1989

To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses

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THE fifth amendment imposes two constraints on the federal government's authority to interfere with private property rights. First, it prohibits the deprivation of property without due process of law. Second, it bars the taking of private property for public use without just compensation.[1] The fourteenth amendment explicitly imposes only the former constraint on the states.[2] Since the late nineteenth century, however, the Supreme Court has interpreted the fourteenth amendment's due process clause to incorporate and make applicable to the states the fifth amendment's taking constraint.[3]

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[1] U.S. CONST. amend. V ("No person shall . . . be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.").

[2] *Id.* amend. XIV, § 1 ("[n]or shall any State deprive any person of . . . property, without due process of law . . . .").

[3] *See* Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226, 241 (1897). This holding expressly affirmed the Court's suggestion a year earlier to the same effect. *See* Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112, 158 (1896). In the years immediately following the adoption of the fourteenth amendment, the Court held that the taking limitation was "a limitation on the power of the Federal government, and not on the [s]tates." Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 176-77 (1871). The Court's incorporation of the taking limitation into the fourteenth amendment's due process clause was premised upon its conclusion that due process had substantive as well as procedural content. Thus, the state may not "take" private property simply by affording the property owner sufficient opportunity to satisfy the requirements of procedural due process. It must also provide just compensation for the property taken. *Chicago, B. & Q.R.R.*, 166 U.S. at 234-35.

The fifth amendment's specification of separate limitations on the government's authority to interfere with private property rights suggests that there is a difference between a "deprivation . . . without due process" and a "taking without just compensation."[4] The constitutional text fails to explain the nature of that difference, relegating the sorting process to the judiciary. The Supreme Court has struggled for nine decades and has proceeded to little acclaim and considerable criticism. As Court decisions have become more far-reaching in the past few years, this criticism has widened and deepened.

In our opinion, the nature of the difficulty plaguing Court decisions on this issue is substantial and fundamental: It stems from a continuous failure to articulate a consistent view of the relationship between "deprivations" and "takings" when considering attacks on the constitutionality of state and local regulations restricting private property rights. Individual rationales and outcomes have rested on unstable jurisprudential foundations because of the Court's vacillation among what we consider three distinct models of possible interrelationship between the due process clause and the taking clause.

Our aims in this Article are several. Part I briefly reviews the separate natures of deprivations and takings as reflected in Court opinions and describes our three proposed models of relating the two clauses. Part II traces each model, noting the various waxings and wanings of each through four jurisprudential eras and identifies the current status of the models as discussed in the deprivation/taking decisions of the past decade. Part III recommends a final choice among the models to serve as a constitutional predicate for future fourteenth amendment issues.

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[4] If there were no difference, the takings prohibition could be viewed as redundant. Alternatively, the prohibition on taking "without just compensation" could specify remedial consequences not explicitly provided for in the due process clause. The Supreme Court has treated the taking limitation as independent of the fifth amendment's additional prohibition on the deprivation of life, liberty, or property without due process. *See, e.g.*, Monongahela Navigation Co. v. United States, 148 U.S. 312, 338-41 (1893) (discussing Bridge Co. v. United States, 105 U.S. 470 (1881), a case in which the Court held that a federal statute requiring a company with a state charter to alter the bridge it had constructed pursuant to a reservation in that charter was not a taking of private property; even if the statute deprived the company of property, it did so with "due process of law" because of the authority of the express reservation in the charter).

I

DUE PROCESS DEPRIVATIONS, TAKINGS, AND MODELS OF RELATIONSHIP

The two constraints on governmental interference with private property rights have separate histories, each operating as a check on a large, distinct, but implied source of governmental authority. These histories must be reviewed briefly because within them lie the seeds of confusion that the Court would sow once the fourteenth amendment incorporated both constraints into the same words in the Constitution.

A. The Power of Eminent Domain and the Taking Limitation

Although the federal Constitution and many state constitutions do not expressly vest in the government the power of eminent domain, it was well settled by the late nineteenth century that both levels of government have the inherent authority to condemn property for public use,[5] although just compensation limits that inherent governmental authority.[6] The requirement of just compensation "was an incident to the exercise of the power of eminent domain" traceable to principles of "natural equity" and "universal law,"[7] "prevent[ing] the public from loading upon one individual more than his just share of the burdens of government."[8]

The obligation to provide just compensation obviously arises when the government initiates formal condemnation proceedings. But the Supreme Court also recognized that other activities of the government may amount to a taking. For example, direct appropriation of private property for a public use constitutes a taking,[9] as

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[5] *See Chicago, B. & Q.R.R.*, 166 U.S. at 240 (quoting I. COOLEY, CONSTITUTIONAL LIMITATIONS 356-57 (6th ed. 1890)).

[6] *See id.* at 238 (citing Sweet v. Rechel, 159 U.S. 380, 398 (1895)); Searl v. School Dist. No. 2, 133 U.S. 553, 562 (1890) (provision of reasonable compensation to the owner of condemned property is a condition precedent to the exercise of the power of eminent domain); *Pumpelly*, 80 U.S. (13 Wall.) at 177 (the just compensation limitation on the power of eminent domain "is so essentially a part of American constitutional law that it is believed that no [s]tate is now without it").

[7] *Chicago, B. & Q.R.R.*, 166 U.S. at 238 (citing *Monongahela Navigation*, 148 U.S. at 325; Sinnickson v. Johnson, 34 A.D. 184, 17 N.J.L. 129 (1839)).

[8] *Monongahela Navigation*, 148 U.S. at 325; *see also* Richards v. Washington Terminal, 233 U.S. 546, 557 (1914) (fifth amendment taking clause prohibits Congress from imposing a "direct and peculiar and substantial" burden on a private property owner without compensation).

[9] *Chicago, B. & Q.R.R.*, 166 U.S. at 236 (owner has right to compensation if "his property be wrested from him and transferred to the public"); *see also id.* at 240. Chief

does governmental activity which results in the transfer of title from one owner to another.[10]

More importantly, activity conducted or authorized by the government that causes an actual physical invasion of private property can amount to a taking.[11] Thus, where the government constructs a dam, flooding riparian land, the encroachment of the water constitutes a taking of the land.[12] Similarly, the repeated firing of projectiles from a government fort over adjacent private property,[13] and governmentally-authorized discharges of dirt, smoke, and gases over private property have been deemed takings.[14]

Justice Marshall concluded that private property could not be "seized without compensation" in Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135-36 (1810).

[10] *See Chicago, B. & Q.R.R.*, 166 U.S. at 235 (citing Davidson v. New Orleans, 96 U.S. 97, 102 (1877)); *see also* Louisville Bank v. Radford, 295 U.S. 555, 601 (1935) (federal bankruptcy legislation which severely restricted rights of mortgagee and enhanced rights of mortgagor in mortgaged property resulted in a taking under the fifth amendment). *Cf.* Armstrong v. United States, 364 U.S. 40 (1960) (federal government's acquisition of title to personal property subject to lien constituted a taking of the lien because acquisition destroyed the value of the lien due to the government's immunity from suit).

[11] A permanent physical occupation by the government or its authorized agents is a per se taking requiring compensation. Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419 (1982). For earlier cases finding takings based on physical invasions see Griggs v. Allegheny County, 369 U.S. 84 (1962) (regular air flights at low altitudes created an air easement which constituted a taking requiring just compensation); United States v. Kansas City Life Ins., 339 U.S. 799 (1950) (government dam which flooded agricultural land and destroyed its value constituted a taking); United States v. Dickinson, 331 U.S. 745 (1947) (flooding caused by dam was taking of a servitude over private property); United States v. Causby, 328 U.S. 256 (1946) (continuous low airplane flights constituted taking of an easement); Portsmouth Harbor Land & Hotel v. United States, 260 U.S. 327, 329-30 (1922) (repeated firing of projectiles from government fort over adjacent private property constituted a servitude on the affected property). *See also Richards*, 233 U.S. 545 (federal statute legalizing activities that would otherwise constitute a private nuisance—here, fans blowing gases and smoke from a locomotive tunnel onto adjacent property—was a taking); Muhlker v. New York & H.R.R., 197 U.S. 544 (1905) (dirt and smoke from government-authorized elevated railway constituted a taking of easements of light and air previously acquired by property owner).

[12] *See, e.g.*, United States v. Cress, 243 U.S. 316, 327-28 (1917) (direct invasion of land by permanent flooding amounted to a taking requiring just compensation); United States v. Welch, 217 U.S. 333, 339-39 (1910) (permanent flooding of land used for right of way constituted a taking); United States v. Lynah, 188 U.S. 445, 468-70 (1903) (permanent flooding wholly destroyed arable land, turning it into an irreclaimable bog); *Pumpelly*, 80 U.S. at 179-81 (actual invasion by flooding, effectively destroying the usefulness of the flooded land).

[13] *Portsmouth Harbor*, 260 U.S. at 329-30 (such trespassory invasions would constitute a servitude on the affected property).

[14] *See, e.g., Richards*, 233 U.S. at 551 (federal statute legalizing activities that would otherwise constitute a private nuisance was a taking); *Muhlker*, 197 U.S. 544 (dirt and smoke from government-authorized railway constitute a taking of easments of light and air previously acquired by property owner).

In all of these instances, the Court has accepted, with little or no comment, the legitimacy of the governmental authority being exercised. The sole question in every case concerned the *impact* of the governmental activity on the plaintiff. If that impact was too great, the government was required to pay just compensation. Thus, "takings" came to be characterized by little examination of authority, careful examination of impact, and a damage remedy.[15]

B. The States' Police Powers and the Due Process Limitation

Just as the federal Constitution provides no express delegation of the power of eminent domain, it does not expressly reserve to the states the right to exercise their police powers. Nevertheless, the Supreme Court has held that these powers inherent in the nature of state sovereignty and, because the Constitution does not expressly transfer them to the federal government, they are retained by the states.[16] Like the power of eminent domain,[17] the police powers provide authority to interfere with private property rights.[18] Although they are "incapable of any very exact definition or limitation,"[19] the Supreme Court has held that police powers include the authority to enact laws for "the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State."[20]

While the police powers enable a state to subject private property

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[15] In several of the early physical invasion cases, the Supreme Court noted that the government's activities had caused a depreciation in value. *See, e.g., Cress*, 243 U.S. at 328 (50% decline in value); *Richards*, 233 U.S. at 549-50 (33% decline in rental value); *Lynah*, 188 U.S. at 469 (flooding "wholly destroyed" value of rice plantation land). Also, the Court found takings where government activities had seriously interrupted the owner's ability to use the property. *See, e.g., Pumpelly*, 80 U.S. (13 Wall.) at 179. Apparently, the extent of the loss suffered by the property owner as well as the extent of the gain derived by the government (or its agents) from the affected property was deemed relevant in deciding whether a taking had occurred.

[16] *See* Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667 (1878); Butchers' Ass'n v. Crescent City Live-Stock (Slaughter-House Cases), 83 U.S. (16 Wall.) 36, 63 (1872); *see also* U.S. CONST. amend. X ("The powers not delegated to the United States . . . are reserved to the [s]tates . . . .").

[17] The power of eminent domain allows the government to interfere with private property rights provided the transfer is made for a public use and just compensation is provided. BLACK'S LAW DICTIONARY 490 (5th ed. 1979).

[18] Because the federal government has only those powers granted by the Constitution, it does not have inherent police powers. The federal government may, nevertheless, regulate private property in a manner analogous to state police power regulation under its various expressly enumerated powers, such as the power to regulate interstate commerce. U.S. CONST. art. I, § 8, cl. 3.

[19] *Slaughter-House Cases*, 83 U.S. at 62.

[20] *Id.* (quoting Thorpe v. Rutland & B.R.R., 27 Vt. 149 (1854)); *see also* Mugler v.

"to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State,"[21] that power is not unlimited. The Supreme Court recognized shortly after the adoption of the fourteenth amendment that a purported police power regulation could amount to an unconstitutional "deprivation" of private property without due process.[22]

The determination, "through a gradual process of judicial inclusion and exclusion,"[23] of when a deprivation occurs has been both difficult and confusing. The Court's initial efforts to define the limits imposed by the due process clause on the states' police powers were halting and inadequate.[24] The Court stated, for example, that the clause prohibited "the arbitrary spoliation of property,"[25] but provided no clear indication of what would constitute an "arbitrary" imposition on private property rights.[26] The Court held that state police power regulation violated the due process clause if it constituted a "palpable invasion of rights secured by the fundamental law,"[27] but it declined to specify which rights were fundamental or the circumstances in which their invasion was sufficiently "palpable" to violate the due process clause.

Gradually, however, the Court's views crystallized. The Court construed the due process clause to require that a police power regulation protect the public health, safety, morals, or general wel-

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Kansas, 123 U.S. 623, 658 (1887) (police power covers "every law for the restraint and punishment of crime, for the preservation of the public peace, health, and morals").

[21] *Slaughter-House Cases*, 83 U.S. at 62 (quoting *Thorpe*, 27 Vt. at 149).

[22] The Court has traced the phrase "due process" back to the Magna Carta, in which the equivalent of due process of law was the guarantee that certain rights would be protected by the "law of the land" against oppression by the Crown. Davidson v. New Orleans, 96 U.S. 97, 101 (1877).

[23] *Id.* at 104.

[24] At first, the Court took the position that the due process clause was exclusively procedural in nature. *See id.* at 104-05. As long as the state provides for a "mode of contesting" a tax or other burden imposed on property for the public use, with notice and other proceedings appropriate to the nature of the case, there is no deprivation of property without due process, "however obnoxious it may be to other objections." *Id.* at 105. However, by the time it decided *Mugler*, 123 U.S. 623, the Court had recognized the judicial duty "to look at the substance of things" in determining whether a state had exceeded the limits of its police powers. *Id.* at 661.

[25] *Mugler*, 123 U.S. at 663 (citing Barbier v. Connolly, 113 U.S. 27, 31 (1885)).

[26] At least two possible readings existed: First, a state's exercise of the police power would be arbitrary if the state had an improper purpose or used improper means of achieving a proper police power objective; or, second a state's exercise would amount to "arbitrary spoliation," if the economic impact of the police power regulation on the property owner were excessive. *Id.*

[27] *Id.* at 661; *see also* Powell v. Pennsylvania, 127 U.S. 678, 685 (1888).

fare,[28] and that the regulation adopt means appropriately chosen to accomplish that purpose.[29]

During this development, the Court frequently stressed the limited role of the judiciary in reviewing the validity of police power regulations attacked on due process grounds, holding that so long as the state promotes legitimate police power ends through proper means, the resulting regulations reflect judgments on matters of public policy which are "conclusive upon the courts."[30] If a particular police power regulation is merely unwise, affected property owners must "appeal . . . to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere without usurping powers committed to another department of government."[31]

Consequently, the Court's analysis of fourteenth amendment "deprivations" has focused almost exclusively on the legitimacy of

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[28] *See, e.g.*, Chicago, B. & Q. Ry. v. Illinois *ex rel.* Drainage Comm'n, 200 U.S. 561, 592 (1906); *Mugler*, 123 U.S. at 661. However, a state's attempt to enact regulations for purposes not sanctioned by the police power produced regulations which the state was not authorized to adopt. Accordingly, the regulations would be void, just as a federal statute lacking article I authorization would be invalid and of no effect. Indeed, in the cases enunciating the requirement of a legitimate police power objective, the relief sought by affected property owners generally was invalidation. *See, e.g.*, *Powell*, 127 U.S. 678; *Mugler*, 123 U.S. 623. In at least one case, however, a property owner brought a damage action in conversion against state game wardens who had seized the plaintiff's fishing nets on the ground that he had violated state fishing regulations. The Court stated that the state "may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations." Lawton v. Steele, 152 U.S. 133, 137 (1894). But the Court did not indicate that a damage remedy would be appropriate for such an arbitrary interference, and the cases it cited to support its dictum about the limits on the state's police power were all cases involving statutes invalidated for exceeding various constraints on federal lawmaking power. *See id.* at 137-38. In any event, the Court concluded in *Lawton* that the statute authorizing seizure of the nets was a lawful exercise of the police power, and therefore, it was not a deprivation of property in violation of the due process clause. *Id.* at 143.

[29] The Court has defined this nexus between ends and means in various ways. *See, e.g.*, *Lawton*, 152 U.S. at 137 (means must be "reasonably necessary for the accomplishment of the purpose"); Minnesota v. Barber, 136 U.S. 313, 320 (1890) (dictum) (there must be "a real and substantial relation between the [regulation's] avowed objects and the means derived for attaining those objects"); *Powell*, 127 U.S. at 684 ("real and substantial relation"); *Mugler*, 123 U.S. at 666 (quoting Patterson v. Kentucky, 97 U.S. 501, 506 (1878)) ("appropriate and direct connection"); *Slaughter-House Cases*, 83 U.S. at 64 ("appropriate . . . stringent, and effectual" means).

[30] *Powell*, 127 U.S. at 685.

[31] *Id.* at 686. The Court has recognized that state legislatures have broad discretion to determine not only whether public interests require regulation under the police powers, but also the appropriate means of achieving that protection. *Lawton*, 152 U.S. at 136 (citing Kidd v. Pearson, 128 U.S. 1 (1888)); *Barbier*, 113 U.S. 27; *see also Powell*, 127 U.S. at 684-86.

the governmental activity imposing the restriction, rather than on the impact of the restriction upon the property owner. Therefore, the remedy for a plaintiff successfully establishing an unconstitutional deprivation has been a declaration that the governmental activity is ultra vires, with injunctive relief against enforcement. Due process cases have thus come to be characterized by careful examination of governmental authority, little examination of individual impact, and injunctive relief for successful plaintiffs.

C. The Relationship Between the Taking and Due Process Limitations: Three Models

If all fact patterns fell neatly into the prototypes set out above, none of the problems discussed in this Article would exist. But they do not. Therefore, we propose three models to conceptualize the interrelationship between the due process and takings clause. One method of relating the due process and taking clauses is premised on the assumption that any regulation which passes the traditional police power test and does not fail the traditional taking test is constitutional. This simplest possible method of relating the clauses, which is to treat them as cumulative and separate, was the first used by the Court, and it dominated judicial thinking during the first half century of fourteenth amendment jurisprudence. We shall refer to the view based on a strict separation of the clauses as the "Separation Model," or "Separatism."

Shortly after incorporation of the fifth amendment taking clause into the fourteenth amendment due process clause,[32] the Court began formulating a second, non-cumulative view of the relationship between the clauses. As early as 1908, it suggested that police power activity could be unconstitutional, despite meeting traditional due process and taking tests, merely because of its burdensome economic impact on the property owner.[33] Once this concept was introduced, two other interrelationships between due process violations and takings were possible, each offering more protection to individuals than the Separation Model, thereby narrowing the state's freedom of regulatory control.

