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Articles

POLICE POWER, TAKINGS, AND DUE PROCESS

WILLIAM B. STOEBUCK*

I. THE PROBLEM

The "police" or "regulatory power of government" is its power to direct the activities of persons within its jurisdiction. The government usually exercises this power negatively¹ but this is not always the case.² The expansion of the government's role in an increasingly complex society occurs largely through greater use of the police power. Thus, the police power is a huge "growth industry" in America today. No wonder then that legal and other writers, observers of fashion in their spheres as much as Christian Dior is in his, are busy fitting together writings on this or that aspect of the police power.

Our particular interest is in those exercises of the police power that regulate the use of land—everything from abatement to zoning. With the heightened attention given urban planning and environmental matters, land-use regulations account for much if not most of the growth in the use of the police power. Whether viewed from the perspective of the planner, the sociologist, the historian—or the lawyer—the filling up of America's urban areas is a phenomenon of enormous import. Although the present article deals with legal theory, any application it receives will be in the area of land-use regulation.

A well known definition of police power says that it "aims directly to secure and promote the public welfare."³ This implies a limitation on all governmental powers, including the police power, that government shall only perform acts that advance the public interest to some degree.⁴ The

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¹ An example of the government exercising the police power negatively is the maximum speed limit for motor vehicles.

² The government exercises the police power positively when it enacts a minimum speed limit for motor vehicles.

³ E. FREUND, *THE POLICE POWER* 3 (1904).

⁴ To illustrate this implied limitation on the government's power with an absurd example, assume that a city council wanted to punish a citizen purely out of spite because the citizen opposed several of the councilmen in the recent election. It is *ultra vires* for the council to enact an oppressive land-use regulation against this citizen to punish him. It would also be improper for the council to use the city's compulsive power to attempt to enforce the regulation or to tax the inhabitants to pay for all this foolishness. It is equally *ultra vires* for the city government to use its eminent domain power to punish the citizen by condemning his land. One would expect a court to declare any of the attempted acts void.

American doctrine of substantial due process is a manifestation of this limitation.⁵ A court will declare regulatory measures void if they are found to be "arbitrary, capricious, or unreasonable," the word "unreasonable" being an obviously broader term than "arbitrary" or "capricious." The unreasonableness question breaks down into three parts:⁶ Does the regulation serve some public end or purpose? If so, are the means adopted reasonably necessary to attain that end? Are the means adopted unduly oppressive upon the persons regulated? This final inquiry entails a balancing of public needs and private interests. As with any legal doctrine that turns upon the word "reasonable," the substantive due process test is a very flexible one involving highly subjective evaluations of mixed questions of fact and law. Despite statements that the judiciary has a narrow role in determining whether a regulatory measure serves a public purpose,⁷ we must expect to find a great deal of seeming inconsistency on similar fact patterns among the substantive due process opinions.

In addition to the constitutional due process limitation, it is generally thought that a second limitation on the exercise of the police power with respect to land is that it shall not, without compensation, amount to an eminent domain "taking." This invokes the so-called eminent domain clause of the fifth amendment to the United States Constitution and the equivalent clause in the constitution of every state except North Carolina.⁸ These clauses provide that private property shall not be taken for public use without just compensation.

To determine when, if ever, a regulation on land use amounts to a "taking" is the sole aim of this article. More precisely, the aim is to work out a test or doctrine for police power takings that courts can use under existing conditions. That is, the aim is to derive a test from the underlying nature and theory of eminent domain, including its constitutional aspects, that is consistent with the application of eminent domain theory to "takings" that occur otherwise than by exercises of the police power. Another requirement is that the test for a "taking" shall not replicate or overlap the judicial test for when a regulatory measure lacks substantive

⁵ The genesis for the American doctrine of substantive due process is found in Lord Coke's decision in *Dr. Bonham's Case*, 77 Eng. Rep. 638 (C.P. 1610). In setting aside an act of Parliament, Lord Coke based the decision on the power he discovered in the common-law judges to declare a legislative act void if they found it "against common right and reason, or repugnant, or impossible to be performed." *Id.* at 652.

⁶ See *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

⁷ See *Berman v. Parker*, 348 U.S. 26, 32 (1954) ("the role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one").

⁸ As a matter of interest, article I, section 17, of the North Carolina Constitution contains the so-called "Magna Carta" formulation: "No person ought to be . . . deprived of his life, liberty or property but by the law of land." This phrase, essentially a due-process statement, has long been held judicially in North Carolina to guarantee compensation for eminent domain "takings." See Note, *Eminent Domain in North Carolina—A Case Study* 35 N.C.L. REV. 296, 299-300 (1957). In fact, North Carolina is most liberal in granting compensation. See especially *Gray v. City of High Point*, 203 N.C. 756, 166 S.E. 911, 915 (1932); *Hines v. City of Rocky Mount*, 162 N.C. 409, 78 S.E. 510, 511 (1913).

due process.

If the stated goal seems too narrow or modest, reflect on the fact that the considerable effort invested by courts and legal writers pursuing that goal so far have, to put it bluntly, come a cropper. In the most important recent decision on the question, the United States Supreme Court, in effect, gave up on trying to formulate such a test.⁹ The court confessed that it was "unable" to develop any "set formula" for a "taking" and then proceeded to consider the case under several different approaches seriatim.¹⁰ That is quite a concession considering that the subject is one of constitutional dimensions and that most of the leading cases have come from the Supreme Court.¹¹ Consider also that the not inconsiderable volume of recent writing on the subject by learned scholars in prestigious law journals has mostly carried on private debate.¹²

Because of the confused state of the law in this area, to make a useful contribution on the subject of police power "takings" one must start with basic eminent domain theory. To borrow a popular phrase, it is time to "go back to the basics." The text that follows will proceed through several steps. The first step examines and summarizes the main currents of judicial doctrine and then the more important recent scholarly writings. The article then identifies some of the deficiencies in these prior doctrines and theories. A doctrine or test will be proposed that is based upon fundamental eminent domain principles. After applying the proposal, by way of example, to several kinds of regulatory measures, the writer will, hopefully with a convincing air of confidence, explain why he feels the time is ripe for courts increasingly to move to a doctrine such as he proposes.

II. ATTEMPTS TO SOLVE THE PROBLEM

A. *Judicial Doctrines*

1. Valid Regulation Not A "Taking"

a. No exercise of police power is a "taking"

Quite a number of decisions hold police power regulations not to be takings on the ground, stated or implied, that no such regulation can amount to a taking. The origin of these decisions appears to be certain passages in Chief Justice Shaw's noted opinion in the 1851 Massachusetts

⁹ See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

¹⁰ *Id.* at 123-28.

¹¹ In truth, the collected decisions of the Supreme Court, and all other courts, leave the subject as disheveled as a ragpicker's coat.

¹² There is one piece of writing that shows promise of influencing court decisions. See Sax, *Takings and the Police Power*, 74 *YALE L. J.* 36 (1964) [hereinafter cited as Sax I]. See also *Maple Leaf Investors, Inc. v. State*, 88 Wash.2d 726, 565 P.2d 1162, 1166 (1977); *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381, 385 (1976). The author of that piece, however, has abandoned his own thesis. See Sax, *Takings, Private Property and Public Rights*, 81 *YALE L. J.* 149 (1971) [hereinafter cited as Sax II].

case of *Commonwealth v. Alger*.¹³ In these passages Shaw emphasized that the police power was "very different" from eminent domain.¹⁴ Thereafter, *Mugler v. Kansas*,¹⁵ decided by the Supreme Court in 1877, became the leading authority for the theory that regulatory measures are not takings.¹⁶ In *Mugler*, the Court reviewed a Kansas statute against the brewing of beer that forced the defendant to close his brewery. The Court held that, because this statute was a valid exercise of the police power,¹⁷ it did not amount to a taking. The decision stands for the general proposition that such regulations are not takings.¹⁸

Since the time of *Mugler v. Kansas*, a sizable group of state decisions apply the rule just stated. Some decisions explicitly adopt the rule.¹⁹ Numerous other decisions, though not specifically stating the doctrine and sometimes using qualifying language, are explainable only by the general rule that regulations are not takings.²⁰

¹³ 61 Mass. (7 Cush.) 53 (1851).

¹⁴ Other parts of the *Alger* decision form the basis for the "noxious-use" doctrine. See text accompanying notes 21-26 *infra*.

¹⁵ 123 U.S. 623 (1887).

¹⁶ *Id.* at 668. *Mugler* is the leading authority for the noxious-use doctrine. See text accompanying notes 21-26 *infra*.

¹⁷ The basis for the decision that the statute forbidding the brewing of beer was a valid exercise of police power is that the legislature determined that the brewing of beer was a public "evil."

¹⁸ The *Mugler* decision stands for the general rule that such regulations are not takings even though, as the court noted, the statute only prevented certain activities on the land. The statute did not prevent every use of the land nor did the state physically invade the land. These same generalizations, however, equally apply to other land-use regulations so that the broad reading of the *Mugler* decision is legitimate.

¹⁹ *City of St. Paul v. Chicago, St. P., M. & O. Ry.*, 413 F.2d 762 (8th Cir. 1969); *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962); *People v. Adco Advertising*, 35 Cal. App. 3d 507, 110 Cal. Rptr. 849 (1973); *Sherman-Reynolds, Inc., v. Mahin*, 47 Ill. 2d 323, 265 N.E.2d 640 (1970); *Jameson v. St. Tammany Parish Police Jury*, 225 So. 2d 720 (La. App. 1969) (dictum); *People v. Raub*, 9 Mich. App. 114, 155 N.W.2d 878 (1967); *Board of Supers. v. Abide Bros., Inc.*, 231 So. 2d 483 (Miss. 1970) (dictum); *Markham Advert. Co. v. State*, 73 Wash. 2d 405, 439 P.2d 248 (1968); *Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955). For example, in *Markham Advertising Co.*, the court stated that "[w]hen a court determines, as we have in this case, that the police power has been properly invoked, there is no basis for this contention [that a taking occurred]." 439 P.2d at 621.

²⁰ See *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Candlestick Props., Inc. v. San Francisco Bay C. & D. Comm'n*, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); *National Advertising Co. v. State Highway Dep't*, 230 Ga. 199, 195 S.E.2d 895 (1973); *State v. Diamond Motors*, 50 Haw. 33, 429 P.2d 825 (1967); *Cobin v. Pollution Control Bd.*, 16 Ill. App. 3d 958, 307 N.E.2d 191 (1974); *Sibson v. State*, 111 N.H. 305, 282 A.2d 664 (1971); *Mansfield & Swett, Inc. v. Town of West Orange*, 120 N.J.L. 145, 198 A. 225 (1938); *Whitmier & Ferris Co. v. State*, 20 N.Y.2d 413, 284 N.Y.S.2d 313, 230 N.E.2d 904 (1967); *Rochester Poster Advertising Co. v. Rochester*, 38 App. Div. 2d 679, 327 N.Y.S.2d 249 (1971); *New York State Water Resources Comm'n v. Liberman*, 37 App. Div. 2d 484, 326 N.Y.S.2d 284 (1971); *State v. Yard Birds, Inc.*, 9 Wash. App. 514, 513 P.2d 1030 (1973). See also *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958) (wartime government order closing all gold mines was not a taking); *Village of Willoughby Hills v. Corrigan*, 29 Ohio St. 2d 39, 278

A reminder is appropriate at this point. The regulated owner still has a legal remedy even if we apply a rule that an exercise of the police power is not a taking. This general rule only says that the governmental act is not an exercise of the *eminent domain* power. As an alternative theory, the court is still free to conclude that the regulation is void as lacking substantive due process.

b. Noxious-use test

The "noxious-use" test of taking traces back to *Commonwealth v. Alger*²¹ and *Mugler v. Kansas*.²² Though categorized as a separate taking doctrine,²³ such categorization implies a misconception of the principles of due process and eminent domain.²⁴ Stated succinctly, the noxious-use test says that a regulation on land use is not a taking if it is to control some "evil" or some "noxious" use the owner is making of the land.

Courts in recent years have chiefly stated the noxious-use test in cases involving required subdivision dedications. If a governmental agency, as a condition to approving a plat, requires the subdivider to dedicate land and perhaps also to install facilities for a road, a park, a school, or some such public area, the subdivider might think that the government is condemning his land without compensation. Under the reasoning in *Ayres v. City Council of Los Angeles*,²⁵ however, no taking occurs if the dedication is necessary to correct or meet some increased demand created by the subdivision, such as increased traffic. This demand is the "evil" created by the owner's subdividing his land. The *Ayres* formula is the usual judicial basis for justifying subdivision exactions though there is a great range of opinion as to when a new subdivision creates or causes needs that the subdivider should correct.²⁶

N.E.2d 658 (1972) (strange distinction between "takings" and "unconstitutional takings").

²¹ 61 Mass. (7 Cush.) 53 (1851). See text accompanying notes 13-14 *supra*.

²² 123 U.S. 623 (1887). See text accompanying notes 15-18 *supra*.

²³ Sax I, *supra* note 12, at 48-50.

²⁴ In fact, the noxious-use test merely focuses attention on one aspect of the substantive due process inquiry. See text accompanying notes 5-7 *supra*.

²⁵ 34 Cal. 2d 31, 207 P.2d 1 (1949).

