*, the Court supported the California ruling interpreting California’s Constitution whereby the owners of private shopping centers were prohibited from excluding persons engaging in non-disruptive free speech. In distinguishing *Kaiser Aetna*, the Court in *Pruneyard* held that the right to exclude others was not a basic economic value of the shopping center, while the proposed public access to the private marina in *Kaiser Aetna* interfered with “reasonable investment-backed expectations.” Thus, regulation must not deny the property owner the primary economic use of the property, and must advance a legitimate government goal.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Court substituted a *per se* rule in place of the multi-factor balancing heritage of *Pennsylvania Coal* in cases of “permanent physical occupations.” The Court struck down a New York law which required a landlord to permit cable television companies to install the cable in rental property. Justice Marshall, writing for the majority claimed the *per se* rule did not conflict with history and amounted to a reaffirmation of “the traditional rule that a permanent physical occupation of property is a taking.” The dissenters condemned the decision as “curiously anachronistic” and complained that such a rule may “undercut a carefully-considered legislative judgment” and that “history teaches that takings claims are properly evaluated under a multi-factor balancing test. By directing that all ‘permanent physical occupations’ automatically are compensable, the Court does not further equity so much as it encourages litigants to manipulate their factual allegations to gain the benefit of the *per se* rule.”

Here is yet another historic lesson unlearned: how analogous is the cable television industry to the telephone company of yesteryear? Or the public utilities? It surely seems that technological advancements are always initially disadvantaged by the courts.

The only recent Supreme Court case of real interest was *Penn Central Transportation Co. v. New York City*, wherein New York City’s historic landmarks protection regulation was contested as a regulatory taking. Grand Central Terminal was designated an historic landmark, which meant that the owners would be obligated to keep the building in good repair and obtain commission approval before making any exterior alteration. The Court undertook an extensive review of taking-regulations

38. *Id.*
40. 458 U.S.
precedent and accepted the dictates of *Pennsylvania Coal* that the standards were *ad hoc* factual inquiries and that the balancing was between the regulation for the benefit of the "health, safety, morals, or general welfare," and the private interest in a "distinct investment-backed expectation. . . ." The Court found that the interference with the owner's property was not of such magnitude as to come under the rule of *Pennsylvania Coal*. As usual Rehnquist, Burger and Stevens in dissenting were more interested in property rights concepts than general welfare concepts.

Justice Rehnquist's dissent in *Penn Central* listed two possible exceptions to the takings rule. The first was the permissible prohibition of noxious uses based upon the safety, health or welfare of others. The second was the foundation of zoning regulation which "secure an average reciprocity of advantage." Brennan's majority opinion felt the historic landmark regulation akin to regulation against noxious uses of land, an implementation of a policy expected to produce widespread public benefit, applicable to all similarly situated.

As noted previously, a great deal of taking litigation occurs in state and lower federal courts. Perhaps at least one newer wrinkle should be noted. In 1966 the State of Wisconsin enacted the Shoreland Protection Act** which compelled local governments to move toward protection of the shores of Wisconsin's many lakes and waterways. Marinette County enacted a shoreland ordinance in compliance with the State's directive. The property owners in question, the Justs, owned a shoreline lot which had a stand of trees at the back and a marsh in the front. The Justs began to fill the front of the lot and Marinette County enjoined the Justs' actions. In the appeal to the Supreme Court of Wisconsin, in *Just v. Marinette County*, the Court proceeded to describe the now familiar test of *Pennsylvania Coal*:

The distinction between the exercise of the police power and condemnation has been said to be a matter of degree of damage to the property owner. In the valid exercise of the police power reasonably restricting the use of property, the damage suffered