The second possible model, one based on economic impact, viewed the difference between a "deprivation" and a "taking" as one of degree and not, as previously assumed, one of kind. This model presented the due process clause as a constitutional contin-

[32] *See supra* note 3.

[33] Hudson Water v. McCarter, 209 U.S. 349 (1908).

uum: on one end stood state government's right to eradicate serious threats to public health and safety, and at the other end stood the individual's right to use and enjoy private property. Somewhere in the middle, where public threat waned and private intrusion increased, lay the invisible border of unconstitutionality. Under this view, deprivations and takings are only relatively different; consequently, we have called it the "Relativist Model," or "Relativism."

The third possible model describing the relationship of the takings and deprivations clause tilts more towards protection of individual property rights than the other two. Under this model, once the takings clause was incorporated into the due process clause the two became one. Any due process violation became a deprivation and any deprivation a taking; thus, all due process violations are takings requiring just compensation. This analysis unifies the two clauses, and we will refer to it as the "Unified Model," or "Unification." While the appearances of this Model have been rarer in the history of fourteenth amendment judicial development than either the Separation or Relativist Models, a recent Supreme Court decision has returned it to the spotlight.[34]

II

THE MODELS THROUGH THE YEARS—FROM CERTAINTY TO CHAOS

The general history of fourteenth amendment due process and taking interpretation begins with a full embrace of separatism, ends with a trilogy of cases pointing in the direction of all three models, and comprises numerous fits and starts in between. Yet the history is crucial to a solution of the judicial jigsaw the Court has now cut, not only because the history has dictated the present, but because it contains the small gems of enlightenment from which a rational fourteenth amendment jurisprudence can be fashioned.

A. The Formative Years

1. The Prevalence of the Separation Model

The confusion that permeates the Supreme Court's jurisprudence on regulatory takings stems from its consistent failure to select one model of relationship between due process and taking as the standard for assessing the constitutionality of police power regulations.

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[34] *See infra* text accompanying notes 197-211.

Indeed, at various times, the Court has endorsed and utilized all three of our proposed models.

Almost exactly a century ago, the Court, responding to a property owner's claim that state legislation had destroyed the value of his property and thus constituted a taking, replied with a classic statement of the Separation Model:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. *Such legislation does not disturb the owner in the control or use of his property for lawful purposes*, nor restrict his right to dispose of it, *but is only a declaration by the state that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests*. Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law.[35]

While the Court seldom articulated the Separation Model more clearly, it applied this idea of distinctly defined limitations faithfully in the lion's share of what became known as "substantive due process" cases. The taking clause, with its requirement of just compensation, applied only when the state sought to exercise its power of eminent domain, not when it invoked its police powers.[36] Indeed, in the very case in which the Court recognized the incorporation of the fifth amendment's taking clause into the fourteenth amend-

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[35] *Mugler*, 123 U.S. at 668-69 (emphasis added).

[36] *Id.* at 668. The Court in *Mugler* rejected a regulated property owner's argument that police power regulation causing a decline in property values required just compensation to sustain it. In particular, the Court concluded that the property owner's reliance on *Pumpelly*, 80 U.S. 166, was inappropriate, since that case involved a physical invasion and thus arose under the state's power of eminent domain rather than under its police power. *See Mugler*, 123 U.S. at 668. But a city's construction of a tunnel which temporarily blocked a property owner's access to his land was not a taking, despite the fact that it partially deprived the owner of beneficial use of his property, because the construction did not involve a physical invasion of, or encroachment onto, the land. In Transportation Co. v. Chicago, 99 U.S. 635, 642 (1879), the Court stated that:

> [A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the [s]tate or its agents, or give him any right of action. This is supported by an immense weight of authority.

ment's due process clause,[37] it held that the taking clause "imposes *no restriction upon* the inherent power of the State by reasonable *regulations* to protect the lives and secure the safety of the people."[38] In particular, the Court consistently noted that police power regulation of activities which constitute a nuisance gave rise to no right to compensation[39] because all property is held subject to government regulations enacted to protect the community from injury.[40] More generally, the Court flatly stated that "uncompensated obedience to a [police power] regulation . . . was not taking property without due compensation."[41] Accordingly, the Court

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[37] Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

[38] *Id.* at 252 (emphasis added). Unfortunately, the Court did not clearly indicate whether an "unreasonable" regulation meant only one lacking legitimate police power ends or means. *But see infra* text accompanying notes 39-41 (supporting the notion that otherwise valid police power regulation with severe economic impact upon a property owner was not a taking and did not violate the fourteenth amendment's due process clause).

[39] This principle was again clearly expressed in *Mugler*:

> The power which the [s]tates have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. *The exercise of the police power* by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, *is very different from taking property for public use*, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

123 U.S. at 669 (emphasis added); *see also Powell*, 127 U.S. at 687.

[40] *See, e.g.*, New York & N.E.R.R. v. Bristol, 151 U.S. 556, 567 (1894); *Mugler*, 123 U.S. at 660, 665-66 (citing Patterson v. Kentucky, 97 U.S. 501 (1878); Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667 (1879); Beer Co. v. Massachusetts, 97 U.S. 25, 32 (1877); Munn v. Illinois, 94 U.S. 113, 124 (1876)).

[41] New Orleans Gas Light Co. v. Drainage Comm'n, 197 U.S. 453, 462 (1905) (citing *Chicago, B. & Q.R.R.*, 166 U.S. at 254 (incorporating the taking clause into the due process clause of the fourteenth amendment)). The Court stated in *Chicago, B. & Q.R.R.*, "it is not a condition of the exercise of [the police power] . . . that the [s]tate shall indemnify the owners of property for the damage or injury resulting from its exercise." 166 U.S. at 252. Thus, in that case, the state was obligated to provide just compensation to the railroad for the portion of its property that had been condemned, but not for the expenditures the railroad was forced to incur to make its operations safe following the opening of an adjacent public street. *See id.* at 256. Similarly, in a case involving a fourteenth amendment challenge to a Missouri statute requiring railroads to maintain ditches along the right-of-way to facilitate drainage of accumulated water, the Court, citing Chicago, B. & Q. Ry. v. Illinois *ex rel.* Drainage Comm'n, 200 U.S. 561 (1906), rejected the challenge by relying upon the "well settled" principle that "uncompensated obedience to a legitimate regulation established under the police power is not a taking of property without compensation, or without due process of law, in the sense of

sustained police power regulations against challenges based on the fourteenth amendment despite allegations that they "very materially diminished"[42] or even wholly destroyed the value of affected property or of the business conducted on it.[43] Thus, the owner of a billiard hall could not "be heard to complain of the money loss resulting from" his investment in a business subsequently regulated, for he "was bound to know [he] could lawfully be regulated out of existence."[44] A Court capable of making such a statement seemed well-wedded to the Separation Model.

2. *Early Appearances of the Relativist Model*

Land use restrictions were not the only kinds of state regulations being challenged under the due process clause. In a parallel line of cases, the Court viewed "deprivations" quite differently. By 1876, it was beyond dispute that states could, through the police power, fix upper limits on public utility rates.[45] It was equally clear, however, that such regulations could cross the line into unconstitutionality if the economic impact on the regulated company was too severe. The power to regulate was "not a power to destroy"; somewhere along the continuum from legitimate regulation to destruction lay the right to injunctive relief.[46] Several times the Court struck down maximum utility rates because of excessive impact rather than lack

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the Fourteenth Amendment." Chicago & A.R.R. v. Tranbarger, 238 U.S. 67, 78 (1915) (also citing *New Orleans Gas Light*, 197 U.S. at 462).

[42] *Mugler*, 123 U.S. at 657; *see also* Pierce Oil v. City of Hope, 248 U.S. 498 (1919) (city ordinance regulating storage of petroleum was not a taking despite reduction in plaintiff's profits and alleged inability to store the product elsewhere); Reinman v. City of Little Rock, 237 U.S. 171, 173 (1915) (city ordinance prohibiting livery stables in certain areas did not violate the fourteenth amendment despite allegations that property owner would forfeit large expenditures made for improvements on the regulated property and could not profitably conduct its business elsewhere).

[43] *See, e.g.*, Walls v. Midland Carbon, 254 U.S. 300, 311 (1920) (rejecting fourteenth amendment challenge to police power regulation alleged "to abolish, ruin, and destroy" a carbon black manufacturer's business); Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915) (city ordinance prohibiting the operation of a brickyard within certain areas upheld despite allegations that petitioner would have to abandon his business and would be deprived of use of his land); *see also* Ohio Oil v. Indiana, 177 U.S. 190, 199, 211 (1900); *Powell*, 127 U.S. at 682; *Mugler*, 123 U.S. at 664.

[44] Murphy v. California, 225 U.S. 623, 630 (1912); *see also id.* at 628 (fourteenth amendment does not prevent a municipality from prohibiting any business which is "vicious and harmful").

[45] *See Munn*, 94 U.S. 113; *see also* Georgia R.R. & Banking v. Smith, 128 U.S. 174, 179-80 (1888).

[46] Dow v. Beidelman, 125 U.S. 680, 689 (1888) (quoting Stone v. Farmer's Loan & Trust (Railroad Comm'n Cases), 116 U.S. 307, 331 (1886)).

of fundamental authority.[47]

For the most part, fourteenth amendment due process decisions proceeded on these two tracks throughout the pre-World War I era: the Separation Model governed police power regulation of land use, and the Relativist Model governed regulation of utility rates. The Court's differing treatment of rate regulation and land use is an intriguing question in its own right;[48] its principal importance here is that the impact analysis from the rate regulation cases began creeping into land use decisions, thereby injecting the Relativist Model into land use regulation and adjudication.

In *Lawton v. Steele*,[49] the Court stated for the first time in the land use context that regulations that are "unduly oppressive upon individuals" are constitutionally invalid.[50] Because the decision preceded the formal incorporation of the fifth amendment's taking clause, it did not expressly endorse the notion of a regulatory taking based on Relativism, but it was a forerunner.

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[47] *See, e.g.*, West Ohio Gas v. Public Util. Comm'n, 294 U.S. 63 (1935); McCardle v. Indianapolis Water, 272 U.S. 400 (1926); Smyth v. Ames, 169 U.S. 466 (1898). In all three cases, the utilites sought to enjoin enforcement of utility commission rate orders. The Court had great difficulty determining exactly when permissible regulation was converted into compensable taking. Its various formulations for regulatory takings provided little guidance. *See, e.g., id.* at 523 (state could not require a utility to operate "without reward" (quoting *Railroad Comm'n Cases*, 116 U.S. at 331)); *id.* at 525 (state could not set rates so low "as to practically destroy the value" of the utility's property (quoting St. Louis & S.F. Ry. v. Gill, 156 U.S. 649, 657 (1895))).

[48] There are at least two possible explanations for the ease with which the Court accepted the concept of a "regulatory taking" in the rate regulation cases but struggled to accept it in the early cases involving other kinds of state regulation of private property. One explanation is that the rate regulation cases did not really involve the question of whether police power regulation had crossed the line into the realm of a compensable taking. Rather, maximum rate regulation of public utilities always constituted a taking of the utilities' property. Utility rate regulation constituted a taking because the utilities were typically compelled by state laws to make their facilities available for public use. The only question was whether the rate order afforded just compensation to the utilities. *See, e.g., Georgia R.R. & Banking*, 128 U.S. at 179; *Beidelman*, 125 U.S. at 687 (utility "must carry when called upon to do so" (quoting *Munn*, 94 U.S. 113)).

The second explanation involves the distinction between utility rate regulation and police power regulation of nuisance-like uses of property. The latter kind of regulation could never give rise to a compensable taking, and was thus governed by the Separation Model, because property owners had no right to operate in a nuisance-like manner. Thus, police power regulation that prohibited or restricted nuisance-like uses did not infringe on any recognized property rights. *See supra* notes 39-40 and accompanying text.

[49] 152 U.S. 133 (1894).

[50] *Id.* at 137. The Court neither defined "unduly oppressive" nor specified the consequences of a regulation that caused it.

In dictum fourteen years later, the Court again endorsed the position that a police power regulation was invalid if its impact on an affected property owner is too severe.[51] In *Hudson County Water v. McCarter*,[52] the Court sustained the constitutionality of a statute that prohibited the transportation of the waters of New Jersey rivers and streams outside the state. The statute was challenged by a company that had contracted to carry water from New Jersey rivers into New York. Justice Holmes, writing for a unanimous Court, viewed the case as one involving the need to balance private property rights against the state's right to protect the public interest through the exercise of its police powers. Although Justice Holmes stated, "[t]he boundary at which the conflicting interests balance cannot be determined by any general formula in advance,"[53] he furnished examples of regulations on either side of the line. A police power regulation could limit the height of buildings,[54] even though such a regulation would, to a certain extent, cut down on what would otherwise be the owner's property rights. "But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the public interest, and the police power would fail. To set such a limit

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[51] Hudson Water v. McCarter, 209 U.S. 349 (1908). Several dissenting opinions provided early support for the notion of a "regulatory taking" based on Relativism. *See, e.g.*, Muhlker v. New York & H.R.R., 197 U.S. 544, 576 (1905) (Holmes, J., dissenting) ("To a certain, and to an appreciable, extent the use of particular property may be limited [by police power regulations] without compensation."). Justice Holmes later made it clear in Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), that regulation going beyond that "extent" could amount to a taking. *See also* Powell v. Pennsylvania, 127 U.S. 678, 699 (1888) (Field, J., dissenting) (regulation prohibiting sale and use would be "nothing less than confiscation"); Mugler v. Kansas, 123 U.S. 623, 678 (1887) (Field, J., dissenting) (discussing "the line which separates regulation from confiscation").

[52] 209 U.S. 349 (1908).

[53] *Id.* at 355.

[54] *Id.* The Court subsequently so held in Welch v. Swasey, 214 U.S. 91 (1909). In that case the property owner alleged that a regulation which deprives a person of a profitable use of his property constitutes a taking unless the invasion of rights is so slight that it is justified by the police power. *Id.* at 98.

The Court was not prepared to hold that the height limitations contained in the challenged zoning ordinance were "so unreasonable that [they] deprive[ ] the owner of the property of its profitable use without justification, and that he is therefore entitled under the Constitution to compensation for such invasion of his rights. The [ordinance] . . . is . . . reasonable, and is justified by the police power." *Id.* at 107. This statement appears to accept the notion that a regulatory taking is possible while arguing that one did not occur here because the owner could make a profit on the regulated land. However, the statement can also be interpreted, to mean that no taking occurred, despite the fact that the owner could not make a profit, because the ordinance was justified by the police power. The latter interpretation reflects the Separation Model.

would need compensation and the power of eminent domain."[55] In *McCarter*, the statute had not crossed over the line of a non-compensable police power regulation into a compensable taking, but Holmes had planted the idea that a different impact could produce a different result.[56]

3. *An Isolated Reference to the Unified Model*

The Unified Model—the Model that would treat all due process violations as takings—received some mention during the early years. The first occurrence of this Model was in *Dobbins v. City of Los Angeles*,[57] in which the plaintiff-owner argued that the city excluded gasworks from his property to protect an existing utility's monopoly, and that the ordinance therefore violated the fourteenth amendment. The issue, according to the Court, was whether the ordinance represented a lawful exercise of the police power or an unwarranted interference with plaintiff's rights "to carry on a lawful business, to make contracts, or to use and enjoy property."[58] It held that the trial court had erroneously dismissed the plaintiff's complaint, which revealed such a "sudden and unexplained" change in the ordinance after plaintiff had purchased the property and begun construction that it might fall within the class of cases involving an arbitrary and discriminatory exercise of the police power.[59] If so, the amended ordinance would "amount[ ] to a taking of property without due process of law and an impairment of property rights protected by the Fourteenth Amendment."[60] Apparently, the Court felt that the absence of a proper purpose[61] would transform a purported police power regulation into a tak-

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[55] *McCarter*, 209 U.S. at 355.

[56] *Id.* at 356. In two other early cases, the Court used language supportive of the notion of a regulatory taking. Both cases, though, involved physical restraints on land use which made the regulations look like physical invasions. Such invasions have always been recognized as takings. *See* Curtin v. Benson, 222 U.S. 78 (1911) (challenged regulation resulted in the physical removal of cattle from the property owner's land and the blockage of physical access to that land); Ohio Oil v. Indiana, 177 U.S. 190, 209 (1900) (dictum) (law forbidding surface owners above a common pool of gas and oil from physically reducing those resources to possession would be a taking).

[57] 195 U.S. 223 (1904).

[58] *Id.* at 236. The first two kinds of rights were the kind protected under the freedom of contract arm of substantive due process. *See infra* note 69. The alleged infringement of these rights in a case decided just one year before Lochner v. New York, 198 U.S. 45 (1905), may explain the Court's receptivity to the plaintiff's constitutional claims.

[59] *Dobbins*, 195 U.S. at 241.

[60] *Id.*

[61] Protection of an existing monopoly would not constitute such a purpose. *Id.*

ing,[62] a characterization which, by equating lack of authority with a violation of the taking clause, could only be consistent with the Unified Model.

4. Chicago, Burlington: *The Models Collide*

By far the most bizarre decision during the formative era was Justice Harlan's majority opinion in *Chicago, Burlington & Quincy Railway v. Illinois ex rel. Drainage Commission*,[63] a decision that contained support for *each* of the three models.[64] First, the opinion may support the Separation Model view that a police power regulation can never constitute a taking. Under this view, a police power regulation can be invalidated only if it lacks proper ends or means, in which event it violates substantive due process.[65] Second, one

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[62] The extent to which the *Dobbins* opinion supports the Unified Model is muddled by the plaintiff also alleging that enforcement of the amended ordinance would destroy his property and render it "worthless." *Id.* It is unclear whether the Court believed that a regulation without this kind of severe economic impact, yet lacking a proper police power end, would nevertheless constitute a taking. If not, then *Dobbins* may be simply another Relativist case.

[63] 200 U.S. 561 (1906). The case originated as a mandamus action by county drainage commissioners in Illinois to force a railroad company to replace the foundation on one of its bridges in order for the county to improve a drainage system. The railroad contended that, absent compensation by the county, the commissioner's order constituted a taking of property and a deprivation of property without due process. *Id.*

[64] *Id.* at 592-94. In several instances, Justice Harlan's language is sufficiently vague that it may be interpreted to support more than one Model. Probably the only thing clear about the opinion is that Justice Harlan failed to differentiate among the three Models or to understand the implications of preferring one over the others.