²⁶ *E.g.*, *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971), *aff'g* 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663 (1970); *Aunt Hack Ridge Estates v. Planning Comm'n*, 160 Conn. 109, 273 A.2d 880 (1970); *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); *Schwing v. City of Baton Rouge*, 249 So.2d 304 (La. App. 1971); *Billings Props., Inc., v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964); *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673 (1966); *McKain v. Toledo City Plan Comm'n*, 26 Ohio App. 2d 171, 270 N.E.2d 370 (1971); *Crownhill Homes, Inc. v. City of San Antonio*, 433 S.W.2d 448 (Tex. Civ. App. 1968); *Jordan v. Village of Monomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965). *Cf.* *City of Corpus Christi v. Unitarian Church*, 436 S.W.2d 923 (Tex. Civ. App. 1968). See also *Selby Realty Co. v. City of San Buenaventura*, 104 Cal. Rptr. 866 (Cal. App. 1972), *rev'd in part and aff'd in part*, 109 Cal. Rptr. 799, 514 P.2d 111 (1973); *Brazer v. Borough of Mountainside*, 55 N.J. 456, 262 A.2d 857 (1970). Note that one occasionally sees brief references in other kinds of cases to a finding that the land-use regulation in question either does

The noxious-use test is a false test of whether a taking has occurred. It is in fact a test of whether the regulatory measure addresses a problem that the government might legitimately try to solve. That is, the test actually focuses on whether the regulatory measure was lacking in substantive due process. If the state has no legitimate privilege to correct the problem—either the problem did not exist or was not remediable by the state—then the state's act is void. In that event, there is no regulation left to amount to a taking. Thus, the noxious-use test is a perfectly tautologous restatement of the rule that no *valid* exercise of the police power is a taking. Since we can face a taking question only when the regulation is valid in the due process sense, the supposed noxious-use test simply is a restatement of the doctrine of the preceding subsection, that no exercise of the police power amounts to a taking.

2. The "Too Far" Test

At odds with the doctrines just discussed is the so-called "too far" test. This test traces back to Justice Holmes' majority opinion in *Pennsylvania Coal Co. v. Mahon*.²⁷ Pennsylvania's Kohler Act prohibited coal mining that caused the surface to subside. Because of this prohibition, the coal company, which owned only the severed strata of coal, was forbidden to mine in the vicinity of Mahon's house. This prevented the coal company from making any use of the underground layer it owned. This regulation, according to the Court, was a "taking" under the fifth amendment because it went "too far." The regulation went too far because it destroyed or nearly destroyed all the rights of use and enjoyment this owner had of its severed estate. As the Court acknowledged, whether a taking occurs is a matter of degree turning on the facts of each case. Justice Brandeis, dissenting, argued mainly for the doctrine of *Mugler v. Kansas*,²⁸ emphasizing that the Kohler Act was the prohibition of a noxious use.²⁹

Some very plain observations are in order concerning the doctrine of *Mahon*. Courts and commentators have not plainly made these observations, perhaps out of deference to the opinion's author, perhaps because of the popularity of the doctrine. First, whether a regulation becomes a taking is a matter of degree depending mainly upon the extent to which it restricts the owner's exercise of whatever property rights he has. Second,

or does not relate to a condition on an owner's land that poses a public threat. *See, e.g.*, *Gates Co. v. Housing Appeals Bd.*, 10 Ohio St. 2d 48, 225 N.E.2d 222 (1967); *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

²⁷ 260 U.S. 393 (1922). Precursors of *Pennsylvania Coal*, which show the development of Justice Holmes's thinking, are *Block v. Hirsh*, 256 U.S. 135 (1921), and *Rideout v. Knox*, 148 Mass. 368, 19 N.E. 390 (1889). Holmes used the phrase "too far" in *Block* but was not that explicit in *Rideout*. *Pennsylvania Coal*, it seems, was the culmination of years of thinking.

²⁸ 123 U.S. 623 (1887); *see text accompanying notes 15-18 supra*.

²⁹ *See* 260 U.S. at 417-18.

the measure of the degree of restriction is inevitably likely to be a percentage of diminution of money value of the owner's interest. Third, as long as one does not require a total prohibition on use—as long as some qualifier such as “very nearly destroyed” appears—the “too far” test is inescapably vague. Finally, *Mahon* is hopelessly at odds with *Mugler v. Kansas*. The United States Supreme Court placed in its constitutional grab-bag a doctrine contrary to *Mugler's*, though the Court to this day refuses to acknowledge this contradiction.³⁰ Without choosing between the two decisions, it must be said the decision in *Mahon* begins the era of extreme confusion about police power takings that still exists. We will have no peace about the matter until either *Mahon* or *Mugler* is overruled or, as happened in New York,³¹ consigned to limbo.

There are variant forms of what seem to be essentially the “too far” test. In some cases a court will decide the issue of whether a regulation is a taking with clear reference to *Mahon* or its test.³² Many other decisions state the test that a land-use regulation is a taking if it is “unreasonable” or some similar adjective.³³ Though “reasonable” is rhetorically different from “too far” and though courts are often vague both linguistically and analytically in these cases, they seem essentially to follow *Mahon*, especially when one considers the imprecision of any legal test couched in such terms.

Somewhat less imprecise but still a sub-species of the “too far” test is the doctrine of the famed case, *Arverne Bay Construction Co. v. Thatcher*.³⁴ In *Arverne Bay Construction*, the New York Court of Appeals labeled a zoning ordinance a taking because the only uses it permitted were not feasible on the particular land. Holmes, as evidenced in *Mahon*, obviously would have agreed. A taking occurs if the land-use regulation prevents all feasible uses on the land. The decisions, especially zoning deci-

³⁰ See *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

³¹ See *Fred F. French Inv. Co. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S. 2d 5, 350 N.E.2d 381 (1976), in which the court said *Mahon* was really a due process case and its language about a taking only a “metaphor.” But see *Spears v. Berle*, 48 N.Y.2d 254, 397 N.E.2d 1304 (1979) (reasoning seems to be a reversion to a *Mahon*-like taking analysis).

³² See, e.g., *Safer v. City of Jacksonville*, 237 So.2d 8 (Fla. App. 1970); *Bureau of Mines v. George's Creek Coal & Land Co.*, 272 Md. 143, 321 A.2d 748 (Ct. App. 1974); *Turnpike Realty Co. v. Town of Dedham*, 72 Mass. 1303, 284 N.E.2d 891 (1972), cert. denied, 409 U.S. 1108 (1973); *Trustees of Sailors' Snug Harbor v. Platt*, 53 Misc. 2d 933, 280 N.Y.S.2d 75 (S. Ct. 1967), remanded for further testimony, 294 A.D.2d 376, 288 N.Y.S.2d 314 (1968); *Grosso v. Board of Adjustment*, 137 N.J.L. 630, 61 A.2d 167 (1948).

³³ See, e.g., *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972) (semble); *City of Denver v. Denver Buick, Inc.*, 141 Colo. 121, 347 P.2d 919 (1959), overruled on other points, 500 P.2d 807 (1972) and 532 P.2d 720 (1975); *William Murray Builders v. City of Jacksonville*, 254 So.2d 364 (Fla. App. 1971); *LaSalle Nat'l Bank v. County of Cook*, 12 Ill. 2d 40, 145 N.E.2d 65 (1957); *In re Spring Valley Development*, 300 A.2d 736 (Me. 1973); *Multnomah County v. Howell*, 496 P.2d 235 (Ore. App. 1972); *Spiegle v. Borough of Beach Haven*, 116 N.J. Super. 148, 281 A.2d 377 (1971) (semble).

³⁴ 278 N.Y. 222, 15 N.E.2d 587 (1938).

sions,³⁵ that apply the *Arverne Bay* test are legion.³⁶ Some jurisdictions, most notably Maryland, have recently taken the next step and announced the rule that a land-use restriction will become a taking only when it does deprive the owner of all feasible uses of his land.³⁷ This may be a variant of the *Mahon* test, though it certainly straitens what Justice Holmes had in mind.

Quite a few decisions assert that a restriction on land use will become a taking if it diminishes the market value of land too much.³⁸ This too is a variant of *Mahon* that attempts to put a price tag on the meaning of "too far." Indeed, Holmes in *Mahon* seems to have been concerned largely with the coal company's loss of value. Some investigators think that, on average, compensation is given when loss of value reaches about two-thirds. Other writers are unable to find any such line.³⁹ Many decisions say that loss of value alone, which courts may denominate as "mere" loss of value, will not constitute a taking.⁴⁰ Some famous decisions denied compensation though regulations caused loss of land values in the range of 80 to 90 per cent.⁴¹ In any event, it means little to say courts "on average" award compensation at a certain level of loss. If loss of value is to have significance as a judicial test, a given appellate court must adopt

³⁵ The *Mahon* decision has an enormous following, especially among zoning cases.

³⁶ *E.g.*, *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); *Samp Mortar Lake Co. v. Town Plan & Zoning Comm'n*, 155 Conn. 310, 231 A.2d 649 (1967); *Corthouts v. Town of Newington*, 140 Conn. 284, 99 A.2d 112 (1953); *Tuggle v. Manning*, 224 Ga. 29, 159 S.E.2d 703 (1968); *Metropolitan Bd. of Zoning App. v. Gateway Corp.*, 256 Ind. 337, 268 N.E.2d 736 (1971); *Morris County Land Imp. Co. v. Parsippany-Troy Hills Tnp.*, 40 N.J. 539, 193 A.2d 232 (1963); *Kozesnik v. Montgomery Tnp.*, 24 N.J. 154, 131 A.2d 1 (1957); *In re Charles v. Diamond*, 42 App. Div. 232, 345 N.Y.S.2d 764 (1973); *Salamar Bldrs. Corp. v. Tuttle*, 29 N.Y.2d 221, 275 N.E.2d 585 (1971); *Stevens v. Town of Huntington*, 20 N.Y.2d 352, 283 N.Y.S.2d 16, 229 N.E.2d 591 (1967).

³⁷ *Wright v. City of Littleton*, 483 P.2d 953 (Colo. 1971); *Spaid v. Board of County Comm'rs*, 259 Md. 369, 269 A.2d 797 (1970); *Montgomery County v. Laughlin*, 255 Md. 724, 259 A.2d 293 (1969); *Norbeck Village Joint Venture v. Montgomery County Council*, 254 Md. 59, 254 A.2d 700 (1969); *Tauber v. Montgomery County Council*, 244 Md. 332, 223 A.2d 615 (1966); *Village House, Inc. v. Town of Loudon*, 114 N.H. 76, 314 A.2d 635 (1974); *Flanagan v. Town of Hollis*, 112 N.H. 222, 293 A.2d 328 (1972). *See also* *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (though reciting "too far" test, held swamp preservation ordinance did not go too far when it required an owner to leave swamp lands in their natural condition, *i.e.*, forbade all development; use of the land in its natural state is still some use).

³⁸ *E.g.*, *Arkansas State Highway Comm'n v. Turk's Auto Corp.*, 254 Ark. 67, 491 S.W.2d 387 (1973); *Dooley v. Town Plan & Zoning Comm'n*, 151 Conn. 304, 197 A.2d 770 (1964); *Westwood Forest Estates, Inc. v. Village of South Nyack*, 23 N.Y.2d 424, 244 N.E.2d 700 (1969).

³⁹ *See* F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 208-10 (1973).

⁴⁰ *E.g.*, *Arnold v. Prince George's County*, 270 Md. 285, 311 A.2d 223 (1973); *Bonds v. City of Webster Groves*, 432 S.W.2d 777 (Mo. App. 1968); *Oriental Boulevard Co. v. Heller*, 58 Misc. 2d 920, 297 N.Y.S.2d 431 (S. Ct. 1969). *See also* *Bowles v. Willingham*, 321 U.S. 503 (1944).

⁴¹ *E.g.*, *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

an exact percentage figure as a rule of law in its jurisdiction. There is no suggestion that any appellate court has adopted such a figure. It is therefore doubtful that the seeming quantification of the "too far" test makes it less vague.

3. Balancing As A Test

Some courts, in determining whether an exercise of the police power amounts to a taking, balance the urgency of public need for the regulation against the degree of loss to the regulated landowner.⁴² It is not clear, however, that there is an express balancing test in determining whether a regulatory measure amounts to a taking. Some legal scholars recognize that such a test exists.⁴³ Perhaps it is better to say there is a balancing "strain" running through some eminent domain opinions.

Balancing is a false taking test. It is simply a somewhat imprecise re-statement of *Lawton v. Steele's*⁴⁴ still classic three-part test of substantive due process. That test requires a finding that the interests of the public require such interference, that the means are reasonably necessary for the accomplishment of the purpose, and that the means are not unduly oppressive on the individuals.⁴⁵ *Mahon* focuses on the third part of this test by saying that a regulation may so oppress the individual that it amounts to a taking regardless of the fact that the regulation meets the first two parts of the test. The balancing test, however, appears substantially to restate the three parts of the *Lawton v. Steele* test and is just another way of saying that a regulation must meet substantive due process requirements.

Balancing is also too "dangerous" to function as a test for a police power taking. Balancing allows the government to destroy real property rights completely, even to appropriate land physically, provided the public necessity is urgent enough. It is contrary to our entire concept of eminent domain to say that urgent necessity will justify an uncompensated taking when a less pressing public purpose will not. Even when the government acquires land for military defense, surely a most urgent need,

⁴² E.g., *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972); *William Murray Builders, Inc. v. City of Jacksonville*, 254 So.2d 364 (Fla. App. 1971); *Trustees of Sailors' Snug Harbor v. Platt*, 53 Misc. 2d 933, 280 N.Y.S.2d 75 (S. Ct. 1967). Under the balancing inquiry, a court examines the regulation to determine whether the regulation is too oppressive on the regulated landowner given the public's need for the regulation. If the reviewing court finds the regulation to be too oppressive then it will constitute a taking. Presumably, dire public necessity will justify an extensive loss of use and enjoyment, or of value, to the regulated landowner. A slight public benefit is justification for only a slight loss to the landowner.