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42. *Id.* at 115-16.
43. *See G. Gunther, Constitutional Law 553 (1982), [f]or other confrontations with the "takings" problem by the post-Lochner era Court, note the decisions sustaining compensation for "takings" by low flying airplanes and rejecting arguments that the injuries were "merely incidental" consequences of authorized air navigation, United States v. Causby, 328 U.S. 256 (1946), and Griggs v. Allegheny County, 369 U.S. 84 (1962); and see also a series of cases holding losses from wars and riots non-compensable.
45. 56 Wis.2d 7, 201 N.W.2d 761 (1972).
by the owner is said to be incidental. However, where the restriction is so great that the landowner ought not to bear such a burden for the public good, the restriction has been held to be a constructive taking even though the actual use or forbidden use has not been transferred to the government so as to be a taking in the traditional sense. 46

The Wisconsin Court, however, follows closely the Brandeis dissent in *Pennsylvania Coal*. Brandeis' view of taking and regulation was that these concepts were concepts which were differential in kind and not degree, which is contrary to Holmes' view. Brandeis, the legal researcher and scholar, always relied on volumes of historic, socio-economic and political evidence as a basis for his decisions. This is because Brandeis was concerned with facts: he knew of the economic burdens involved and knew of the diminution of value to the property owner:

> But all values are relative. . . the rights of an owner as against the public are not increased by dividing the interests in his property into surface and subsoil. . . the conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be an "average reciprocity of advantage" as between the owner of the property restricted and the rest of the community; and that here such reciprocity is absent. . . but where the police power is exercised, not to confer benefits upon property owners but to protect the public from detriment and danger, there is in my opinion, no room for considering reciprocity of advantage. 47

It is obvious that Brandeis felt that the due process clause of the Fourteenth Amendment on the one hand, and voluminous socio-economic and political evidence on the other was sufficient to solve any regulations problems. 48 "Takings" were a substantially different sort of problem from the regulation of property use.

The Wisconsin Court held that:

> what makes this case different from most condemnation or police power zoning cases is the interrelationship of the methods, the swamps and the natural environment of shorelands to the purity of the water and to such natural resources as navigation, fishing,

46. Id. at 767, 201 N.W.2d at 767.
47. 260 U.S. at 422.
and scenic beauty. Swamps and wetland were once considered waste land, undesirable, and not picturesque. But as the people become more sophisticated, an appreciation was acquired that swamps and wetlands serve a vital role in nature, and a part of the balance of nature and are essential to the purity of the water in our lakes and streams. Swamps and wetlands are a necessary part of the ecological creation and now, even to the uninitiated, possess their own beauty in nature.\footnote{49}

The Court reasoned that if the proposed use of the property would result in public harm, then no compensation was required. On the other hand, if the regulation conferred a public benefit then such control would be beyond the role of the police power.

The Justs argued their property has been severely depreciated in value. But this depreciation of value is not based on the use of the land in its natural state but on what the land would be worth if it could be filled in and used for dwelling. While the loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.\footnote{50}

VI. DAMAGES: INVERSE CONDEMNATION, CIVIL RIGHTS, RESTRAINT OF TRADE

The pre-industrial revolution viewpoint that land in its natural state was of value in itself is emerging again. The Lochner era is ending, and with it the viewpoint that private commercial exploitation of lands and resources are superior to the rights of the public to a safe and clean environment. It is now becoming obvious that the acceptance of the dominant value scheme as neutral has placed all competing value systems at a disadvantage. What has happened has been that regulation of the use of land which has interfered with a property owner’s right to make a profit from the land has created a constitutional right in the owner of land exploited, even in the face of harm to the public lands. This certainly cannot have been the intent of the Framers. Land as a commodity has been an evolution of capitalist economy, and should be clearly seen as such.

At first we must agree that no one has the right to use his property with utter disregard for the effects of such use upon others. Historically this is the basis for the evolution of the law of nuisance. Over the centuries of the English and American law this doctrine has prescribed parameters of various interests in property. Seen in the light of centuries of uses, property

\footnote{49. 201 N.W.2d at 768.}
\footnote{50. 201 N.W.2d at 771.}
TAKINGS REGULATION

The community, initially the sovereign, has retained the prerogative to legislate for the health, morals, safety, and general welfare in spite of the burdens placed on the use and enjoyment of private property. This exercise of power is commonly called the police power.