[65] Justice Harlan stated that "[p]rivate property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals or the public safety . . . ." *Id.* at 592-93. This may mean that it is conceptually impossible for a police power regulation to ever constitute a taking of private property, the view which is reflected in the Separation Model. Alternatively, it may mean that the due process clause of the fourteenth amendment prohibits the states from enacting police power regulations which constitute a taking unless they act for a public use and provide just compensation. Since the quoted sentence does not illuminate the circumstances in which police power regulation may amount to a taking, this second interpretation could support either the Relativist or Unified Model, both of which recognize the concept of a regulatory taking. Justice Harlan added that "[c]ompensation has never been a condition of its [police power's] exercise, even when attended with inconvenience or peculiar loss . . . ." *Id.* at 593. This statement seems again to reflect the Separation Model view that police power regulation can never amount to a taking. So does Justice Harlan's assertion that " '[i]t has always been held that the legislature may make police regulations, although they may interfere with the full enjoyment of private property and though no compensation is given.' " *Id.* at 594 (quoting SEDGWICK'S STAT. & CONST. LAW 434). Justice Harlan noted that the taking clause " 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of' " society. *Id.* This statement supports the notion that a police power regulation cannot conceptually amount to a taking if it is interpreted

can read *Chicago, Burlington* to stand for the proposition that a police power regulation is unconstitutional if its economic impact on the affected property owner is sufficiently great, thereby reflecting the Relativist Model.[66] Third, Justice Harlan hinted that a police power regulation consitutes a taking *either* if its economic impact is excessive *or* if it lacks proper ends or means.[67] If that correctly describes his views, then Justice Harlan also endorsed the Unified Model. Doubtless, Justice Harlan was unaware that he was apparently endorsing simultaneously three conflicting models of

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to mean that police powers are necessary to ensure societal tranquility and they are not limited by the taking clause. The same ambiguous statement, however, can also be interpreted to mean that "necessary" exercises of the police power are noncompensable, but "unnecessary" uses of this power are a taking. Although the quoted statement provides no clue as to the distinction between a "necessary" and an "unnecessary" police power regulation, it may mean that a police power regulation unsupported by proper ends or means is "unnecessary," and, therefore, a taking. This interpretation is consistent with the Unified Model.

66 The opinion asserts that "[w]hatever conflict there is" in previous cases revolving around the question of what constitutes a taking, "[i]f the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution." *Id.* at 593-94. This may mean that "incidental" or relatively minor injury caused by police power regulations is noncompensable but that, at some point, the injury becomes so substantial as to warrant compensation as a taking. Such an interpretation is consistent with the Relativist Model. However, the same statement supports the view that there is no such thing as a regulatory taking (the Separation Model) if it is interpreted to mean that as long as a regulation is supported by the police power (*i.e.*, it has valid ends and means), *any* injury suffered by the owner of affected property is "incidental" to the exercise of the police power and therefore noncompensable.

67 Justice Harlan stated that "[t]he constitutional requirement of due process of law, which *embraces* compensation for private property taken for public use, applies in every case of the exertion of governmental power." *Id.* at 593 (emphasis added). If this sentence means that the scope of the "due process" guarantee under the fourteenth amendment is equivalent to the taking limitation, it appears to support the Unified Model. The quoted sentence may simply mean, however, that the due process clause incorporates, and therefore includes, the taking limitation, but that there is a separate component to the due process clause (as under the Relativist Model) which may be substantive as well as procedural. Furthermore, Justice Harlan asserted that "if the means employed [in a police power regulation] have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such legal action." *Id.* (citing Minnesota v. Barber, 136 U.S. 313, 320 (1890)). This statement may mean that if a purported police power regulation lacks proper ends or means, the courts may disregard the legislature's attempt to label it a "regulation" and recognize it for what it really is—a taking. As such, it reflects an acceptance of the Unified Model. Alternatively, Justice Harlan may have been saying that if a police power regulation is unsupported by proper ends or means, the courts may "interfere" by invalidating the regulation as a violation of substantive due process.

analysis. This is evidenced by his failure, even in dictum, to specify the appropriate remedies for violations.[68]

5. *Summary*

Justice Harlan's opinion is the most obvious example of the Court's early failure to adopt a single, coherent model to explain the relationship and content of the taking and due process limitations on police power regulation.[69] Perhaps inspired by Justice Harlan,

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[68] Justice Harlan concluded his *Chicago, Burlington* opinion with several problematic statements. "If in the execution of any power, no matter what it is, the Government, Federal or state, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner." *Chicago, Burlington*, 200 U.S. at 593. That much is clear from the text of the fifth amendment. But can a regulation ever amount to a taking and, if so, under what circumstances? Justice Harlan did not say, although each of the cases he cited involved a physical invasion authorized by the government. *See* United States v. Lynah, 188 U.S. 445 (1903); Sweet v. Rechel, 159 U.S. 380 (1895); Monongahela Navigation v. United States, 148 U.S. 312 (1893); Cherokee Nation v. Southern K. Ry., 135 U.S. 641 (1890). Finally, Justice Harlan remarked that "[t]here are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored." *Chicago, Burlington*, 200 U.S. at 594. Unfortunately, his opinion in this case made it difficult to understand precisely what those limitations are.

[69] The relationship between the taking and due process limitations on police power regulation of private property was complicated by the Supreme Court's use of substantive due process to limit the government's authority to interfere with freedom of contract in the late nineteenth and early twentieth centuries. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 11.2-.3 (3d ed. 1986); F. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE 90-103 (1986); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-1 to 8-4 (1978); Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 U. CHI. L. REV. 324 (1985). In its 1897 decision in Allgeyer v. Louisiana, 165 U.S. 578 (1897), the Court invalidated a Louisiana statute which prohibited certain marine insurance contracts not in compliance with Louisiana law for improperly infringing on freedom of contract. *Allgeyer* was followed by Lochner v. New York, 198 U.S. 45 (1905), the most famous of the substantive due process cases, in which the Court invalidated a New York statute setting maximum working hours for bakers on the ground that it arbitrarily and unnecessarily interfered with the liberty to contract between an employer and an employee.

The Court's resort to substantive due process as a shield for freedom of contract did not prevent all attempts to regulate private contractual relationships. Such attempts would withstand due process scrutiny if they sought to achieve legitimate ends through means which had a "real and substantial relationship" to those ends. *Id.* at 56, 64; *see also* Liggett Co. v. Baldridge, 278 U.S. 105, 111 (1928); Jacobson v. Massachusetts, 197 U.S. 11, 31 (1905). But the Court engaged in more rigorous scrutiny of both the ends and the means than it had in the previous cases rejecting substantive due process attacks on state police power regulation of property. *See* L. TRIBE, *supra*; Currie, *supra*, at 380. The impetus behind this heightened scrutiny of regulations impairing contractual freedom may have been the Court's desire to protect the free enterprise system, *see* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra*, § 11.3, at 344, or to prevent forced redistributions of resources among private persons, *see* L. TRIBE, *supra*, § 8-4 at 439.

the Court's opinions in the decade following *Chicago, Burlington* were dotted with the kind of talismanic platitudes that marked the Court's earliest attempts to construe the fourteenth amendment following its adoption.[70] Although the police power was "far-reaching,"[71] the constitutional limitations upon its exercise were "hard to define."[72] All property rights were subject to the "fair" exercise of the police power,[73] and a "legitimate" police power regulation was not a deprivation of property without due process.[74] However, police power regulations were "subject to judicial scrutiny upon fundamental grounds,"[75] and could not be sustained if they were arbitrary or unjustly discriminatory.[76] The Court asserted that police power regulations must be supported by proper ends and means[77] and courts must provide deference to legislators concerning

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Whatever the motive, the Court's forceful use of substantive process to protect freedom of contract differed dramatically from the deferential substantive due process review afforded police power regulation of private property in the years following the adoption of the fourteenth amendment.

The first hints that the Court might abandon the use of substantive due process as a means of protecting liberty of contract came in cases upholding state mortgage moratoriums and milk price control regulations. *See* Nebbia v. New York, 291 U.S. 502 (1934); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934). In *Nebbia*, for example, the Court opined that "a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose." 291 U.S. at 537. The Court continued to invalidate economic regulatory legislation, including significant aspects of the New Deal, on Commerce Clause and substantive due process grounds for several years after *Nebbia*. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra*, § 11.3 at 348. But in 1937, the Court staged a significant retreat from the doctrine of substantive due process, as reflected in cases like *Lochner* and *Allgeyer*, when it upheld the constitutionality of Washington's minimum wage law for women. West Coast Hotel v. Parrish, 300 U.S. 379 (1937). A dozen years later, the Court expressly rejected the "*Allgeyer - Lochner - Adair - Coppage* constitutional doctrine," declaring that states may regulate "injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law." Lincoln Fed. Labor Union v. Northwestern Iron & Metal, 335 U.S. 525, 535-36 (1949). For analysis of the reasons for the decline of *Lochner*-type substantive due process, see generally J. NOWAK, R. ROTUNDA & J. YOUNG, *supra*, § 11.4; L. TRIBE, *supra*, §§ 8-5 to 8-7.

[70] *See supra* notes 24-31 & accompanying text.

[71] Sligh v. Kirkwood, 237 U.S. 52, 59 (1915); *see also* Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (police power is "one of the most essential powers of government, one that is least limitable"); Eubank v. Richmond, 226 U.S. 137 (1912).

[72] *Sligh*, 237 U.S. at 58.

[73] Chicago & A.R.R. v. Tranbarger, 238 U.S. 67, 77 (1915).

[74] Northern Pac. Ry. v. Minnesota *ex rel.* Duluth, 208 U.S. 583, 596 (1908) (quoting New York & N.E.R.R. v. Bristol, 151 U.S. 556, 567 (1894)).

[75] Reinman v. Little Rock, 237 U.S. 171, 177 (1915).

[76] *See Hadacheck*, 239 U.S. at 411; *Reinman*, 237 U.S. at 176.

[77] *See, e.g.*, Cusack Co. v. City of Chicago, 242 U.S. 526, 531 (1917); *Sligh*, 237 U.S.

the propriety of both.[78] By themselves, however, these principles did nothing to clarify the content of the due process and takings limitations on police power regulations.

By the end of World War I, it was at least clear that the fourteenth amendment's due process clause had substantive content and that it incorporated the fifth amendment's prohibition on taking of private property for public use without just compensation. It was less clear whether government regulation of private property, in and of itself, could ever be a compensable taking. Except for maximum rate regulation of public utilities, the Court had not yet found an example of what we now call a "regulatory taking." A fair reading of the Court's decisions was that police power regulation aimed at a nuisance-like use of property could never be voided as a taking. Such regulation could violate substantive due process, however, if it sought to achieve ends beyond the scope of the police power or employed means improperly related to legitimate police power ends. In other words, regulation of nuisance-like land uses appeared to be governed by the Separation Model.

B. The Roaring Twenties: The Road Splits

The second distinct era in the judicial development of the due process/taking issue fell between the end of World War I and the late 1920s. It was the last period dominated by the Separation Model and one in which the headwater decision of modern, Relativist fourteenth amendment jurisprudence was issued. Not surprisingly, then, it was an era in which the seeds of confusion planted during the formative era began to sprout.

1. Separatism as Alpha and Omega

When the post-World War I San Francisco city government ordered an owner to raze a wooden structure situated in an area where such buildings were not permitted, the Court unanimously found the underlying regulation lawful, even though it was enacted after the offending building was erected.[79] The Court focused on the question of proper authority.

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at 61; Murphy v. California, 225 U.S. 623, 629-30 (1912) (quoting Booth v. Illinois, 184 U.S. 425, 429 (1902)); Welch v. Swasey, 214 U.S. 91, 105 (1909)).

[78] *See, e.g.*, Walls v. Midland Carbon, 254 U.S. 300, 322, 324 (1920); *Reinman*, 237 U.S. at 177 ("considerable latitude of discretion must be accorded to the law-making power"); *Sligh*, 237 U.S. at 61 (whether police power "regulation is necessary in the public interest is primarily within the determination of the legislature").

[79] Macguire v. Reardon, 255 U.S. 271 (1921).

Several years later, the Court's penultimate opinion of the period expanded on the same theme. In upholding the state of Virginia's right to destroy diseased cedar trees, the spores from which threatened nearby orchards, the Court wrote that "where the public interest is involved, preferment of the [legislatively determined] interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."[80] Both of these decisions were Separation Model prototypes.

2. *Separatism Expands to Non-Nuisance-Like Uses*

An even more resounding endorsement of the Separation Model came when the Court used it to uphold the constitutionality of regulations restricting non-nuisance-like uses. The first American zoning ordinance was enacted in New York City in 1916—by 1921 the idea had "taken the country by storm."[81] By the time the question of its general constitutionality reached the Court, zoning had already passed muster in nine states and failed in three.[82] Despite some internal doubts,[83] the Court upheld zoning in the landmark case of *Village of Euclid v. Ambler Realty*.[84]

In *Euclid*, the landowner argued that the ordinance exceeded police power authority because the state had no right to restrict non-nuisance-like uses. In upholding the ordinances, the Court engaged in traditional, Separatist due process analysis, finding both that separating land uses was a legitimate governmental objective and that zoning was a reasonable method of accomplishing that objective.[85]

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[80] Miller v. Schoene, 276 U.S. 272, 279-80 (1928).

[81] Kimball, *A Review of City Planning in the United States, 1920-1921*, 11 NAT'L MUN. REV. 27, 32 (1922). The same report notes that by 1922 there were 20 enabling acts, 50 ordinances, and more than 100 ordinances in development. *Id.* Much of the wildfire spread was attributable to the messianic zeal of zoning's supporters—one prominent member of the vanguard dedicated victory to the "great sacrifice and efforts on the part of many noble men who consecrated themselves . . . ." J. METZENBAUM, 1 LAW OF ZONING 52 (2d ed. 1955).

[82] The states sustaining the concept were Massachusetts, Louisiana, New York, Illinois, Minnesota, Wisconsin, Kansas, California, and Rhode Island. Those holding contrary were Maryland, New Jersey, and Texas. *See* Village of Euclid v. Ambler Realty, 272 U.S. 365, 390-91 (1926) (listing citations).

[83] A brief reference written 20 years later indicates that the first majority view was that zoning should be declared unconstitutional. McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710, 712 (1946).

[84] 272 U.S. 365 (1926).

[85] *See id.* at 387-90 (discussing the governmental objective); *id.* at 390-93 (discussing zoning as appropriate means).

The Court, however, warned that zoning could be "arbitrary and unreasonable" when applied to specific tracts.[86]

Two years later, the Court enforced the *Euclid* warning by finding a zoning ordinance unconstitutional when applied to specific property. The decision in *Nectow v. City of Cambridge* noted that the "invasion" of the plaintiff's rights was "serious and highly injurious,"[87] thus hinting at an impact-based analysis. But the Court ultimately enjoined application of the ordinance because it did not bear "a substantial relation[ship] to the public health, safety, morals, or general welfare"[88] and concluded that the "invasion" was unconstitutional because that police power predicate was missing.[89]

Nectow would be the last major decision in the due process/taking area for a half century. Looking back from *Nectow*, one would have the impression that the Separation Model was well-entrenched, perhaps even more so than at the close of the previous era because of its extension in *Euclid* to non-nuisance-like uses.

3. *Strange Interlude*: Pennsylvania Coal *and its Predecessor*

Looming directly in the midst of the postwar decade, however, stood *Pennsylvania Coal v. Mahon*,[90] an apparently anomalous detour into Relativism which cast the longest shadow of any fourteenth amendment interpretation ever issued.

Pennsylvania Coal declared unconstitutional certain applications of a Pennsylvania statute prohibiting the mining of anthracite (hard) coal in a way that caused subsidence. The case involved a private action for an injunction through which a surface owner attempted to prevent mining beneath his house while acknowledging that his predecessor in title never received support rights in the original transfer from the coal company.

Justice Holmes wrote a two-part opinion for the Court. The first part held the attempted application of the statute unconstitutional because the private nature of the potential harm attributable to the subsidence did not justify the substantial destruction of the company's property rights. While acknowledging that property rights could be modified constitutionally through police power regula-

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[86] *Id.* at 395.
[87] 277 U.S. 183, 188 (1928).
[88] *Id.*
[89] *Id.* at 188-89.
[90] 260 U.S. 393 (1922).

tion,[91] Holmes found that "the extent of the taking is great,"[92] and "the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the [company's] constitutionally protected rights."[93] In this first part, Holmes used the term "taking" somewhat loosely, and consequently gave the decision a decidedly Relativist shape.

The opinion's second part examined the "general validity of the Act" and found it unconstitutional "so far as it affects . . . mining . . . where the right to mine . . . has been reserved."[94] This was the section of the opinion that would become the polestar of all later taking interpretations. After distinguishing a case in which the Court had struck down another coal mining regulatory scheme because the former scheme offered "an average reciprocity of advantage,"[95] Holmes hit full Relativist stride:

> The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. . . . [T]his is a question of degree . . . .[96]

Thus, what became the headwater decision and language for modern due process/taking cases was born. But why, in the midst of many decisions viewing police power regulation questions from a perspective exclusively emphasizing *authority*, did the Court suddenly lurch toward a perspective predominantly emphasizing *impact*? Why did the usually pithy Holmes accept the invitation to write the second part of the opinion when he obviously found the first part sufficient to conclude the matter?[97] And having decided to

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[91] *Id.* at 413.

[92] *Id.* at 414.

[93] *Id.*

[94] *Id.*

[95] *Id.* The previous case was Plymouth Coal v. Pennsylvania, 232 U.S. 531 (1914), concerning a law requiring that a pillar of coal be left along property lines to guard the safety of employees. Holmes' reference presumably means that while each company lost some coal, it reciprocally gained some safety for its employees because other companies were also required to leave coal. The obvious assumption is that Pennsylvania Coal gained nothing from the restrictions imposed by the Kohler Act.

[96] *Pennsylvania Coal*, 260 U.S. at 415-16.

[97] "If we were called upon to deal with the plaintiffs' position alone, we should think it clear . . . .

. . . .

But the case has been treated as one in which the general validity of the act should be discussed." *Id.* at 414. These statements led a later Court to view the rest of Holmes'

write the second part, why did he ignore powerful evidence about the devastation wrecked by subsidence in northeast Pennsylvania, evidence that would seem to be abundantly sufficient to justify police power intervention under the Separation Model?[98]

The answers to these questions can be found neither within the opinion nor in any peculiarity in Holmes, who joined the majority, Separatist views set out in the decade's other prominent land use regulation cases. But we believe there is an answer, and it both casts light on the strange happenings in *Pennsylvania Coal* and undermines the case's importance as an expression of fourteenth amendment philosophy.

One year before *Pennsylvania Coal*, *Block v. Hirsh*[99] upheld the constitutionality of emergency rent control legislation in the District of Columbia. The legislation permitted, *inter alia*, tenants to remain on rented premises after the expiration of their leases, paying either the contract price or a "reasonable" amount as determined by a special commission.[100] Not surprisingly, the legislation was attacked as a taking under the rate regulation precedents[101] and as a direct appropriation of the owner's reversionary right to possession.[102]

Justice Holmes, writing for the Court, gave short shrift to the owner's contentions, but not without leaving an interesting trail. The legislation *could be* constitutional, he argued, because property

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opinion as "advisory." Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 484 (1987).

