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Justice between generations is a growing concern in land use, particularly in the areas of environmental and historic preservation. In this Article, Professor Gjerdingen addresses the effect of this development on contemporary takings clause doctrine. He argues that conventional takings doctrine is comprised of four different "causes of action" that merely focus on intragenerational conflicts over the use of resources. As a result, part of the reason why the law generates so many hard cases in the area of environmental and historic preservation is that the conventional takings doctrine is unable to accommodate the justice between generations component of preservation issues. In response, he proposes the recognition of a new takings cause of action—that of "intergenerational condemnation." The final portion of the Article sets forth a modified utilitarian model for an intergenerational condemnation cause of action.

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INTRODUCTION

Land use in the United States has always been an uneasy partnership between private property and public control. Private land ownership remains the predominant means of encouraging efficient use of resources, although public control is increasingly regarded as necessary for the control of future growth. Yet amidst all the dialogue about control of critical areas, zoning, and wilderness preservation, what is being overlooked is that land use is also becoming something more—an uneasy

partnership between present and future generations. In an increasing number of areas, justice between generations has replaced mere intragenerational resource conflicts as an important concern. At the same time, the legal culture's interpretation of the takings clause—the modern placeholder for the basic societal ground rules for the regulation of property—is implicitly limited to resource conflicts between members of the present generation. The purpose of this Article is to begin to explore this problem and its impact on takings clause jurisprudence.

As an introduction to the problem, Section I provides an overview of conventional takings doctrine. Two basic themes are considered. First, existing takings doctrine can only be understood in light of the political structures of the Civil War-to-1937 and post-1937 periods of American law. This initial theme illustrates not only the general connection between politics and substantive legal categories, but also the connection between the politics of each period and the purpose served by concepts of the takings clause, such as the meaning of "public" and "private," the nature of "property," and the role of the state. Second, current takings law, because it represents a blend of both periods, cannot be structured around a unified theory. Rather, it is a placeholder for four distinct types of causes of action; some represent a carryover of the psychological features of common law thought, others represent distinctive problems related to modern concepts of the state.

Section II then considers the relationship between these conventional causes of action and some of the emerging problems associated with environmental and historic preservation. The thesis of this Section is that all of the existing causes of action under the takings clause are limited to intragenerational resource conflicts. At the same time, however, land use is increasingly a matter of justice between generations. As a result, part of the tension in takings clause doctrine is related to the inability of conventional legal categories to accommodate questions of justice between generations. To develop this thesis, the first part of Section II considers the relationship between conventional legal categories and the new class of market failures associated with environmental and historic preservation. Two types of market failures are considered—intragenerational and intergenerational, both of which are present in the typical preservation case. Conventional notions of private property and the takings clause are unable to accommodate both kinds of market failures. While most of the recent innovative proposals for takings doctrine deal with intragenerational market failures, little has been done to deal

with intergenerational market failures. To illustrate the significance of this problem in the contemporary analysis of preservation issues, the second part of Section II considers the legal reasoning used in two landmark land use cases, *Just v. Marinette County* and *Penn Central Transportation Co. v. New York City.* The conclusion of Section II is that if takings clause jurisprudence is to respond to the growing issue of justice between generations, a new takings clause cause of action must be recognized—that of "intergenerational condemnation."

Section III then sketches out a possible model for an intergenerational condemnation cause of action. As an introduction to the nature of intergenerational condemnation, the first part of Section III surveys recent scholarly work devoted to the development of a utilitarian model for takings clause jurisprudence. While initially applied only to conventional takings clause categories, this model could be adapted to deal with justice between generations in land use. The remaining part of Section III proposes a modified utilitarian model of intergenerational condemnation.

I. AN OVERVIEW OF CURRENT TAKINGS CLAUSE JURISPRUDENCE—POLITICAL THEORIES AND THE LEGAL CULTURE

The takings clause of the fifth amendment provides that "private property [shall not] be taken for public use, without just compensation."[1] Thus, three central concepts are built into takings clause jurisprudence. The first concept is a distinction between "public" and "private." This not only assumes the existence of a distinction between "public" and "private" activities, but also prohibits the taking of "private property" for a mere "private" use, even though compensation would be paid. The second concept focuses on what constitutes a "taking" and what can be considered "property"; the nature of property itself must be considered in light of what serves as a taking of that property. The final concept, "just" compensation, underscores the absence of a textual requirement that all takings be compensated and the concomitant notion that compensation for a taking is mandated only where it is "just" to do so. To understand the relationship of the takings clause to intergenerational justice, it first is necessary to trace the interpretation of these concepts during two different periods of American law, the Civil War-to-1937 period and the post-1937 period. The interpretation of the takings clause during

1. U.S. CONST. amend. V.

each period not only reflects the dominant political expectations of each period, but also the nature of legal thought during each period.

A. *The Invisible Hand State and the Public/Private Distinction—The Takings Clause During the Period of Substantive Due Process*

Legal consciousness during the Civil War-to-1937 period presupposed two separate and independent spheres, one private, the other public.[2] The private sphere included those activities that were off-limits to the state, while the public sphere included those activities that were legitimate interests of the state.

On the one hand, the state could not redistribute wealth, change bargaining power, regulate the market, or concern itself with the validity of the existing social structure (e.g., existing structures of power in society).[3] These areas represented private areas off-limits to the state and, accordingly, influenced the concept of individual rights in the era of substantive due process.

On the other hand, the state could regulate according to the "police power," which defined most of the content of the public sphere.[4] The use of the police power, however, fit in closely with the political philosophy of the period and influenced legal concepts of legitimate state regulation. Under the police power, the state could regulate private relationships only for three possible reasons. The first reason was the idea of a public good. According to this standard, the state could only take a person's money (through taxation)[5] or property (through eminent domain)[6] if the purpose of the regulation was to benefit the public rather than a private group or a subgroup of the public. Thus, the use of the taxing power or the takings power was legitimate for projects used by the public (such as roads) or open to the public (such as schools and public buildings)[7] or even projects for private businesses so long as those businesses were of a

2. *See, e.g.*, Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425-28 (1982). *See generally Symposium on the Public/Private Distinction*, 130 U. PA. L. REV. 1289 (1982).

3. *See, e.g.*, B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 24-28 (1984); L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-1 to -3 (1978).

4. *See, e.g.*, T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 572-97 (1868); E. FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (1904); C. TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES (1886).

5. *See, e.g.*, Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1874); T. COOLEY, *supra* note 4, at 487-94.

6. *See, e.g.*, T. COOLEY, *supra* note 4, at 530-36.

7. *See, e.g.*, C. TIEDEMAN, *supra* note 4, at 379-80.

benefit to the public at large and were open to the public at large.[8] The latter category, usually deemed businesses "affected with a public interest," was analogous to the common law category of common carriers because such carriers were required to serve all comers and thus could be said to be open to the public.[9] Projects which did not fall into one of these general categories and which, instead, attempted to claim and later transfer one person's money or property to a particular subgroup of the public were deemed class legislation. As such, these projects were suspect since they constituted a redistribution of wealth (i.e., the state taking something from person *A* and giving it to person *B* for the personal benefit of *B*).[10] It was also required that persons be treated equally as members of the public. Accordingly, legislation that favored one segment of the public at the expense of another was suspect.[11]

The second reason for the regulation of private relationships was grounded in the promotion of the general "health, safety, and welfare."[12] This category, much like the public/private distinction, required a benefit for the public at large.[13] In addition, it also emphasized physical danger.[14] As a result, this standard covered such things as unclean bread[15] or disease,[16] since both of these problems posed harm to the general public and were physically harmful.

The third reason, usually linked with the second, was to regulate private relationships for "moral" reasons.[17] During the Civil War-to-1937 period, this principle was correlated with the enforcement of the accepted moral values of the dominant social groups. Thus, if a person made an unreasonable use of his land (as defined by common sense), it would be deemed a nuisance.[18] If a person did not follow the expected norms of the existing social structure he would be punished. The law

8. *See, e.g.*, Munn v. Illinois, 94 U.S. 113 (1876).

9. *See, e.g.*, Tyson & Brother v. Banton, 273 U.S. 418, 430-39 (1927); E. FREUND, *supra* note 4, at 397-98.

10. *See, e.g.*, Gulf, Colo. & Santa Fe Ry. v. Ellis, 165 U.S. 150 (1897); Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 596-97 (1895) (Field, J., concurring); E. FREUND, *supra* note 4, at 632-34; *see also* L. TRIBE, *supra* note 3, § 8-4, at 439.

11. *See, e.g.*, L. TRIBE, *supra* note 3, § 8-4, at 438-39.

12. *See generally* E. FREUND, *supra* note 4, at 109-241.

13. *See, e.g., id.* at 109-24.

14. *See, e.g.*, Holden v. Hardy, 169 U.S. 366, 391-96 (1898) (mining); *cf.* Hammer v. Dagenhart, 247 U.S. 251, 271-72 (1918) (goods must be physically harmful before they can be subject to federal "police power" of commerce clause).

15. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 60-62 (1905).

16. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination against smallpox).

17. *See, e.g.*, E. FREUND, *supra* note 4, at 172-241.

18. *See, e.g.*, C. TIEDEMAN, *supra* note 4, at 422-42.

would not uphold "immoral" contracts[19] or "deviant" social practices (such as being a vagrant[20] or reading "dirty" books[21]) and would allow the states to regulate "bad" things (such as liquor[22] or prostitution[23]). Similarly, the dominant social roles of the period were reinforced. Women "belonged" at home,[24] "illegitimate" children could be ostracized,[25] and blacks did not "belong" with whites.[26]

Given this background on the politics of the Civil War-to-1937 period and the substance of the accepted legal categories, each of the three concepts of the takings clause—public/private, taking and property, and just compensation—reflects an interpretation consistent with the dominant political and legal categories of the period. First, the interpretation of the public/private feature of the takings clause integrated two central assumptions of this period: distinct public and private spheres and a prohibition on the redistribution of wealth. Consequently, the public use requirement served as an important limitation on the regulation of property by the state.[27] Given the restriction on the redistribution of wealth and the related ban on class legislation, the "public" uses for which property could be taken were naturally quite limited.[28] Private property could not be taken for any purpose which would be tantamount to a redistribution of wealth or which amounted to class legislation since, in each case, this would constitute a taking of private property for a private use.[29]

Second, property meant common law property and, therefore, typically meant control over real or reified things.[30] Moreover, a "taking,"

19. *See, e.g.*, Marvin v. Trout, 199 U.S. 212, 224-25 (1905) (gambling debts).

20. *See, e.g.*, E. FREUND, *supra* note 4, at 97-100.

21. *See, e.g.*, Commonwealth v. Friede, 271 Mass. 318, 171 N.E. 472 (1930).