The usual theory of land use law assumes a balancing between the rights of the individual property holder to the use and enjoyment of property and the general welfare of the community, or the police power. There still rages a debate in the law of eminent domain over whether or not, and at what point in regulation of property, the police power has invaded that last small but sacred precinct of property ownership: there must be some sticks in that bundle that the community cannot take without violating some seemingly undefinable basic right. The problem is simply that such legal reasoning is the product of an era long since dead, but the rubric and sanctity still holds a mythical sway in the American Frontier Mentality where land was not only cheap but plentiful ("My God! Next they'll be tellin' us whut to do with our land!).

Legal Realists have, of course, proved such viewpoints to be not merely quaint but nonsense. The only sticks in that bundle that the property owner has any "right" to are those sticks that the police power says he has a right to: rights are circular legal creations. It always seems as though what we are balancing in such cases are conflicting rights between which the court is called upon to choose. It is in the enunciation of that choice that the Court determines the result and forms the "right." Property simply means the legally granted power to withhold from others. As such it is merely the inverse face of the police power, created by the state and given content by legal decisions that limit or extend the property owner's power over others. Seen as such, property is an always conditional delegation of the public right, and simply a form of the police power: property is necessarily public and not private.

Therefore, the validity of land use regulation is predicated upon the power to regulate for the benefit of the health, morals, safety or general welfare of the community. If seen as such, we must examine our basic premises again. Is the purpose of our constitutional government the aiding and abetting of class against class in a static socio-economic scheme? Or are we a democracy, committed to the changing concerns and needs of a complex social organism? If this is the case perhaps respect for the police power, and deference to legislatures should rank high in our value structure—higher than economically based policy. Certainly there is no doubt that we have progressed along an historic continuum, one where legislatures provided protections and impetus to labor and industry. But the modern corporate economy has evolved, as must our legislative treatment of political economy, and the courts must not stand in the past,
holding fast to old, outworn, and now destructive ideals. As the representation of the popular will, legislatures are a strong part of the democratic process. As the protectors of our basic political values courts have a difficult position. It becomes imperative for the courts to stick to procedural aspects of the Constitution wherever possible, and where open-ended areas of the document are encountered to interpret carefully and with the utmost diligence, and not simply in terms of a now prevailing, but evolving, value scheme. It is now fairly clear that the "takings" clause of the Fifth Amendment is not so open-ended as Holmes and the property-rights oriented opinions which follow him would have us believe. The procedural aspects of the clause are fairly explicit and to travel further than that is to take common sense, common perception, and indulge in excessive sophistry. Taking property is physical appropriation, destruction, occupation. Regulation of property may amount to taking in some sense, but regulation of property is not the same as taking property. We have become too used to legal sophistry when we allow the expansion and melding of these two concepts into one.

Agins v. Tiburon51 and San Diego Gas and Electric v. City of San Diego52 show a new and dangerous attack upon constitutional integrity at work in takings cases. This is the attempt to use the theory of inverse condemnation in order to get damages for property owners whose property has been regulated by an ordinance subsequently struck down as a "taking." These rulings did not allow such damages, holding that the invalidation of the regulation was the only available remedy. Nevertheless this new tack may be successful in the future in view of the Court's (especially Rehnquist's) concern with "investment backed expectations."53 A newer approach to the collection of damages is available, and in the long run may relieve some of the pressures put upon Fifth Amendment judicial review of legislative regulation.

The first path which may be taken by litigators is the use of 42 U.S.C. § 1983 (1976). This so-called "Section 1983" remedy is available to anyone who has been deprived of federal statutory or constitutional rights. The basic requirements are that a "person" must violate a citizen's rights, privileges, or immunity under color of a state law which may be a statute, ordinance, regulation, custom, or usage. Money damages and reasonable attorney's fees may be awarded. In a landmark 1978 decision54 the United

54. Monell v. Department of Social Services, 436 U.S. 658 (1978). Justice Brennan, writing for the majority, noted that:
   Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included
States Supreme Court held that municipalities were persons under Section 1983, and oppressive regulation may be successfully litigated in terms of injunction, declaratory relief, and monetary damages. The Court’s holding in Monell v. Department of Social Services subjected municipal corporations to liability under Section 1983 of the Federal Civil Rights Act of 1871. And then, in 1980 the Court decided in Owen v. City of Independence, Mo. that good faith action by the municipal corporation was no excuse. Thus, a property owner is afforded a full panoply of rights under Section 1983. One can easily infer that a successful damages suit could wipe out many a small municipal corporation’s budget, for the fiscal year, or several fiscal years.