98 While every section of the city was more or less affected the worst devastation was in the heart of the business section of West Scranton. Visitors there . . . can clamber through pits strewn with broken brick and rubbish covering great areas formerly improved with handsome business blocks but now permitted . . . to revert to the wilderness of abandon. Our once level streets are in humps and sags, our gas mains have broken, our water mains threatened to fail us in time of conflagration, our sewers spread their pestilential contents into the soil, our buildings have collapsed under their occupants or fallen into the streets, our people have been swallowed up in suddenly yawning chasms, blown up by gas explosions or asphyxiated in their sleep, our cemetaries have opened and the bodies of our dead have been torn from their caskets.

Brief on Behalf of the City of Scranton, Intervenor at 5, Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) (No. 549). A description of the Day After? The denouement of a horror movie? Judgment Day? No, it is a description of a northeast Pennsylvania city after several years of subsidence caused by coal mining.

99 256 U.S. 135 (1921).

100 *Id.* at 153-54.

101 *See supra* notes 45-48 and accompanying text.

102 *Block*, 256 U.S. at 141-42. A companion case, Marcus Brown Co. v. Feldman, 256 U.S. 170 (1921), upheld a New York City rent control scheme.

rights were vulnerable to interference "not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay."[103]

Holmes then found the scheme constitutional because it met the traditional substantive due process tests. After cautioning against second-guessing legislative purpose,[104] he found protections against rent-gouging compatible with nuisance-abating regulations previously upheld.[105] The means were no more difficult: "[I]f the public interest be established the regulation of rates is one of the first forms in which it is asserted . . . ."[106]

Had it all ended there, as it seemingly should have, *Block* would be unremarkable, except to the extent that by equating "taking" with "cutting down rights" under the police power,[107] Holmes began the muddying process between the substantive due process and taking limitations that has been with us ever since. But Holmes was not content with a passing reference. Again, uncharacteristically, he stopped for a lecture on constitutional theory:

> All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort pressed to a certain height might amount to a taking without due process of law.[108]

So there it was, in all its Relativist glory, even using the same phrase that would become famous when repeated in *Pennsylvania Coal*. Again, though, the critical question is why; why was the Relativist island so intentionally constructed in the center of the Separatist lake?

The answer, it would appear, lay in Justice McKenna's strong

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[103] *Block*, 256 U.S. at 155.

[104] No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the Courts. But a declaration by a legislature concerning public conditions that by necessity and duty it must know, is entitled to at least great respect.

Id. at 154 (citations omitted).

[105] *Id.* at 155-56.

[106] *Id.* at 157 (citing Munn v. Illinois, 94 U.S. 113 (1876), discussed at *supra* note 45 and accompanying text).

[107] *See supra* text accompanying note 103.

[108] *Block*, 256 U.S. at 156.

dissent, written for himself, Chief Justice White, and Justices Van DeVanter and McReynolds.[109] The dissent disagreed with the majority view on the constitutional adequacy of both the statute's purpose and its means. Yet it was the language employed in these analyses that signalled this as no ordinary dispute within the Court: "Have conditions come, not only to the District of Columbia, embarrassing the Federal Government, but to the world as well, that are not amenable to passing palliatives, so that socialism, or some form of socialism, is the only permanent corrective or accommodation?"[110] Further, the dissent asked "[i]f such power exist[s], what is its limit and what its consequences? . . . [T]he broader consequences of unrestrained power and its exertion against property . . . is of grave concern. The security of property . . . is of the essence of liberty."[111] Accordingly, "the assertion . . . that legislation can regard a private transaction as a matter of public interest . . . is . . . to express the possession or exercise of [the most] unbounded or irresponsible power."[112] Thus, "if one provision of the Constitution may be subordinated to [the police] power, may not other provisions be?"[113]

This would be tough stuff in any era, but it must have been particularly so at a time when the country was just beginning to emerge from a three-year paroxysm of Red-baiting, the effects of which would last much of the decade.[114] Calling colleagues "socialists" was serious business in 1921, when many Americans were having a difficult time distinguishing which "isms" true patriots should vilify.[115] The great bulwark against the leftist hordes was, of course,

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[109] *Id.* at 158.

[110] *Id.* at 162.

[111] *Id.* at 164-65.

[112] *Id.* at 167.

[113] *Id.* at 170.

[114] R. MURRAY, THE RED SCARE (1955). Murray's highly-regarded review of the era observes that many public figures, including Harvard law professors Chaffee and Frankfurter, were attacked as "Red." While the last major "event" was the Wall Street bombing of September, 1920, Murray states that "the anti-radical emotionalism emanating from the Scare affected both governmental and private thinking for almost a decade to come and left its unmistakable imprint on many phases of American life." *Id.* at 263. He adds that "there was a high degree of Scare-inspired psychology at work on public opinion down to 1924-1925." *Id.* at 264; *see also* W. PRESTON, ALIENS AND DISSENTERS 208-72 (1963); EGBERT & PERSONS, 1 SOCIALISM AND AMERICAN LIFE (1952).

[115] R. MURRAY, *supra* note 114, at 166. Murray notes that 15 to 20 million Americans were suspected of Bolshevik leanings at the depth of the Scare. *Id.* at 168. Holmes was himself involved in some of the principal events of the Scare. In 1919, he wrote an opinion for a unanimous Court upholding the conviction of Eugene V. Debs under the

private property. Thus, it is understandable that Holmes, and the other members of the *Block* majority, attempted in their *excursis* to make clear that their "socialism" came only in degrees. It is equally understandable that they leaped overeagerly at the first opportunity thereafter to demonstrate that their Relativist perspective posed no continuing threat to the use and ownership of private property. If *Pennsylvania Coal* had not come along, Holmes would have had to invent it.

4. Unification: A Forgotten Model

While both the Separation and Relativist Models were being showcased during the postwar era, the Unified Model totally disappeared. Although it is possible to argue that Holmes' opinion in *Pennsylvania Coal* reflected the Unified Model, in that he found the Act in question "took" plaintiff's property because it lacked a sufficient legislative purpose, this argument is unconvincing for two important reasons.

First, it is evident from the context of Holmes' use of the word "taking" in both *Pennsylvania Coal* and, especially, *Block*, that he was not using it in the strict, fifth amendment taking clause sense[116]—that is, as an activity tantamount to inverse condemnation. Rather, he seems to have meant that a regulation lacking sufficient authority to justify a severe "cutting down" of property rights was invalid because it violated substantive due process. Such an interpretation reflects the Separation rather than the Unified Model. Second, even if Holmes used the term "taking" literally rather than metaphorically, it seems that Holmes' problem with the statute in *Pennsylvania Coal* rested in neither its purpose nor its means,[117] but with its economic impact on the property owner. The now-famous phrase, "goes too far," reflected this, as did his metaphor of "a man's misfortunes [justifying] his shifting the damages to [a] neighbor's shoulders."[118] *Pennsylvania Coal* was, and is, the fountainhead of Relativism, untainted by other models.

Espionage Act for general rabble-rousing speech against the war. *See* Debs v. United States, 249 U.S. 211 (1919). Later that year, he dissented for himself and Justice Brandeis in a "Bolshevik literature" case under the same Act. *See* Abrams v. United States, 250 U.S. 616, 624 (1919). Most remarkably, he was one of 36 Americans marked for death by letter bombs apparently mailed by radicals. R. MURRAY, *supra* note 114, at 71.

[116] *See supra* note 103 and accompanying text.

[117] Holmes conceded the presence of a public interest even "in the case of a single private house." Pennsylvania Coal v. Mahon, 260 U.S. 393, 413 (1922).

[118] *Id.* at 416.

Many years later, Justice Stevens would also suggest that *Euclid* had "fused the two express constitutional restrictions on any state interference with private property—that property shall not be taken without due process, nor for a public purpose without just compensation—into a single standard . . . ."[119] Arguably, this "single standard" reflected the Unified Model. This suggestion contains at least two weaknesses. First, it is not at all clear where Justice Stevens found this fusion in *Euclid*; he does not reveal his source. Second, the plaintiff in *Euclid* argued that the ordinance was "confiscatory," thereby inviting the Court to dispose of the case on taking grounds,[120] and yet the Court responded in due process terms, holding that the ordinance was neither "arbitrary nor unreasonable."[121]

5. *Reprise and Reflection*

The post-World War I era comprised three important developments in the constitutionality of land use regulations: the entrenchment of the Separation Model and its expansion to non-nuisance-like uses, the disappearance of the Unified Model, and the anomalous but substantial adoption of the Relativist Model in *Block/Pennsylvania Coal*.

Two of these developments proved illusory. As the modern era unfolded, it became obvious that the Separation Model would no longer dominate fourteenth amendment jurisprudence and that the Unified Model was not dead. But *Pennsylvania Coal*, and the Relativism it spawned, endured, grew, and became the bedrock of subsequent Court decisions relating due process and takings. The principal question surviving the era becomes whether that case's illegitimate roots should affect judicial attitudes toward it.

Pennsylvania Coal is the foundation of all modern "taking" cases. It is also the basis for the continuing mystery of "what Holmes meant"[122] and for the enigma reflected in the Supreme Court's un-

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[119] Moore v. City of East Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J., concurring in the judgment). Justice Stevens appeared to indicate, however, that police power regulations aimed at nuisance-like uses are governed by the Separation rather than the Unified Model. *See id.* at 513 (owner's right to decide how best to use his own property "has always been limited by the law of nuisance which proscribes uses that impair the enjoyment of other property in the vicinity"). Justice Stevens confirmed this interpretation of the takings limitation a decade later in the *Keystone* case. *See infra* notes 187-94 and accompanying text.

[120] Village of Euclid v. Ambler Realty, 272 U.S. 365, 375, 386 (1926).

[121] *Id.* at 395.

[122] *See, e.g.*, F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 124-38 (1973); Berger & Kanner, *Thoughts on "The White River Junction Manifesto": A Reply*

wavering loyalty to the Relativist formulation, juxtaposed with the reality that it had never before, nor has since, struck down a regulation merely because it went "too far."

As Dorothy's experience in Oz demonstrated, the wrinkled little man behind the screen is a far less imposing Wizard than the artificially projected omnipresence.[123] Behind the screen, the Relativist Model arose from *dicta* in *Block* as a feeble attempt to counteract the dissenters' name-calling and fulfilled itself as *dicta* in *Pennsylvania Coal* as an assurance that private property remained sacred in the American constitutional system. That is not to say that Holmes did not believe in the Relativist Model, or that there may not be sound constitutional bases for that viewpoint. It is to say that the origins of the doctrine are both unusual and artificial, strongly suggesting that whatever fealty the Relativist Model now commands should be based on merit and not on historical awe or frequent repetition.

C. The Age of Innocence (a.k.a. the "Dark Ages")

During the fifty years following *Nectow*, the Supreme Court exercised relatively few opportunities to review the constitutionality of local land use controls. In a few cases, the Court sought to provide guidance on some of the basic questions left unresolved by the cases of the 1920s. These efforts were unsuccessful mainly because the Court still had not decided which of the three models governed the relationship between the taking and due process limitations on police power regulation.

The most basic question emanating from the decade was whether the Court's return to the Separation Model in *Euclid* and *Nectow* had buried Relativism. During this third epoch, the Court made clear that it had not, at least for some types of regulation.[124] In

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to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property, 19 LOY. L.A.L. REV. 685, 726-28 (1986); Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193 (1984).

123 L. BAUM, THE WIZARD OF OZ 145-48 (1900). Kansans offer such analogies with considerable trepidation, knowing that most of our readers already think that Dorothy was probably our mother. But the allusion is apt, and parochial fears must be cast aside.

124 *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) (dictum) (citing Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922)). Several years earlier, the Court stated in dictum that "we have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking." United States v. Central Eureka Mining, 357 U.S. 155, 168 (1958). Inexplicably, however, the Court cited two cases involving *physical invasions* as examples to support this proposition. *See id.* (citing

fact, it was in this interim period that the Court began its modern posture of endorsing the use of the Separation Model in the context of regulations aimed at nuisance-like uses and the Relativist Model in all others.

Two cases which reflect that dichotomy addressed the constitutionality of regulations requiring railroads to finance grade separation improvements. In *Atchison, Topeka & Santa Fe Railway v. Public Utilities Commission*,[125] the Court held that a state's order requiring a railroad to bear half of the costs of constructing grade separations between the tracks and adjacent streets was not a taking because "[t]he presence of these tracks in the streets creates the burden of constructing grade separations in the interest of public safety and convenience. Having brought about the problem, the railroads are in no position to complain" about having to share in the cost of alleviating it.[126] In *Nashville, Chattanooga & St. Louis Railway v. Walters*,[127] increased motor traffic, rather than the railroad's operation, was responsible for the problem.[128] Applying Relativist principles, the Court stated that the government could not single out the railroad to bear the cost of advancing the public convenience unless the costs imposed on it were reasonably related to the benefits it derived from the improvements. If they were not, the order constituted a taking.[129] When the government regulated a non-nuisance-like use,[130] the burden imposed on the regulated property owners

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United States v. Kansas City Life Ins., 339 U.S. 799 (1950); United States v. Causby, 328 U.S. 256 (1946)); *see also* United States v. General Motors, 323 U.S. 373, 378 (1945) (the term "taking" "would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys"). During the 50 year period between *Nectow* and *Penn Central*, the Court also made an effort to define what "property" is. The notion of property as a "bundle of rights," which became a prominent analytical tool in the takings cases of the 1970s and 1980s, *see infra* note 288, surfaced in an opinion by Justice Roberts. *General Motors*, 323 U.S. at 373. "Property," as that term is used in the fifth and fourteenth amendments, is not confined to the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law." *Id.* at 377. Rather, the term denotes "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *Id.* at 378.

125 346 U.S. 346 (1953).

126 *Id.* at 353.

127 294 U.S. 405 (1935).

128 *See id.* at 422-23.

129 *See id.* at 428-29. The Court remanded to the state supreme court for a determination whether the costs were excessive. *Id.* at 433-34.

130 The Court in *Nashville* distinguished earlier cases permitting the government to impose upon railroads the entire cost of grade separations by noting that these cases perhaps reflected the attitude that railway operations were then "specially dangerous" and that railroad tracks crossing highways "would be nuisances." *Id.* at 429 n.37 (quot-

could amount to a taking unless offset by an average reciprocity of advantage.[131]

Having answered the basic question, the Court also dealt with one that followed: When did regulations of non-nuisance-like uses go too far? Noting "the difficulty of trying to draw the line" between takings and non-compensable government actions affecting private property,[132] the Court conceded its inability to develop an all-encompassing definition. Whether a particular governmental action amounted to a "taking" had to be decided on a case-by-case basis.[133] The Court did state that a comparison of the property's value before and after regulation is relevant, though "by no means conclusive," of the limits of police power regulation.[134] It added that a taking is measured by the deprivation imposed on the property owner rather than by the gain to the government.[135] Although a regulation that deprived the property of its most beneficial use was not necessarily a taking,[136] governmental action whose "effects are so complete as to deprive the owner of all or most of his interest in the subject matter" could violate the taking limitation.[137]

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ing Fertilizing Co. v. Hyde Park, 97 U.S. 659, 679 (1878) (Strong, J., dissenting); Thorpe v. Rutland & B.R.R., 27 Vt. 140, 150 (1854)).

[131] *Cf.* Armstrong v. United States, 364 U.S. 40, 49 (1960) (prohibition against taking without just compensation "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). In National Bd. of YMCA v. United States, 395 U.S. 85 (1969), the Court rejected a property owner's claim for compensation for damage caused by the government's efforts to squelch a riot. Because the property owner was the particular intended beneficiary of the government's activity, which was meant in part to protect the property, " 'fairness and justice' do not require that losses which may result from that activity 'be borne by the public as a whole.' " *Id.* at 92.

[132] *Armstrong*, 364 U.S. at 48; *see also Goldblatt*, 369 U.S. at 594 (denying the existence of a "set formula to determine where regulation ends and taking begins").

[133] *Central Eureka Mining*, 357 U.S. at 168 (citing *Pennsylvania Coal*, 260 U.S. at 416).

[134] *Goldblatt*, 369 U.S. at 594.

[135] *General Motors Corp.*, 323 U.S. at 378; *cf. Causby*, 328 U.S. at 261 (the owner's loss rather than the taker's gain is the measure of the value of the property taken). *But cf.* United States v. Caltex, Inc., 344 U.S. 149, 155 (1952) (no taking even though property "was destroyed, not appropriated for subsequent use"), *reh'g denied*, 344 U.S. 919 (1953).

[136] *See Goldblatt*, 369 U.S. at 592; *Central Eureka Mining*, 357 U.S. at 168; *cf.* Village of Belle Terre v. Boraas, 416 U.S. 1, 9-10 (1974) ("property rights may be cut down, and to that extent taken, without pay" (quoting Block v. Hirsh, 256 U.S. 135, 155 (1921))). For cases holding that regulations were not compensable takings, see Lichter v. United States, 334 U.S. 742 (1948) (statute authorizing government to recover "excess profits" on contracts for the production of war goods); Bowles v. Willingham, 321 U.S. 503 (1944) (maximum rent control statute).

[137] *General Motors*, 323 U.S. at 378 (dictum). *But cf. Central Eureka Mining*, 357

As in the previous era, the Unified Model received little attention, and what was written was confused. The Court's opinion in *Berman v. Parker*[138] seemed to deny that the absence of proper ends or means could ever be a taking.[139] In *Berman*, the owners of condemned property argued that the government had taken their property for a private rather than public use, thereby violating the taking clause of the fifth amendment.[140] Deferring to Congress' conclusion that the program served a public purpose, the Court rejected the

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U.S. 155 (government order requiring temporary but total shutdown of gold mines, and prohibiting disposition of certain assets, during wartime was not a taking).

[138] 348 U.S. 26 (1954).