22. *See, e.g.*, Mugler v. Kansas, 123 U.S. 623 (1887).

23. *See, e.g.*, L'Hote v. New Orleans, 177 U.S. 587 (1900).

24. *See, e.g.*, Bradwell v. State, 83 U.S. (16 Wall.) 130, 140-42 (1873) (Bradley, J., concurring).

25. *See, e.g.*, W. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS 304-09 (R. Cooley 3d ed. 1921).

26. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896).

27. *See, e.g.*, I J. LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES 413-14 (2d ed. 1900); H. MILLS, A TREATISE UPON THE LAW OF EMINENT DOMAIN 24-32 (1879).

28. *See, e.g.*, I P. NICHOLS, THE LAW OF EMINENT DOMAIN §§ 37-78 (2d ed. 1917); Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599, 603-07 (1949). For a good general discussion of the topic of public use, see Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1 (1980).

29. *See, e.g.*, Cole v. La Grange, 113 U.S. 1 (1885); *see also* P. NICHOLS, *supra* note 28, at §§ 79-80.

30. *See, e.g.*, J. LEWIS, *supra* note 27, at 53-56; *see also* Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325, 328-33 (1980).

consistent with the intuitionistic basis of common law thought, typically meant either the physical destruction of a thing or the transfer of that thing to another person.[31]

Third and consistent with the police power concepts of the period, compensation was not required when the regulation was within the accepted police power category, such as the control of noxious uses or nuisances.[32] In contrast, when the regulation was not based on a police power category, compensation was required. The requirement of public use also mitigated the consequences of a police power regulation, since it required that the benefit for which the property was to be used be one for the public at large (including, of course, the person from whom it was taken) rather than for the benefit of a particular group.

B. *The Rise of the Activist State and the Takings Clause*

With the demise of the *Lochner* era and the rise of the activist state, the preceding takings clause structure changed significantly in several ways. First, common law property became subject to numerous new economic regulations. For example, validation of zoning in 1926[33] gave rise to the regulation of land for reasons other than traditional police power rationales (such as noxious use).[34] As a result, it became much more difficult to determine whether property had been "taken" because such regulation did not fall into accepted common law categories and only restricted the use of land or diminished its economic value rather than causing physical destruction or a change in ownership.[35] Second, redistribution of wealth became permissible.[36] This necessarily meant the blurring of the public/private distinction because private property could now be taken for the benefit of subgroups of the public.[37] Third, the state could regulate the market for reasons other than the promotion of the police power. Legislation aimed at making a more efficient allocation of resources or a more equitable distribution of wealth was now permissi-

31. *See, e.g.,* J. LEWIS, *supra* note 27, at 53-70.

32. *See, e.g.,* Miller v. Schoene, 276 U.S. 272 (1928); E. FREUND, *supra* note 4, at 546-47; P. NICHOLS, *supra* note 28, at 284-87.

33. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

34. *See, e.g.,* I P. ROHAN, ZONING AND LAND USE CONTROLS § 1.03 (1984).

35. *See, e.g.,* Sax, *Takings, Private Property and Public Rights,* 81 YALE L.J. 149 (1971) [hereinafter cited as *Takings II*].

36. *Compare, e.g.,* Steward Mach. Co. v. Davis, 301 U.S. 548 (1937) (unemployment compensation upheld) *with, e.g.,* United States v. Butler, 297 U.S. 1, 61 (1936) ("The word [tax] has never been thought to connote the expropriation of money from one group for the benefit of another.").

37. *Compare, e.g.,* West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399-400 (1937) *with, e.g.,* Adkins v. Children's Hosp., 261 U.S. 525, 557-59 (1923).

ble.[38] Fourth, the nature of property necessarily changed to include rights between people with respect to things rather than merely rights in things (i.e., reification).[39] Fifth, the nature of the state changed from a mere night watchman to one, in part, of bureaucracies having control over the welfare of citizens and a potential for abuse of discretion.[40]

The end result of these changes was that (1) the private/public distinction no longer served as an independent limitation;[41] (2) "property" included more than common law property; and (3) whether government action was a "taking" could depend on whether the regulation was justified on the basis of efficiency or redistribution of wealth and on whether there was a need to control abuse of discretion by government officials.[42]

C. *The Present Four-Part Mosaic of Takings Doctrine*

Current takings clause doctrine is a strange mixture of the invisible hand state and the activist state periods. On the one hand, post-1937 developments have given rise to the need to consider such issues as governmental aggrandizement and the development of Hohfeldian concepts of property. On the other hand, it is still very hard to dislodge the deep, intuitionistic notions held by laypersons about when the government has "taken" a person's "thing." Thus, modern takings clause doctrine does not display a unified doctrine; rather, it is a mixture of four different types of takings "causes of action."[43] Individually, each cause of action displays the markings of one of the two periods more than the other; collectively, they represent the tensions between accommodating modern

38. *See, e.g.,* Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2330 (1984) (use of takings clause arguments to challenge government action taken to correct "market failure" and to break up oligopoly).

39. *See, e.g.,* Grey, *The Disintegration of Property,* in NOMOS XXII, PROPERTY 69 (J. Pennock & J. Chapman eds. 1980); Vandevelde, *supra* note 30, at 357-67.

40. *See, e.g.,* Reich, *The New Property,* 73 YALE L.J. 733 (1964).

41. *See, e.g.,* Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2328-31 (1984) (transfer of real property from lessors to lessees to reduce concentration of land ownership); Berman v. Parker, 348 U.S. 26, 31-33 (1954) (use of private enterprise for development of blighted areas); Note, *The Public Use Limitation on Eminent Domain: An Advance Requiem,* 58 YALE L.J. 599, 611-14 (1949); *see also* L. TRIBE, *supra* note 3, § 8-5, at 444-46. *But see* Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause,* 1982 SUP. CT. REV. 351, 365-69 (argues for continued recognition of limitation).

42. *See, e.g.,* L. TRIBE, *supra* note 3, § 9-4, at 463-64.

43. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). In *Penn Central,* the most recent major statement by the Supreme Court on the takings doctrine, the validity of all four causes of action was recognized. *See id.* at 124 (physical invasion), 127-28 (rendering useless) (Type I); *id.* at 125-27 (Type II); *id.* at 125 (Type III); *id.* at 128 (Type IV). The landowners in *Penn Central* then proceeded to make arguments based on Types I, III, and IV, all of which failed. *See id.* at 128-31 (Type I); *id.* at 131-35 (zoning and possibility of discrimination), 133-35 (reciprocity lacking), 135 n.32 (check on arbitrary official action) (Type III); *id.* at 135 (aggrandizement) (Type IV).

concepts of property and the state with categories of conventional legal thought.

1. Type I—"You Took My Thing"

The first kind of takings cause of action (Type I) corresponds to intuitionistic notions of "taking my thing" and is a carryover from the pre-1937 era. Despite the infusion of Hohfeldian notions of property into legal thought, the intuitionistic notion that the state has acted improperly when it has "taken" a person's "thing" continues to be a central part of takings doctrine.[44] While the genesis of these concepts in the era of substantive due process certainly had important political connotations at the time, the enduring nature of these concepts in contemporary legal thought is perhaps best explained in nonpolitical terms by the difficulty in structuring any legal system that would try to dislodge the intuitionistic notions that laypersons have about property.[45]

Under this cause of action, three basic concepts are central. First, property is typically a physical thing.[46] In addition, property rights are reified; that is, people are typically assumed to have rights that are located in physical objects.[47] As a result, the Hohfeldian concept of property, which treats property as merely the regulation by the state of rights between people with respect to things (such as basic economic regulation), is disfavored.[48] Second and also consistent with intuitionistic no-

44. *See, e.g.,* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); *see also* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).

45. *See* Gjerdingen, *The Coase Theorem and the Psychology of Common-Law Thought,* 56 S. CAL. L. REV. 711, 741-46 (1983).

46. *See, e.g.,* United States v. Causby, 328 U.S. 256, 264-65 & n.10 (1946) (airspace above land as property).

47. *See, e.g.,* B. ACKERMAN, *supra* note 44, at 26-27, 116-45, 244 n.31; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165, 1184-85 & nn.37 & 41 (1967).

48. The current strength of this position on the Supreme Court is evident in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Six Justices took the position that a "permanent physical occupation of property" constitutes a taking "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Id.* at 434-35. Emphasizing that "[i]n such a case, the property owner entertains a historically rooted expectation of compensation," *id.* at 441, the majority stressed the interference with dominion over a physical thing. *Id.* at 432-38. In contrast, the three dissenting Justices, showing obvious discomfort with the majority's use of reification, found the per se takings rule used by the majority to be "uniquely unsuited to the modern urban age." *Id.* at 447 (Blackmun, Brennan & White, JJ., dissenting). This case is of particular importance because of the obvious conflict between the majority and the dissent about the nature of "property" itself. The majority seems to treat the owner's interest as dominion over a physical thing; in contrast, the dissent is more comfortable perceiving the matter in Hohfeldian terms, as one involving an "entitlement" protected by a "liability rule." *See* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,* 85 HARV. L. REV. 1089, 1092, 1105-06 (1972).

tions of property, an "easy" case for a taking has occurred whenever the state has physically invaded the property, physically destroyed it, or transferred it to someone else.[49] A "hard" case occurs whenever the state so restricts the use of the property that the owner cannot use it or get access to it so that, even though the state has not actually transferred or destroyed the property, it has, in effect, "rendered it useless."[50] Third, the "state" is also reified. In determining whether the state has taken property, it is assumed (consistent with intuitionistic notions) that the state exists in certain places and in certain people. The taking complained of, therefore, must be by someone who clearly works for the state. Similarly, the criterion for determining whether there has been a taking by the state is to ask whether, in essence, a layperson would label the action complained of a taking if a private person had done the same thing.[51]

2. Type II—Noxious Use

The second takings cause of action (Type II) is the "noxious use" or common law nuisance analogy. This variety, which dominated the substantive due process era, allows the state to take property without paying for it if, based on prevailing standards of dominant social expectations, the owner was using it improperly.[52] This would include engaging in unneighborly acts,[53] creating a threat of physical danger or disease to the public,[54] or using property to further socially unacceptable activities such as crime.[55] The corresponding hard cases under this cause of action typically involve either difficulty in the designation of what constitutes a de-

49. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982); L. TRIBE, *supra* note 3, § 9-3, at 460 & n.2; *see also* B. ACKERMAN, *supra* note 44, at 123-36.