The second path that may be taken is relief under federal anti-trust law, specifically the Sherman Antitrust Act of 1890 [15 U.S.C. §§ 1-7 (1976)] and the Clayton Antitrust Act of 1914 [15 U.S.C. §§ 12-27 (1976)]. In a 1978 ruling, the Court ruled that local governments could be held liable to federal antitrust claims. The three necessary elements are whether or not the defendant is a person for purposes of the federal antitrust law, whether the activity involved interstate commerce and whether the activity is commercial. As far as the second element is concerned, there is at least one recent land use decision wherein out-of-state purchasers and out-of-state financing was enough to settle the issue in favor of the plaintiffs. Federal courts have historically gone to great lengths to find interstate commerce links in order to afford jurisdiction. The courts must then ask, when considering whether a regulation violates federal antitrust law: does the regulation operate to unreasonably restrain trade or

among the persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers. Moreover, although the touchstone of the § 1983 action against a government body is a allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 ‘person’ by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental ‘custom’ even though such a custom has not received formal approval through the body’s official decision-making channels. 436 U.S. at 690.


56. See note 55 supra.

57. See note 55 supra.

58. In describing the purpose which motivates this legislation the Supreme Court stated: “Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.” United States v. Topco Ass’n, 405 U.S. 596, 610 (1972).


to monopolize a part of trade or commerce?\textsuperscript{61}

A third path that may be taken is that of substantive due process. The basic protections afforded by the Fifth and Fourteenth Amendments are still in place and are in the face of oppressive regulation, an especially viable route for litigation. In fact, if the due process protections are to be relied upon, the focus of the litigation would shift to questions concerning the purpose and effect of the regulation in question, which is the center of the matters that should concern us in such a case.

In view of the crux of the issues, that circumstances have changed and that our limited natural resources are facing exploitive destruction, it is time that the courts stopped balancing public benefit against property owners' losses and applying archaic property rights doctrine to the balancing process and began protecting the interests of our culture in the preservation of our natural and aesthetic resources.

VII. CONCLUSION

As the synergism of ecosystems become more apparent to us the concepts of "average reciprocity of advantage" which underlies the current Court's tenor of land use decisions must merge and expand into the old, and hopefully, new concepts of noxious uses. It is imperative to limit the damaging impacts of unbridled exploitation if succeeding generations are to be able to enjoy our environment and use our public lands. Certainly there will be a balancing of needs, but such a balance must be struck in a focus upon the purpose and effect of legislation, which is the essence of 14th Amendment due process review. A balancing between the "absolute" rights of a property owner and the welfare of the society as a whole creates rights which may run counter to the welfare of humanity and the rights of future generations to a clean and safe environment as well as aesthetically satisfying public lands.

Adam Smith\textsuperscript{62} laid the foundations of our political economy with a conception based upon a vision wherein the strife between general interests and private interests would be overcome in the all-encompassing whole. All conflicts of interests were to be melted and submerged into the market place to dissolve into the rational action of supply and demand. This was an historic vision of freedom. The economic, the social, and the political worlds began at the same point and progressed upon parallel courses: the free competition of free subjects and a socio-political search for truth founded in open self-expression and free dialogue. The rational self

\textsuperscript{61} For a more complete discussion, see Netter, "Anti-trust Laws and Land Use Regulation," APA-Planning and Law Division, 1982.

\textsuperscript{62} A. Smith, \textit{Wealth of Nations}, Book III, chap. 1 "Natural Progress of Opulence" (1968 ed.).
culminated in enlightened self-interest.