[139] The Court's post-*Nectow* jurisprudenee generally reflected the traditional, two-part substantive due process analysis. A state could not exercise its police powers "arbitrarily or unreasonably." Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 415 (1935) (citing, among other cases, Nectow v. City of Cambridge, 277 U.S. 183 (1928) Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922); Lawton v. Steele, 152 U.S. 133, 137-38 (1894)); *see also Goldblatt*, 369 U.S. at 594. To avoid arbitrary action, the state must act for broadly-defined police power ends. *See Village of Belle Terre*, 416 U.S. at 8-9. It must also employ means "rationally" or "substantially" related to those ends. *See* Moore v. City of East Cleveland, 431 U.S. 494, 498 n.6 (1977); City of Eastlake v. Forest City Enter., 426 U.S. 668, 676 (1976) (quoting *Euclid*, 272 U.S. at 395). Furthermore, ever since the demise in the late 1930s of the use of substantive due process as a doctrine to protect "liberty of contract," *see supra* note 69, the Court afforded virtually complete judicial deference to legislative determinations concerning the propriety of both the ends and means reflected in police power regulation. *See, e.g.*, *Berman*, 348 U.S. at 32 (because legislative declarations of the public interest are "well-nigh conclusive," the role of the judiciary in determining whether social legislation is enacted for a proper public purpose "is an extremely narrow one"). *Berman* involved federal legislation, but because that legislation was enacted pursuant to Congress' authority to regulate the internal affairs of the District of Columbia, the case involved "what traditionally has been known as the police power." *Id.*; *see also Goldblatt*, 369 U.S. at 595 ("debatable questions as to reasonableness are not for the courts but for the legislature . . . ." (quoting Sproles v. Binford, 286 U.S. 374, 388 (1932))); *cf.* City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) (equal protection case, in which the Court said that "[s]tates are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude").

In the mid-1970s, the Court indicated that it would forsake its "usual judicial deference" to legislative ends and means determinations if the regulation at issue allegedly infringed on "fundamental rights" guaranteed by the Constitution. *Moore*, 431 U.S. at 499; *Village of Belle Terre*, 416 U.S. at 7-8. In 1977, the Court invalidated a zoning law for the first time since *Nectow* when it addressed a substantive due process challenge to an ordinance that limited certain properties to single family use and defined a "family" in a way that prohibited a grandmother from living with her two grandsons of different parents. *Moore*, 431 U.S. 494. Although the Court deemed legitimate the ordinance's goals of preventing overcrowding, minimizing traffic and parking congestion, and avoiding an undue financial burden on the city's school system, it found that the means chosen were too tenuously related to those goals to justify infringing on freedom of personal choice in matters of marriage and family life. *Id.* at 499-500.

[140] 348 U.S. at 31.

claim and dismissed the argument that it was inappropriate for Congress to authorize lease or sale of the condemned property to private developers to carry out the urban renewal scheme. According to the Court, "the power of eminent domain [was] merely the means" chosen to achieve the police power purposes the Court had recognized as legitimate.[141] Thus, although Congress might have chosen other methods of eliminating the injurious consequences of slum conditions, such as regulation, "the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established."[142]

The *Berman* analysis implicitly addressed the scope of the police power by implying that an invalid police power regulation does not constitute a taking. It is apparent from the Court's analysis that the judiciary cannot dictate to the legislature the means of achieving police power ends, and that it is up to the latter to determine what *legitimate* means it will use in lieu of the means invalidated by a court. The legislature may choose to regulate in a different manner, or it may choose to condemn property as a means of promoting the public health, safety, morals, or general welfare. *Berman* and the Court's other cases deferring to legislatively-chosen means seemed to preclude a court that has labelled an invalid police power regulation a "taking" from forcing the legislature to employ eminent domain as the solely acceptable means of achieving its goals.[143]

In contrast with *Berman*, in one case the Court implied that all regulations of private property which violate the substantive due process standard are, *ipso facto*, takings. In *Goldblatt v. Hempstead*,[144] the Court upheld a municipal ordinance restricting dredging and pit excavations. In a straightforward Relativist analysis, the Court concluded that the ordinance did not constitute a regulatory taking under the doctrine of *Pennsylvania Coal* because the record contained no evidence that the ordinance reduced the value of affected property,[145] and that the ordinance was a valid police

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[141] *Id.* at 33.

[142] *Id.*

[143] The legislature would not be forced to employ eminent domain in the future, since it may refrain from re-adopting an invalidated regulation. But if the government is forced to compensate the owner of the regulated property for the time the regulation was in effect, an issue the Supreme Court would not resolve until 1987, *see infra* text accompanying notes 167-68, the court has, in essence, forced the government to condemm the regulated property after the fact.

[144] 369 U.S. 590 (1962).

[145] *Id.* at 594.

power enactment with appropriate ends and means.[146]

But the opinion added the odd observation that the record contained "no indication that the prohibitory effect of [the ordinance] [was] sufficient to render it an unconstitutional taking if it [was] otherwise a valid police regulation."[147] Did the Court mean that an ordinance that exceeded the police power for lack of proper ends or means would also be a regulatory taking, a view consistent with the Unified Model? Or was it just saying that an ordinance that is not a regulatory taking nevertheless can be unconstitutional as a violation of substantive due process if it lacks proper ends or means, the analysis dictated by the Relativist Model? The opinion offered no further explanation.

In summary, the cases decided in the half-century after *Nectow* presented little guidance and some confusion on the nature of regulatory takings. The Court did not recognize the remedial implications of its decisions, a failure that would soon begin to take a central position in the Court's treatment of fourteenth amendment restrictions. The Court's wandering from model to model had now lasted a century.

D. Quo Vadis?: A Decade of Searching

After the Supreme Court's half-century of relative silence on land use regulation came a period of creative activity. From 1978 through 1988 the Court wrote nearly a dozen important majority opinions, and several important dissents, in an attempt to bring order to takings jurisprudence. In some regards the effort succeeded. It definitively ruled that all permanent physical invasions are takings without regard to impact.[148] It made clear that Relativism is here to stay for certain kinds of regulations. And it held that damage actions to compensate for temporary takings are constitutionally compelled.[149]

The Court failed, however, to bring complete order to the chaotic world of regulatory takings. While pursuing a generally Relativist tack, it provided little guidance about when a regulation "goes too far." It re-introduced the Separation Model but made hash of its applicability. Additionally, it brought the Unified Model to center

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[146] *Id.* at 594-96.

[147] *Id.* at 594.

[148] Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419 (1982); *see also* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

[149] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

stage with no apparent realization of the significance of that maneuver.

1. Relativism: Dominant, Described, and Diminished

If any doubt remained after *Goldblatt v. Hempstead*[150] that the Court had accepted a dominant jurisprudential role for the Relativist Model, those doubts were erased by the Court's ambitious effort to explain the scope of the taking limitation in *Penn Central Transportation v. City of New York*.[151] Justice Brennan's opinion for the Court flatly rejected the idea that takings were limited to physical invasions or transfers of title.[152] It embraced Relativism by describing the issue in the case as whether the impact of the regulation in question was of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]."[153]

Justice Rehnquist dissented in *Penn Central*,[154] but he soon thereafter wrote the opinion of the Court in *Kaiser Aetna v. United States*,[155] in which he cited "the economic impact of the regulation" as a key element in assessing constitutionality.[156] This unanimous acceptance that regulations could "go too far" continued apace through the decade and appeared as fresh and viable at the end as at

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[150] 369 U.S. 590 (1962); *see supra* text accompanying notes 144-47.

[151] 438 U.S. 104 (1978). *Penn Central* involved an attack on a city ordinance establishing a historic preservation regulatory scheme for buildings in New York City. The modestly complicated scheme began with the Landmarks Preservation Commission designating a building or area as a "landmark" or "historic district," respectively. The City Board of Estimate could modify or disapprove the designation, and the owner could seek judicial review of the ultimate status. Once designated, the building or district had to be kept in good repair, and Commission approval was necessary prior to improvement. Transferrable development rights equivalent to any rights removed by Commission action accompanied its ruling. The sticking point in the case was an effort by the owner to obtain Commission approval to construct a tower on Grand Central Terminal, a request denied in two forms. *Id.* at 107-20.

[152] *Id.* at 123 n.25 ("[W]e do not embrace the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel.").

[153] *Id.* at 136 (quoting *Pennsylvania Coal*, 260 U.S. at 413). Similarly, nearly a decade later, Justice Stevens began his opinion in Keystone Bituminous Coal Ass'n v. De Benedictis, 480 U.S. 470 (1987), by endorsing Holmes' statement in *Pennsylvania Coal* that when "the extent of the diminution [in value]" caused by a police power regulation "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain [it]." *Id.* at 473. The Court in *Keystone*, by a 5-4 vote, upheld the constitutionality of Pennsylvania statutory and regulatory limitations on bituminous (soft) coal mining.

[154] 438 U.S. at 138; *see also infra* text accompanying note 186.

[155] 444 U.S. 164 (1979).

[156] *Id.* at 175.

the beginning.[157]

The Court also made some progress in bringing Relativism into clearer focus. By the mid-seventies, the problem of drawing the line between regulation and "taking"[158] had metamorphosized into a more focused discussion of whether owners who successfully challenged regulations as "takings" were entitled to a damage remedy.[159] That issue lead commentators and courts back to the question of whether what was referred to as a "regulatory taking" under the Relativist Model was, indeed, a violation of the fifth amendment takings clause, or whether it was a violation of the fourteenth amendment proscription against the deprivation of property without due process, *i.e.*, merely a shorthand method of describing an *ultra vires* governmental act which happened to involve land use regulation.

Two prominent state supreme courts opened the debate by holding that landowners who successfully challenged overly-restrictive governmental regulations were entitled only to injunctive relief.[160] Justice Brennan responded in a famous dissent, stating that such a position "fails to recognize the essential similarity of regulatory takings and other 'takings' . . . ."[161] This point of view brought forth a heavy attack from commentators taking the view that Justice Holmes had not "meant" to use the term "taking" literally in *Pennsylvania Coal*, and that a half century of jurisprudence since had treated regulatory takings as unconstitutional deprivations, for

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[157] *See, e.g.*, Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 191 (1985) ("[T]his Court consistently has indicated that among the factors of particular significance in the [taking] inquiry are the economic impact . . . ." (quoting Penn Cent. Transp. v. New York City, 438 U.S. 104, 124 (1978))); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance . . . denies an owner [economical] use of his land."); *see also* First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 316 (1987).

[158] *See* R. BABCOCK, THE ZONING GAME 168-72 (1966); C. HAAR, LAND USE PLANNING 766 (3rd ed. 1977); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165 (1975); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

[159] *See* HFH, Ltd. v. Superior Court of Los Angeles County, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1976); Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975).

[160] Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980); Fred F. French Inv. Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *appeal dismissed*, 429 U.S. 990 (1976).

[161] San Diego Gas & Elec. v. City of San Diego, 450 U.S. 621, 651 (1981).

which invalidation was the proper remedy.[162] Brennan's analysis drew strong support in both academic[163] and judicial[164] circles.

Four years after the Brennan dissent, Justice Blackmun, writing for the majority, did not reach the merits of the remedies issue, but he offered a hint that a segment of the Court might sympathize with the "metaphor" position:

> This Court often has referred to regulation that 'goes too far'. . . as a 'taking'. . . . Even assuming that those decisions meant to refer literally to the Taking Clause of the Fifth Amendment, and therefore stand for the proposition that regulation may effect a taking for which the Fifth Amendment requires just compensation . . . [this case was] not ripe [for review].[165]

But when the Court again avoided the remedies issue on finality grounds in 1986, a four-Justice dissent added White and Rehnquist to those formally on record in support of Brennan's position.[166]

All debate mercifully and abruptly ended with the Court's opinion in *First English Evangelical Lutheran Church v. County of Los Angeles*,[167] in which a majority opinion by Rehnquist removed the quotation marks from the word "taking" by holding that all takings—physical *or* regulatory—were governed by the fifth amendment takings clause and required "just compensation." Rehnquist cited several cases arising from temporary appropriations of property during World War II as precedent for the proposition that " 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for

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[162] *See* Kmiec, *Regulatory Takings: The Supreme Court Runs Out of Gas in San Diego*, 57 IND. L.J. 45 (1982); Williams, Smith, Siemon, Mandelker, & Babcock, *supra* note 122.

[163] The direct response to the *White River Junction Manifesto* came in Berger & Kanner, *supra* note 122. Reading the two articles brings to mind the proverbial ships in the night: the first authors argued that Holmes wrote metaphorically in *Pennsylvania Coal*, and regulatory takings are merely invalid acts; the latter authors argued that all takings must be compensated.

[164] For cases upholding Brennan's view, see Bank of Am. v. Summerland County Water Dist., 767 F.2d 544 (9th Cir. 1985); Nemmers v. City of Dubuque, 764 F.2d 502 (8th Cir. 1985); United States v. Riverside Bayview Homes, 729 F.2d 391 (6th Cir. 1984), *rev'd*, 474 U.S. 121 (1985); Barbian v. Panagis, 694 F.2d 476 (7th Cir. 1982); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981); Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983); Annicelli v. Town of S. Kingston, 463 A.2d 133 (R.I. 1983); Zinn v. State, 112 Wis. 2d 417, 334 N.W.2d 67 (1983).

[165] Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985).

[166] MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) (White, J., dissenting).

[167] 482 U.S. 304 (1987).

which the Constitution clearly requires compensation."[168] Having finally set to rest the true nature of regulatory takings, the Court returned the case to the district court for an assessment of whether a taking had occurred.

So it came to pass that while the Court became more and more wedded to Relativism as its dominant model for adjudicating taking cases, it also clarified the position of that model with respect to the continuum between deprivations and takings. Yet to a considerable extent this progress was illusory, for even as Relativism appeared ascendant, the doctrine of finality was beginning to corrode its foundation.

Not until the end of his tone-setting opinion in *Penn Central* did Justice Brennan suggest that the owner's claim might be premature because the city had denied only two specific plans rather than all possible uses of the air space.[169] To suggest, as the Court later did, that *Penn Central* was nothing more than a finality decision[170] is patently wrong and trivializes the majority's effort to bring substantive order to takings law. Yet this hint at the end of Brennan's opinion was destined to become a major development of the period, and one that threatened the viability of the Relativist Model.

Two years later, *Agins v. City of Tiburon*[171] sounded a similar theme. In *Agins*, the landowners claimed a taking because the city had downzoned their land. While again the Court reviewed certain substantive aspects of the case, it limited its review of facial unconstitutionality because the owners "never . . . sought approval for development of their land under the zoning ordinances"[172] and thus were "free to pursue their reasonable investment expectations by submitting a development plan to local officials."[173]

Thrice more during the decade the Court refused to reach the merits of significant inverse condemnation cases founded on a regulatory taking theory because the majority found them not ripe for substantive resolution. Brennan's dissent may have made *San Diego Gas & Electric v. City of San Diego* famous,[174] but the majority

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[168] *Id.* at 318 (citing Kimball Laundry v. United States, 338 U.S. 1 (1949); United States v. Petty Motor, 327 U.S. 372 (1946); United States v. General Motors, 323 U.S. 373 (1945)).

[169] 438 U.S. at 136-38.

[170] *See infra* note 182 and accompanying text.

[171] 447 U.S. 255 (1980).

[172] *Id.* at 257.

[173] *Id.* at 262.

[174] *See supra* notes 161-64 and accompanying text.

held that because the California courts never reached the merits of the plaintiff's taking allegation, there was "no final judgment or decree" to review.[175] This inclination to "pass" became even more explicit in *Williamson Planning Commission v. Hamilton Bank*.[176] There, the owner's appeal was held not "ripe" because it had failed to seek a variance from the allegedly overrestrictve ordinance and because it had not exhausted state judicial remedies by bringing an inverse condemnation action in state court.[177] Finally, in *MacDonald, Sommer & Frates v. Yolo County*,[178] the Court directly tied Relativism to finality:

> It follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes.[179]

Given the otherwise ascendant nature of the Relativist Model during the period, it is difficult to overestimate the importance of the ripeness development.

Within the 1978-87 decade, the Court decided eight major takings cases. Two involved physical invasions,[180] and a third was totally unrelated to land use.[181] Only five cases concerned regulatory takings of real property interests under the federal Constitution. The Court resolved all five against the landowner, of which three were based specifically on ripeness grounds. And while the Court decided the other two on substantive basis, it later referenced each as a prime example of its disinclination to review a premature claim.[182]

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[175] 450 U.S. at 633-37 (interpreting 28 U.S.C. § 1257 (1982)). Rehnquist separately concurred, though he agreed fundamentally with the opinion of the Court. *Id.* at 634. Brennan's dissent was premised on his conclusion that the California court's determination that no set of circumstances could result in a compensable taking was "final" enough. *Id.* at 639-46.

[176] 473 U.S. 172 (1985).

[177] Here the Court claimed no precedents, relying instead on an analogy to Parratt v. Taylor, 451 U.S. 527 (1981), in which a claim for compensation was denied when a state employee allegedly arbitrarily deprived the plaintiff of his property. But *Parratt* was clearly a *due process* claim based on deprivation without hearing, *id.* at 536, while the property owner in *Williamson* had all the process he needed, and more.

[178] 477 U.S. 340 (1986).

[179] *Id.* at 348.

[180] Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419 (1982); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

[181] Andrus v. Allard, 444 U.S. 51 (1979).

[182] [I]n Agins v. Tiburon . . . the Court held that a challenge to the application

Results were not the entire picture. The ripeness barrier to substantive review erected during the era offered little hope to future litigants claiming regulatory takings. This was especially so for those initiating requests to improve property. Combining the requirements of *Williamson Planning Commission* and *Yolo County*, claimants seeking to improve property could now obtain substantive federal judicial review of the constitutionality of a denial only after the appropriate body had reached a final, negative decision on all possible development schemes, unlikely in the normal handling of owner-initiated requests, and all state judicial remedies had been exhausted.

Thus did the decade end for Relativism—reigning but infirm. While the Court repeated the Relativist Model's fundamental dogma that regulations are invalid if they "go too far," it was apparent by decade's end that the Justices had little eagerness to make those determinations. Landowners' hopes springing from the clear adoption of Holmes' test proved to be more ephemeral than substantial.

2. *Separatism: How Deep, How Broad?*

While Relativism dominated this last jurisprudential era, it did not monopolize it. In two of the more significant decisions of the period, the Justices debated what role, if any, the Separation Model would continue to play in takings decisions. The answer came in response to the question of when, if ever, can state and local governments regulate *without regard to impact* so long as they meet the traditional substantive due process ends/means test? As far back as *Pennsylvania Coal*, Justice Brandeis' dissent provided one answer: "[A] restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction . . . is merely the prohibition of a noxious use."[183] He added that the only proper test in such cases was the traditional, substantive due process ends/means inquiry.[184]

> of a zoning ordinance was not ripe because the property owners had not yet submitted a plan for development of their property . . . . In *Penn Central* . . . the Court declined to find . . . a taking because . . . the property owners had not sought approval for any other plan . . . .

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 187 (1985).

[183] 260 U.S. at 417.

[184] "The restriction . . . cannot, of course, be lawfully imposed, unless its purpose is to protect the public . . . . Furthermore, a restriction . . . will not be lawful, unless [it] is an appropriate means to the public end." *Id.* at 417-18.