50. *See, e.g.*, Andrus v. Allard, 444 U.S. 51, 64-68 (1979) (no takings found despite severe restrictions placed on use of lawfully acquired eagles because some limited economic use remains); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 n.36 (1978) (dictum) (regulation must not be so severe that enterprise is no longer "economically viable"); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-14 (1922) (takings occurred when state, in effect, denied owner of subsurface interest access to property); *see also* B. ACKERMAN, *supra* note 44, at 136-45; L. TRIBE, *supra* note 3, § 9-3, at 460.

51. *See, e.g.*, Gjerdingen, *supra* note 45, at 744-45; *cf.* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (influence of similar factor in determining whether state action exists). This, for example, seems to explain such decisions as Flemming v. Nestor, 363 U.S. 603 (1960) (takings clause did not apply to entitlement program).

52. *See, e.g.*, E. FREUND, *supra* note 4, at 546-51.

53. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (dangerous quarry in residential area).

54. *See, e.g.*, North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) (seizure of contaminated food).

55. *See, e.g.*, Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 680-90 (1974) (forfeiture of yacht used for smuggling upheld even though owner innocent); *cf.* Mugler v. Kansas, 123

viant activity (particularly after 1937)[56] or marginal application of acknowledged categories.[57]

3. Type III—Classical Zoning

The third takings cause of action is based on the classical zoning paradigm (Type III). This cause of action is a transitional category because it draws support from both the *Lochner* and modern eras. Even though initially validated in the latter part of the substantive due process era, it has continued, in part, because it also deals well with additional concerns relevant to the character of the modern state. The classical Euclidean zoning paradigm provided the *Lochner* era Court with a relatively hard case.[58] On the one hand, the restriction on the use of property that followed from the zoning decision by the state seemed to interfere with the right of the owner to exercise physical autonomy over his property.[59] Moreover, it seemed to restrict the property on the basis of group characteristics rather than on the acts of individual property owners.[60] On the other hand, the restriction of development was related to the dominant understanding of police power, which emphasized *physical* safety and *public* health.[61] At the same time, the "reciprocity of advantage" present in the classical zoning paradigm mitigated claims of a taking by providing some type of compensation in kind.[62]

While these aspects of the classical zoning paradigm were primarily keyed to concepts dominant in the *Lochner* era, the classical zoning paradigm reinforced some additional concerns about the power of state officials, a power that would become particularly acute after 1937. Following the demise of the *Lochner* era, the acceptable political basis for regulation expanded beyond the dominant social expectations which

U.S. 623, 661-70 (1887) (prohibition of manufacturing or sale of intoxicating liquor upheld under takings power even though it rendered property of existing breweries useless).

56. *See, e.g.,* Moore v. City of East Cleveland, 431 U.S. 494 (1977) (use of zoning power to define nature of "family"); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (exclusionary zoning); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (zoning for "adult" theatres).

57. *See, e.g.,* Agins v. City of Tiburon, 447 U.S. 255 (1980) (open spacing zoning vis-à-vis classical zoning paradigm); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131-35 (1978) (historical preservation vis-à-vis classical zoning paradigm).

58. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (6-3 decision).

59. *See* Vandevelde, *supra* note 30, at 328-33.

60. And thus, in essence, raised some aspects of liability without individual wrongdoing or fault.

61. *See Euclid,* 272 U.S. at 391-95.

62. The presence of implicit compensation continues to be an important factor in the interpretation of the takings clause by conservatives. *See, e.g.,* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 147-50 (1978) (Rehnquist, J., dissenting); Epstein, *supra* note 41, at 372-80.

were present in the concept of "police power" to include a wide variety of concerns related to social and economic policy.[63] Predictably, this increased power of the state brought with it the greater possibility for abuse of power by those who enforced its decisions. In this respect, the requirement in the classical zoning paradigm of general applicability over a large geographic area helped to limit abuse of discretion by officials. This aspect of the classical zoning paradigm, which has been termed the equal protection component[64] of the takings clause, protects against the singling out of individual property owners for special treatment. As such, it serves as a safeguard against the use of governmental economic regulation to favor individual landowners (thus lessening somewhat the incentives for corruption) or to discriminate against individual property owners (thus lessening the possibility for discrimination).[65]

4. Type IV—Government Aggrandizement

The fourth takings clause cause of action (Type IV) is based on bureaucratic aggrandizement. First introduced into the takings clause literature by Joseph Sax in the 1960's,[66] the subsequent recognition and use of this category by the Supreme Court[67] can be linked to a change in the nature of the state after 1937. The rise of the activist state, with its increased potential for governmental correction of market failures and the rearrangement of property rights for the purposes of wealth redistribution,[68] brought with it an increased potential for abuse of power by the government. In the era of substantive due process, the state itself had no special role to play over and above the enforcement of "private" bargains and the enforcement of idealized standards of conduct grounded in dominant (and hence majoritarian) social expectations. Given these political assumptions, there was every reason to treat the state as if it were no different than an ordinary person. The role of the state was merely to enforce private agreements or dominant social expectations. With the rise of the activist state, however, came a corresponding recognition by the Court that the state could no longer be judged by these same stan-

63. *See* Sax, *Takings II, supra* note 35, at 169.

64. *See* Sax, *Takings and the Police Power,* 74 YALE L.J. 36, 64-65 (1964) [hereinafter cited as *Takings I*]; Sax, *Takings II, supra* note 35, at 169-71.

65. *See* Sax, *Takings I, supra* note 64, at 62-76.

66. *See id.*

67. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 128, 135 (1978); *see also* Kaiser Aetna v. United States, 444 U.S. 164, 174-80 (1979) (implicit recognition of "enterprise" nature of governmental action).

68. This seems to be explicitly recognized, for example, in Brennan's opinion in *Penn Central. See Penn Central,* 438 U.S. at 133 n.30.

dards in its own transactions with citizens; such standards were only applicable when the state was required to mediate disputes between citizens. Therefore, additional checks on the potential abuse of rights by the state for its own gain were needed. Accordingly, the bureaucratic aggrandizement cause of action distinguishes between actions which the government takes in an arbiter capacity (i.e., merely as a neutral umpire between two private claims) and those which it takes in an enterprise capacity (i.e., those instances where the agency has a particular goal to fulfill and, accordingly, has an incentive not to pay compensation for any private property that it may need to appropriate to meet its goal).

Type IV takings clause problems represent one of the many instances in the modern era in which the Supreme Court has responded to the modern change in the nature of the state. Rather than merely treating self-interested actions by the state by the same standard that would apply to a private person (and hence, by implication, insisting that the state has no more power over the lives of citizens than anyone else), the Court has consistently applied a stricter standard to state action taken in an enterprise capacity, whether in the area of economic regulation[69] or in the realm of individual conduct.[70]

Together, these four causes of action provide the implicit constructs for conventional legal analysis of takings issues. These categories, however, also carry with them a particular intellectual structure that helps to ask certain questions, but to ignore others. In particular, these causes of action fail to deal well with the concerns of environmental and historic preservation. The next Section, therefore, will consider why the application of conventional takings categories is particularly problematic when applied to environmental and historic preservation.

II. INTERGENERATIONAL JUSTICE AND THE LEGAL CULTURE—A SHORT STUDY IN THE CULTURAL SIGNIFICANCE OF CONVENTIONAL LEGAL CATEGORIES

The jurisprudence of the takings clause, it is now common to acknowledge, is in a state of disarray.[71] It is also common to acknowledge

69. *See, e.g.,* Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-13 & n.14 (1983) (higher standard of review for state regulation of public contracts than for private contracts).

70. *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254 (1970) (disputes with state bureaucracy subject to greater court review than analogous disputes with other citizens).

71. *See, e.g.,* Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle,* 57 S. CAL. L. REV. 561 (1984).

that the current state of the law reflects a legal culture in transition.[72] Takings law has always presented "hard" questions, but in the current scheme of things many of these questions seem "particularly hard." Part of the reason for this state of affairs is that there are two similar, yet fundamentally distinct, issues behind some of the disorder in the takings clause, particularly when applied to environmental and cultural preservation. The first deals with the inability of conventional legal categories to reflect the emergence of certain intragenerational aspects of environmental and cultural preservation. The second is the inability of those same categories to reflect the intergenerational concerns present in these two areas. The legal culture has begun to address the first set of questions, but it has not done well with the second. Efforts are being made to add the new intragenerational concerns into legal dialogue, yet not enough has been done to add the equally important intergenerational concerns.[73] Consequently, part of the tension in contemporary takings clause jurisprudence can be attributed to a legal culture that has not yet assimilated intergenerational concerns into its categories in any significant way.

To illustrate the nature of this dilemma, the first part of this Section considers the intragenerational and intergenerational problems associated with environmental preservation and the takings clause. Two separate issues—intragenerational market failures and intergenerational market failures—are considered in light of the ability of conventional legal categories to accommodate each set of problems. To further illustrate the nature of this dilemma and the continued fixation of the legal culture with categories grounded in intragenerational justice, the second part of this Section considers the legal categories used in two significant land use cases, *Just v. Marinette County,* a state court decision on wetlands preservation, and *Penn Central Transportation Co. v. New York City,* a Supreme Court decision on the constitutionality of historic landmark preservation.

A. *The Conventional Doctrine and Market Failure*[74]

As an example of the problems that conventional legal categories

72. *See, e.g.,* B. ACKERMAN, *supra* note 44, at 89, 168-89; *see also* Ackerman, *Four Questions for Legal Theory,* in NOMOS XXII, PROPERTY 351 (J. Pennock & J. Chapman eds. 1980).

73. One of the few exceptions is Heller, *The Importance of Normative Decision-Making: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Home Development,* 1976 WIS. L. REV. 385, 406-07, 459-64.

74. For a general discussion of "market failure," see E. STOKEY & R. ZECKHAUSER, A PRIMER FOR POLICY ANALYSIS 291-308 (1978); Bator, *The Anatomy of Market Failure,* 72 Q.J. ECON. 351 (1953).

create when applied to such areas as environmental and cultural preservation, assume that a state, in an effort to slow the destruction of redwoods located on private property, prohibits the cutting of the trees. Such a proposal would be perceived as a "hard" case under the takings clause by conventional standards. Each of the four existing takings causes of action would be problematic when applied to the example of the preservation of the redwoods. Under the Type I or "Taking My Thing" analysis, it is difficult to argue that a cause of action exists because there has not been an alteration of the land. Moreover, it is difficult to argue either that a thing has been transferred to someone else, since no tangible item has been transferred, or that an existing thing has somehow been rendered useless or invaded, since the owner of the land can continue to do anything he was previously able to do to the land and need not share his existing access to the land.

Under the Type II or "Noxious Use" cause of action, it is difficult to argue that the restriction was triggered by a noxious use. The existing uses of the property did not produce any existing conflicts with other landowners and, if anything, were compatible with the uses of surrounding areas.