There are many problems with this scenario in the latter half of the twentieth century. This rationalization of economic life and social organization is a strictly private matter tied to the rational practice of the individual (substitute corporate) economic subject, or the multiplicity of such individual subjects. Supposedly the harmony of the whole is to result from the relatively undisturbed course of such economic practice. Of course we have not allowed such practice, for very good reason, to be relatively undisturbed. The system itself, at the level of monopoly capital manipulates the system beyond any concepts of “relatively undisturbed.” However, the real problem with the theory is that such privatization of the economic structure along with socio-political rationalism denies us the end which is our goal: the rational criticism of the whole whereby there may be a rational determination of the conditions under which fulfillment of the so-called free individual might be realized. All is left to the irrational forces of “harmony” in the market place. Thus all jurisprudence and liberal theory becomes mere abstraction and the structure and order of the whole becomes accidental “natural balance.” If, to borrow from Holmes, the life of the law is not logic but experience, we must realize that we are creating, as well as receiving values. The logic of our struggle to preserve our environment and our public lands is not that of the individual interest against the common welfare, but is a struggle for life itself, a life that has a right to the enjoyment and the preservation of nature, a life that has a right to emerge and grow in dignity. The internal dynamic of this struggle is the attempt to translate knowledge into reality, which is the groundwork for building a bridge between the “is” and the “ought.”

“Ought”, of course, suggests some standard, some valuation by which we are to judge our acts and our goals. The lack of such a realistic standard is our most serious social problem. The current trend of the Court is merely to institutionalize the prevailing exploitative value structure as value neutral in an attempt to mask the conflicts and inequities, hoping to preserve the status quo while appearing objective and impartial. But history, like art, is an expression of life. In order to guide our social goals it is necessary to grasp historical truth. What is required is not mere historicism, but a “critical history” which would allow us to break the grip of the past by revealing that which must be overcome. This is necessary where the past oppresses the present; it is dangerous and painful at times because in order to succeed we must destroy a part of ourselves. To destroy what is regressive and preserve that which is progressive is the key to building the models and methods for finding our future.

Against Hegel and the Marxists we should object that history like art, is not a product of imminent reason; history is full of accident and irrationality. However, a denial of a perfect order in history does not imply
a pure chaos. All of the traditional rationalist schools have undermined the old orders and yet remain impotent to create a substitute. Man, no longer the essential center of life and creation, has become a meaningless accident in a vast cosmic mechanism, a mere pawn of mechanical or historic force. In law, Legal Realism, as modern rationalism in science and philosophy, has willed values which are not only unreal, but hostile to reality, in place of life values, life goals. In place of meaning we have Nothing. “Facts” have become the foundation of all objectivity and “values” have become suspect: there has become a total contrast between “fact” and “value”.

As such we are standing on our head. Man has lost dignity as well as tragic proportion. From the Christian conception of man as the image of God we have slid down to man as animal, and finally, to man as atoms in motion. Truth has become a function of the electro-chemical discharges of the brain, or as a function of imminent history. Evil and injustice become meaningless. Pessimism becomes nihilism.

Faced with modern rationalism and Legal Realism how are we to reconstruct a standard of values? We should ask ourselves what our values and moral goods are worth: what would we expect of these rules? What should be our answer? Life. We must be loyal to life. We must be true to our mother the Earth. Moralities which are oriented towards the benefits of a group or class, whether “capitalist” or “masses” are at once suspect.

As important as our foundational documents are, there is no blueprint for Utopia. What has been cast in our foundational documents represents a very important historical innovation for mankind, such as the Lockean crystallization of the limits of governmental power of the state and the protection of the rights of the individual. Unfortunately such concepts have been twisted into the service of corporate capital (the wolf in sheep’s clothing when called an individual) and the Court persists in extending the Lochner era into the foreseeable future by imposing a set of values suited to an era of capital expansion which is no longer justified. The Court as such seems Quixotic when insisting upon not only an out-dated and unsuitable, but potentially suicidal, set of values in the face of the needs of our people and the values of life. Since the Court has chosen this course those who value life and reality and freedom as opposed to destruction and exploitation must begin to detail clearly the fact that it is the Court, and not the people who are being unrealistic in the face of history, science and morality. We must do our utmost to make our side win: the stakes are too high, we must demand that our Constitution should not be twisted and tortured and subverted to satisfy the tawdry, destructive and exploitative goals of the modern corporate capital economy. The logical extension of Lochner and Pennsylvania Coal allows for the death knell of clean water, clean air, and the loss of the public lands to our children and their children.