Justice Brennan's opinion in *Penn Central* seemed to reject Brandeis' view explicitly. He asserted that the rejection of takings challenges in so-called "nuisance cases" rested "not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit . . . ."[185]

This odd reading, dismissing the relevance of impact in historical analysis, was challenged by dissenter Rehnquist who apparently aligned himself with Brandeis: "As early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use."[186] This apparent role reversal, with Rehnquist arguing for governmental prerogative and Brennan against, probably stemmed from Rehnquist's fear that the Brennan language could precipitate a drift back toward the formative years when governmental latitude to act without regard to impact was broader.

This debate was submerged for almost a decade, only to appear more prominently in *Keystone Bituminous Coal Association v. DeBenedictis*,[187] a case in which the facts were virtual mirror images of those in *Pennsylvania Coal*.[188] In his majority opinion upholding the validity of the regulation, Justice Stevens seemed to directly re-

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[185] 438 U.S. at 134 n.30. Brennan saw the assertion as one based upon a distinction suggested by commentators that regulations aimed at eliminating harms could not be takings while those aimed at creating benefits were. *See, e.g.*, E. FREUND, THE POLICE POWER 546-47 (1904); Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV., 650, 663-69 (1958).

[186] *Penn Central*, 438 U.S. at 144 (citing Mugler v. Kansas, 123 U.S. 623 (1887)).

[187] 480 U.S. 470 (1987).

[188] Unless one finds an immediate distinction between hard and soft coal, the reader will enjoy Justice Stevens' noble but obviously futile attempt to distinguish *Pennsylvania Coal*. *Id.* at 481. His opinion offered at least two bases (beyond the density of the carbon) for distinguishing the earlier case. First, before offering what Justice Stevens termed "an advisory opinion" on the Kohler Act's general constitutionality, he noted that Holmes had described his case as involving "a single private house." That contrasted with the Subsidence Act at issue in *Keystone* which was passed to "arrest . . . a significant threat to the common welfare" and to "protect the public interest in health, the environment and the fiscal integrity of the area." *Id.* at 483-88 (citing Block v. Hirsh, 256 U.S. 135, 155 (1921)). By focusing on the absence of a proper police power objective in *Pennsylvania Coal*, Stevens essentially tried to rewrite Holmes' opinion as a Unified Model case. But Holmes' language fits far more comfortably into the Relativist Model, and the case has always been cited to support the notion that the economic impact of a regulation can be so excessive as to render it a taking. Second, Justice Stevens said that the two cases were distinguishable even as Relativism cases. Unlike

pudiate Brennan's views in *Penn Central*, an odd position considering Brennan's presence in the majority. After noting the general importance of the nature of the government's action and quoting *Mugler*'s statement that prohibitions on injurious uses cannot be takings,[189] Stevens denied that *Mugler* and its progeny had been overruled by *Pennsylvania Coal*.[190] According to Stevens, Holmes did not dispute Brandeis' contention that the state can prohibit nuisance-like uses without regard to impact; he simply disagreed that the statute in *Pennsylvania Coal* applied to such uses.[191]

Although the Stevens opinion did not endorse the Separation Model without qualification in the context of regulation of nuisance-like uses,[192] it came close by referring to "the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the state has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity."[193] More importantly, the opinion reached beyond Rehnquist's narrow definition in *Penn Central* by extending the Separatism Model to uses "tantamount to public nuisances," although such uses might not have qualified as nuisances under common law or statutory criteria.[194]

Justice Rehnquist dissented, ostensibly reiterating his position from *Penn Central* while, in reality, seeking to narrow governmental prerogative even further. This "nuisance exception," he as-

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Pennsylvania Coal, in *Keystone*, there was no claim that the coal could not be mined profitably. *See id.* at 493.

Chief Justice Rehnquist was closer to the mark when he called the two cases "strikingly similar." *Id.* at 506 (Rehnquist, C.J., dissenting). The true distinction between *Pennsylvania Coal* and *Keystone* is the latter's expanded definition of the class of regulations governed by the Separation Model. To change Justice Steven's emphasis, the two cases provide a prime example that "circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern." *Id.* at 488 (citing *Block*, 256 U.S. at 155).

189 *Id.* at 489.

190 *Id.* at 490 (citing Miller v. Schoene, 276 U.S. 272 (1928); Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926)).

191 *Id.* at 488.

192 Justice Stevens said the Court had always been "hesitant" to find a taking in the context of such regulation. *Id.* at 491. The implications of *Keystone* for the Separation Model are also muddied by Stevens' inquiry into whether the legislation "went too far" in terms of its economic impact. Although his conclusion that it did not appears to be an alternative holding, it remains possible that he believes that even regulations aimed at nuisance-like uses are subject to a Relativist interpretation.

193 *Id.* at 491 n.20 (citing Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 155-61 (1971); Michelman, *supra* note 159, at 1235-37).

194 *Id.* at 491.

serted, applies only to regulations resting on "discrete and narrow" purposes, without regard to "economic concerns."[195] Not surprisingly, he found the Pennsylvania statute wanting.

As with the Relativist Model, the final period in fourteenth amendment interpretation ended a bit chaotically for the Separation Model. All the Justices believed Separatism had a role to play, but all were uncertain as to exactly what role. A final role for the Separation Model in deprivation/taking jurisprudence has yet to be found.

3. *Unification: Out of the Blue*

The Court capped this most prolific decade in takings interpretation by ignoring everything it had decided, not only for that period but for some seventy previous years, by resurrecting and bringing to center stage the Unified Model.

At least since Justice Harlan's opinion in *Chicago, Burlington*,[196] the possibility had existed that a regulation might violate the taking limitation not only through excessive economic impact but also because of insufficient proper ends or means. Prior to 1987, that possibility remained theoretical despite occasional *dicta* seeming to obliterate the distinction between the substantive due process and taking limitations.[197]

In *Nollan v. California Coastal Commission*,[198] the Court for the first time found a compensable taking on a basis other than impact.

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[195] *Id.* at 513 (Rehnquist, C.J., dissenting). The legislation in *Keystone*, according to the Chief Justice, was "much more than a nuisance statute" based "on essentially economic concerns." *Id.* But contrary to Rehnquist's characterization, enhancement of property tax values was merely one of several purposes listed in § 2 of the Subsidence Act. *See id.* at 485-86. Furthermore, the Chief Justice asserted, "our cases have *never* applied the nuisance exception to allow complete extinction" of property value or "prohibit all use without providing compensation." *Id.* at 513 (emphasis added). Other members of the court have read the taking cases differently. *See, e.g., Penn Central*, 438 U.S. at 125 (Court has upheld land use regulations that destroyed recognized real property interests); *see also* Siemon & Larsen, *The Taking Issue Trilogy: The Beginning of the End?*, 33 WASH. U.J. URB. & CONTEMP. L. 169, 178-79 (1988); *supra* notes 43-44 and accompanying text.

[196] *See supra* notes 63-68 and accompanying text.

[197] In *Penn Central*, Justice Brennan stated that a regulation would not be a taking if it "served a substantial public purpose," was "reasonably necessary to the effectuation" of that purpose, and did not have "an unduly harsh impact upon the owner's use of the property." 438 U.S. at 127. Similarly, Justice Powell asserted that a regulation "effects a taking if [it] does not substantially advance legitimate state interests or denies an owner economically viable use of his land . . . ." Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)(citations omitted).

[198] 483 U.S. 825 (1987).

Justice Scalia's majority opinion did not reflect an awareness that something truly revolutionary in the world of regulatory takings had apparently occurred.[199]

Nollan involved an attempt by the owners of beachfront property in California to procure a coastal development permit required by state statute. A state commission issued the permit, but only on the condition that the Nollans allow the public an easement to pass across their property between the seawall and the mean high-tide line, thus facilitating the public's ability to get to the beaches north and south of the Nollans' land. The commission found that the Nollans' proposed house would increase blockage of ocean views and private use of the shorefront. The effects, along with other new development in the area, would cumulatively "burden the public's ability to traverse to and along the shorefront."[200] The permit condition was meant to offset that burden.

The issue, according to Justice Scalia, was whether requiring the Nollans to convey the easement as a condition for issuing a land use permit constituted a taking.[201] As there was no evidence of any

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[199] The Court's endorsement of the Unified Model in *Nollan* might have been foreshadowed earlier in the year in Hodel v. Irving, 481 U.S. 704 (1987), where the Court invalidated as a taking a federal statute that abrogated the right of Indian property owners to transfer land by intestacy or devise and provided that certain small fractional interests in land would escheat to the tribe upon the owner's death. Justice O'Connor's majority opinion repeatedly referred to the possibility that the escheat provision's application to certain transfers could produce results counterproductive to the statute's objective which was consolidation of fractionated Indian landholdings. The statute prohibited descent or devise of fractional interests even when the heir or devisee already held an interest in the same land. Descent or devise in such a situation would result in consolidation, not further fragmentation, of fractional interests and yet the escheat provision precluded such a transfer. *See id.* at 715. Justice O'Connor's analysis in effect amounts to the conclusion that the means chosen by Congress to promote the consolidation of fractionated Indian lands were not reasonably related to the achievement of that permissible objective. If Justice O'Connor believed that the absence of proper police power means (rather than economic impact) is a basis for invalidating a regulation as a taking, then *Hodel* implicitly foreshadows the Court's express holding to that effect in *Nollan*.

[200] *Nollan*, 483 U.S. at 829 (citation omitted).

[201] *Id.* at 831. Following the Court's decision in Loretto v. Teleprompter Manhattan CATV, 458 U.S. 419 (1982), one might have expected the analysis to turn on whether the permit condition amounted to a permanent physical invasion and therefore a per se taking, or a lesser invasion which nevertheless infringed sufficiently on the Nollans' land to require compensation. Indeed, Justice Scalia's majority opinion, stressing the importance of a property owner's right to exclude, stated that a taking would have occurred if the state had simply required the Nollans to grant an easement to increase public access to the beach. *Nollan*, 483 U.S. at 831. Such a requirement would have constituted a permanent physical occupation, since it would have given members of the public "a permanent and continuous right to pass to and fro, so that the real property may contin-

substantial economic impact on the owners, the constitutional question became whether the regulation advanced legitimate state interests.

As Justice Scalia assumed that the commission was acting for legitimate reasons,[202] the only question was whether the commission chose appropriate means for achieving them. He found that it did not because the easement did not promote the ends advanced as its justification.[203] It was "quite impossible to understand" how a requirement that the Nollans afford the public lateral access across their property would protect the public's ability to view the beaches.[204] The lack of a nexus between the permit condition and the police power purpose it allegedly promoted "converts that purpose to something other than what it was."[205] The commission's real purpose, Justice Scalia concluded, was to expropriate an access easement from the Nollans without paying for it.[206] Therefore, the permit condition was not a valid police power regulation but a taking.[207] The only way for the commission to achieve its objectives was through the exercise of the state's power of eminent domain.[208]

The *Nollan* case put the Court's stamp of approval on the Unified Model: a police power regulation that lacks proper ends or means constitutes a taking rather than a violation of substantive due process. The case thus moves beyond *Pennsylvania Coal* and creates two categories of regulatory takings: one, based on Relativism, for

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uously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.* at 832 (footnote omitted).

[202] *Id.* at 836.

[203] *Id.* at 837.

[204] *Id.* at 838. The difficulty with this analysis, as Justice Brennan pointed out, is that it totally ignores one of the commisssion's expressly stated purposes. The majority erroneously assumed that the commission's only purpose was to protect the public's visual access to the beach. The commission, however, had supported the permit condition with a specific finding that the Nollan's proposed development would burden not only visual access but also "the public's ability to traverse to *and along* the shorefront." *Id.* at 850 (Brennan, J., dissenting) (citation omitted) (emphasis added). Thus, the commission was concerned with protecting lateral access as well as visual access. Justice Brennan therefore believed that the permit condition "directly responds to the specific type of burden on access created by [the Nollans'] development." *Id.* at 842.

[205] *Id.* at 837.

[206] *Id.*

[207] *See id.* at 837-38. Justice Scalia deemed the commission's actions "an out-and-out plan of extortion." *Id.* at 837 (quoting J.E.D. Assoc. v. Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)). Justice Brennan, on the other hand, asserted that the majority had given the Nollans "a windfall at the expense of the public." *Id.* at 842 (Brennan, J., dissenting).

[208] *See id.* at 842.

regulations that "go too far" by imposing excessive economic constraints on the use of private property; and a second, based on Unification, for regulations lacking a sufficient nexus between their asserted police power ends and the means chosen to accomplish them. In *Nollan*, the Supreme Court held for the first time that land use regulation amounted to a taking of the second kind.[209] It represents the final step in the fusing of the substantive due process and takings limitations on land use regulation referred to by Justice Stevens in the *Moore* case[210] and reflected in the two-part takings analysis of *Penn Central* and *Agins*.[211]

E. Summary: The Long and Winding Road

Shortly after the turn of the century, Justice Harlan's opinion in *Chicago, Burlington* described three distinct and incompatible models governing the relationship between the due process and taking limitations on the police power. The Court's failure thereafter to choose consistently among the models left unresolved a series of issues, the most important of which were: (1) whether a regulation could be a taking, (2) if so, when, and (3) what the available remedies are for regulatory takings. By the end of 1987, the Court had answered the first and third questions. Regulations can be takings, and interim damages are available for those whose property is temporarily "taken by regulation."

The second question of when a regulation becomes a taking was not so easily resolved. At the end of 1987, it was no clearer than it was after *Chicago, Burlington* which of the three models accurately described the nature and relationship of the due process and taking limitations. *Keystone* reflects a Separation Model analysis,[212] coupled with an attempt to distinguish *Pennsylvania Coal* based on Relativism.[213] *Nollan* clearly and unequivocably endorses the Unified Model.[214] *First English* purports to involve only the remedy issue, but it can be interpreted to reject the Separation Model en-

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[209] Although Justice O'Connor's opinion in *Hodel*, 481 U.S. 704, can be read to support the theory that a police power regulation employing inappropriate ends is a taking, *see supra* note 199, the opinion does not explicitly recognize the Unified Model. In any event, Justice O'Connor relied primarily on the escheat provision's total deprivation of the right to dispose of property upon one's death, a title-appropriating, rather than an impact-based, analysis.

[210] *See supra* note 119 and accompanying text.

[211] *See supra* note 197 and accompanying text.

[212] *See supra* notes 187-95 and accompanying text.

[213] *See supra* note 188.

[214] The two cases can be reconciled. The Separation Model applies only to regula-

tirely and to substitute instead an impact-based Relativist test.[215]

It is not clear whether the Court believes it finally has made sense of the fourteenth amendment's due process and incorporated taking limitations. If Justice Harlan were alive today, he might well think that the 1987 opinions represent worthy successors to *Chicago, Burlington*.

III

The Road Not Taken: The Proper Role of the Three Models

A number of avenues are available to the Court to bring the due process/taking equation into sharper focus, and choosing one is probably less important than realizing the true nature of the problem. But we have a solution to suggest, and the purpose of the final part of the Article is to delineate the proper role of each of the three Models in a coherent and consistent manner.

A. The Unified Model: A Plea For Elimination

Despite occasional and oblique references in dicta,[216] the Court never used the Unified Model to strike down a police power regulation prior to *Nollan*.[217] We believe there were good reasons for this avoidance. The Unified Model is inconsistent with both the text and purpose of the fourteenth amendment and with the vast majority of the Court's cases interpreting it. If that were not objection enough, the Court's method of implementing the model in *Nollan* appears to be seriously flawed. We begin this section with the latter point before revealing the conceptual flaws of the Unified Model.

Although it does not cite it, Justice Scalia's *Nollan* opinion relies substantially on the analytical framework set forth in Richard Ep-

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tions aimed at eliminating harm to the public. Regulations not governed by Separatism could be subject to the Unified Model.

[215] The Court's citation to *Pennsylvania Coal* for the proposition that regulations that go too far are takings, *see* 482 U.S. at 321-22, can be read to support the view that *all* regulatory taking claims should be adjudged by the substantive standards of the taking clause. In a "pure" fifth amendment analysis, no matter how strong the police power justification and regardless of its nature, a regulation may always "go too far." This analysis might be compatible with *Penn Central* and *Agins*. It is not, however, compatible with the line of cases—dozens in number—that concentrate solely on governmental purpose and authority to determine constitutional legitimacy. Read this way, *First English* denies the existence of the Separation Model endorsed only three months earlier in *Keystone*. *See supra* notes 187-95 and accompanying text.

[216] *See, e.g., supra* note 197 and accompanying text.

[217] *See supra* notes 197-209 and accompanying text.

stein's recent book on takings.[218] As Professor Epstein acknowledges, each of the major components of his theory fly in the face of "the received judicial wisdom" about the content of and relationship between the due process and taking limitations on the police power.[219]

Professor Epstein's first point concerns the test for determining whether a police power regulation pursues appropriate ends through proper means. Epstein contends that the courts should apply an "intermediate level of scrutiny," more searching than the traditional requirement of a rational basis, in determining whether the regulatory means chosen are sufficiently related to the purported ends to constitute a legitimate exercise of the police power. He cites *Lochner* as a case employing this "intermediate level" of scrutiny.[220] Heightened scrutiny should not be confined to the narrow range of cases dealing with infringements on "fundamental" rights[221] because the distinction between "fundamental" and "ordinary" rights is erroneous. In Professor Epstein's view, "under the proper analysis all rights are, as it were, fundamental. Neither the due process clause nor the taking clause draws any distinction among the types of interests they protect."[222]

In *Nollan*, Justice Scalia hedged on the question of the appropriate standard of judicial review of the ends-means nexus by concluding that the permit condition concerning public access to the beaches did not satisfy even the traditionally deferential rational basis test.[223] However, his opinion strongly suggests that he supports a standard of judicial review more exacting than the one traditionally applied in cases assessing the constitutionality of police power regulation.[224] According to Justice Scalia,[225] the Court has never

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[218] R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

[219] *Id.* at 349-50; *see also id.* at 102-03 (Epstein's definition of a "regulatory taking" departs from Supreme Court precedent as far back as *Pennsylvania Coal*); *id.* at 109, 128 (The accepted test for reviewing the rationality of police power regulation cannot be defended in analytical terms; indeed, even the *Lochner* standard of review lacks verbal precision.); *id.* at 142-43 (The attempt in *Belle Terre* and *Moore* to limit the class of fundamental rights which trigger heightened scrutiny is "flawed.").

[220] *Id.* at 128.

[221] *See, e.g., supra* note 139.

[222] R. EPSTEIN, *supra* note 218, at 143.

[223] *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 838-39 (1987).