⁴³ *Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63 [hereinafter cited as *Dunham*]; *Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 SO. CAL. L. REV. 1, 37-41 (1970) [hereinafter cited as *Van Alstyne*].

⁴⁴ 152 U.S. 133 (1894).

⁴⁵ *Id.* at 137.

they must pay for it.⁴⁶ It is one thing to employ *Lawton v. Steele's* balancing test for the due process validity of a governmental act, but it is quite different and wholly inappropriate to use this inquiry as a test for an eminent domain taking. Physical appropriation without compensation would result whenever an imperative public need exists. That no court would reach this result returns us to our former point, that balancing is a false test.

4. False Taking Tests

There are at least two doctrines that are not properly a part of eminent domain that courts nevertheless often confuse with that concept. Though these doctrines are not strictly within our subject, they are dealt with here chiefly to eliminate them from further consideration.

a. Lack of public purpose

A few opinions contain language suggesting that a police power regulation becomes an exercise of eminent domain if it is lacking in a public purpose.⁴⁷ These statements, which often are only allusive and not decisive, confuse eminent domain with due process. The existence of a public purpose is really one of the elements in the test for due process.⁴⁸ The question of public purpose goes to the question of whether the governmental entity has the power to impose the particular regulation. A regulation is void if the answer to the due process question is negative, and one need not—cannot—then ask if the regulation is a taking. Should the answer to the due process question be affirmative, then one may go on to the taking issue. If public purpose is considered again at this stage, the taking issue becomes a replay of the due process questions. It follows, therefore, that public purpose *vel non* is not a test of whether there is a taking.

b. Emergency doctrine

There is an old doctrine in our law that allows public officials, in certain situations, to destroy improvements on privately owned land without paying compensation. We may call this the emergency doctrine. The ar-

⁴⁶ The emergency doctrine, which allows the razing of improvements on land to prevent the spread of a conflagration or the like, does not disprove the fact that the government must pay for condemned land even when there is an urgent public purpose. See text accompanying notes 49-54 *infra*.

⁴⁷ *E.g.*, *Harbor Farms, Inc. v. Nassau County Planning Comm'n*, 40 App. Div. 2d 517, 334 N.Y.S.2d 412 (1972); *Pure Oil Div. v. City of Brook Park*, 26 Ohio App. 2d 153, 269 N.E.2d 853 (1971); *Town of Glocester v. Olivo's Mobile Home Court*, 111 R.I. 120, 300 A.2d 465 (1973); *Board of Supervisors v. DeGross Enterprises*, 214 Va. 235, 198 S.E.2d 600 (1973).

⁴⁸ These statements, in effect, ask whether a regulation serves a public purpose and whether that purpose is one to which the promulgating governmental body may address itself. These questions fall under the three-part substantive due process test of *Lawton v. Steele*. See text accompanying notes 44-45 *supra*.

chetyal example is the power of the fire department to tear or burn down a private building in the path of a conflagration to form a firebreak. By extending this doctrine, the Supreme Court upheld the uncompensated destruction of Caltex's petroleum facilities during the Japanese invasion of the Philippine Islands.⁴⁹ A more frequent example is the power of governing authorities to order the razing of a dangerous building.⁵⁰ A court may also see the razing of such a building as the abatement of a public nuisance. Unlike the case of the unoffending house caught in the path of conflagration, the court may consider the structure's owner to be a wrongdoer. Either analysis seems to fit.⁵¹

Upon first examination it appears that the acts of destruction conducted by the government under the emergency doctrine are acts of eminent domain. Courts sometimes speak of the emergency power as an exception to the normal rule of compensation. This is nearly correct, but not quite. The power to raze houses in a conflagration was historically one of the long list of ancient prerogative powers of the English crown which, like most of the prerogatives, the crown could exercise without compensation. Most of the prerogatives have disappeared as a separate institution, and others are now a part of eminent domain.⁵² The emergency power, however, has survived not so much as an exception to the normal rule of compensation but as the survivor of an older institution.⁵³ Thus, when a government agency employs the emergency power it is not engaging in an act of eminent domain.⁵⁴

⁴⁹ See *United States v. Caltex, Inc.* 344 U.S. 149 (1952). For exhaustive reviews of the prerogative power—and a result, by a divided court, contrary to *Caltex*—see *Burmah Oil Co. v. Lord Advocate*, [1964] 2 All E.R. 348 (H.L. 1964).

⁵⁰ See *Urciolo v. Washington*, 305 A.2d 252 (D.C. App. 1973); *Ajamian v. Township of North Bergen*, 103 N.J. Super. 61, 246 A.2d 521 (1968); *Horton v. Gullede*, 277 N.C. 353, 177 S.E.2d 885, *cert. denied*, 398 U.S. 952 (1970).

⁵¹ The emergency doctrine, though not always clearly articulated, may help explain some confusing cases. See, e.g., *Miller v. Schoene*, 276 U.S. 272 (1928) (burning cedar trees to prevent cedar rust's killing apple trees); *Bowes v. City of Aberdeen*, 58 Wash. 535, 109 P. 369 (1910) (compulsory filling of marshy land). *But see Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (discussion of *Miller v. Schoene* as though the court did not decide on the emergency doctrine).

⁵² An example of a royal prerogative that is now a part of eminent domain is the power to build lighthouses or fortifications on private land.

⁵³ See Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 562-65 (1972) [hereinafter cited as Stoebuck, *Eminent Domain*]. Some courts recognize that the emergency doctrine is not an exception to the normal rule of compensation but is the survivor of an older institution. See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922) ("as much upon tradition as upon principle"); *Ajamian v. Township of North Bergen*, 103 N.J. Super. 61, 246 A.2d 521, *cert. denied*, 398 U.S. 952 (1968).

⁵⁴ It is impossible to categorize some cases in which courts decide whether a particular land-use regulation amounts to a taking. These decisions reach unsupported holdings that are conclusionary and lack a doctrinal or theoretical basis. Some of these decisions strike down the regulatory measure. See, e.g., *Shaffer v. City of Atlanta*, 223 Ga. 249, 154 S.E.2d 241, *aff'd* 223 Ga. 630, 157 S.E.2d 630 (1967); *Gordon v. City of Warren Planning & Urban Renewal Comm'n*, 29 Mich. App. 309, 185 N.W.2d 61 (1971), *aff'd* 388 Mich. 82, 199 N.W. 2d 465 (1972); *Central Advertising Co. v. City of Ann Arbor*, 42 Mich. App. 59, 201 N.W.2d

5. Throwing In The Sponge: "No Single Test"

In 1978, the Supreme Court, after 91 years of producing nearly all the leading police power taking decisions, essentially gave up. Viewing the facts of *Penn Central Transportation Co. v. City of New York*⁵⁵ as presenting a question of police power takings, the Supreme Court announced that there was no "set formula" to resolve the question. Rather, said the Court, different fact patterns require different approaches for solution. The Court, however, did not seek to find the approach best suited for the fact situation before it. Instead, the majority opinion focused on various lines of analysis that the Court had used in some of its famous decisions.⁵⁶ These decisions are not all in harmony and *Penn Central* presented an opportune occasion to resolve the conflicts. This is particularly true of the conflict between the *Mahon* and *Mugler* decisions.⁵⁷ What the Court did, however, was seemingly to treat the variant doctrinal approaches as *alternatives*. The Court concluded that under *Penn Central's* facts there was no taking under any of the alternatives.

There the matter rests. A dissenting opinion by Justice Rehnquist, joined by Chief Justice Burger and Justice Stevens, proposes what amounts to an attempt to form a taking doctrine that accommodates both *Mahon* and *Mugler*. A regulation that destroys property rights such as the airspace rights in *Penn Central* amounts to a taking except in two situations: when the regulation is necessary to prevent the owner's using the land in a way injurious to the public health, safety, or morals⁵⁸ or when the regulation covers a large area, as zoning does, so that a given owner gains a "reciprocity of advantage" by the regulation of his neigh-

365 (1972), *rev'd in part and aff'd in part*, 391 Mich. 533, 218 N.W.2d 27 (1974). Other decisions uphold the regulatory measure. *See, e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Central Bank & Trust Co. v. City of Miami Beach*, 392 F.2d 549 (5th Cir. 1968); *Naegle Outdoor Advertising Co. v. Village of Minnetouka*, 281 Minn. 492, 162 N.W.2d 206 (1968); *Golden v. Planning Bd. of Town of Ramapo*, 30 N.Y. 2d 359, 285 N.E.2d 291 (1972). Results alone, however, do not give us much aid in expounding a doctrine for police power takings.

⁵⁵ 438 U.S. 104 (1978). New York City designated Grand Central Station a "landmark" and denied its owner a permit to erect a building in excess of fifty stories on an arch above it. The city's Landmarks Preservation Law allowed the owner to transfer the development rights thereby lost to certain other sites, of which the owner owned several, thus permitting development that would otherwise be excess on those sites. The New York Court of Appeals, following its analysis in *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976), treated the legal question as one of substantive due process not one of eminent domain. *Penn Central Transp. Co. v. City of New York*, 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977), *aff'd* 438 U.S. 104 (1978). The Supreme Court, however, analyzed the issue as one of a regulatory taking. 438 U.S. at 131-33.

⁵⁶ The cases examined by the Supreme Court in *Penn Central* included *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958); *Miller v. Schoene*, 276 U.S. 272 (1928); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); and *Mugler v. Kansas*, 123 U.S. 623 (1887).

⁵⁷ *See* text accompanying note 30 *supra*.

⁵⁸ This exception has its basis in the *Mugler* decision.

bor.⁵⁹ Whatever the merits of this doctrine, it fails to accommodate *Mugler* and *Mahon*. Nevertheless, the formula in the dissenting opinion is at least more coherent than the majority's attempt to straddle all the old cases.

The Supreme Court's lengthy majority and dissenting opinions in *Penn Central* compound rather than disentangle the doctrinal imbroglia over when a taking occurs. To say, as the majority appears to, that a number of alternative theories exist is, if taken on its face, to create a situation of near anarchy. Landowners and their counsel not only would have to test their facts by a known doctrine, they would, to get to that point, have to determine which doctrine applied. It may be a case in which too much law is worse than not enough. Justice Rehnquist's dissent, which is not the law in any event, may present a clearer formula but it fails to resolve the conflict in the Court's decisions that has existed since *Mahon*. Until the Court resolves that conflict we are, in the final analysis, just waiting for the other shoe to drop.

7. Summary Of Judicial Doctrines

Having reviewed the judicial tests for a police power taking, we can now postulate a conclusion that may seem a bit of an anticlimax given the welter of doctrines discussed above. There are only two basic contending doctrines, one represented by *Mugler v. Kansas* and the other by *Pennsylvania Coal Co. v. Mahon*, that courts use in determining whether there is a police power taking.

Stated in their simplest, starkest form, *Mugler v. Kansas* and the numerous decisions following it stand for the proposition that no exercise of the police power is a taking; police power is one thing, eminent domain another.⁶⁰ On the other hand, *Pennsylvania Coal Co. v. Mahon* stands for the proposition that a police power regulation amounts to a taking if it goes "too far" in diminishing the regulated landowner's property rights. While this latter test is obviously different from *Mugler's* and will produce different results on some facts, it will not on all facts. The "too far" test reduces the taking question to a matter of degree and to a mixed question of fact and law, much like a test of reasonableness. It is not a logical opposite to *Mugler*⁶¹ but is different and in that sense inconsistent.⁶²

⁵⁹ This second exception was part of Holmes' reasoning in the *Mahon* decision.

⁶⁰ See text accompanying notes 13-20 *supra*.

⁶¹ The logical opposite of the *Mugler* test, which we do not see in practice, is that every exercise of the police power is a taking.

⁶² See text accompanying notes 27-41 *supra*. The *Mahon* test has some variants. One variant, seen in zoning decisions, is that a land-use regulation goes too far and amounts to a taking if it prevents all feasible uses. See *Arverne Bay Construction Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587 (1938). Another variant is that a land-use restriction becomes a taking if it too much diminishes the value of the regulated land. This test gives the appearance of quantifying *Mahon's* "too far" test, but the appearance is false because courts have

There are some other tests that courts refer to as "taking tests" which are palpably false for that purpose. The so-called noxious-use test, which holds that an exercise of the police power is not a taking if it serves to remedy some "noxious use" or "evil" on the regulated owner's land, is simply a statement of the test for substantive due process and is not a test for taking at all. This test, essentially a restatement of the *Mugler* test, merely says that a valid exercise of the police power is not a taking.⁶³ Similarly, the "balancing" test, which says that the occurrence of a taking turns on balancing the public need for regulation against the degree of restriction on the landowner, is nothing more than a restatement of the test for substantive due process.⁶⁴ Another similar false taking test is that a regulatory measure is a taking if it serves no valid public purpose. This is really only a fragment of the balancing test and is still a test for due process. Finally, courts sometimes confuse the "emergency doctrine" with eminent domain. The emergency doctrine gives the government the power to raze improvements on land to prevent a public catastrophe. This does not include an eminent domain issue at all because the governmental power involved is older than and separate from the power of eminent domain.

We are thus left with only two basic judicial tests. *Mugler* holds that no exercise of the police power is a taking. *Mahon* holds that an exercise of the police power is a taking if it goes too far. Both of these cases and the tests they represent come from the Supreme Court and both are still "good law." Yet, the two cases are inconsistent.