Does it not seem as likely that our energy for exploitation could
become energy for preservation and conservation given the new values and the demise of the old values? The new beginning would require a new consciousness. It is true that the unnatural values of *Lochner* and *Pennsylvania Coal* have stunted our potential. However, our technology and our rationalism are an expression of energy and self-confidence. Once we have recognized our power and capacity as a people, and we have also stripped away the nihilistic values of the past, once we have recognized and contested the “inevitability” of historicism and modern rationalism, then we can develop a feeling of moral outrage at the path which the Court has taken.\(^6\)

In this struggle to change this course of events we should define two basic forms of authority: rational and predatory. Rational authority is that authority which supplies good reason to believe that human suffering will diminish and human needs will be fulfilled without an attendant increase in misery in some other segment of society. Predatory authority only seems rational to that group or class which seeks to profit by its exercise.\(^6\) The victims of this exercise find no rationality or justice in the actions. All exercise of predatory authority should be clearly exposed. The antitheses between life and exploitative values abound in our society: clean well scrubbed and “virtuous” pillars of our communities who poison our waters, spread herbicides, create acid rain and destroy our ecosystems; clean well-scrubbed and “virtuous” pillars of our communities who are professionals at dirty deals. All of humanity is left awash in the filthy, poisonous garbage produced by predatory authority while a small class or group reaps the transient and questionable rewards of the moment.

Our Constitution may not be an express blueprint for Utopia. But, conversely, Utopia may not be a fanciful concept. The denial of Utopia by predatory authority may be only a vicious ideology which is preserved in order to perpetuate a system of values which, although rightfully a part of our past, now threatens to destroy our future. Simply put, Utopia may be blocked from coming about by the establishment. What must happen is the subordination of the development of our productive capacity and technology to rational authority, which is animated by the newly created, constantly recreated values of life. What possible realistic reasons can there be for paying farmers not to produce food while a third of our world starves? What possible realistic reasons allow our aquifers to be drained, acid rain and the death of lakes and forests, and the impending loss of the natural and unspoiled beauty of our public lands? Ignorance of a sacred trust, ignorance of history and life. The triumph of a class over the whole of

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64. *Id.* p. 440.
humanity. The triumph of predatory authority in the enforcement of our laws and the interpretation of our Constitution. Must it be so? Of course not. What must be done? Protest, complain, ring the bell, sound the alarm, and hope that we are successful before it is too late.

Therefore, since alternatives exist in litigation for the protection of the landowner in bona fide cases of governmental takings (the Fourteenth Amendment, the Sherman and Clayton Acts and Section 1983 of the Civil Rights Act), which are not only available but viable, we have a right to demand that our Constitution and the Fifth Amendment not be twisted and interpreted into bizarre shapes and forms. What the Court has done is to simply make excuses for a bygone era in the face of change, engaging in legal sophistry which will ultimately destroy respect for its authority. In our society even the Court cannot insulate itself from the people and the needs of reality. Justice is not merely a commodity, sold to a variety of litigants on an ad hoc basis. When the Court refuses to act in and for society the demands of justice drive these values into the streets. The demands of justice require the Court to exercise rational authority while allowing the law to serve the real, and not the manufactured needs of the people. Among those real needs are the protection of the public lands.

As far as a proper approach to judicial review of "takings" regulation is concerned, we ought not let Holmes rewrite the Constitution as he did in Pennsylvania Coal. If we follow the Brandeis dissent and accept the proposition that regulation is different in kind from a "taking" the full panoply of due process protection is left intact; however, the focus has been reset upon the purpose and effect of the regulation, and this, we must all agree, is where the emphasis really belongs.