[224] Certainly, Justices Brennan and Blackmun believed that, whatever the test he purported to be employing, Justice Scalia was in fact engaging in a degree of scrutiny much more exacting than any the Court had used since the heyday of *Lochner*-type substantive due process. According to Brennan, Scalia's analysis reflected "a standard of preci-

elaborated "the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter."[226] But he denied Justice Brennan's assertion that the Court's opinions establish that the standard of reviewing the nexus between ends and means in a taking case is the same as the rational basis test used in cases involving due process or equal protection challenges. He found "some reason to disbelieve" that the standards for reviewing takings, due process, and equal protection challenges to the regulation of property are identical.[227]

Whatever the majority's motivation may have been,[228] the Court's adoption of heightened scrutiny of traditional land use regulation represented to Justice Brennan "a judicial arrogation of legislative authority" that "has long been discredited."[229] The Court had simply substituted "its own narrow view" of the appropriate

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sion for the exercise of a State's police power that has been discredited for the better part of this century." *Id.* at 842 (Brennan, J., dissenting). Justice Blackmun agreed, deeming the majority's "close nexus between benefits and burdens" resulting from police power regulation "an anomaly in the ordinary requirement that a State's exercise of its police power need be no more than rationally based." *Id.* at 865 (Blackmun, J., dissenting) (citing Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 466 (1981)).

225 The Chief Justice apparently endorses a degree of judicial scrutiny even more stringent than Professor Epstein's intermediate level of scrutiny. At least as to the purported ends of police power regulation regarding a nuisance exception, Rehnquist appears to favor *de novo* judicial review of legislative or administrative determinations. *See* Keystone Bituminous Coal Ass'n v. De Benedictis, 480 U.S. 470, 506 (1987) (Rehnquist, C.J., dissenting) ("The legitimacy of this purpose of a police power regulation is a question of federal, rather than state, law, subject to independent scrutiny by this Court.").

226 *Nollan*, 483 U.S. at 834. Justice Scalia emphasized, however, that the Court has required a "substantial," rather than simply a rational, connection between the ends and the means. He added that the Court is "inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." *Id.* at 841.

227 *Id.* at 834 n.3. Justice Scalia deemed the apparent assumption to the contrary in Goldblatt v. Hempstead, 369 U.S. 590 (1962), to be "inconsistent with the formulations of our later cases." *Nollan*, 483 U.S. at 835.

228 Although Justice Brennan could only speculate why the Court had invoked its unusually nondeferential standard of review in *Nollan*, he considered the possibility that the Court was "somehow suggesting that 'the right to build on one's own property' has some privileged natural rights status . . . ." *Id.* at 860 n.10 (Brennan, J., dissenting); *cf. supra* text accompanying notes 220-22 (discussing Professor Epstein's broadened conception of the class of "fundamental rights" which trigger heightened scrutiny of state regulatory activity).

229 483 U.S. at 846 (Brennan, J., dissenting).

balance between a landowner's ability to use his property and the state's need for protective regulation for the different, but "eminently reasonable," judgment of the commission.[230]

If the dissenting Justices are correct in their interpretation of the standard of review Justice Scalia employed, then *Nollan* represents a sharp turn back toward the era of *Lochner*-type substantive due process. During that era, the Court, acting as a super-legislature, rejected regulatory schemes fashioned by the political branches simply because they conflicted with the Court's own view that a laissez-faire economic system was superior to one subject to government regulation.[231] If the Court intends to return to *Lochner*-type review, at least in the context of land use regulation, it ought to admit that it is doing so. This intended change also should require a better explanation than appears in *Nollan* as to why the Court is resurrecting an approach to judicial review for constitutionality that has been subject to almost universal criticism for half a century.[232]

But *Nollan* is misconceived for a reason more fundamental to the central concern of this Article, that is, its merging of the substantive due process and taking limitations into a unified, fourteenth amendment limitation on government authority to regulate property. This aspect of the decision is also in accord with Professor Epstein's work. According to Epstein, all regulations of private property are at least partial takings.[233] Some takings are "justified" and, therefore, do not require compensation. Justifiable takings include those resulting from the government's exercise of its police power.[234] The government may exercise those powers only if it seeks to promote proper police power ends[235] and employs appropriate means of achieving them.[236] Thus, in the absence of proper means, the state

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[230] *Id.* at 864; *see also id.* at 850 n.4. According to Justice Stevens, the Court's decisions in *Nollan* and *First English* would "obviously" have an "unprecedented chilling effect . . . on public officials charged with the responsibility for drafting and implementing regulations designed to protect the environment and the public welfare . . . ." *Id.* at 866-67 (Stevens, J., dissenting).

[231] *See supra* note 67.

[232] For a summary of such criticisms, see P. MURPHY, THE CONSTITUTION IN CRISIS TIMES 70-82, 99-110 (1972). *But see* R. EPSTEIN, *supra* note 218, at 128.

[233] R. EPSTEIN, *supra* note 218, at 95. Epstein contends that even if a regulation restricts only a small portion of the use or value of a piece of property, the regulation constitutes a taking of the increment affected by the restriction. *See id.* (government imposition of restrictive covenant or lien is prima facie partial taking).

[234] *See id.* at 110-12. Other justifications, or "affirmative defenses," to takings are consent or assumption of risk by the regulated property owner. *Id.* at 146-58.

[235] Professor Epstein limits these to the control of nuisances. *See id.* at 112-25.

[236] *See id.* at 126-34.

exceeds its police power. Without the shield provided by this power, the taking caused by land use regulation is "unjustified" and, therefore, compensable. This is precisely the theory relied on by Justice Scalia in *Nollan*.[237]

The Unified Model's fusion of the substantive due process and taking limitations is inconsistent with the text of the Constitution and the Court's historic interpretation of it. The fifth amendment explicitly contains two separate constraints on government power. The fourteenth amendment states but one, a prohibition on deprivations of property without due process. But the Court has recognized the incorporation of the fifth amendment taking clause into the fourteenth amendment's due process clause, and, for most of the last century, it has treated the substantive due process and taking constraints as separate and distinct doctrines.

The merging of the two limitations also glosses over the distinct functions served by each.[238] The requirement of substantive due process is meant to ensure that the government acts for a proper purpose, *i.e.*, to enhance the aggregate social welfare.[239] The prohi-

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[237] It is not clear whether the four dissenting Justices agree with this analysis. Justice Brennan, who was joined by Justice Marshall and Justice Blackmun, concluded that the permit condition in *Nollan* was supported by both proper police power ends and means. Under "conventional" taking analysis, then, whether the condition constituted a taking depended upon factors such as the nature of the government's action and its economic impact on the Nollans. *See* 483 U.S. at 853 (Brennan, J., dissenting); *id.* at 865-66 (Blackmun, J., dissenting). The dissenters concluded that, based on these factors, the condition did not "go too far" and was therefore not a taking under Relativist principles. *See id.* at 853. Since Justices Brennan and Blackmun found the condition to be a reasonable exercise of the police power, they had no occasion to determine whether a regulation that exceeds the police power is a taking or a violation of substantive due process.

[238] *See* McGinley, *Regulatory 'Takings': The Remarkable Resurrection of Economic Substantive Due Process Analysis in Constitutional Law*, 17 ENVTL. L. REP. (Envtl. L. Inst.) 10,369, 10,372 n.31 (1987) ("The Due Process Clause and the Just Compensation/Eminent Domain Clause deal with separate and distinct constitutional concerns. Each clause expresses independent concerns of the framers; these considerations should be recognized and given weight by courts rather than being subsumed in some theoretical 'unified taking theory.' ").

[239] This function has been described as a guarantee of "efficient" or "rational" government action. *See, e.g.*, Michelman, *supra* note 158, at 1173 (government regulation that augments gross social product or maximizes total amount of welfare in society is "efficient"); *id.* at 1195 (regulatory measure that does not contribute positively to social welfare lacks a proper public purpose); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 49-50 (1985) (core demand of due process clause is that regulatory measures be "rational," or backed by "some independent 'public interest' "); *id.* at 69 (rationality requirement ensures that regulations are not mechanical responses to interest-group pressures); *see also* Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1066 (1980) (due process requirement of public purpose

bition on taking private property without just compensation serves a different function; it prevents the government from imposing on particular property owners a disproportionate share of the burdens caused by government actions taken to promote the public good.[240] These distinct functions reflect the Court's historic focus in substantive due process cases on issues of authority and in taking cases on questions of impact.[241]

The final problem with the Unified Model's fusion of the substantive due process and taking limitations is that it obliterates the remedial differences arising from violations of the two constraints. If a police power regulation violates substantive due process, it is invalid because the government lacked the authority to enact it.[242] On the other hand, if a police power regulation constitutes a taking due to its impact, the government may keep the regulation in effect, but only by providing just compensation, presumably fair market value, to those whose property has been taken.[243]

Similarly, the remedial consequences of due process and taking violations differ with respect to past harm. For a regulatory taking, interim damages are required to compensate the property owner for the burden imposed by the excessive regulation while it was in ef-

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"goes to the question of whether the governmental entity has the power to impose the particular regulation."); Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689-90 (1984) (means-ends requirement is meant to "filter out naked preferences," which involve "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.").

[240] *See, e.g.*, Armstrong v. United States, 364 U.S. 40, 49 (1960) (taking prohibition "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"); Michelman, *supra* note 158, at 1217 (the more disproportionate the injury sustained by a regulated property owner, "the more compelling will his claim to compensation become"); *id.* at 1225 ("justice or fairness," rather than utility, seems to be the key to compensation); *id.* at 1226 ("true purpose of the just compensation rule is to forestall evils associated with unfair treatment"); Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 587 (1972) (principle that just compensation "is designed to even the score when a given person has been required to give up property rights beyond his just share of the cost of government"); cases cited at *supra* note 8 and *infra* note 297.

[241] This dichotomy—substantive due process concerns authority and taking concerns impact—does not render the "public use" requirement of the taking clause redundant. The public use component of the taking clause is still necessary, for example, to ensure that when the government formally exercises its power of eminent domain through condemnation proceedings, it does so for a proper purpose.

[242] In such a case, "one need not—cannot—then ask if the regulation is a taking" on the ground that it lacks proper ends or means. Stoebuck, *supra* note 240, at 1066.

[243] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 320-22 (1987).

fect.[244] The just compensation clause explicitly demands as much. The Constitution provides no explicit damage remedy, however, to a person whose property was temporarily subject to a regulation that violates substantive due process. A person "deprived" of property without due process should be entitled to the same remedies that the Court has determined are available to a person similarly deprived of life or liberty, remedies which are derived from a statutory source[245] but not from the Constitution itself. This distinction in source is significant. The government may be immune from a statutory action based on a deprivation of due process, while it would not be shielded from an inverse condemnation action based on the just compensation clause.[246] By merging the substantive due process and taking limitations, the Court has eliminated this web of immunities for a government seeking to defend itself against the charge that its land use regulation lacks proper ends or means.

In summary, the Unified Model has no basis in the text of the Constitution, it conflicts with the Court's historical interpretation of the fourteenth amendment, it ignores the different functions served by the due process and taking limitations, and it produces remedial consequences for violations of substantive due process that are appropriate only for regulatory takings. The Court should recognize

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[244] *Id.*

[245] 42 U.S.C. § 1983 (1982) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an action at law . . . .

[246] A civil rights suit in federal court against the state itself or one of its agencies, for example, would be barred by the eleventh amendment. *See, e.g.*, Pennhurst State School & Hosp. v. Halderman (II), 465 U.S. 89 (1984); Smith v. Reeves, 178 U.S. 436 (1900); Fitts v. McGhee, 172 U.S. 516 (1899). A similar suit against state officials for equitable relief would not be barred. *Ex parte* Young, 209 U.S. 123 (1908); *see also* Home Tel. & Tel. v. City of Los Angeles, 227 U.S. 278 (1913). However, an action for past damages, even if nominally against individual state officials, would be prohibited by the eleventh amendment if the judgment would be satisfied from the state treasury. Edelman v. Jordan, 415 U.S. 651, 667 (1974). Furthermore, state officials might have common law "good faith" immunity. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

Local governments enjoy no constitutional immunity from suit in federal court. Mt. Healthy School Dist. v. Doyle, 429 U.S. 274 (1977). However, in a damage action a county or municipality might be barred by common law immunity unless the plaintiff can show that the alleged deprivation resulted from "official policy." *See* Monell v. Department of Social Serv., 436 U.S. 658 (1978). Although the Supreme Court has yet to flesh out the meaning of "official policy," an alleged deprivation resulting from the application of a zoning law seems the quintessential example of an official policy.

Nollan for what it is, an aberration, and take the first opportunity to bury both it and the Unified Model.

B. Separatism and Relativism: The Proper Balance

Once the Unified Model is discarded, the Court will have to reconstruct fourteenth amendment jurisprudence from the Separation Model, the Relativist Model, or some combination of the two. There is much beyond mere history to recommend the Separation Model, the re-adoption of which would eliminate regulatory takings except those that have become the equivalents of physical invasions by destroying all valuable use. This position is entirely consistent with the holding of *Pennsylvania Coal*,[247] and it would recognize the questionable birthright of the Relativist Model in that case.[248] It would also ratify the position of those who have argued that Holmes used the word "taking" metaphorically in *Pennsylvania Coal* and *Block*. The present Court seemed inclined to agree with this position until it backed into a contrary posture while adjudicating the remedy question in *First English Evangelical Lutheran*.[249] But that decision, numerous repetitions of the "goes too far" litany, and the general movement of the Court to a jurisprudence more protective of property rights, seems to have eliminated any prospect of returning to the halcyon days when Separatism ruled virtually alone.

The Court seems equally disinclined to accept Relativism as its sole standard. Each of the eight current Justices would find some role for the Separation Model; each has recognized a range of governmental freedom in which regulations are constitutional without

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[247] "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This [sic] we think that we are warranted in assuming that the statute does." 260 U.S. at 414-15.

[248] *See supra* notes 96-112 and accompanying text.

[249] For a discussion of why Holmes was using taking metaphorically, *see supra* text accompanying notes 103 & 108. The Court's flirtation with the metaphor position took place in Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985), when Justice Blackmum, writing for the Court, noted:

> This Court often has referred to regulation that 'goes too far' (citation omitted) as a 'taking.' (citation omitted) Even assuming that those decisions meant to refer literally to the Taking Clause of the Fifth Amendment, and therefore stand for the proposition that regulation may effect a taking for which the Fifth Amendment requires just compensation . . . .

Id. at 186. These apparent doubts went by the wayside, at least for the majority, two years later in *First English Evangelical Lutheran*, which held that if the regulatory action was found overrestrictive, damages were due. *See supra* text accompanying notes 167-68.

regard to impact so long as they meet the ends/means substantive due process test. However, the breadth of that range of freedom is very much at issue after *Keystone*.[250]

Assuming, then, the repudiation of the Unified Model, it seems inevitable that the deprivation/taking interpretations of the future will revolve around the relationship between the Separation and Relativist Models. A lawful predicate for governmental action is necessary for all regulation, of course, so the first question in any case involving the constitutionality of land use regulation must be whether the action meets the substantive due process test.[251] If purpose and means are proper, the Court will then have to determine whether the regulation falls within the zone of freedom permitted governments under the Separation Model. If it is, it will be declared constitutional without examination of impact on the landowner. If it is not, the Court will then have to assess the impact under its Relativist precedents to determine whether the restriction "goes too far."

The problem at the moment is that operative statements by the Court on both the range of governmental-freedom and the impact issues are so confused that the predictability of result is very uncertain. Perhaps bright lines are impossible to draw, but even dull ones would improve the status quo.

1. The Role of the Separation Model

The easier, and probably more important, step the Court could take to improve predictability is to define more sharply the zone of regulatory freedom allowed under the Separation Model. Such a step would have to begin with an examination of Chief Justice Rehnquist's views on the question as set forth in his dissents in *Penn Central* and *Keystone*. While he prevailed in neither, Rehnquist's formulation of the "nuisance exception" — defining the zone of regulatory freedom merely to cover efforts to restrict "a misuse or illegal use"[252] — took the jurisprudential offensive on the issue, with the majority relegated to reactions to his interpretation.

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[250] *See supra* notes 187-95 and accompanying text. No member of the Court seems inclined to assess impact in nuisance-elimination cases; some Justices apparently would give governments additional latitude.

[251] While it is the exclusive test under the Separation Model, substantive due process is also an acknowledged predicate for governmental action under the Relativist Model. *See* Penn Central Transp. v. City of New York, 438 U.S. 104 (1978).

[252] *Keystone*, 480 U.S. at 512 (Rehnquist, C.J., dissenting) (citing Curtin v. Benson, 222 U.S. 78, 86 (1911)).

Those responses in the majority opinions of *Penn Central* and *Keystone* were somewhat contradictory. At the most fundamental level, they raised some question whether there is *any* zone of freedom, as both refer to impact while purporting to discuss the zone of regulatory freedom. Brennan's exposition in *Penn Central* includes a paragraph on *Pennsylvania Coal* which asserts that the Pennsylvania statute was unconstitutional because it "frustrate[d] distinct investment-backed expectations . . . ."[253] Stevens' treatment in *Keystone* refers cryptically to the "important role that the nature of the state action plays" but it also comments in the same paragraph that " 'a comparison of values before and after' a regulatory action 'is relevant . . . .' "[254]

There is enough contrary language in both majority opinions, though, to provide a reasonable basis to conclude that the Separation Model lives. In *Penn Central*, Brennan cited *Nectow* and *Euclid* for the proposition that:

> [I]n instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. (citation omitted). Zoning laws are . . . the classic example . . . which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property. (citation omitted).[255]

He also pointed out that in such cases as *Miller v. Schoene*,[256] *Hadacheck v. Sebastian*,[257] and *Mugler v. Kansas*,[258] the Court upheld regulations eliminating current uses. Finally, in a footnote, Brennan appeared to define the zone of freedom quite broadly when he rejected the owner's claim that these cases were distinguishable because they were intended to eliminate "noxious uses":

> [T]he uses in issue in *Hadacheck*, *Miller*, and *Goldblatt* were perfectly lawful in themselves. . . . These cases are better understood as resting . . . on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all simi-

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253 438 U.S. at 127.

254 480 U.S. at 490 (citing Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

255 438 U.S. at 125.

256 276 U.S. 272 (1928); *see supra* text accompanying note 80.

257 239 U.S. 394 (1915).