The classical zoning paradigm of Type III is also inapplicable because the preservation does not produce a reciprocity of advantage. The reciprocity of advantage argument necessarily assumes that the property owner's "loss" is offset by the benefits gained by restrictions on nearby property, a factor not present here. Similarly, while the equal protection component of the classical zoning paradigm might also seem to raise a problem, since the landowner in some sense could be considered singled out for special treatment, that, too, would seem to be inapplicable. It is difficult to argue either that another property owner has been helped by the condemnation (i.e., the bribery motive) or that the property owner affected by the condemnation has been injured (i.e., the discrimination motive).

The fourth cause of action, "Bureaucratic Aggrandizement," may also seem to be applicable. The government in this case appears to be acting out of some kind of ulterior motive, and thus it could be argued that compensation is required to check government aggrandizement. While initially appealing, this argument, too, is flawed. In this case, it could be argued, the state is actually acting in an arbiter rather than in an enterprise capacity. Instead of arguing that the state is acting out of selfish motives, it could be argued that the state is merely serving as an arbi-

ter or broker between citizens who are in dispersed locations or in different generations.

The reason that the redwoods example is a difficult one for present-day lawyers is that it places traditional concepts of private property and takings in conflict with two different economic and social concepts associated with environmental and historic preservation: intragenerational market failures and intergenerational market failures. Each will be considered in turn.

1. Intragenerational Market Failures and Conventional Doctrine

Under conventional private property concepts, the owner of the land would be free to cut down the redwoods.[75] Under conventional market assumptions there would likely be every incentive for the owner to do this to maximize his investment in the land. Use of the land would be determined almost entirely by the property owner. The "property," in turn, would be defined by the physical boundaries of the land, and the owner would be free to determine the use of the land. Any dispute about the use of the land would be localized; only the direct physical effects of the activity on neighboring land would be assumed to be relevant, and the decision on how to use the land would be left solely within the property owner's discretion.

Under conventional economic and legal assumptions, such a legal framework of rights, when joined with free market trading, would be assumed to reflect the proper societal ordering of uses. But once this framework is used to assess a multiplicity of environmental concerns, however, it can be expected to generate a series of problems.

One source of problems is that the "psychic" value of the redwoods may well extend beyond the physical boundaries of the property itself.[76] For example, even though people may not have any immediate plans to visit the redwoods, they may derive enjoyment merely from the knowledge that such redwoods exist and that if the trees are preserved, they in effect retain an "option" to visit them in the future. Similarly, people

75. *See, e.g.*, Vandevelde, *supra* note 30, at 328-33; *see also* Sax, *Takings II, supra* note 35, at 151-55. *But see* State v. Dexter, 32 Wash. 2d 551, 202 P.2d 906 (upholding statute requiring commercial logging operations to leave certain number of trees standing), *aff'd per curiam*, 338 U.S. 863 (1949).

76. *See, e.g.*, Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 747 (1977) ("[A] considerable portion of the benefits from pristine environments consists of the 'long distance' ideological satisfaction afforded nonresidents concerned with the preservation of extraordinary environments such as the Grand Canyon or the Alaska wilderness.").

may derive some benefit merely from the "existence" value of such trees, even though they may never plan to visit them. In terms of conventional market analysis, however, this separation of economic benefit from the immediate physical location of the land itself creates several problems. One problem is that because people may derive a benefit from the redwoods without having to set foot on the land itself, the economic value of these psychic benefits cannot be captured by the property owner, and thus the value of these benefits will not be reflected in the market value of the land. Not unexpectedly, therefore, the conventional market system may systematically underestimate any such dispersed psychic value vis-à-vis the immediate development value of the land.[77]

A second and related problem is the presence of transaction cost and "free rider" problems.[78] Even though the economic benefit derived from the preservation of the redwoods may be greater than the development value of the property, an actual bargain between the property owner and those willing to pay for the preservation is unlikely simply because such a large and dispersed group of persons face virtually insurmountable negotiation problems. If negotiations were possible, each person in the group would likely "hold out" and wait for someone else to absorb the costs of negotiation. As a result, the conventional market system tends to systematically underestimate the preservation value of natural resources.

This aspect of environmental preservation, in essence, is one of intragenerational concern. The problem is the inability of the market to register the desires of the present generation. In response to such problems, recent economic analysis has responded either by redoing the economic notion of "externality,"[79] by using transaction cost economics to justify governmental intervention,[80] or by attempting to place an existence or an option value on preservation.[81] In a similar fashion, legal

77. *See, e.g.,* Sax, *Some Thoughts on the Decline of Private Property,* 58 WASH. L. REV. 481, 485-86 (1983) [hereinafter cited as *Decline of Private Property*].

78. *See, e.g.,* W. BAUMOL & W. OATES, THE THEORY OF ENVIRONMENTAL POLICY 10-11; R. STEWART & J. KRIER, ENVIRONMENTAL LAW AND POLICY: READINGS, MATERIALS AND NOTES 107-08 (2d ed. 1978); Michelman, *supra* note 47, at 1174-76. *See generally* M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).

79. *See, e.g.,* Coase, *The Problem of Social Cost,* 3 J.L. & ECON. 1 (1960); *see also* Mishan, *The Post-War Literature on Externalities: An Interpretive Essay,* 9 J. ECON. LIT. 1 (1971).

80. *See, e.g.,* Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique,* 33 STAN. L. REV. 387, 398-400 (1981).

81. *See, e.g.,* Arrow & Fisher, *Environmental Preservation, Uncertainty, and Irreversibility,* 88 Q.J. ECON. 312 (1974); Cicchetti & Freeman, *Option Demand and Consumer Surplus: Further Comment,* 85 Q.J. ECON. 528 (1971); *see also* TVA v. Hill, 437 U.S. 153, 177-79 (1978) (option value on preservation of endangered species). *See generally* Krutilla, *Conservation Reconsidered,* 57 AM. ECON. REV. 777 (1967).

scholarship has responded by proposing new legal concepts aimed at confronting such concerns. The most innovative legal argument, set forth by Joseph Sax, has been to redefine the notions of property and takings to reflect these intragenerational market failures. This argument has taken two forms. The first response is to argue that the notion of private property should be redefined to acknowledge the shift from an individualistic, localized concept of property that stressed individual autonomy to one that stresses the interrelated nature of land use and the resulting "public" nature of the concern over land use.[82] Sax, in essence, responds to the intragenerational market failure created as a result of the diffused, "psychic" nature of the benefits from the environmental preservation by treating these benefits as a single public or common right. By recognizing a common right, a type of meta-class action is created which overcomes the free rider and negotiation problems that otherwise would have hindered the advocates of preservation.

The second and related response has been to redefine the takings problem in such a way that the preservation of these public rights is not deemed to be a taking even though it may result in a severe restriction on the present development of property.[83] The approach Sax takes here parallels his treatment of property rights. Under conventional takings doctrine, preservation of the environmental value of the land that severely diminished the value of the property might be treated as a taking since the analysis would be limited to its impact on the landowner. In contrast, under Sax's formulation, the same action would be analyzed as a conflict between two different interests (i.e., those of the property owner and those of the holders of public rights).[84] Each set of rights, therefore, would be considered on an equal footing. If the actions of the property owner had significant spillover effects, the dispute would be resolved in favor of the holders of the public right and, thus, not be considered a taking "however severe the economic loss on the property owner."[85]

This analysis of takings, of course, presupposes Sax's theory of property rights. It is only when public rights are recognized that the focus of the legal analysis can be expanded beyond the property of the landowner

82. Sax, *Decline of Private Property, supra* note 77 (transformation of nature of private property to recognize public rights); Sax, *Takings II, supra* note 35, at 161-72 (same); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471 (1970) (development of "public trust" doctrine to the effect that environmental resources are impressed with a trust for the benefit of the public which governs disposition and use of such areas).

83. Sax, *Takings II, supra* note 35; Sax, *Takings I, supra* note 64.

84. Sax, *Takings II, supra* note 35.

85. *Id.* at 162.

and its immediate physical surroundings. Thus, both Sax's reconstruction of property rights and his reconstruction of takings doctrine are related. Moreover, both are efforts to respond to the same basic problem of intragenerational market failures.

2. Justice Between Generations and Conventional Doctrine

Without denying the validity of Sax's approach, it must be recognized that intragenerational market failures are only part of the problem. Indeed, this approach fails to address the related, yet fundamentally different, problems of intergenerational market failures and justice between generations. Although part of the rationale for the preservation of the redwoods may be linked to the inability of conventional notions of private property and the market to register the desires of the present generation, an equally important justification is the preservation of the redwoods for future generations. In this sense, the preservation of the redwoods for purposes of justice between generations—what could be termed "intergenerational condemnation"—differs fundamentally from each of the existing four takings causes of action, each of which serves as an example of "intragenerational condemnation."

Intergenerational condemnation, unlike the conventional intragenerational condemnation, is not a contest between a present landowner and present government. Instead, it is a contest between present landowners and the next generation as represented by the present government. The present government takes part of a bundle of property rights from the present generation and gives it to the next generation. The purpose of redistributing the property rights is to give a voice to the next generation, who, because they are not yet in existence, would not otherwise be able to bid on the saving of such lands in the marketplace.

The inability of conventional doctrine to accommodate justice between generations is not accidental. The simple reason for this shortcoming is that conventional takings doctrine is grounded in an intragenerational concept of land use. In particular, three fundamental assumptions about land use are implicit in all four of the conventional causes of action for takings. First, all four focus exclusively on intragenerational resources conflicts. The temporal framework of each is limited to conflicts between members of the present generation over existing property. In each case, the government has either tried to transfer property to another member of the present generation or restrict the present use of property. Second and perhaps most significantly, the rele-

vant economic effects of each cause of action are considered solely in terms of the present generation. Compensation is judged by the current market value and is paid by members of the present generation (through their government) to other members of the present generation. Similarly, any effects of noncompensated takings are also limited to the present generation. Third and closely related, the standard of just compensation is based on the assumptions of a working market and existing bidders. The fair market value standard for just compensation necessarily assumes that the worth of the land is to be measured by its value to the present generation.

While takings clause jurisprudence remains grounded in intragenerational resources conflicts, land use as a whole has increasingly begun to take the form of a question of intergenerational justice. For most of this country's past, the use of a purely intragenerational focus did not raise any significant problem. In an era of growth, a commitment to the development of land benefited both present and future generations. So long as an expansionist ethic prevailed, along with a cheap and abundant supply of land, the interests of the present generation and the next generation were substantially identical. Present growth served the needs of the next generation as well. What allowed the present generation to grow also allowed the next generation to grow. The interests of the next generation were thus cared for by the same means that cared for the present generation—the market. Under these assumptions, the needs of the two generations did not diverge and the market became the predominant means of achieving the perceived public goals. Under such circumstances, an intragenerational perspective on the takings clause remained unproblematic. The relevant legal categories, with their implicit assumptions about present market value and intragenerational resource conflict would, by coincidence, also serve the needs of the next generation. By promoting growth and umpiring the conflicts of the present generation, the takings clause doctrine would also protect the next generation.