B. *Recent Scholarly Writings*

For the past twenty years a number of American legal scholars have sought to discover the touchstone, the leitmotiv, for defining a regulatory taking. In 1962 Professor Allison Dunham's article in the *Supreme Court Review* analyzed Supreme Court decisions on the subject.⁶⁵ Subsequent articles by other writers, viewing the subject broadly or in specific contexts, have been of a generally high quality. In approach they range from high-level exegesis, through policy oriented, to philosophical. Somewhat surprisingly, a careful examination will show that very little of this writing has had as its central focus the formation of a doctrine or test of police power taking that courts might apply without the enactment of new legislation. A review of those articles, however, is useful in fulfilling the ultimate purpose of this article which is to formulate a definitive doctrine or test of police power taking.

not placed firm dollar or percentage limits on diminution of value.

⁶³ See text accompanying note 60 *supra*.

⁶⁴ See text accompanying notes 44-45 *supra*.

⁶⁵ See Dunham, *supra* note 43.

1. Non-doctrinal Writings

In the 1962 article just mentioned, Professor Dunham demonstrated that the Supreme Court, author of most of the leading decisions on the subject, had been unable to formulate a consistent test for police power takings. Subsequent investigators are much indebted to him for thus directing their attention to the problem that excites their concern. They are further indebted to him for his conclusion, in which most of them share, that existing doctrines were producing results that were unfair to many owners of regulated land. Professor Dunham's particular objection was to judicial formulas that turned upon defining the concept of "property." He feared that "government," apparently referring to both the legislative and judicial branches, might destroy landowners' rights to compensation by manipulating this concept. Professor Dunham stated that compensation should be given for any loss of market value that resulted from government action to promote the public welfare. Market value, he felt, was a more objectively demonstrable concept and was not as manipulable as "property."⁶⁶ Because Professor Dunham doubted a court's ability to follow his or any consistent test of a taking, however, his final conclusion was that Congress and other legislative bodies should devise statutory tests. This conclusion also marks much of the subsequent writing on the subject. Thus, while Professor Dunham certainly expressed a theory and a test for police power takings, it is not a doctrinal statement as used here because he did not address the doctrine to the courts.

It is an inviting idea to equate the economic concept of wealth with the constitutional concept of property. Perhaps, strictly speaking, Professor Dunham would not redefine "property" to mean wealth; it is more precise to say he would have legislatures substitute wealth, measured by market value, for property. In this sense he would have legislatures be more liberal in allowing compensation than the language of the Constitution requires. Recent legislation does follow Professor Dunham's suggestions, for instance, by allowing compensation for such items as relocation expenses and business losses. There are, however, serious problems, both theoretical and practical, with a rule that allows compensation to every landowner who can prove that any governmental exercise of the police power causes a measurable decrease in the market value of the land.⁶⁷

Insofar as one might propose legislative adoption of the market value test, the objections are that it is enormously expensive and, moreover, leads to absurd results in many cases. Government can hardly do anything, from adjusting interest rates to closing military bases to zoning, that will not affect some landowners' market values. A good specific example is the location of a new highway on the other side of town that

⁶⁶ *Id.* at 80-81.

⁶⁷ No objection is made here to this recent legislation extending governmental largesse to landowners. Any objection made would likely be on the ground of public cost.

diverts traffic from an established motel on the old highway, drastically reducing the motel's value. Under traditional analysis, though a court might liberally allow compensation if the owner had his property right of access to the abutting road blocked, the court will deny compensation for what will be called a loss of nonproprietary traffic flow.⁶⁸ Under a system that allows compensation for loss of value alone, such an owner, suffering a large and readily provable loss, would receive compensation for this loss of traffic flow. This owner is not an isolated case. He is representative of millions who suffer substantial value losses as an indirect result of government actions. It would be so intolerable in our society to award all such persons that legislative bodies would surely construct an intricate web of exceptions to the stated compensation principle. Is it even possible that the "delivery" of compensation under such a system would be similar to what the present property-based system would look like with a little legislative tinkering?

Professor Dunham does not propose that courts apply the market value concept without legislative action. To do so would require considerable judicial liberties with the constitutional mandate that the government award compensation for the taking of "property." When one keeps in mind that it is only this constitutional mandate that requires compensation, it is evident that the word "property" imposes a kind of outer limit on the judicial award of compensation in the absence of legislation that is more generous. Indeed, the existence of this constitutional mandate makes certain kinds of eminent domain cases, police power cases above all, a fascinating laboratory in which to explore the concept of "property." Assuming a court would not feel free to ignore the constitutional language, to reach Professor Dunham's suggested goal it would have to make the concept of property coincide with the economic concept of wealth. Besides creating problems of the sort described in the preceding paragraph, this would cause serious dislocations in the judicial process. How could a court justify such a large departure from normal property concepts? Would there be one concept of property for eminent domain purposes and another for other branches of law? These are only examples of problems that would have broad repercussions.

This leads to another concern that Professor Dunham seems to have in mind. He appears to fear that courts will manipulate the definition of "property." Such concern loses sight of what "property" is. "Property" is the product of 800 years of judicial manipulation. "Property" is, literally, what the courts have made it. The concept of "property" is part of the common law. It is not mere epithetical jurisprudence for the courts to define and redefine the concept, constantly to mix new ingredients in the old bottle labeled "property." Our system contemplates that the ingredients will change to, among other things, accommodate the needs of a

⁶⁸ See Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEXAS L. REV. 733, 751 (1969).

changing society. All we require of our judges is that they proceed in a rational manner, retaining enough of the existing ingredients to give stability (this is the function of theoretical jurisprudence) and adding enough new ingredients to meet the needs of society (that is the function of policy-oriented jurisprudence). It is therefore no criticism to say that our courts manipulate the concept of property in the context of eminent domain. Considering the nature of the judicial process and the limits of the fifth amendment, it is far better that they engage in such manipulation rather than substituting "wealth" for "property."

Another article receiving a good deal of attention is Professor Frank I. Michelman's article on the ethical foundations of compensation systems.⁶⁹ His is certainly not any attempt to work out judicial doctrine; in fact, Professor Michelman doubts that his article is even an essay on constitutional law.⁷⁰ Rather, it is an attempt to discover philosophical principles that should govern a compensation system and to gauge how well the results of the existing American system measure up to those principles.

Professor Michelman proceeds by positing alternatively two ethical theories, one a Benthamite utilitarian model and the other a "fairness" model based upon John Rawls' theory of fairness.⁷¹ It is not clear why Professor Michelman chooses these two models or whether he would consider other models unsuitable for his purpose. However that may be, he describes what would be "efficient" compensation under the two models. To a large extent the practical results of the two systems coincide, but in some situations the results differ. Professor Michelman gives an overview of the applied principles of existing American compensation law, concentrating on the more difficult areas, particularly police power cases. His conclusion is that while courts generally decide consistently with his chosen ethical system (systems?), in some areas "the courts fall too far short of adequate performance to be left without major assistance from other quarters."⁷² The "other quarters" include at least legislatures and possibly administrative agencies. Professor Michelman does not spell out in any detail the changes he would make to existing rules, but it is clear that compensation would become available in more situations than at present.

Valuable as it has been for stimulating thought on underlying eminent domain questions, the Michelman article is not "working the same side of the street" as the present one. Whereas the present chosen aim is to formulate judicial doctrine, Professor Michelman regards the courts as incapable of applying his "fairness" standards.⁷³ Like Professor Dunham, he would turn to legislation to achieve the reforms he wishes.

⁶⁹ Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) [hereinafter cited as Michelman].

⁷⁰ *Id.* at 1166-67.

⁷¹ See Rawls, *Justice as Fairness*, 67 PHIL. REV. 164 (1958).

⁷² Michelman, *supra* note 69, at 1226.

⁷³ *Id.* at 1246-53.

Professor Arvo Van Alstyne's 1971 article, *Takings or Damaging by Police Power: The Search for Inverse Condemnation Criteria*,⁷⁴ is primarily a lengthy analytical exegesis of police power cases. The article covers, without sharp differentiation, both due process and taking decisions. It is a valuable presentation of the currents of American law in the areas mentioned. Professor Van Alstyne, however, does not attempt a new theory, doctrine, or mode of analysis. Rather, he concludes with general descriptions of legislative reforms he advocates in certain specified aspects of eminent domain law and procedure. If his descriptions provide a rather more explicit blueprint than do Professors Dunham's and Michelman's suggestions, the end product urged is similar. All propose legislative reform. Professor Van Alstyne's reforms also have a tendency to liberalize compensation awards. Again, however, his aim is not to advocate judicial doctrine.

Two scholars whose writings, for our purposes, deserve mention together are Professors John J. Costonis and Donald G. Hagman. Both have primarily concerned themselves with modes of compensation instead of refining a judicial test for a taking and both make proposals that apparently look to legislation for realization. Professor Costonis is, of course, chiefly known for his pioneering work in advocating the granting of transferable development rights as a form of compensation in place of money in certain cases in which land-use restrictions constitute takings.⁷⁵ In a general way, his thesis is that governments may avert having their regulations defeated as takings by voluntarily offering enough compensation so that the regulations do not go "too far." To relieve the burden this would impose on public treasuries, he would have compensation consist, at least in part, of governmental concessions of special, or excess, development privileges.⁷⁶ Though Professor Costonis is not concerned with defining the point at which regulation becomes a taking, he implicitly assumes that a regulatory taking occurs when it goes "too far," as a matter of degree, in reducing the value of the regulated land. He thus assumes a kind of *Mahon* test.⁷⁷ The important step for our purposes would be to have Professor Costonis determine the threshold point at which the devaluation passes over into a taking. The landowner could then receive compensation, in cash or in special development privileges, to bring his net worth back up to or above (apparently not too far above) this point.

Professor Hagman, in *Compensable Regulation: A Way of Dealing*

⁷⁴ See Van Alstyne, *supra* note 43.

⁷⁵ See Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L. J. 75 (1973).

⁷⁶ See Costonis, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021 (1975). In examining this article, one should also consider Professor Curtis J. Berger's observations in *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 798 (1976).

⁷⁷ See text accompanying notes 60-61 *supra*.

with *Wipeouts From Land Use Controls*?⁷⁸ operates from premises that are essentially similar to Professor Costonis' and also proposes somewhat similar solutions. He, like Costonis, impliedly assumes that land-use regulations pass over the "taking" threshold as a matter of degree.⁷⁹ He too advocates "regulation with compensation," the thesis again being that the government can give enough compensation to ease the regulation's harshness to the extent that the regulation will cease being a taking. At this juncture he would pay that amount of compensation in the traditional form of money; he does not advocate the granting of governmental developmental permission in lieu of money. Like Professor Costonis, however, he does provide a plan to ease the enormous burden all this compensation would require. Professor Hagman would recapture some of these expenditures by assessing those owners, other than those regulated, who have their land values artificially enhanced by the regulations.

The last two writers have limited points of contact with the present subject. The concern here is not with their central foci, modes of compensation. Since our purpose is to determine when a taking occurs, these two writers are important for their implied assumption that a taking is a matter of a regulation's going "too far" in diminishing the owner's land value. The theory proposed later in this paper is very much in opposition to this implied assumption.⁸⁰

2. Doctrinal Writings

As hard a time as the courts have determining when regulatory measures amount to takings, one would suppose a host of scholars massed like crusaders to battle false doctrine. Not so. This area of the law has only seen small skirmishing. The main contributor has been Professor Joseph L. Sax.

Professor Sax's first and most important article, *Takings and the Police Power*,⁸¹ (Sax I) came out in 1964. Professor Sax says the functions of government fall into two categories. The government performs in an "enterprise capacity" in which it "acquires resources for its account." The government also performs in an "arbitral capacity" in which it "governs" or "mediates the disputes of various citizens and groups."⁸² His rule of compensation thus follows:

The rule proposed here is that when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required. . . . But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to

⁷⁸ 54 U. DETROIT J. URB. L. 45 (1976).

⁷⁹ *Id.* at 106-11 ("harsh regulation" may amount to a taking).

⁸⁰ See subsection II. B. *infra*.

⁸¹ Sax I, *supra* note 12.

⁸² *Id.* at 62.

be viewed as a non-compensable exercise of the police power.⁸³

Thus, the compensation question turns not upon the intensity of government regulation, but upon which of two possible purposes that regulation serves.

Professor Sax then distinguishes between the two government purposes to show why compensation is appropriate for one purpose but not the other. His basic thesis is that the function of compensation, historically and at present, was and is to prevent arbitrary or tyrannical use of government power and not to prevent "value diminution." In other words, payment for the full value of what the government appropriates removes the sting from any punishment. It also will provide a disincentive to take if the government must pay.

Professor Sax's historical proofs are not convincing. In tracing the history of compensation he, correctly, cites Grotius, Vattel, and Pufendorf, the civil law writers who first discussed the jurisprudence of eminent domain. Incorrectly, however, he cites passages from their writings that deal with the so-called public-use limitation. In fact, they were concerned with the condemnee's economic position and specifically with the concept of just share—that a citizen should not have to bear a greater share of the cost of government than other citizens. John Locke, whose ideas underlie much of American constitutional principles of eminent domain, had the same concern. More to the point, the jurists and the Constitution's writers had in mind, as an end of itself, the protection of that form of "value" represented by "private property." Professor Sax is simply wrong saying this was not the case.⁸⁴

The underpinnings of Sax I are also weak. First, it is self-evidently illogical to say that compensation is to prevent tyranny and not "value diminution." Without "value diminution" is there any tyranny? Second, Professor Sax's aim was to show why the function of governmental resource enhancement requires compensation but the function of citizen regulation does not. He must convince us that the same act of "value diminution" will tyrannize, if not solely with the former category, at least significantly more with it than the latter.