258 123 U.S. 623 (1887); *see supra* note 35 and accompanying text.

larly situated property.[259]

Thus, these kinds of regulations are constitutional without regard to impact as long as they meet the traditional substantive due process test. But Rehnquist's attempt to narrow this zone of regulatory freedom by his dissent in *Penn Central* seems to have taken its toll by the time Stevens wrote the majority opinion in *Keystone*. Gone are the broad references to implementation of public policy. In their stead are attempts to push the zone just beyond strict nuisance elimination: "The Court's hesitance to find a taking when the state merely restrains uses of property that are tantamount to public nuisances is consistent with . . . *Pennsylvania Coal*."[260] In its footnote to that reference, the Court came even closer to accepting the Rehnquist thesis by noting that:

> [T]he special status of this type of state action can also be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the state has not "taken" anything when its asserts its power to enjoin the nuisance-like activity.[261]

This is exactly where Rehnquist began his argument in *Penn Central*.[262]

Rehnquist's view of when states can regulate under the police power without regard to impact is considerably narrower than any previous formulation, and the apparent gravitational pull of his dissents on the remainder of the Court is unfortunate. The view certainly reads history selectively. Without doubt, many Court opinions upholding governmental action without reviewing impact can reasonably be considered as assents to the elimination of public or private nuisances. But many others cannot. *Euclid*, for example, was a difficult case precisely *because* zoning restricted what were otherwise perfectly lawful uses.[263] Brennan's comment in *Penn*

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[259] *Penn Central*, 438 U.S. at 133-34 n.30. The note also rejects the general idea of distinguishing between eliminating harm and creating a benefit. *See supra* note 185 and accompanying text.

[260] *Keystone*, 480 U.S. at 491.

[261] *Id.* at n.20.

[262] "As early as 1887 the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use." *Penn Central*, 438 U.S. at 144 (Rehnquist, J., dissenting).

[263] *See supra* notes 81-86 and accompanying text. A modern example is Andrus v. Allard, 444 U.S. 51 (1979), in which the Court upheld federal regulations forbidding the sale of eagle parts, even by those owning the regulated property prior to the effective date of the governmental action. Justice Brennan's opinion rejected the owner's taking claim by focusing on the presence of adequate government authority. The Court made

Central that measures promoting health, safety, and welfare are often held constitutional despite their destruction of real property interests is historically accurate. If anything, it understates the precedent before *Block* and *Pennsylvania Coal*, many of which ignored impact entirely.

Historical inaccuracy is not the only reason to reject a narrowly-defined, nuisance-based Separation Model analysis. An even greater problem with Rehnquist's view arises from the baggage attending the term "nuisance": "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' . . . Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of the problem . . . ."[264]

It seems foolish to adopt such an ephermeral standard as the foundation of an important aspect of constitutional law. If, as Rehnquist's view requires, a court must decide whether a use was, or had been, a "nuisance" prior to legislative action, it will be forced into a trial-within-a-trial. To determine whether the regulation falls within the zone of government freedom, the amorphous definition of an actionable "nuisance" prevailing in most jurisdictions will require the court to confront extremely difficult legal questions of fault, causation, and social utility. Furthermore, it will have to arrive at its decision without the presence of such directly affected parties as the supposed victims, thereby creating potentially serious evidentiary problems.[265]

These definitional problems become especially troubling in the specific context of governmental regulation to protect health and safety. The same reasons why government regulations came initially to supplant common law nuisances as the public's chief defense against threats to health and safety make a renewed dependence on the term unfortunate. Governmental acts to prevent serious harm are often aimed at *cumulative* conditions, none of which would be a nuisance in isolation. Measures guarding against air and water pollution are excellent examples: "The wholly sound legal requirement that liability for nuisance will not be imposed on a defendant unless his material factual contribution . . . can be estab-

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virtually no mention of the economic impact on the owners. Both Rehnquist and Stevens signed the obviously majority opinion.

[264] W. KEETON, PROSSER & KEETON ON TORTS 616-17 (5th ed. 1984). One court called the term "the great grab bag, the dust bin, of the law." Awad v. McColgan, 357 Mich. 386, 389, 98 N.W.2d 571, 573 (1959).

[265] RESTATEMENT (SECOND) OF TORTS §§ 824-28 (1977).

lished by proof renders the action practically unavailable against some of the worst abuses. Who can be shown legally responsible for urban smog for example . . . ?"[266]

An equally disabling problem is that nuisance law looks almost exclusively backward. Many courts refuse to declare a use a nuisance before the fact.[267] Thus, when Rehnquist suggests limiting no-impact cases to ones involving a "misuse or illegal use,"[268] he is either endorsing a broad but circular criterion under which governments can prospectively define those terms or, far more likely, limiting the terms to occurrences that have already taken place. If he intends the latter, the upshot of his standard is to encourage governmental measures aimed at eliminating existing threats to health and safety and to discourage measures aimed at preventing future threats. Encouraging public bodies to wait before acting until harm has occurred cannot be sound constitutional policy.

As Stevens' "tantamount to public nuisances" standard in *Keystone*[269] is obviously based on the same unstable foundation as Rehnquist's view, only Brennan's formulation in *Penn Central* remains as a possible basis for future Separation Model analyses. But it, too, is flawed. First, as stated above, one can read Brennan's opinion as holding that the nature of governmental action is merely a factor in a larger equation that also includes impact in an interpretation that would eliminate any distinct role for the Separation Model.[270] More importantly, if read as a Separation Model standard, Brennan's conceptualization is almost certainly too broad to be acceptable to the Court in the foreseeable future. When he states that governments can "destroy or adversely affect recognized property interests" in the name of the police power[271] or eliminate "existing uses" because "the restrictions were reasonably related to the implementation" of a favorable public policy,[272] he terrifies those, like Rehnquist, who fear that such views promote a move back to-

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[266] F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS § 1.23, at 85 (2d ed. 1986).

[267] "If the business was restrained in the first instance, we could never learn from the great teacher experience, whether the business would, in fact, be a nuisance or not." Duncan v. Hayes & Greenwood, 22 N.J. Eq. 25, 28 (1871). For more modern manifestions, see Nicholson v. Connecticut Half-Way House, 153 Conn. 507, 218 A.2d 383 (1966); Moore v. Baldwin County, 209 Ga. 541, 74 S.E.2d 449 (1953).

[268] *See supra* text accompanying note 252.

[269] *See supra* text accompanying note 260.

[270] *See supra* text accompanying note 253.

[271] *See supra* text accompanying note 255.

[272] *See supra* text accompanying note 259.

ward pure Separatism while simultanously providing very little predictive help for those attemping to bring rationality to these determinations.

Yet within Brennan's opinion lie the building blocks for a sound jurisprudential construction of a proper zone of regulatory freedom. Ironically, the blocks rest with an idea Brennan specifically rejects—distinguishing between governmental acts that prevent harm and those that create a public benefit.[273] Surely Brennan is correct that, in many instances, trying to determine whether a governmental act is intended to prevent harm or promote good is a nonsensical, semantic question that anyone can answer to his own liking. That was obviously the case with the historic preservation ordinance at issue in *Penn Central*.

But to discover that many governmental acts do not fall neatly into one of these categories does not discredit the classification completely. Many governmental measures *are* undeniably aimed at eliminating or preventing direct and substantial harm to the public health and safety. Pollution control laws and regulations are prime examples. Whenever a state or local government establishes a legislative purpose that is "genuine, substantial, and legitimate,"[274] and which is aimed at stopping or guarding against a direct threat to the health or safety of its citizens, that governmental action should be constitutional if appropriate means are chosen to effectuate the purpose. The impact of such legislation has long been considered "as part of the burden of common citizenship,"[275] regardless of the diversity of impact, and adoption of a standard recognizing this would, to some extent, reconcile regulation of real property and other types of property under the fourteenth amendment.[276] Further, acceptance of the standard would allow the Court to bring all but one of its relevant modern and historical precedent under a

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[273] *Id.* *See generally* Dunham, *supra* note 185; Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

[274] *Keystone*, 480 U.S. at 486. The full quotation from Justice Stevens' majority opinion also helps answer Justice Rehnquist's expressed fear that "the legitimacy of [the law's] purpose is a question of federal, rather than state, law, subject to independent scrutiny by this Court." *Id.* at 512 (Rehnquist, C.J., dissenting). By emphasizing that "[t]he District Court and the Court of Appeals were both convinced [of] the legislative purposes," *id.* at 1242, Stevens agreed with Rehnquist's position. The obvious difference between the two is not the *site* of review, but the *scope* of review. As Stevens' unspoken premise seems to be in accord with the Court's traditional view that expressions of legislative purpose will be granted considerable deference upon judicial review, his position seems the sounder one.

[275] Kimball Laundry v. United States, 338 U.S. 1, 5 (1949).

[276] As "taking" law has been more and more influenced by Relativism, the Court has

common flag.[277]

No criterion can resolve all of the difficult problems that attend choosing a proper place in fourteenth amendment jurisprudence for the Separation Model. But as all Justices seem to want a place at the jurisprudential table for that Model, no criterion would be more historically accurate, render fairer solutions, or offer more predictability than one employing the traditional substantive due process test whenever a measure under review is legitimately aimed at eliminating or preventing a direct threat to health and safety.

2. *The Role of Relativism*

Once an appropriate place for Separatism is determined, the proper role for Relativism becomes much easier to define. There is general agreement that a regulation which prevents all use or destroys all economic value should be viewed as the equivalent of an actual appropriation. Thus Relativism, with its focus on impact, should be employed only when a regulation: (1) is not aimed at the elimination or prevention of a direct threat to health or safety, and (2) effects neither a physical invasion, a forced transfer of title, nor a complete destruction of use or value. This formula substantially narrows the number of cases in which courts must determine whether a regulation "goes too far." It is always useful to remem-

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scrutinized the regulation of real property more finely than regulation of use of other kinds of property.

Following the rejection of *Lochner*-type substantive due process, when the Court again began giving wide discretion to state legislation aimed at adjusting economic relationships, *see supra* note 69, it permitted substantial reductions in use of personal and intangible property without as much as a nod to impact. Ferguson v. Skrupa, 372 U.S. 726 (1963), is a prime example. The Kansas legislature had passed a statute making it a misdemeanor to engage "in the business of debt adjusting" in most instances. *Id.* at 726-27. The plaintiff had a business that arguably fell within the statutory definition of "debt adjusting," a business he alleged would be entirely wiped out by the statute. *Id.* In upholding the statute, the Court merely noted that "it is up to the legislatures, not courts, to decide on the wisdom and utility of legislation." *Id.* at 729. It added that "[i]t is now settled that States have the power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition . . . ." *Id.* at 730-31 (footnote omitted). No mention was made of the plaintiff's unchallenged allegation that the legislation would totally destroy his theretofore lawful business, a business that presumably would fall under any accepted definition of the word "property."

277 Every case from *Mugler* to *Keystone* that even arguably fell within the proposed standard was decided in favor of the government. *Pennsylvania Coal* is the notable exception, and we have tried to explain that elsewhere. *See supra* notes 97-115 and accompanying text.

ber, of course, that the Court has not struck down a regulation on this basis since Holmes' headwater opinion in *Pennsylvania Coal*.

When making determinations of impact, many definitions are available from which to select. Holmes' only clue in *Pennsylvania Coal* as to what went "too far" was to note that the Act had made mining the coal "commercially impracticable," a condition he equated with "appropriating or destroying it."[278] No subsequent cases discussed impact seriously until forty years later when *Goldblatt* originated the oft-repeated bromide that "[t]here is no set formula to determine where regulation ends and taking begins." The only clarification was that "a comparison of values before and after is relevant, [but] it is by no means conclusive . . . ."[279]

Sixteen years later, Justice Brennan added to the confusion in *Penn Central* by not only repeating both the *Pennsylvania Coal* and *Goldblatt* aphorisms,[280] but adding not less than four new ones of his own. At various points in the opinion, he indicated that a regulation would go "too far" if it: (1) "has an unduly harsh impact upon the owner's use,"[281] (2) "frustrates distinct investment-backed expectations,"[282] (3) produces no "reasonable return",[283] or (4) leaves no "economically viable use."[284] Although the last of these suggestions was merely a quote from oral argument, repeated in a footnote, it stuck and became the Court's sole expression of the impact standard in *Agins* two years later.[285] Stevens' majority opinion in *Keystone* finished the parade by stating that the "economically viable" test applies only to facial challenges, while repeating the "commercially impracticable" and "reasonable investment-backed expectation" standards in a case involving a facial challenge.[286]

Matters are probably not as bad as they might seem from this litany. While the Court has stated the impact test in many different ways and sometimes in the wrong places,[287] it has consistently held that mere diminution in value does not mean a taking occurred. It has also offered several factors to be examined beyond the con-

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[278] *Pennsylvania Coal*, 260 U.S. at 414.

[279] *Goldblatt*, 369 U.S. at 594 (citation omitted); *see supra* notes 124, 134-36 and accompanying text.

[280] *Penn Central*, 438 U.S. at 127.

[281] *Id.*

[282] *Id.*

[283] *Id.* at 129.

[284] *Id.* at 138 n.36.

[285] *Agins*, 447 U.S. at 260.

[286] *Keystone*, 480 U.S. at 495-96, 498-99.

[287] *See supra* notes 249-50 and accompanying text.

clusory aphorisms to aid in the determination of whether a constitutional use has been left to an owner. *Penn Central* cited the owner's ability to continue current usage and to propose alternative development plans as indications that the regulation had not gone "too far." Both *Penn Central* and *Andrus* specifically rejected the idea that the extinguishment of an academically-recognizable property right was proof that a regulation "goes too far."[288] And *Penn Central* also noted that other valuable consideration flowing to the owner from the governmental activity was a factor indicating constitutionality.[289]

This last, "flowing consideration" notion has been a particularly difficult one for the Court when it has arisen not, as in *Penn Central*, as tangible return, but as what Holmes first described in *Pennsylvania Coal* as "reciprocity of advantage."[290] The Court has used the phrase frequently since *Pennsylvania Coal* and has rather consistently defined it as the process by which "each of us is burdened somewhat by [police power] restrictions [and], in turn, benefit greatly from the restrictions that are placed on others."[291] The problem for the Court is deciding precisely where within the deprivation/taking formula the concept should operate. A proper resolution of that problem fits the final piece in the Relativist puzzle in place.

Holmes used the term "reciprocity of advantage" in *Pennsylvania Coal* ostensibly to distinguish the law in question from another that had been held constitutional earlier.[292] But immediately thereafter, Holmes explained that as regulation reached a certain level of intrusiveness, it became possible only through the taking clause. And he began the following paragraph with the famous ref-

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[288] Relying on the traditional "bundle of rights" theory of property, *see supra* note 124, the plaintiff in *Penn Central* had argued that: (1) the Constitution forbids taking property, (2) air rights are property, (3) the City took air rights, and, thus (4) the City violated the Constitution. The majority refuted the syllogism in part by rejecting the third premise, noting that the owner was free to submit other development plans for approval. More basically, however, the majority simply disagreed with the assumption that property could be defined solely by reference to its academic components. 438 U.S. at 130-32. It took a similar view of the owners' claim in *Andrus* that the regulation there eliminated the right of sale. 444 U.S. at 65-66; *see also Keystone*, 480 U.S. at 500.

[289] The owners had been given transferable development rights in lieu of those restricted under the ordinance. While indicating that these might not constitute "just compensation," the majority noted that "the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed . . . ." *Penn Central*, 438 U.S. at 137.

[290] 260 U.S. 393 (1922).

[291] *Keystone*, 480 U.S. at 491.

[292] *See supra* note 95 and accompanying text.

erence to a regulation that "goes too far." Reciprocity of advantange thus, to Holmes, seemed to be evidence that a regulation had remained within the constitutional bounds of intrusiveness, that it had not "gone too far."

The Court has continued to invoke the phrase, or at least its general meaning, but in substantially different ways. In *Penn Central*, Brennan rejected the owners' claim that the ordinance fell somewhat arbitrarily on their shoulders, but he apparently accepted Rehnquist's assertion in dissent that the absence of reciprocity of advantage would, *ipso facto*, render the law unconstitutional.[293] Eight years later, in *Yolo County*, the Court noted that "what [governments] take with one hand they may give back with another," thereby suggesting that reciprocity of advantage should be a factor in calculating whether "just compensation" had been given.[294] And, in *Keystone*, Stevens used the phrase as evidence that the requisite "[s]tate's interest in the regulation" was present.[295]

The concept of reciprocity of advantage has nothing to do with "the State's interest in regulation." It should be a factor in determining whether a taking has taken place, not whether just compensation has been forthcoming. As Holmes originally suggested, the presence of reciprocity of advantage is excellent evidence that the

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[293] In *Penn Central*, Justice Rehnquist argued that:

> Even where the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby 'secures an average reciprocity of advantage.' [citing *Pennsylvania Coal*] It is for this reason that zoning does not constitute a 'taking.' While zoning at times reduces *individual* property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.

438 U.S. at 147 (Rehnquist, J., dissenting).

Brennan's majority opinion does not use the phrase but responds by pointing out that:

> the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and . . . over 400 landmarks and 31 historic districts have been designated pursuant to this plan.
>
> . . . .
>
> Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do —we cannot conclude that the owners . . . have in no sense been benefited by the Landmarks Law.

Id. at 132-35.

[294] MacDonald, Sommor & Frates v. Yolo County, 477 U.S. 340, 351 (1986).

[295] 480 U.S. at 488.

impact level of a regulation is acceptable—that the individual has not been overloaded with public responsibility.

As noted in the introduction to this Article, taking clause jurisprudence has always emphasized individual impact.[296] In determining when regulation has "gone too far," the Court has consistently emphasized that the "Fifth Amendment guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[297] The presence or absence of reciprocity of advantage is as powerful a tool as the Court has at its disposal to make such a judgment.[298] While other factors can be helpful,[299] nothing goes more to the heart of the individual impact question than whether the restriction is part of a larger regulatory fabric that brings benefits as well as burdens to those whose property it affects.

Conclusion

A review of deprivation/taking precedents reveals that the chief obstacle to the development of a consistent and predictable jurisprudence has been the failure of the Court to recognize and choose among three possible readings of the fourteenth amendment due process clause as it is applied to land use regulation. Fundamentally, those possible readings are: (1) that the concepts of "substantive due process" and "taking" are separate and cumulative (Separatism), (2) that the concepts are merely two subparts of the same test (Unification), and (3) that the concepts are two ends of a continuum (Relativism). All three approaches have been used recently, further retarding doctrinal advancement.

The Court should reject the Unified Model as historically and interpretatively unsound. It should then carve out a clear area in which governments can regulate without regard to impact, specifically when the aim is substantially to eliminate or prevent direct harm to the public health or safety. Finally, the Court should direct that in cases in which impact is a factor, the presence or absence of reciprocity of advantage should be the critical determinative of constitutionality.

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296 *See supra* notes 11-15 and accompanying text.

297 *Penn Central*, 438 U.S. at 123 (citing Armstrong v. United States, 364 U.S. 40, 49 (1960)).

298 The Court has at times recognized as much. *See, e.g., supra* text accompanying notes 126-31.

299 *See supra* text accompanying notes 278-83.

Those three basic steps would not, of course, solve all difficulties in an area rife with problems. But they would advance the development of taking jurisprudence more than any others conceivable within the framework of the Court's history and current judicial philosophy and would provide owners and regulators alike with considerably more guidance than the current precedential hash. For the first time in at least a decade, and arguably a century, those working in the field might have some idea of what "process" is here "due."