With the coming of greater land scarcity and the rise of the conservation ethic, the interests of the present and next generation began to diverge and the market paradigm for land use became increasingly problematic.[86] Growth in the form of development of land by the present generation no longer necessarily served the goals of the next generation.

86. *See, e.g.*, Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393 (1981) (general discussion of relationship between economics and environmental values).

As planning and conservation became prominent features of land use, the focus shifted away from merely present concerns to both present *and* future concerns. And as future concerns diverged from present concerns, the market test became less relevant and "market failure"—the inability of the market to translate relevant preferences into collective decisions—became a more frequent problem. If the desires of future generations were relevant but did not happen to match those of the present generation, the market could not respond. The present preferences registered in the market thus did not correspond to the preferences of the relevant group.

As a result of the conflict between the intragenerational perspective assumed within the conventional takings causes of action and the intergenerational concerns about preservation, each of the four existing causes of action is unable to accommodate the relevant concerns of justice between generations. The same features of conventional notions of private property that make it difficult to accommodate problems of intragenerational market failures also make it difficult to accommodate intergenerational market failures. For example, conventional legal categories implicitly assume that property is a physical thing defined by physical boundaries in which the owner exercises considerable autonomy. This reification and resulting localization of property screens out dispersed, nonphysical concerns (such as the psychic value of preservation) and thus fails to create the physical harm to adjoining property redressed by the nuisance cause of action. At the same time, however, these same features screen out intergenerational concerns. The reification of property associated with conventional notions of private property is time-bound. The property and the relevant acts of autonomy or injury associated with it are confined to three dimensions. As a result, a split of control between generations or an act that only becomes harmful in the context of more than one generation is also outside the scope of the conventional framework. The intragenerational perspective of conventional takings clause doctrine also assumes that the preservation of land will be considered from the viewpoint of a contest between members of the present generation.

The presence of both intragenerational market failures and intergenerational market failures thus combine to create most of the "particularly hard" questions for the treatment of preservation issues under the conventional legal categories. Ultimately, an adequate modern theory of takings will have to deal with both. To the extent that the legal

culture continues to rely upon the conventional takings causes of action, however, the analysis of preservation issues will continue to be problematic.

B. *Conventional Categories and the Legal Culture*

In order to illustrate the significance of this problem for the present legal culture, the remainder of this Section will consider two landmark takings cases in the environmental and land use area—*Just v. Marinette County,* which deals with the preservation of wetlands, and *Penn Central Transportation Co. v. New York City,* which deals with the preservation of historic landmarks. Not surprisingly, both cases are influenced by concerns of intragenerational market failures. Yet each case also deals with concerns of justice between generations. In the instance of wetlands preservation, the state is attempting, in part, to compensate for the inability of the present market to register current demand for preservation and, in part, to save the land in its natural state for use by future generations. Similarly, in the instance of historic preservation, the state is attempting to preserve a cultural landmark, in part, for the benefit of future (as well as past) generations. Inasmuch as the categories used in each opinion to structure the legal analysis constitute reformulated versions of one of the four conventional causes of action under the takings clause, the legal analysis in each case remains somewhat controversial. In each case, it is not so much that the final result reached is necessarily unjustified. Rather, the problem with each case is that the result that was reached was justified solely by reliance on conventional categories, which, in turn, are grounded in notions of intragenerational justice. Thus, most of the legal dialogue was not focused on the legitimate issue of justice between generations. In neither instance, however, could the conventional categories accommodate all of the relevant concerns. Therefore, the lingering uneasiness about each case is not so much a matter of unease about the politics of the end result but, more meaningfully, the inability of conventional legal categories (however much reformulated) to direct attention to all of the relevant substantive issues raised by such cases.

1. *Just v. Marinette County* [87]

In *Just,* the property owners purchased lakeshore land expecting to develop and then sell it. After they bought the property, however, the

87. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

state passed shoreland zoning legislation that severely limited the development that could take place on the land and, in essence, required that the land be preserved in its present natural and undeveloped state.[88] The property owners argued that the legislation constituted a taking of their property.

In upholding the preservation scheme, the Wisconsin Supreme Court, in what has become a landmark opinion, justified the zoning on two general grounds. First, the court, in what was essentially a modified Type II or noxious use cause of action, drew upon the statement of a *Lochner* era treatise that government action would be upheld if the property was taken because it "harmed" the public but would be deemed a taking if, instead, it was taken for the "benefit" of the public.[89] Based upon this "harm/benefit" theory, the court argued that requiring that the natural status quo of the environment be maintained constituted the prevention of harm rather than the securing of a benefit for the public and, therefore, concluded that the legislation "[does] not create or improve the public condition but only preserves nature from the despoilage and harm resulting from the unrestricted activities of humans."[90] Second, the court stressed the "public trust" nature of the action by the state, thus implying that it was recognizing the existence of public rights.[91]

While hailed by environmentalists as a landmark decision, the court's rationale has remained controversial. In particular, the use of the "harm/benefit" theory has been criticized[92] and has raised a number of problems.[93] The most important point is that any extensive use of such a

88. In *Just,* the county adopted a shoreland zoning ordinance to comply with a state shoreland zoning statute. The ordinance classified the shoreland area into three districts, including a "conservancy district" covering wetlands. Only natural uses were permitted in the conservancy district, such as hunting, fishing, hiking, and harvesting of wild crops. *Id.* at 11-12 & n.3, 201 N.W.2d at 765 & n.3. Conditional permits were permitted for such actions as dredge and fill. *Id.* at 12 & n.4, 201 N.W.2d at 765 & n.4. The property owners, however, did not apply for a permit. *Id.* at 14, 201 N.W.2d at 766. Instead, they challenged the creation of the conservancy district as a violation of the takings clause. *Id.* at 14, 201 N.W.2d at 767.

89. *See id.* at 16, 201 N.W.2d at 767 (quoting E. FREUND, *supra* note 4, at 546-47). The relevant language from the Freund treatise is the following:

> [I]t may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . .
>
> From this results the difference between the power of eminent domain and the police power, that the former recognises a right to compensation, while the latter on principle does not.

Id.

90. 56 Wis. 2d at 25, 201 N.W.2d at 771.

91. *See id.* at 16-19, 201 N.W.2d at 768-69.

92. *See, e.g.,* D. MANDELKER, LAND USE LAW 328-29 (1982).

93. *See, e.g., id.* at 18-20; Michelman, *supra* note 47, at 1196-1201.

theory is bound to be incomplete for the simple reason that a Type II analysis was meant to deal only with intragenerational problems and was developed as a complement to conventional notions of private property. Given the need to justify what on an intuitive basis must have seemed like a proper decision, the court cannot be faulted for merely attempting to modify existing standards to justify the decision. On a long-term basis, however, such a rationale is problematic because it fails to analyze the problem as one of justice between generations.

In this respect, the *Just* decision serves as a prominent example of the cultural aspects of legal categories. The wetlands issue, in part, is about such problems as the inability of the conventional notions of the market and of private property to respond to the environmental values held by those in the present generation. This issue is also, in part, a matter of justice between generations. The reason why the development of wetlands is being restricted (which the court itself seemed to acknowledge[94]) is so that the land in its natural state will be preserved for use by the next generation of citizens.

Nonetheless, because the dominant categories in the legal culture are grounded in intragenerational justice and because the developing categories (such as public trust) deal predominantly with intragenerational market failures, the continued use of the modified Type II "benefit/harm" theory is likely to be problematic. The issue is not truly centered on whether there is a benefit and a harm within one generation, but whether there is a benefit or harm between several generations. By merely categorizing the action as a prevention of "harm," the court necessarily conflated the two issues and thus was unable to generate an entirely satisfactory rationale for its decision.

2. *Penn Central Transportation Co. v. New York City*[95]

In *Penn Central*, the United States Supreme Court considered whether a New York plan for the preservation of historic structures violated the takings clause. Under the New York City law, no exterior changes could be made on a landmark without the prior approval of the New York City Landmarks Preservation Commission. After Grand Central Terminal had been designated as a landmark, Penn Central, the owner of the terminal, applied for permission to build a fifty-five-story

94. *See* 56 Wis. 2d at 23-24 & n.6, 201 N.W.2d at 771 & n.6.
95. 438 U.S. 104 (1978).

office building over the terminal. The permit was denied.[96] Penn Central then challenged the Landmarks Preservation Law, arguing that its property had been taken without just compensation.

In upholding the validity of the historic preservation scheme, the Court, in an opinion authored by Justice Brennan, relied on conventional legal categories.[97] While several different takings causes of action were argued, the critical portion of the opinion centered on a Type III or classical zoning paradigm and its associated concept of "average reciprocity of advantage."[98] As discussed previously, a key concept in the classical zoning paradigm is the assumption that the benefits and burdens of the program are more or less evenly distributed over the affected property owners.[99] Thus, even though a property owner may be "harmed" in the sense that the zoning reduced the immediate economic value of the land (for example, because of restricting the use of the land to residential rather than industrial use), the same property owner is also "benefited" in the sense that zoning restrictions on other property in the zoning plan ultimately redound to his benefit. Consequently, zoning and its arrangement of benefits and burdens supposedly represents a series of pareto superior moves brokered by the state. In addition, the notion of a benefit offsetting harm also serves as a variety of compensation in kind.

Given this rationale for classical zoning, the New York preservation scheme presented a dilemma for the Court. Unlike a conventional zoning scheme that designated general uses over entire geographic areas, the New York scheme designated individual landmarks.[100] As a result, the classical notion of average reciprocity of advantage was missing; the restriction on the property designated as an historic landmark benefited surrounding property owners as well as the public at large, but there was no countervailing restriction on any other property in the immediate area to offset the diminution of the value of the designated property.

The reason why no average reciprocity of advantage existed was because, in part, the preservation of Grand Central Station ultimately presented a matter of intergenerational condemnation. The preservation of the property represented, in part, a bargain struck by the present government between a property owner in the present generation and mem-

96. The Landmark Law, however, provided that if the full development of the designated site was thus prohibited, the property owner was entitled to transfer development rights (TDRs) to contiguous parcels on the same city block. *See id.* at 114-15.

97. *See supra* note 43.

98. 438 U.S. at 133-35.

99. *See supra* notes 58-65 and accompanying text.