It seems there are two aspects to the tyranny question. The first is whether a given deprivation tyrannizes or punishes an owner more if the motive for it is to augment government's resources than if the motive is to regulate among citizens. Motive is of little concern to the regulated owner; it matters little to the person run over by a truck whether the cause was brake failure or a broken tie rod.

The second aspect, apparently what Professor Sax has in mind, is whether, if there is no requirement of compensation, government has more temptation or motivation to regulate land to enrich its own re-

⁸³ *Id.* at 63.

⁸⁴ For a more elaborate explanation of the propositions in this paragraph, see Stoebuck, *Eminent Domain*, *supra* note 53, at 566-68, 583-87.

sources than to regulate, or adjust disputes, among citizens. If one were to assume that the government uses its assets to produce profits for division among officials who make regulatory decisions, *i.e.*, legislators, then this would be correct. In representative governments, however, the government does not use public assets in this manner to any significant degree.⁸⁵

Contrast two examples. In one, suppose the county is considering imposing airport approach zoning on owners around the county-owned airport, a step that under Sax I would trigger compensation because it would enhance the county's property in the airport. In the second example the county commission is considering environmental regulations, sponsored by numerous environmental pressure groups, that would impose as severe restrictions on land use as would the airport zoning. Considering the position of an elected official in American government, it is not clear that the owner is substantially more likely to have the regulation imposed on him in the first case than in the second. In any event, it is very doubtful that he is so much more likely to be tyrannized in the first example as to justify compensation in that case and not in the other.⁸⁶

The field once occupied by Sax I is now open for recapture because Professor Sax has abandoned his original thesis. He modestly stated in a 1971 article (Sax II) that he was modifying his views.⁸⁷ Sax II is, in fact, a wholly different theory bearing no resemblance in its formulation or results to Sax I. Though Professor Sax does not so bill it, Sax II is built upon a nuisance model or upon an extension of the law of nuisance.

To get around the inhibition that the compensation requirement supposedly imposes upon worthwhile regulations, Sax II proposes that we recognize a form of property labeled "public rights" which would serve as a counterbalance to the now-rampant private property rights. Government, presumably as trustee of these "public rights," could assert them against a private owner's real property rights. If the private owner's activities produce a "spillover" effect that interferes with these public property rights, then the government can regulate him without compensating him. This is because the regulation protects property of the public. The derivation from traditional nuisance doctrine is obvious. "Spillover" is an

⁸⁵ Legislative motivation to regulate private owners to augment governmental assets would decrease costs and increase the ease of government operations, which certainly would have some attraction to legislators. On the other hand legislators, in theory, would consider regulations designed to adjust conflicts among citizens from a detached, mental viewpoint. In a representative government, however, with legislators aligned with various individual citizens, interest groups, and constituencies, legislative detachment and neutrality seldom exist.

⁸⁶ Despite the criticism of the rule in Sax I, the doctrine formulated in the latter part of the present article operates similarly to that rule. The two doctrines, though stated in different verbal form, have meanings that are very close. These two doctrines of a police power taking would produce the same results in nearly, though perhaps not quite, all cases. The course of reasoning used to formulate the doctrine herein, however, bears no resemblance to that of Sax I.

⁸⁷ Sax II, *supra* note 12.

extension of the nuisance concept of "unreasonable interference" with another owner's property rights, with the "other owner" being the public. If the government regulates an owner who does not produce "spillover," then he gets compensation.

To what extent Sax II makes an original or useful contribution to resolution of the "taking question" will be left to the reader's judgment. One might ask, among other things, whether the analogy to nuisance law is much the same as courts drew long ago in early zoning decisions, notably *Village of Euclid v. Ambler Realty Co.*⁸⁸ Sax II has not had appreciable impact on the courts, though it may have influenced two or three writers.⁸⁹ This is ironic for Professor Sax because, just as he was abandoning it, there were definite signs that the doctrine of Sax I was catching on in the courts.⁹⁰

Messrs. Fred Bosselman, David Callies, and John Banta, authors of the book, *The Taking Issue*,⁹¹ give an exhaustive historical analysis of American eminent domain law as it relates to the police power; the book provides the best introduction to the subject for those who come to it for the first time. Then follow five chapters, each outlining a different "strategy" governmental lawyers might use in meeting the challenges of landowners who seek eminent domain compensation on account of land-use regulations. The authors do not necessarily endorse any of these "strategies;" they only identify and explain them. Chapter 12 outlines the strategy the authors refer to as a return to "strict construction" of the taking clause of the fifth amendment. This is simply the doctrine of *Mugler v. Kansas*⁹² which Messrs. Bosselman, Callies, and Banta state to be that "a regulation of the use of land, if reasonably related to a valid public purpose, can never constitute a taking."⁹³ As they frankly acknowledge, adoption of this principle would require overruling *Pennsylvania Coal Co. v. Mahon*.⁹⁴

These three authors are sometimes given credit for saying more than they intended. We are indebted to them, not for personally advocating or developing any theory, but for their contribution in presenting the *Mugler* doctrine and its antecedents and sequels in an uncommonly clear fashion. A particular contribution is that the authors frankly face up to the conflict between *Mugler* and *Mahon*.

⁸⁸ 272 U.S. 365 (1926).

⁸⁹ See Large, *This Land is Whose Land? Changing Concepts of Land as Property*, 1973 Wis. L. Rev. 1029 [hereinafter cited as Large]; Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEXAS L. REV. 201 (1974) [hereinafter cited as Plater].

⁹⁰ See especially *Fred F. French Inv. Co. v. City of New York*, 39 N.Y. 2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976); *Maple Leaf Inv. v. State*, 88 Wash. 2d 726, 565 P.2d 1162 (1977).

⁹¹ U.S. Government Printing Office, 1973.

⁹² See text accompanying notes 15-16 *supra*.

⁹³ F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 236 (1973).

⁹⁴ *Id.* at 238; see text accompanying notes 27-31 *supra*.

Except for some articles that deal with specialized problems,⁹⁵ we have now reviewed the legal literature that attempts to come to grips with the problem of police power takings. The writings by Professors Dunham, Michelman, Van Alstyne, Costonis, and Hagman do not attempt to formulate judicial doctrine; in general, they advocate legislation. The book by Messrs. Bosselman, Callies, and Banta, valuable as it is in sharpening our understanding of existing doctrines and their uses, does not advocate a particular doctrine or formulate a new one. Only Professor Sax attempts to formulate a doctrine. That formulation has been influential in a few judicial decisions. Professor Sax, however, has repudiated this earlier doctrine. His new formulation, confusing and appearing to be only an adaptation of ancient nuisance concepts in a new linguistic guise, has had little impact. Can it not be said that nearly twenty years of scholarly concern with police power takings has netted little help for the courts?

C. *Deficiencies of Existing Theories*

The two leading doctrines in the courts, that of *Mugler v. Kansas* and that of *Pennsylvania Coal Co. v. Mahon*, are poles apart and evidence a judicial impasse on the formulation of a taking doctrine. The Supreme Court has been unwilling to abandon either pole or, if possible, to formulate a doctrine to bridge the gap between the two decisions. Even though the Supreme Court's announced current position is that different fact patterns require the application of different formulas,⁹⁶ in actuality these formulas are only variants of *Mugler* or *Mahon*. Little wonder, then, that the courts are confused.

Scholarly commentators have also had little beneficial impact on the courts. Most writers suggest legislation as the way to cut the knot. It is easier to conclude with a suggestion of legislation that will wipe the slate clean than it is to try to persuade courts to change their doctrines, a glacially slow process even if successful. Legislation, however, is not occurring in the area of police power takings. The legislative reform that has taken place, though welcome, deals with liberalizing compensation for displacement costs, business losses, attorney's fees, and the like. In the meantime, the courts continue to struggle in the police power cases, left to their own doctrines to deal with a rising number of cases of zoning and environmental regulations. The need for rational, workable, uniform judge-made doctrine is not going away. It is more acute now than it was fifteen or twenty years ago. At least until we reach the nirvana of omniscient and universal legislation, we need doctrinal reform. A closer examination of the deficiencies of the existing doctrines is necessary before un-

⁹⁵ See Large, *supra* note 89 (floodplain and swampland regulations); Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFFALO L. REV. 77 (1974) (transferable development rights); Plater, *supra* note 89 (floodplain regulations).

⁹⁶ Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

dertaking that doctrinal reform.

1. Failure To Work Within Constitutional Principles

Eminent domain, not as it might exist in some imaginary state or as it exists as part of a general theory of government but as it actually exists in America, is a constitutional subject. It is possible, even likely, that our courts would allow compensation in the absence of constitutional requirements. There are some famous examples of this.⁹⁷ Nevertheless, the United States Constitution (binding on the states through the fourteenth amendment) and the constitutions of every state except North Carolina contain a clause defining when governmental entities must give compensation. These clauses are self-enacting; the courts must award compensation in the situations they describe even in the absence of further legislation. Certainly legislative bodies are free to adopt legislation allowing compensation in categories in addition to those constitutionally required.⁹⁸ In the absence of liberalizing legislation, courts, except within the bounds of constitutional interpretation, are not free to grant compensation in categories beyond those their relevant constitutions require. Courts cannot legislate. It follows that any attempt to formulate a judicial test of compensation for police power takings is, if it is to be useful to our courts, essentially an exercise in constitutional interpretation.

A serious failing with much of the recent writing on the constitutional subject of police power takings is that it ignores this constitutional perspective. Any doctrine that will be useful to the courts in this area must come to grips with the constitutional concepts of "property" and "taking." That is so because the question is always whether a taking occurs; the crucial question is not the so-called "public use" issue or how much compensation is due. If "property" is "taken," then an act of eminent domain occurs. An analysis that will be helpful to the courts must try to unlock the mysteries of "property" and "taking" in the context of land-use regulations. Moreover, the analysis must, for the courts to use it, be an application of accepted eminent domain principles. Of course the law changes and grows; adaptability is the genius of the common law. But the process is erosion, not earthquake; one can safely put a little new wine in old bottles if it is mixed sparingly with old. To the large extent the writings fail to build upon the constitutional concepts of property and taking they are not useful to the courts.

⁹⁷ See e.g., *Hines v. City of Rocky Mount*, 162 N.C. 409, 78 S.E. 510 (1913); *Gardner v. Trustees of Village of Newburgh*, 2 Johns. Ch. 162 (N.Y. 1816); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 Wis. L. REV. 67 (1931).

⁹⁸ Legislatures, of course, cannot decrease the categories that constitutionally require compensation.

2. Failure To Make Theory Consistent With Other Areas Of Eminent Domain

Too much writing speaks of police power takings in hushed tones. These writings treat the subject as if it cannot be a part of the general law of eminent domain. Instead, the emphasis should be on trying to see how to adapt general principles of eminent domain to police power fact patterns. Special study should be made of some fact patterns that are closest to those in which land-use regulations may cause takings. The reference here is to that large group of takings known as "nontrespasory takings," such non-physical invasions of private property as deprivations of street access and condemnations by nuisance. It is easier to draw parallels between the impact of such invasions and police power restrictions than between police power acts and physical, or appropriative, takings. Previous case law and writings do not use the suggested parallels to any extent. This helps explain the general lack of connection between police power takings and the larger subject of eminent domain and its principles. This article freely draws these parallels.

3. Failure To Give Proper Place To Due Process

Confusion over the proper role of substantive due process and over the relationship between due process and takings is a pervasive problem in judicial decisions and in scholarly writing. This confusion appears in several ways, the most frequent of which is what may be called "blending." Many decisions strike down land-use regulations on the stated ground that they are "arbitrary, unreasonable, confiscatory, and void" or some similar phrase.⁹⁹ Analysis of these words shows that "arbitrary" refers to a governmental act that lacks due process and is thus "void." "Confiscatory" is, of course, a code word for "taking." "Unreasonable" refers to acts that lack due process. Courts sometimes also use "unreasonable" as a test of a police power taking. The best that can be said of decisions that blend due process and eminent domain concepts is that they do not carefully analyze the words; it is not reasoning but a substitute for reasoning—little more than surplusage. If this is the best that can be said, it is also the worst; a decision ostensibly based on such vacuous language is scarcely better than an arbitrary conclusion.

There is a second way, less obvious but far more consequential than that just discussed, in which courts, joined by some legal writers, confuse police power takings with due process. The "too far" test of a regulatory taking, originating in *Pennsylvania Coal Co. v. Mahon*,¹⁰⁰ is a widely used, if not the predominant, test. Variations of the *Mahon* test are "un-

⁹⁹ See, e.g., *Corthouts v. Town of Newington*, 140 Conn. 284, 99 A.2d 112 (1953); *LaSalle Nat'l Bank v. County of Cook*, 12 Ill. 2d 40, 145 N.E.2d 65 (1957); *Kozesnik v. Montgomery Township*, 24 N.J. 154, 131 A.2d 1 (1957); *Stevens v. Town of Huntington*, 20 N.Y. 2d 352, 283 N.Y.S.2d 16, 229 N.E.2d 591 (1967).

¹⁰⁰ 260 U.S. 393 (1922); see text accompanying notes 27-31 *supra*.

reasonableness" and diminution in market value.¹⁰¹ Any such test restates, and is included within, the classic test for substantive due process as formulated in *Lawton v. Steele*.¹⁰² The third part of *Lawton's* test was that a regulation should not be "unduly oppressive upon individuals." If the regulation fails to pass this part of the test, as well as either of the other two parts, it is void for lack of due process.

Suppose a court is considering a regulation on land use. If the court follows an orderly and logical development of the case it will first determine whether the regulation is void on due process grounds before entering upon an eminent domain issue. This order of proceeding is necessary because if the regulatory measure is found void it will be unnecessary, indeed logically impossible, to consider whether it amounts to a taking. When the court passes upon the due process issue it will have to determine whether the measure is "unduly oppressive" to the regulated landowner. If the regulation is held to afford due process, the court will move on to the taking question, assuming the landowner raises it, which he nearly always will do. Under *Mahon's* test or its variants, the court will then ask if the same measure goes "too far" or is "unreasonable" in its restrictions on land use. Perhaps a metaphysician might try to distinguish among "unduly oppressive," "too far," and "unreasonable," but it is fatuous to suppose a court could formulate distinctions that would work in resolving actual cases. In fact, it does not appear that any court has even identified this problem. This probably accounts for those opinions, already described, where courts speak of regulations being "arbitrary, unreasonable, confiscatory, and void."

A few courts and some scholars make mention of a "balancing" test for a taking.¹⁰³ The test balances the public need for a police power regulation against the degree of loss it causes the regulated landowner to determine if it constitutes a taking. As the previous discussion indicates, this test overlaps *Lawton v. Steele* almost completely, even more so than does the *Mahon* test. It is not necessary to labor the point but only to observe that the problem with the *Mahon* test is more acute with the balancing test.

4. Lessons To Be Observed

By examining the deficiencies in the existing police power taking tests we can identify some of the ingredients a sound judicial theory should include: (1) there must be a resolution of the impasse between *Mugler v. Kansas* and *Pennsylvania Coal Co. v. Mahon*; (2) the theory must derive from—must essentially be an interpretation of—existing constitutional eminent domain clauses; (3) any doctrine advanced must be an applica-

¹⁰¹ See text accompanying notes 27-41 *supra*.

¹⁰² 152 U.S. 133, 137 (1894).

¹⁰³ See text accompanying notes 42-45 *supra*.

tion of principles applied in eminent domain law generally,¹⁰⁴ (4) the test of a police power taking must not replicate the test for a denial of substantive due process.

It goes without saying that a proposed doctrine must also be internally consistent and logical. It must not produce results for the public or for regulated landowners that are palpably unfair or extreme. Most of all, the doctrine must be workable in the sense that, once stated, actual courts in actual cases can apply it to produce consistent and predictable results. With these goals in contemplation we turn now to our ultimate purpose which is to formulate a judicial test for determining when an exercise of the police power amounts to an eminent domain taking.

III. A JUDICIAL TEST FOR POLICE POWER TAKINGS

A. *The Constitutional Elements*

In the present state of American jurisprudence eminent domain is a constitutional subject. It is essentially an exercise in constitutional interpretation. Our chosen task happens to be to determine when a "taking" of "property" occurs by reason of a police power regulation that inhibits a landowner's use of his land. This is not unrelated, as some seem to assume, to the larger or general question of when other governmental activity causes a taking. There is a relationship, for instance, among the appropriation of land for a road, the unreasonable diminution of an abutting owner's street access, and a taking by a police power measure. More to the point, since the eminent domain issues in all these cases relate to one constitutional clause, there must be a definition or test of a taking that fits all the cases. It thus becomes necessary to explore the controlling elements at large. These elements are primarily the concepts of "taking" and "property" with the question of what a taking is being the more crucial and difficult. The ensuing discussion will emphasize these two concepts. Also, an examination of the "public use" language is appropriate because it may have some bearing on the taking question.

1. A "Taking"

The constitutional concepts of "taking" and "property" are intertwined. To discuss one sometimes requires the making of assumptions about the nature of the other. In fact one of the persistent problems that complicates most analysis of certain difficult eminent domain cases is the failure of judges and legal writers to separate the two concepts. Rigorous separation is necessary for analysis, but to some extent the discussion of "takings" will have to anticipate the discussion of "property" that will come in the next section.

The key to understanding the nature of a taking—and, candidly, the

¹⁰⁴ Reference to categories of nontrespasory takings related to police power takings is particularly useful.

linchpin to the doctrine presently propounded—is the principle that an exercise of eminent domain always involves a transfer of property. More to the point, this transfer is from a landowner to an entity that has the governmental power of eminent domain. Proof, more properly “demonstration,” of this principle comes from an analysis of the way the American system of eminent domain functions. Moreover, this transfer principle has its basis in the constitutional language of a “taking.”

Takings as transfers are, like many eminent domain principles, most conspicuous in connection with physical, or appropriative, takings. If the state condemns land for a road, public building, or some other physical use, the court decree in the condemnation action operates to transfer an interest in land from the owner to the condemnor. In fact, a perfectly equivalent result occurs if the parties settle the action by the owner's giving and the condemnor's accepting a deed. Settlement in this fashion is routine, of course, and no one supposes the condemnor acquires anything more or less or different by the deed than by letting the action go to a decree. This is easy to see when the governmental entity acquires a possessory interest, which usually means the fee simple estate. Nor do we have any difficulty seeing the transfer when the interest acquired is an easement for a street, road, utility line, or the like.

Things become a bit more complex when the act of eminent domain occurs in the form of what one should call a “nontrespasory taking,” euphemistically sometimes styled a taking without a touching. Reference to this type of taking is often by the term of “inverse condemnation,”¹⁰⁵ but that misplaces the emphasis for our purposes. This simply means the parties are reversed from the usual order, with the landowner instead of the governmental entity appearing as plaintiff. It happens statistically that the vast majority of nontrespasory taking cases, including the police power cases, are of the inverse sort. Governmental entities usually do not commence nontrespasory taking actions, because they usually do not plan for their nontrespasory acts to give rise to eminent domain compensation. No matter what the order of the parties, the issue remains whether the governmental action amounts to a taking.¹⁰⁶

The most common example of a nontrespasory taking¹⁰⁷ may occur when a governmental entity deprives a landowner who abuts on a land-service street or road of all or part of his access to that public way. This governmental act operates to create a transfer of a property interest with the owner the transferor and the government the transferee. The abutting owner had an easement of access from his land onto the public way. This

¹⁰⁵ E.g., Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 So. CAL. L. REV. 1 (1972).

¹⁰⁶ There may be some contexts in which condemnation and inverse condemnation actions are not the same but these do not bear on our present inquiry. See *United States v. Clark*, — U.S. —, 100 S. Ct. 1127 (1980).

¹⁰⁷ There is no need to attempt to make a complete listing of the ways in which nontrespasory takings may occur. Two or three examples are sufficient.

was an appurtenant easement, with his land being the dominant tenement and the state's interest in the street being the servient tenement. There is no novelty with this even if the state had only an easement for the street because it is quite possible for one to have an easement upon an easement as well as upon a possessory estate. When the government partly or wholly destroys the owner's easement of access the owner is in effect compelled to give the government a whole or partial release of the easement. The landowner's property rights in his land, of which the easement was part, are diminished and the government's property interest in the public way is correspondingly increased. There has thus been a transfer of a property interest. The same result occurs if the owner gives the governmental entity a deed of release.¹⁰⁸

As a second example consider what happens when a court awards a landowner eminent domain compensation when governmental activity denies him the benefits of a restrictive covenant. To visualize a typical fact pattern assume that A, owner of the benefitted parcel, has a right that B, owner of the burdened parcel, shall improve his land with nothing but a single-family dwelling. A governmental entity acquires title to B's parcel and constructs an office building, a clear violation of the restriction, which we assume to be capable of running with B's title. Had a private owner attempted or constructed the office building, A might have obtained damages or enjoined construction. Since the state is the actor, A's injunction action will not lie; at least there appears to be no decision allowing such an injunction. In practice A will bring an action on the theory that the government is engaging in an act of eminent domain by, in effect, extinguishing his restriction on B's land. Some jurisdictions refuse to allow compensation in such a case with the usual ground being that A has lost no "property" right. The majority, and better, position is that A's rights against B's ownership are property rights, often styled a "negative easement," the forced extinguishment of which entitles A to compensation. A closer analysis will show that the intervention of the governmental entity diminishes A's property rights in his land because he no longer possesses the right that the owner of B's land will build nothing except a single-family dwelling. There is an increase in the state's quantum of property rights in B's land by the lifting of this burden. The presence of the governmental entity forces A to give the governmental entity a release of the restriction with the same effect as if A gave a deed of release. There is thus a compulsory transfer, the essence of an act of eminent domain.¹⁰⁹

A third and final example of the transfer principle in operation comes from the field known as condemnation by nuisance. *Thornburg v. Port of*

¹⁰⁸ See Stoebuck, *The Property Right of Access Versus The Power of Eminent Domain*, 47 TEX. L. REV. 733 (1969).

¹⁰⁹ For details of and support for the propositions contained in this paragraph, see Stoebuck, *Condemnation of Rights the Condemnee Holds in Lands of Another*, 56 IOWA L. REV. 293, 301-10 (1970).

Portland,¹¹⁰ the leading case, is useful in focusing discussion. Aircraft landing at and taking off from a large public airport passed at low altitudes near, but not directly over, the plaintiffs' land. This disturbance to the plaintiffs' enjoyment of their land amounted to a nuisance as defined in the law of torts. According to the Supreme Court of Oregon, this amounted to an eminent domain taking.

Upon analysis it is clear that the disturbance caused the plaintiffs to lose property rights and the governmental entity to gain rights. There was thus a transfer. The law of nuisance gives landowners the right to be free from nuisance committed by other owners. These rights are property interests augmenting the landowner's quantum of rights in land. Of course a landowner might surrender his right to be free from nuisance by granting another owner a privilege to commit some acts that otherwise would be an actionable nuisance. This surrender might be by an instrument in deed form. In that event it is accurate to say the grantor gives up property rights and the grantee correspondingly gains rights for his land, a transfer thus occurs between them. This is in effect what happened when the Port of Portland compelled the Thornburgs to submit to the nuisance-type interferences. The Thornburgs lost rights they formerly had, and the airport correspondingly gained.¹¹¹

The three examples outlined above were chosen for two reasons. First, they are probably the most difficult of all the categories of nontrespassory takings in the sense that they require the most difficult and sophisticated analysis to discover the property interests involved and to see transfers at work. Second, these examples appear to be factually the closest to those fact patterns that may produce takings by exercises of the police power. In fact, the loss of a street access, if caused by a traffic control regulation, is actually an example of a police power taking.

To be more exact, the difficulty in analysis seems to lie in the nature of the property interests involved. In all the examples, and also in the case of police power regulations on land use, the governmental acts that may give rise to a taking are nontrespassory. Of course Anglo-American lawyers know that "property" consists, not of physical things, but of legal rights concerning things. We all know that "property" is a construct, a thing of the mind and not of the earth. Yet, whether from some traces on our minds antedating our legal studies or from the popular use of the word "property" to denote physical things, we find it easier to think of property when a problem focuses attention on the physical aspect of property. In the eminent domain setting, it is easier to see the property interests affected when government physically invades private land than when it does not. If this explains the essential difficulty in analyzing the

¹¹⁰ 233 Ore. 178, 376 P.2d 100 (1962). See also *Thornburg v. Port of Portland*, 244 Ore. 69, 415 P.2d 750 (1966).

¹¹¹ For details of and support for the matters contained in this paragraph, see Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 *DICK. L. REV.* 207 (1967) [hereinafter cited as Stoebuck, *Condemnation*].

various kinds of nontrespassory taking cases, it also explains why the three examples given above bear a close resemblance to the police power cases: all involve nontrespassory takings. More than a mere resemblance, all these classes of cases share the same core quality, as brothers and sisters share the same blood.

An eminent domain taking should occur in essentially the same way in all these classes of cases. In all of them, the taking should have the same aspects, including of course the aspect that a transfer must occur. Our analysis of the three categories of nontrespassory cases then leads to this conclusion: for a police power taking to occur, there must be a transfer of property interests from a landowner to an entity having the power of eminent domain.

It is possible to reach the same conclusion by another line of analysis. As emphasized previously, American eminent domain law is a constitutional subject and the process of constitutional interpretation gives us its leading principles. We are now dealing with the word "taken" in a constitutional phrase that typically reads, "private property shall not be taken for public use without just compensation." *Webster's Third New International Dictionary*¹¹² devotes over a full page of small print to the verb "take." In the word's rich and varied meanings, it strongly suggests the getting into one's possession, especially when used in the transitive form. The word does not suggest merely the destruction or putting away of the thing that is the object of the verb; it suggests a transfer of the object into the actor's possession, power, or control.

This exercise in what is sometimes referred to as epithetical jurisprudence is concededly not in vogue among some legal scholars. However, when one is dealing with statutory or constitutional provisions, linguistic interpretation is the beginning point for further analysis. That is the most appropriate occasion for careful definitional analysis. In this case the normal meaning of the word "take" includes the notion of transfer; it is not an unusual or strained meaning. Certainly the constitutional use of the word supports strongly the conclusion previously reached that for "property" to be "taken" there must be a transfer from condemnee to condemnor.