100. *See* 438 U.S. at 107, 109-11, 133.

bers of the next generation. Under such circumstances, any conventional notion of reciprocity of advantage was lacking because the harm and the benefit were in two different generations. Because Brennan continued to analyze the landmark preservation law solely in terms of the conventional causes of action, he was presented with a significant conceptual problem. On the one hand, if he relied entirely on the conventional application of the existing takings categories, he would be hard pressed to justify the restriction on the use of the land, since none of those categories was designed to deal with justice between generations. On the other hand, he could pretend that the conventional categories covered intergenerational condemnation. This would make it easier to uphold the landmark preservation law, but at the expense of depriving the categories of their normal meaning and dealing openly with the concerns of justice between generations.

Brennan ultimately chose to reconstruct the conventional categories by using two different techniques. First, he redefined the nature of average reciprocity of advantage. Despite Penn Central's claim that it had been singled out for harm and that it did not in fact receive any countervailing benefits because of the designation of the property as an historic landmark, Brennan declared that such a claim was "factually inaccurate."[101] The Court, Brennan continued, could not "conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law" since 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."[102] As evidenced by Justice Rehnquist's dissenting opinion, Brennan's argument is, of course, problematic at best from the perspective of the conventional categories.[103] Except in the most general sense, there was no offsetting benefit from the other nearby property for the owner of the property selected for preservation. Thus, Brennan's reliance on some conventional notion of reciprocity of advantage can only be described as marginal.

Second, Brennan also tried to disguise the landmark designation as merely a Type II or noxious use cause of action. Historic preservation, however, cannot be classified as a conventional Type II noxious use case. The designation of Grand Central Terminal as a landmark without payment of compensation could not be justified on the basis of either physi-

101. *See id.* at 134-35.
102. *Id.*
103. *See id.* at 147-50 (Rehnquist, J., dissenting).

cal harm to surrounding property or violation of accepted standards of neighborliness. In fact, if anything, the preservation benefited surrounding property owners. The "act" of historic preservation thus did not fit into the classical concept of nuisance.[104] Far from being the classic "pig in the parlor,"[105] the case did not deal with pigs at all, but rather with the preservation of the parlor itself. When faced with this possibility, Justice Brennan responded by pretending that the noxious use cases in fact stood for something else and that something else was what was involved in the present case. Specifically, Brennan denied that the noxious use cases had ever really been noxious use cases at all.[106] Instead, he argued, they merely represented "the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property."[107] This, of course, was a classic example of a bootstrap argument. Instead of redefining the problem to fit the category (as he had with the zoning paradigm), Brennan redefined the category to fit the problem.

The real problem in *Penn Central* was not so much the decision's result, but the legal categories used to arrive at that result. *Penn Central* really had nothing to do with classical zoning or nuisance; instead, the case displayed a continued reliance by the Court on legal categories which were ultimately grounded in the resolution of intragenerational resource conflicts to deal with intergenerational condemnation. Historic preservation, like wetlands preservation, also involves both intragenerational and intergenerational market failures.[108] Once again, the market is likely to fail to register all of the intragenerational concerns about the psychic desires of large numbers of persons. Most important, it also involves significant intergenerational concerns. In the case of historic preservation, the future generation is seeking to have significant cultural items preserved for itself, and the present generation (as well as the past)

104. *See id.* at 144-46 (Rehnquist, J., dissenting).

105. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard.").

106. *See* 438 U.S. at 133 & n.30.

107. *Id.* at 134 n.30.

108. While certainly similar from the general perspective of intergenerational condemnation, wetlands preservation and historic preservation still have some important differences. First, the preservation of the natural environment merely requires the cessation of a noncompatible activity, while the preservation of historic structures requires that action be taken (i.e., repairs) to maintain the status quo. Second, environmental preservation is typically for the benefit of present and future generations, while historic preservation is, in part, for the benefit of past generations as well. Third, because historic preservation typically takes place in an urban setting (and can also involve isolated landmarks), compensation schemes (such as TDRs) based on the development of adjacent property would be difficult to implement in the context of environmental preservation.

is attempting to pass on some of its important statements of culture. By relying on conventional categories, however, the Court failed to make this distinction and, as a result, its rationale remains troublesome.

3. The Continued Influence of Conventional Categories

Together, *Just* and *Penn Central* illustrate an important dilemma in current takings clause jurisprudence, particularly as it is applied to environmental and cultural preservation. Part of the perceived increase in the need for environmental and historic preservation is the inability of conventional legal and economic categories to deal with concerns of justice between generations. At the same time, however, the legal culture continues to analyze such problems solely in terms of conventional causes of action. To some extent, this is understandable. If new problems can be made to look like old problems, any judge that recognizes them and any lawyer that argues for them runs less of a risk of being perceived by his or her peers as being deviant or by the public as disregarding the (supposed) rule of law. At some point, however, it is important to recognize that the conventional categories necessarily carry with them a certain intellectual structure. The conventional categories can only be pushed so far before they no longer make sense. A legal culture that continues to rely upon the conventional causes of action because of their familiar appeal can therefore be expected to generate less than satisfactory analyses when confronted with factual situations laden with intergenerational concerns. Thus, while the end result in a given case may be politically satisfying, there is a sense that the legal doctrine supporting that result does not fit together as well as it should.

If takings clause jurisprudence and the legal culture are to respond to these emerging concerns of justice between generations, a fifth takings clause cause of action must be added—that of "intergenerational condemnation." If the legal culture is to begin to deal with the problems of intergenerational justice, it must recognize the limits of its existing categories and begin to talk about alternatives. Consideration must go beyond conventional legal categories. Harder issues of intergenerational justice must be considered. First, to what extent can the present government take bundles of rights from present landowners for the purpose of giving them to the next generation? Second, when, if ever, must the present landowners be compensated? Third, if the landowner is to be compensated, how much should it be? Finally, if the landowner is to be compensated, who is to do it, the present generation or the next? The

next section of this Article, therefore, presents a modest proposal for a utilitarian model of intergenerational condemnation.

III. THE TAKINGS CLAUSE, POLITICAL PHILOSOPHY, AND INTERGENERATIONAL JUSTICE—A UTILITARIAN PROPOSAL FOR INTERGENERATIONAL CONDEMNATION

Recent legal scholarship has generated several models based in political philosophy that could be adapted to intergenerational condemnation. This Section will therefore analyze intergenerational condemnation in light of recent scholarly treatment of the takings clause.

A. *Political Philosophy and the Takings Clause*

The leading scholarly work on the takings clause in the last several decades has been done by Joseph Sax,[109] Frank Michelman,[110] and Bruce Ackerman.[111] While their work considered only intragenerational condemnation—and thus would not be directly applicable to intergenerational condemnation—their basic approach is promising. The work of Michelman and Ackerman is of particular importance because each author shows the usefulness of analyzing the takings clause from the viewpoint of political philosophy.[112] A brief discussion of their ideas about intragenerational condemnation may serve as a useful preface to a similar analysis of intergenerational condemnation.

The takings problem arises because of a shift in entitlements by the state. Some citizens lose bundles of rights, others gain. A loser claims the shift is unjust unless he is paid. Instead of analyzing the loser's claim in traditional terms, such as physical invasion or noxious use,[113] Ackerman and Michelman develop a utilitarian ("efficiency")[114] analysis.

109. Sax, *Takings II, supra* note 35; Sax, *Takings I, supra* note 64.

110. Michelman, *supra* note 47.

111. B. ACKERMAN, *supra* note 44. Other significant works in the area include Baxter & Altree, *Legal Aspects of Airport Noise,* 15 J. L. & ECON. 1 (1972); Berger, *A Policy Analysis of the Taking Problem,* 49 N.Y.U. L. REV. 165 (1974); Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue,* 58 N.Y.U. L. REV. 465 (1983); Costonis, *Development Rights Transfer: An Exploratory Essay,* 83 YALE L.J. 75 (1973); Dunham, Griggs v. Allegheny County *in Perspective: 30 Years of Supreme Court Expropriation Law,* 1962 SUP. CT. REV. 63; Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power,* 52 TEX. L. REV. 201 (1974); Williamson, *Administrative Decisionmaking and Pricing: Externality and Compensation Analysis Applied,* in THE ANALYSIS OF PUBLIC OUTPUT 115 (J. Margolis ed. 1970).

112. Most recently, this approach is discussed in *Developments in the Law—Zoning,* 91 HARV. L. REV. 1427, 1462-1501 (1978) [hereinafter cited as *Developments*].

113. *See, e.g., id.* at 1466-82. A good summary can also be found in L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 9-1 to -4 (1978 & Supp. 1979).

114. *See* B. ACKERMAN, *supra* note 44, at 44-49; Michelman, *supra* note 47, at 1208-13; *Develop-*

Under the utilitarian analysis, the issue is whether overall social utility is maximized by granting or denying the claim.[115] The calculation is based on three factors:[116]

1. Net Efficiency Gains.

A net efficiency gain occurs when the benefits (B) from a project exceed all project costs (C) other than demoralization costs and settlement costs. Such costs typically flow from the project itself.

2. Demoralization Costs (D).

These costs consist of the dollars necessary to offset (a) the disutility caused to the landowner if compensation is not paid, (b) the disutility caused to other landowners because they are made more insecure by the prospect that the same thing might happen to them, and (c) the disutility caused by any future production lost because of (a) or (b).

3. Settlement Costs (S).

This category of costs takes into account the time, effort, and resources needed to process and pay compensation claims.

Assuming that the project itself would not be undertaken unless the net efficiency gains are greater than either the demoralization costs or the settlement costs (i.e., [B-C]-D$>$0 or [B-C]-S$>$0), the additional decision to award or deny compensation is the result of a simple calculation. Under the utilitarian model, the state would pay compensation whenever the social cost of providing compensation is less than the social cost of allowing individuals to remain uncompensated. In effect, the state chooses the lesser of two evils, demoralization costs or settlement costs. If demoralization costs are greater than settlement costs (D$>$S), compensation is given. On the other hand, if demoralization costs are less than settlement costs (D$<$S), compensation is denied.[117]

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ments, supra note 112, at 1483-91. This model is further developed in Note, *Uncertainty over Adverse Government Action and the Law of Just Compensation,* 90 YALE L.J. 1670 (1981) [hereinafter cited as *Uncertainty*]. A Kantian or "fairness" analysis has also been developed. *See* B. ACKERMAN, *supra* note 44, at 71-76; Michelman, *supra* note 47, at 1214-24; *Developments, supra* note 112, at 1491-97; *see also* Note, *Utility, Fairness and the Takings Clause: Three Perspectives on* Laird v. Nelms, 59 VA. L. REV. 1034, 1058-68 (1973). This approach will not be discussed here, however.

115. B. ACKERMAN, *supra* note 44, at 44-49; Michelman, *supra* note 47, at 1208-13; *Developments, supra* note 112, at 1483.