A further line of inquiry is helpful in probing the meaning of "taken." This inquiry, unorthodox and tentative, is put forward in the spirit of, "What do you think about this?" The constitutional language quoted a few lines back says that "private property shall not be taken for public use without just compensation." The question usually raised is whether "public use" imposes a constitutional limitation on those purposes for which government can exercise the eminent domain power. At one end of the spectrum, represented by perhaps a handful of decisions, tending to be old ones, is the rule that government can take only if the land is physically appropriated by the state and put to some physical use for the pub-

¹¹² WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2329-31 (1971).

lic. This requirement would of course greatly restrain use of the power; it would place a much greater restriction on eminent domain than on other powers of government. At the other end of the spectrum is the notion of *Berman v. Parker*¹¹³ that "public use" means only that there must be some public purpose, the same as there must be to justify any governmental acts. *Berman's* view, likely pretty close to the prevailing view today, would of course place no special restraints on the eminent domain power. Note also that it would denude the words "public use" of specific meaning, making them surplusage.¹¹⁴

The question in the above paragraph assumes that one should read the constitutional language as "private property shall not be taken *except* for public use." Now, consider whether the words "public use" do not limit exercise of the power but modify and describe "taken." In other words, if "taken" implies a transfer from landowner to government, is it possible that "public use" reinforces the idea that the transfer of "property" must be to a governmental entity as trustee for the public? Can one read the words to mean "compensation need be paid only when a taking is for public use?" By implication this reading would allow that some takings are for private use and some for governmental use but that there is a requirement of compensation only for the latter. Of course, "public use" would have meaning broader than physical appropriation or occupation; it would include the principle that government may acquire private property interests without possession.

Frankly, it is doubtful that the Constitution's writers had in mind nontrespassory takings when they drafted early eminent domain clauses. Scant historical records available tell very little about what they actually said or thought about these clauses.¹¹⁵ It seems unlikely, however, that they had the problem of nontrespassory takings called to their attention since cases involving that problem did not come along until the 19th century. Therefore, justification for the interpretation suggested above would have to be in light of subsequent developments that could not have been cognizable originally. This reading would do less violence to the syntax of the constitutional clause than would the reading assumed in traditional discussions of the "public use" phrase when, as noted above, *Berman v. Parker* has largely destroyed any meaning. To the extent one finds the suggested reading permitted and the arguments for it persuasive, the words "public use" support the conclusion that a taking may occur only when there is a transfer of property interests from a private owner to a governmental entity.

Let us summarize the discussion of the nature of a "taking." We saw first that a transfer of property interests from owner to government al-

¹¹³ 348 U.S. 26 (1954).

¹¹⁴ For further discussion of the "public use" question and reference to materials on it, see Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 588-89 (1972) [hereinafter cited as Stoebuck, *Theory*].

¹¹⁵ *Id.* at 591-95.

ways occurs in both trespassory takings and, more significantly for the present inquiry, in those classes of nontrespassory takings most like police power takings. Second, the constitutional word "taken" includes within its accepted meaning the notion that a thing is taken away from one person and taken by the actor. Third, though the reading is tentative and the argument not as strong as the two preceding, it is plausible that the phrase "public use" may imply that a taking includes a transfer. That conclusion is inevitable, both to give natural meaning to the constitutional word "taken" and to explain how the American system of eminent domain works.

2. The Concept Of "Property"

We now turn to an examination of the meaning of "property" in the familiar constitutional eminent domain clauses. This is not as crucial a step in the development of the doctrine being propounded as was the interpretation of the word "taken," nor is it likely to be as controversial. It is an essential step, however, because one of the great difficulties in analyzing any case of nontrespassory taking, including a police power taking, is to see how governmental acts that do not physically touch land affect an owner's property rights. One cannot find the transfer of anything unless he can visualize and identify the proprietary interests involved. This shows the relationship between "taking" and "property."

As previously discussed, it is much easier to focus on the physical aspects of property. In the history of eminent domain law in America one of the interesting and important developments has been the increasing understanding that takings may occur without physical invasion or appropriation of the condemnee's land. Through most of the 19th century the courts, under the influence of decisions such as *Callender v. Marsh*¹¹⁶ and *Monongahela Navigation Co. v. Coons*,¹¹⁷ would generally not allow compensation unless a governmental entity somehow trespassed. "No taking without a touching" became the popular notion. Nontrespassory governmental acts, though they might infringe on an owner's exercise of real property rights, were usually held non-compensable with the court labeling any damage "consequential."

On occasion one still sees the influence of the "touching" idea in eminent domain decisions.¹¹⁸ In the main, however, the trend has been toward increasing recognition of the possibility that acts of taking may occur with no physical invasion whatever.¹¹⁹ Thus, courts now award compensation in a considerable variety of nontrespassory taking cases. In

¹¹⁶ 18 Mass. (1 Pick.) 417 (1823).

¹¹⁷ 6 Watts & Serg. 101 (Pa. 1843).

¹¹⁸ See, e.g., *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963).

¹¹⁹ For a more detailed exposition of this trend and of some of the developments by which it occurred, see Stoebuck, *Theory*, supra note 114, at 599-605; Stoebuck, *Condemnation*, supra note 111, at 209-15.

the prior discussion of the "taking" concept there were three examples of nontrespassory takings, and the same examples will serve here to illustrate the involvement of "property." The three examples were loss of street or road access,¹²⁰ governmental violations of land restrictions,¹²¹ and condemnations by nuisance.¹²² In fact, the previous discussions anticipated to a considerable extent the present subject of property rights.

When a governmental entity wholly or partially blocks an abutting owner's street access by either physical barriers in the public right of way or by regulation there is no touching of his land. Yet, the government act denies the exercise of a recognized property right, an easement of access. The right the owner enjoys in the easement, like all property rights, is not a physical thing though it pertains to, and is appurtenant to, his physical land. Since he can have no easement upon his own land but only upon the adjoining street, the loss can occur only by an off-premises act. It would, in fact, be impossible to destroy an easement by an act of trespass; it not only may be, but must be, by a nontrespassory act.

Similarly, when a governmental agency prevents the owner of parcel A from exercising a use restriction he has against parcel B, the act causing the loss must occur on parcel B. The right lost, though appurtenant or beneficial to parcel A, was exercisable only over parcel B and subject to interference only by acts on parcel B. Also, when a court allows the cause of action, governmental activities of the nuisance type may cause a taking. Once again no trespass occurs. The acts constituting a nuisance always occur outside the plaintiff's land boundaries. His complaint, however, is that he has lost a property right in his own land. The right is the right to be free from nuisances.

All of the foregoing examples force us to see property rights for what we know them truly to be, legal constructs, creations of the minds of judges and lawyers through the centuries. We have this understanding of "property" from our first days as students of the law. We have today reached the point in eminent domain law at which we can say there is recognition of the non-physical nature of property. That, of course, is one implication of the nontrespassory taking decisions.

When we consider the possibility that a police power regulation might cause a taking of property we are dealing with the purest case of a nontrespassory, non-physical act. Some kinds of nontrespassory takings, usually including the three examples discussed above, at least involve physical activities outside the condemnee's land. But an exercise of the police power, essentially a legislative action, has no physical aspect whatever; the action is complete in the legislative council chamber. Therefore, we must come to grips with an entirely non-physical taking. Actually that is not as difficult a task as it might seem if we bear in mind that non-physical as well as physical acts can take the landowner's property rights, these

¹²⁰ See text accompanying note 108 *supra*.

¹²¹ See text accompanying note 109 *supra*.

¹²² See text accompanying notes 110-11 *supra*.

rights being ideal constructs. The key is to identify the property interests involved. It turns out that these interests are easier to identify than in some other nontrespassory taking cases, especially the cases of condemnation by nuisance. The property interests affected by a police power regulation are simply the regulated landowner's rights of use and enjoyment. Any regulation that impacts him will diminish or destroy some of these property rights.

B. *The Test for a Police Power Taking*

1. The Test Stated

Certain conclusions are evident from the preceding discussion. Any exercise of the eminent domain power, be it by trespassory or nontrespassory acts, may occur only if certain phenomena are present. There must be some activity by an entity having the power of eminent domain, though this activity may be nontrespassory or trespassory. A legislative act, specifically, a police power regulation, may be such an activity. The governmental activity must diminish a landowner's property rights. These property rights include the rights of use and enjoyment. More than a diminishing of property rights, there must also be a transfer of property rights from the owner to the governmental entity. Note that these conclusions flow from the typical constitutional language, "private property shall not be taken for public use without just compensation." They also describe the actual operation of the American system of eminent domain in all cases of trespassory or nontrespassory takings with the exception of police power takings, now to be discussed.

There is no difficulty in seeing how governmental activity, regulation, diminishes a landowner's property rights of use and enjoyment. The difficulty, peculiar to police power activities, is in seeing how or when a transfer of property rights passes to the government. Loss to the owner is plain; gain of property by the government is not. The government can be a transferee in one of two ways. The first way is by acquiring rights in the condemnee's land that the government can exercise on that land, *e.g.*, a road easement. The second way is by having an interest it already owns in other land augmented by diminishing the owner's rights, *e.g.*, blocking an access easement the owner had upon a street. A regulatory measure does not work a transfer in the first mode for it gives government no right to make any use of the regulated owner's land. Whether government can receive the transfer in the second mode is a complex question that requires closer analysis.

What is the nature of a land-use regulation? Its counterpart in real property ownership terms is a restriction on land use or a restrictive covenant. For instance, the impact on the owner is the same from having a single-family dwelling zoning ordinance as having a burdening restrictive covenant to that effect. At least the effect to diminish his totality of rights of use and enjoyment is the same. Land-use regulations generally have near analogues in private restrictions. The two are of the same

“stuff” and, in the sense critical to our discussion, have the same effect on the regulated owner’s property rights.

We have seen an analogous situation in which private restrictive covenants are the subject of an eminent domain transfer. This may occur, as discussed previously, where *A* has the benefit of a restriction on *B*’s land and the government acquires *B*’s land for use in a manner that breaches the restriction. In that case an eminent domain transfer may occur. The breach of the restriction diminishes *A*’s property by loss of the right and augments the government’s property in *B*’s land by being free of the burden. Observe, however, that this is the opposite of what would occur if the government imposed a police power restriction on *A*’s land. *A*’s loss, instead of consisting of the release of a pre-existing benefit, would consist of the receipt of a new burden. If that event were to result in a transfer to the government, as eminent domain must entail, then government—to be precise, some governmentally owned land—would have to be the recipient of a new benefit from the restriction. Can that occur?

Regulatory land-use restrictions, like their analogous private restrictions, always cause transfers of real property rights, but not always to the government. If there are 1,000 parcels of land within a given political jurisdiction and that jurisdiction imposes a zoning restriction on 100 of them, the other 900 presumably receive a benefit. Though the effect is much more diffuse than with private restrictions which are generally among near neighbors, the same kind of transfer occurs in each situation. The restricted owner or owners have their property rights diminished and the benefitted owner or owners have their property rights correspondingly and reciprocally augmented. At a high level of generality a transfer occurs.

When then, can a land-use regulation cause a transfer to the regulating political entity? The answer is that this can occur only when that political entity is the “other” landowner, *i.e.*, when it owns, or at least has some piece of ownership of, some land that is so situated that the regulation benefits and augments it. It will not suffice merely that government carries on some activity within the benefitted radius. The government must hold real property interests and they must be of a kind capable of receiving the “property” in the benefit. This is so because the transfer is of a real property interest and only one who has an interest in land to which that interest can attach can receive it.

Moreover, there must practically be some minimum threshold level of benefit to the governmental realty before we can say there is a transfer. For instance, it should not suffice if a city government, as the owner of land here and there in a town, receives only an incidental or casual benefit that is the same as that received by owners throughout the town. To avoid absurd or, as old English judges would say, “inconvenient” results, a transfer occurs to the government only when governmental land receives “special” benefits or perhaps “special and direct” benefits. One should probably not say that governmental land must be the “intended” beneficiary since that places on the landowner a proof burden that does

not exist in other nontrespassory taking cases, to show motive or intent. While the concept should be that governmental land is singled out as probably the sole beneficiary, or at least one of a select group of beneficiaries, the regulated owner should not have to prove this was subjectively intended.

We may now state the test for a police power taking: A police power regulation on land use is an eminent domain taking only when its effect is specially directed toward benefitting a governmental entity in the use of land in which that entity holds incidents of ownership. "Specially directed" ordinarily signifies that the governmental land is singled out as the sole beneficiary, or one of a select group of beneficiaries, but it does not imply that governmental officials need have actual intent to produce the benefit. Use of the phrase "holds incidents of ownership" instead of the word "owner" allows for the possibility that there might be a benefit to the government as holder of interests in land less than the fee, such as an easement or a leasehold.

2. The Test Tested

Under the test or doctrine stated not many land-use regulations amount to takings. Most building codes, fire codes, health regulations, zoning restrictions, and environmental regulations, which together must comprise the bulk of land-use regulations, would not. Their beneficial effects are ordinarily spread widely and faintly throughout the community with some increased impact in and around the immediate area in which they are in effect. It is not the intent of the test, for example, to make governmental land an eminent domain transferee simply by its lying within or adjacent to the boundaries of a zoning district. Rather, the intent is to suggest that a regulation, to cause a taking, must have some feature or features that single out governmental ownership for benefits that do not accrue to the ownership interests of others. This eliminates the test from operating on the vast majority of regulations. It is perhaps easier to offer some examples of when the test would produce a taking than when it would not.

The airport approach zoning cases provide the clearest and possibly commonest example of a land-use regulation that may cause a taking.¹²³ *Hageman v. Board of Trustees*,¹²⁴ a 1969 Ohio Appeals decision, provides a vehicle for discussion. A local zoning board imposed restrictions consisting mainly of limitations on height and building density on land that lay within the approaches to Wright-Patterson Air Force Base. This the court of appeals held to constitute a taking of property of the owners of the

¹²³ For citations to these decisions, see *Chongris v. Corrigan*, 409 U.S. 919 (1972) (Douglas, J., dissenting); Annot., 77 A.L.R.2d 1355, 1362-64 (1961). Surprisingly, decisions in airport zoning cases appear to go as far back as 1939.

¹²⁴ 20 Ohio App. 2d 12, 251 N.E.2d 507 (1969). *But see* *Village of Willoughby Hills v. Corrigan*, 29 Ohio St. 2d 39, 278 N.E.2d 658, cert. denied, 409 U.S. 919 (1972) (though distinguishing *Hageman*, seems to weaken it).

land. The court saw an analogy in the aerial easement decisions such as *United States v. Causby*,¹²⁵ *Griggs v. Allegheny County*,¹²⁶ and *Ackerman v. Port of Seattle*.¹²⁷ The court recognized that not only were the landowners' property rights diminished but there was a corresponding benefit to the governmentally owned airbase.¹²⁸ The airport approach zoning imposed what was in substance a land-use restriction, analogous to a restriction created by covenant, with the landowners' lands as the burdened parcels and the airbase as the benefitted parcel. A transfer occurred in effect and the requirements of the test propounded above are met.

Another possible extant example of a regulatory taking, depending on the analysis used, may be the "reserved area" cases. *Miller v. City of Beaver Falls*¹²⁹ is perhaps best known. A city ordinance declared that a portion of the plaintiff's land was to be within the area of a possible future public park or playground. The ordinance did not outright forbid the plaintiff from building on that portion but provided that if he did so build and if the government did condemn that portion for the projected use within three years from the date of the ordinance his compensation award would not include the value of the buildings. In holding the ordinance to be a taking, the Supreme Court of Pennsylvania seemed to reason mainly that the city designed the ordinance to deny the owner just compensation. Another line of analysis would be to say that the regulation, a development freeze, was a means of keeping the land clear of improvements for the benefit of the possible future park owned by the city. Certainly the ordinance would meet the test for a taking if the city required the owner to keep his land clear so that buildings would not, for example, impede the passage of light and air to an existing city park next door. The fact that the city did not, and might never, own the park land introduces a complication that one may feel takes the case out of the test. Still, the facts provide a possible example of the test in action.

One can imagine any number of fact patterns in which a land-use regulation could satisfy the taking test stated. Some possibilities include: a stringent noise ordinance to benefit a nearby public hospital; special off-street parking requirements to keep on-street parking available for nearby public buildings; and single-family-dwellings-only zoning to prevent competition with a public housing project. It is apparent that none of these regulations are widespread. This is evidence that the test does

¹²⁵ 328 U.S. 256 (1946).

¹²⁶ 369 U.S. 84 (1962).

¹²⁷ 55 Wash. 2d 400, 348 P.2d 664 (1960).

¹²⁸ It is interesting to note that a local government of the State of Ohio enacted the zoning while the sovereign benefitted was the United States Government as owner of the airbase. There is nothing unusual about this. States may, and indeed once did as a customary practice, condemn land for the federal government. See *Kohl v. United States*, 91 U.S. 367 (1875) (upholds federal government's power to do its own condemnations and refers to prior practice of states doing condemnations for United States).

¹²⁹ 368 Pa. 189, 82 A.2d 34 (1951).

not allow compensation in many cases.

3. The Test Compared With Similar Tests

The test worked out here is of course far different from the "too far" test of *Pennsylvania Coal Co. v. Mahon*¹³⁰ or the variations built upon it. However, the doctrine of *Mugler v. Kansas*¹³¹ and Professor Joseph Sax's test, referred to earlier as "Sax I,"¹³² are both much more closely related to the stated test, as well as to each other. The relationship to the theory advocated here will be summarized briefly.

a. *Mugler v. Kansas*

Mugler v. Kansas, as we previously saw, stands for the proposition that no police power regulation is an eminent domain taking. The regulation may be void as lacking due process, but it cannot be objectionable as a taking. The test propounded in this article appends a qualification to *Mugler's* doctrine: a regulation, though usually not causing a taking, may do so if "its effect is specially directed toward benefitting a governmental entity in the use of land in which that entity holds incidents of ownership."

In the day-to-day resolution of police power cases the test would not frequently produce a different result from *Mugler v. Kansas*. As a proposition of law, however, the present test is significantly more accurate. The theoretical, if not the practical, possibility of a regulation's serving to enlarge governmental property rights at a private owner's expense encompasses a sizable spectrum. Also, the test gives full recognition to the abstract nature of property rights and to their non-physical transfer which *Mugler*, possibly because of its age, does not. The doctrine advanced applies constitutional eminent domain language and brings the subject of police power takings into harmony with other trespassory and non-trespassory takings in a way *Mugler* does not.

b. The test of Sax I

In Sax I Professor Sax advocated a test that is even closer to the one stated here than is the doctrine of *Mugler v. Kansas*. His test was that "when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required. . . . But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power."¹³³ Comparison of Professor Sax's test with the present one will show that, though

¹³⁰ 260 U.S. 393 (1922); see text accompanying notes 27-31 *supra*.

¹³¹ 123 U.S. 623 (1887); see text accompanying notes 15-18 *supra*.

¹³² See text accompanying notes 81-86 *supra*.

¹³³ Sax I, *supra* note 12, at 63.

the two are rhetorically different and completely different in their theoretical derivations, they will produce the same result in most police power taking cases that are apt to arise.

The Sax test, loosely rendered, is that "when a regulation only regulates, there is no taking, but if it also has the effect of enriching a governmental entity, it is a taking." The test presently proposed makes a taking depend on whether the regulation benefits a governmental entity as a holder of ownership interests in land. Professor Sax does not require that enrichment be in the form of real property interests, but of any governmental "resource position." This would include broadly any kind of personal or real property rights. In the present article, the test is cast in the language of property law and attempts to deal only with the taking of real property rights. Both tests imply a transfer from regulated landowner to government, though neither states it explicitly. Thus, though the forms of words are different, the two tests have similar meanings.

It is in their derivations and underlying theories that the two tests are entirely different. Professor Sax's doctrine comes from an understanding of certain functions of government, essentially an exercise in political theory. He finds that government may regulate in two basic capacities: as an arbiter among citizens to settle or prevent conflicts and as an enhancer of its own "resource position." In the latter capacity, government, he believes, is tempted, more than in the former capacity, to use eminent domain to oppress its citizens. The function of compensation is to provide a disincentive to this form of oppression and is thus a political function. His theory is not derived from or expressed through the concepts of property law. By contrast, the theory presently advanced is basically a proprietary theory. Beginning with a constitutional eminent domain clause, it attempts to express the meaning of the key words "property" and "taken" within the concepts and linguistic forms of property law.¹³⁴

In their practical applications, the two tests ought to produce the same result in any of the examples used in this article so far. One might imagine a hypothetical case, however, in which different results appear. Suppose a city operated a municipal bus line that ran by certain land and the city council regulated that land in some way that "enhanced" the city's "resource position" in its bus system and perhaps in the buses themselves. Professor Sax's test would seemingly allow the landowner compensation. The present article's test would not; so far as appears the city has no real property interests to augment. Though the regulation diminishes the landowner's interests, government cannot be transferee of any reciprocal real property interests unless it has some real property interests capable of receiving them. To the extent similar cases might arise, the present test and the Sax I test could produce different results; other-

¹³⁴ The author's inability to accept some of Professor Sax's propositions long prevented his sharing any of the conclusions of Sax I. Though the author still does not accept the underpinnings of Sax I, he has not reached the same place but certainly the near vicinity by a different road.

wise they should not.

C. *The Role of Due Process*

One strenuous objection to the doctrine here advanced is that it works drastically to the detriment of private landowners. That would not be so, of course, when the alternative is the doctrine of *Mugler v. Kansas* which would seemingly never allow the regulated landowner compensation. But if a court applies the "too far" test of *Pennsylvania Coal Co. v. Mahon* or one of its variations, then the owner has much more opportunity to establish a taking than with the test here advanced. Apparently assuming that *Mahon's* is the predominant doctrine now established in the courts, some critics of the proposed test would label it "anti-landowner."¹³⁵ Conversely, other critics who themselves apparently favor stringent environmental controls seem to fear what would happen if courts denied owners compensation that might now receive it. Their fear must be that fairly liberal compensation provides a "valve" that releases the owners' "steam" that they would otherwise vent against the controls.¹³⁶

One answer, which likely will not satisfy critics, is that while legal principles may in their application favor the interests of this or that class of persons, they ought not be formulated for that purpose. Beyond this, however, the test proposed will not have the draconian result feared for there is an "escape hatch." This is the constitutional guarantee of due process which courts should give its full scope in controversies over land-use regulations. Two recent important decisions from the highest courts of the most populous states provide almost laboratory-like examples for comparison. These decisions are *Fred F. French Investing Co. v. City of New York*¹³⁷ and *Agins v. City of Tiburon*.¹³⁸

In *Fred F. French* the New York Court of Appeals had before it a zoning regulation that required the owner of the private Tudor Parks to keep them as parks without buildings and to keep them open for public use. Using the test of Sax I, the court held that the regulations did not amount to a taking because they did not enrich the city in its "enterprise capacity." The court, however went on to hold that the regulations unreasonably deprived the owner of property rights in the land. On that basis the zoning regulation was held void as a deprivation of private property without due process. In what is one of the most interesting aspects of the decision, the court dealt with *Pennsylvania Coal Co. v. Mahon* and with its own prior decision in the leading case of *Averne Bay Construction Co.*

¹³⁵ See Hagman, *Compensable Regulation: A Way of Dealing with Wipeouts From Land Use Controls?*, 54 U. DET. J. URB. L. 45, 48-65 (1976).

¹³⁶ The "fear" described in the test seems, in part at least, to motivate Professor Costonis in his article, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies, 75 COLUM. L. REV. 1021 (1975).

¹³⁷ 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976).

¹³⁸ 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979), *aff'd* — U.S. —, 100 S. Ct. 2138 (1980).

v. Thatcher.¹³⁹ *Arverne Bay* held that zoning that deprived an owner of all practical uses of his land was a taking because it went too far, essentially an application of *Mahon's* doctrine. *Fred F. French* sidestepped *Mahon* and *Arverne Bay* by saying that when they spoke of a "taking" they were really using a "metaphor" for lack of due process.

Agins v. City of Tiburon is much like *Fred F. French*—up to a point. A city's large-lot zoning allowed a landowner from one to five houses on a five-acre tract, the exact number depending on a formula. In the posture of the case as it came through the court of appeals, it appeared that the zoning caused the owner to have a "lack of any remaining reasonably beneficial use."¹⁴⁰ Much as did the New York court in *Fred F. French*, the court held there was no taking. The court, however, went on to hold there was no denial of due process, leaving grave doubts in California whether any regulation of land can ever be either a taking or a violation of due process. Thus, the result in *Agins* does indeed produce a draconian result and locks the "escape hatch" that *Fred F. French* leaves unlocked.

In evaluating the difference between *Fred F. French* and *Agins* it is helpful to return to *French's* treatment of *Mahon* and *Arverne Bay*. A theme that the author has developed in this article is that the "too far" test for a taking largely duplicates part of *Lawton v. Steele's* classic test for the substantive due process of a regulatory measure. *Lawton's* question about whether a measure is unduly oppressive upon the persons regulated is hard to distinguish, particularly in application to the facts of an actual case, from the question of "too far." If *Agins* fails to take proper (and constitutionally required) account of *Lawton v. Steele*, *Fred F. French* may have found the proper place for *Mahon*, as well as *Lawton*.

Fred F. French comes as close as any decision to showing the way out of the dilemma over police power takings that has been the cause of so much trouble since *Pennsylvania Coal Co. v. Mahon*. Without requiring the overruling of *Mahon* (which of course New York could not do anyway), *French* finds a way to reconcile *Mahon* and *Mugler v. Kansas*, after a fashion, without overruling either. *French* applies a test for a taking that, on its facts, operates like the test developed here.¹⁴¹ With a little

¹³⁹ 278 N.Y. 222, 15 N.E.2d 587 (1938).

¹⁴⁰ See *Agins v. City of Tiburon*, 80 Cal. App. 3d 225, 145 Cal. Rptr. 476, 481 (1978). The California Supreme Court seemed to accept as a fact that the owner lost all beneficial use. See *Agins v. City of Tiburon*, 24 Cal. 3d 266, 274, 157 Cal. Rptr. 372, 376, 598 P.2d 25, 29 (1979) (use of the phrase "[w]e now reach that issue"). The United States Supreme Court's affirmance of *Agins* is no doubt important to land-use planners because it encourages exclusionary zoning. For our purposes here, the development of theory, the Court's reasoning is too superficial to make the opinion important. See *Agins v. City of Tiburon*, — U.S. —, 100 S. Ct. 2138 (1980).

¹⁴¹ Unfortunately the clear vision of *Fred F. French* has been clouded by a later decision in *Spears v. Berle*, 48 N.Y.2d 254, 397 N.E.2d 1304 (1979). New York's Freshwater Wetlands Act authorized compensation when wetland regulations amounted to a taking. The Court of Appeals used reasoning that ignored *Fred F. French's* analysis and read like a reversion to *Mahon's* doctrine. Of course, the court was interpreting a statute that itself embodied that doctrine, but the court, which cited *Fred F. French*, showed no recognition

“touching up,” *French’s* test could bring the doctrine of police power takings into line with the constitutional concepts of “property” and “taking” and with the principles applied in all other kinds of trespassory and non-trespassory takings. Finally, *Fred F. French Investing Co. v. City of New York* correctly identifies the interrelationship among the police power, eminent domain, and due process. That other courts will follow New York’s lead is a thing earnestly to be wished.

that its theory was different from that of earlier decisions.