116. *Developments, supra* note 112, at 1483; *see* Michelman, *supra* note 47, at 1214-15. A slightly different formula is used in B. ACKERMAN, *supra* note 44, at 44-49.

117. Ackerman's additional contribution was to link political philosophy to the way a judge understands his role in the legal system. B. ACKERMAN, *supra* note 44, at 31-39, 49-63, 77-83. The

B. *A Utilitarian Model of Intergenerational Condemnation*

Neither Michelman nor Ackerman deal with intergenerational justice; however, their work might be adapted to apply to intergenerational condemnation. This Section will develop a model for intergenerational condemnation based on a modified version of utilitarianism. Although the basic utilitarian format will be used, it will be tempered somewhat by several of the justice between generations arguments proposed in John Rawls' *A Theory of Justice.*

1. A Model for Intergenerational Condemnation

The utilitarian model for intragenerational condemnation provides a useful starting point for a model for intergenerational condemnation. The same factors can be considered: net efficiency gains, demoralization costs, and settlement costs. The application of these factors in the context of justice between generations, however, raises two additional considerations. First, a different group of persons with different interests must be placed in the balance. Calculations of utility for intragenerational condemnation can be made for a single point in time for a single group. But in intergenerational condemnation, calculations must be made for two different groups at two different times. The interests of the present generation must be considered from the point of view of the present generation, while the interests of the next generation must be considered from the point of view of the next generation. Second, there is an obvious time gap between the two generations. This time gap brings up two problems: discounting (i.e., how much weight should be given by the present generation to the future desires and needs of the next generation) and projections of future land use (i.e., what the desires of the next generation would be). Both of these new factors predominate in the discussion of net efficiency costs, the first component of the utilitarian formula. In the model to be offered, the basic utilitarian elements will also be modified by Rawls' view of justice between generations and time preference. After net efficiency goals have been discussed, demoraliza-

starting point is the notion of a "well-ordered" society, borrowed from John Rawls. *Id.* at 35; *see* J. RAWLS, A THEORY OF JUSTICE 4-5, 453-72 (1971). In such a society the basic social, legal, and economic institutions generally perform in a manner consistent with basic accepted principles. If a judge believes that society is presently "well-ordered," he will not want to use his power to change the existing state of affairs. In other words, he will be *restrained.* B. ACKERMAN, *supra* note 44, at 35-36. On the other hand, if the judge believes that some component of society is presently not "well-ordered," he would view his power as an opportunity to correct the malfunction so that the final result would be the same as if it originally had been the result of a well-functioning system. Such a judge would be labeled *innovative. Id.* at 36.

tion costs and settlement costs will be covered. Finally, a formula will be offered for an assessment of intergenerational condemnation.

a. The first element: net efficiency gains

By analogy to the utilitarian model for intragenerational condemnation, the net efficiency gains for intergenerational condemnation flowing from a given preservation of land would be the excess of the total economic benefits in both generations over the economic losses (excluding settlement costs and demoralization costs) in both generations.[118] The calculation of the benefits for intergenerational condemnation is both more complex and less definite than for intragenerational condemnation, however, because of the need to project future benefits and because of the problems of discounting.

Projection of Future Benefits. A model for intergenerational condemnation must project the benefits to the next generation. Even before discounting is confronted, the benefits expected must still be identified. An estimate of future benefits necessarily involves prediction. Nonetheless, several useful guidelines would include:

(1) the types of nondestructive activities popular at some time in the past, even though not presently pursued (this helps to preserve options and to accommodate the reemergence of past uses);

(2) the trends in land use in the present generation, such as an increase in camping (more likely than not, the next generation will resemble the present generation more than a more distant generation); and

(3) the activities that have survived history (if the activities have gone on for several hundred years or more, it is likely that they will be continued in the future).

In addition to projected land use preferences, the number of people involved and their location would also be considered. Thus, projections of population growth and concentration would also be important. The use of such criteria would undoubtedly generate a certain amount of good faith disagreement over projections. Some choices, however, would be easy to make. For example, while the preservation of land for sport hunting would be perceived as controversial, since opinion is changing on

118. Only the calculation of benefits are specifically discussed here in the text. Costs, of course, will also have to be considered; however, in the typical intergenerational condemnation setting, the costs are incurred for the most part by the present generation. Thus, the calculation of costs typically does not present the special intergenerational problems associated with the calculation of benefits discussed in the text.

the matter, the preservation of land for hiking or wilderness preservation would probably not present a difficult issue.

Discounting: The Need for a Rawlsian Constraint on Time Preference. After a projection of the benefits for the next generation has been made, a second aspect of intergenerational justice remains. Specifically, the benefits calculated for the two generations are still separated by time; some benefits are in the year 1986, others are in the year 2016. Should the two figures simply be summed together or should the future benefits count less? Consideration of this problem brings up the weight to be given to the benefits of the next generation vis-à-vis the present generation. Typically, the process employed in making this determination is expressed as discounting.

Discounting is the devaluation of the benefits which accrue to the next generation. For example, as is done in conventional cost-benefit analysis,[119] if the benefits to the next generation in the year 2016 totalled $100, but if the present value of those benefits, once they are discounted to 1986, is $20, an argument might be made that the $20 figure rather than the $100 figure should be used. The use of discounting, however, would be particularly damaging to intergenerational condemnation because of the expected temporal distribution of gains and losses; that is, benefits would be greatest in the future, while losses would be greatest in the present. Thus, most benefits would be subject to discounting but most losses would not, thereby skewing the balance toward the present.[120]

More significantly, perhaps, the argument against the use of discounting in an intergenerational scenario can be extended beyond the technique's mechanical bias towards the present to include, first, a practical concern about growth and the use of the market and, second, a philosophical claim grounded in justice between generations. The practical argument is that the rationale originally favoring discounting of future benefits in the preservation of land is less applicable now than previously.[121] Discounting favors present development. In a predominately

119. *See, e.g.,* E. STOKEY & R. ZECKHAUSER, *supra* note 74, at 159-76.

120. Moreover, this problem would be particularly acute when projected more than one generation into the future.

121. General support for the discussion in this paragraph may be found in Fisher, Krutilla & Cicchetti, *The Economics of Environmental Preservation: A Theoretical and Empirical Analysis,* 62 AM. ECON. REV. 605, 609-10 (1972). The authors argue that in a typical cost-benefit analysis, benefits from development projects such as dams are overvalued while the benefits from nondevelopment are neglected or undervalued. They argue that conventional cost-benefit analysis neglects the possibilities that technological change is likely to decrease the value of the electricity generated by the

land-rich, agrarian, low-technology country seeking development, such as the United States in the nineteenth century, discounting had the effect of furthering future needs. Both the present and the next generation benefited from the development of land since it represented (in that economic structure) the predominant means of capital formation.

Given those circumstances, economic development, particularly in a country blessed with an abundant supply of natural resources, would be tied to the appropriation, development, and use of land. Development of natural resources represented the surest, cheapest, and quickest way to stimulate capital formulation. Preservation limited the capital carried over to the next generation because it removed land from the marketplace. But once the development of land is displaced by the development of technology as the primary means for future growth, as is the case in a land-limited, technology-based country such as the present United States, the discounting of future benefits from the preservation of land can no longer be justified as a basis for total growth. Under the current set of economic parameters, the development of technology, rather than the development of land, must be viewed as the predominate means of capital development and future growth. In other words, in a country with vast land reserves and low technology, discounting of future benefits from the preservation of land use favors the society's overall development. But in a developed country, the same discounting of benefits from future land use (as opposed to technology) has served its purpose. Furthermore, discounting presupposes a market analysis that is capable of asking the present generation what it would pay in the present market for a delayed use of resources. As such, like the "fair market value" test for compensation, discounting simply asks the wrong question. A present market analysis cannot assess intergenerational needs and, thus, must be subject to some of the same intergenerational market failure problems discussed previously with respect to environmental and cultural preservation.

In addition to this practical claim, there is a more fundamental philosophical claim that one generation should not be favored over another. A contemporary statement of this position is found in the treatment of justice between generations in *A Theory of Justice* by John Rawls.[122] At

dam within the life of the project and that the value society places on undeveloped areas is likely to rise with increased affluence.

122. J. RAWLS, A THEORY OF JUSTICE (1971). For general background and assessment of *A Theory of Justice*, see B. BARRY, THE LIBERAL THEORY OF JUSTICE (1973); READING RAWLS (N. Daniels ed. 1975); R. WOLFF, UNDERSTANDING RAWLS (1977).

the core of Rawls' entire theory of justice is the belief that persons have a certain fixed minimum amount of rights that cannot be sacrificed even if doing so would create an overall gain to society.[123] A person may not be treated only as a means to gain benefits for society.[124] Similarly, one generation is not to be preferred over another.[125]

To develop this theory, Rawls refined social contract theory by utilizing the concept of an "original position," a hypothetical situation in which persons are to decide once and for all the fundamental principles that should govern the major social institutions.[126] To avoid the problems of self-interest, Rawls' unique contribution was to place persons in an "original position" behind a hypothetical "veil of ignorance" where they do not know the abilities, wealth, or place in society they would later inherit.[127] From such a position, Rawls posits that individuals would choose to have a world based on the following two principles:

> First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.
>
> Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.[128]

These two principles form the basis for the organization of the major social institutions in each generation.[129]

Rawls facilitates the development of justice between generations by positing that, in addition to the lack of knowledge about personal skills or wealth, the persons in the original position do not know the generation to which they will belong.[130] Thus justice between generations is also determined from the original position.[131] The task for those in the original position, in Rawls' words, is the following:

> They try to piece together a just savings schedule by balancing how much at each stage they would be willing to save for their immediate descendants against what they would feel entitled to claim of their immediate predecessors. Thus imagining themselves to be fathers, say, they are to ascertain how much they would set aside for their sons by noting what they would believe themselves entitled to claim of their fathers. . . . When this principle is followed, adjacent generations can-

123. J. RAWLS, *supra* note 122, at 3-4.
124. *Id.* at 179-82.
125. *Id.* at 293-98.
126. *Id.* at 17-22, 118-92.
127. *Id.* at 18-19, 136-42.
128. *Id.* at 60. For a more extended version of the two principles, see *id.* at 250.
129. *See id.* at 195-201.
130. *Id.* at 287.
131. *See id.* at 287-93.

> not complain of one another; and in fact no generation can find fault with any other no matter how far removed in time.[132]

The key feature of Rawls' position is that differences in time do not justify treating persons differently. Because the persons in the original position do not know the generation to which they will belong and thus have no "time preference," one generation is not favored over another. A proposal favoring the present would therefore be deemed arbitrary and ethically unsound:

> There is no reason for the parties to give any weight to mere position in time. They have to choose a rate of saving for each level of civilization. If they make a distinction between earlier and more remote periods because, say, future states of affairs seem less important now, the present state of affairs will seem less important in the future. Although any decision has to be made now, there is no ground for their using today's discount of the future rather than the future's discount of today. The situation is symmetrical and one choice is as arbitrary as the other.[133]

On the basis of this analysis, Rawls suggests that the rejection of time preferences could moderate the consequences of a utility criterion.[134] Rawls' time preference constraint is especially appealing because it reinforces the earlier practical argument based on theories of growth and market failure.

b. The second element: demoralization costs

A utilitarian analysis of the demoralization costs of intragenerational condemnation included the disutility flowing from three sources. The first two sources included the disutility caused to the landowner because he is not compensated and the disutility caused to other landowners, even though they are not directly affected, because they are made more insecure by the prospect that the same thing might happen to them. The third source of disutility included the dollars needed to offset any future loss of production caused to either the affected landowner because

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132. *Id.* at 289-90. Once the savings rate has been determined under this method, it will serve as a constraint between generations in the same manner that the two principles of justice served as a constraint between persons within a generation:

> In any generation their expectations are to be maximized subject to the condition of putting aside the savings that would be acknowledged. Thus the complete statement of the difference principle includes the savings principle as a constraint. Whereas the first principle of justice and the principle of fair opportunity limit the application of the difference principle within generations, the savings principle limits its scope between them.

Id. at 292.

133. *Id.* at 294.

134. *See id.* at 297, 298.

of the direct loss of the use of his land or to other landowners because of the general insecurity the regulation causes them. Disutility for the landowner affected by the condemnation would be reflected by personal expectations for future use of his land. For example, if a person purchased undeveloped land and planned to develop it later, either for personal or business reasons, disutility would be generated outside the market. Reasonable expectations about land use would be frustrated—and thus susceptible to compensation—even though they were not registered in the market.

In the case of intergenerational condemnation, the disutility caused to present landowners in the form of uncertainty could be significant. If the prospect of intergenerational condemnation disaffected a sufficient number of landowners in the present generation, even its isolated use could generate high uncertainty costs. Such uncertainty costs would typically arise from two sources.[135] First, during the period when the state was contemplating whether to use intergenerational condemnation, the specific applications of the technique would be unknown. Until specific uses were known, uncertainty would exist in any activities that might be affected by intergenerational condemnation.[136] Second, once a specific action was taken and the state failed to provide compensation, uncertainty would be created about the similar uncompensated actions in the future, thus diminishing the projected economic return of those persons similarly situated.[137] If landowners perceived the prospect of the use of intergenerational condemnation as creating more uncertainty than environmental, land use, or condemnation plans currently in use, greater disutility would be created. In turn, this perception would lower future profits as a result of less investment. A factor which would mitigate against this, however, is that with respect to environmental preservation only certain lands would be subject to intergenerational condemnation. Urban developments and industrial centers where demoralization costs would be higher would be excluded. In the case of historic preservation, it seems plausible to suggest that the demoralization costs accruing from such preservation would also be higher.

c. The third element: settlement costs

The role of settlement costs (i.e., the costs of time, effort, and re-

135. *See* Note, *Uncertainty, supra* note 114, at 1673-74.
136. *Id.*
137. *Id.* at 1674.

sources needed to pay compensation claims) in intergenerational condemnation assumes a position of increased complexity when compared to the role of such costs in intragenerational condemnation, in which the task of placing a value on the property interest taken is relatively easy. In the latter situation, the state takes part of the landowner's bundle of property rights, effectively creating a forced sale. Thus, the price paid is what would prevail in an uncoerced sale in the market. Moreover, both parties interact within the same time period.

In contrast, intergenerational condemnation creates a temporal schism. The buyer is the next generation, and the seller is the present generation. The state, in the interest of fairness, attempts to strike a bargain between the two generations. The next generation, because it is not yet in existence, must rely on the state to act in its behalf. The state, in turn, can enforce the bargain through condemnation. The difficulty arises because the buyer and the seller are not in the same time period; a forced sale between different points in time is taking place. In addition, the worth of the property interest is different in each time period. What may be worth a great deal to the next generation for preservation may be worth very little to the present generation for use.

In light of these distinctions, at least three different approaches might be taken to evaluate the property interest taken.[138] First, the focal point could be the worth of the property interest taken to the present generation. This approach would measure what the present generation loses. The cost, of course, would tend to be small because it would consist only of the present market value of the interest taken. Under this approach, the state would have an incentive to use intergenerational condemnation. At the same time, however, such an approach would favor the next generation by allowing it to use the state to gain a temporal bargain over the present generation.

A second approach might consider what the next generation gains. Under this analysis, the property interest would be assessed at the value the next generation would attach to the property upon its receipt in the future.[139] Even though this value could only be an approximation, it is likely that it would be significantly higher than the cost derived under the

138. For some related proposals, see Heller, *supra* note 73, at 459-64.

139. Benefits may accrue to nonusers as well as to users of the resource. Some economists have argued that scenic wonders are a significant part of the real income of many individuals. Thus many people would be willing to pay to retain an option to use such areas in their undeveloped state even though the option might never be exercised. For a classical statement of this position, see Krutilla, *Conservation Reconsidered,* 57 AM. ECON. REV. 777 (1967).

first approach. Similar to financing other acquisitions over time, the payment to the present landowner could be made by the next generation by a bond-like process. The value of the property to the next generation could be paid to the present property owner. The state would facilitate the acquisition by selling bonds financed by future tax revenues. The present landowner would receive the next generation's price, and the next generation, through the bonds, would pay the cost. This approach, however, would also create a windfall for the property owner. In addition, the cost might burden the next generation. The windfall to the landowner might be cured by spreading it among society at large or by creating a subsidy to conserve other land areas. However, even if this were done, the next generation would still be burdened with a debt based on projections of their desires by the present generation. The argument by the next generation would not be that it would be unwilling to pay for the benefits if the projection were correct, since giving them the chance to bid in the present market is the very purpose of intergenerational condemnation, but that the projection would necessarily be ambiguous. This would restrict the options of the next generation and magnify the consequences of any errors in the projection of uses.

A third option might be to take an intermediate approach and, in the process, attempt to ameliorate some of the problems of each of the first two approaches. Instead of asking what the present generation would lose or what the next generation would gain, it would attempt to strike a more even bargain between the generations. This intermediate approach would start with the gain to the next generation and then discount it to some extent, not because of any conventional notions of cost-benefit analysis, but because of any of the following four reasons: (1) the necessary ambiguity in calculating the benefits to the next generation (a scientific rationale); (2) a decision that the options of the next generation for use should not be limited to those projected by the present generation (a political rationale); (3) the belief that one generation cannot necessarily be deemed more worthy than another generation (another political rationale); and (4) such an approach would simultaneously avoid granting the present landowner a windfall and unduly burdening the next generation (both practical considerations). Under this approach, then, each generation would give up something but would be compensated in some degree for it. The present generation would be compensated in some degree for the use it would otherwise make of the land in the interim period following the time of the taking to the time of full alternative use by the

next generation (when, presumably, the market value would be greater). In return, the present generation would forego development of the land. The next generation would give up some of its spending power and, in return, would receive unspoiled land it could not otherwise have had. In sum, the present generation would give up development but receive funds it would not otherwise be entitled to, while the next generation would give up funds but receive land it would not otherwise have been able to preserve.

d. Application of the three elements

A possible model for the assessment of intergenerational condemnation would take the following steps. First, the overall efficiency of a project would be calculated. A projection of future benefits of a present condemnation for preservation would be made on the basis of past uses, current trends, and activities that have survived history. In addition, population and growth trends would be studied. The final goal would be to calculate a response to the following questions: in the next generation, how many people would want to engage in activities that required undeveloped land, where would they want to perform such activities, and what would they be willing to pay if the land were preserved now for the later use of that activity rather than developed and therefore lost for such uses? The worth of these benefits, pursuant to the Rawlsian constraint on time preference, would not be discounted. Unless these benefits were greater than either the demoralization costs or the settlement costs, the project would not be undertaken.[140]

After this calculation had been made, the second step would be to determine whether a taking had occurred (i.e., if settlement costs must be paid to the present landowner). The demoralization costs to the present generation from the use of intergenerational condemnation would be compared to the settlement costs the present generation would receive from the next generation. The intermediate settlement method previously suggested would be used and, therefore, would not only require a payment to the present generation, but would also require some of the worth of the benefits to the next generation to be discounted. If the demoralization costs were greater, settlement costs would be paid. In contrast, if the demoralization costs were less than the settlement costs, no payment would be made. Another way of approaching the issue is that if the benefits to the next generation were particularly high, and thus would

140. *See supra* notes 115-17 and accompanying text.

generate high settlement costs, intergenerational condemnation would be appropriate. This approach would thus allow the use of intergenerational condemnation for the preservation of particularly important landmarks or undeveloped areas subject to unusual future demand. When preservation is feasible, payment would more likely be necessary in cases involving preservation of historic landmarks in an urban area (because of greater demoralization costs), while it would be comparatively less likely in cases involving preservation of wilderness areas.[141]

CONCLUSION—INTERGENERATIONAL CONDEMNATION AND LAND USE

The flaw that the proposed model for intergenerational condemnation attempts to correct in the existing law is the failure to openly consider the relevance of justice between generations. The model, once accepted, could be applied to any land use setting where significant intergenerational interests were present. Thus, a continuum of applicability might be imagined. At one extreme would be areas, such as wilderness preservation, where justice between generations is particularly strong. Descending from this extreme would be other situations with less significant aspects of intergenerational justice. At the other extreme would be situations in which intergenerational concerns were negligible. For example, the basic model might be applied to historic preservation,

141. Several options for payment could be used. One approach would be to utilize a special type of bond financing. Initially, capital could be raised by selling bonds which would not mature until the next generation. To protect the next generation from being put into excessive debt by the present generation for present improvements, present statutes prohibit bond issues from extending beyond twenty or thirty years. However, the purpose of the proposed "Future Improvement Bonds" would be to provide future benefits and thus would justify the imposition of the debt. Interest could be capitalized from proceeds received from the initial sale of bonds to cover the period of time before the future generation began to pay for the benefits. Of course, this approach assumes a restructuring of the present arbitrage regulations, which prohibit such a large portion of the bond proceeds from being used for purposes other than capital expenditure. The next generation would be taxed on the value of the development rights condemned on their behalf by the previous generation. The revenue raised from the tax would be placed in a common sinking fund to pay the principal and interest on the bonds which had been sold in the previous generation. If the revenues were greater than the amount needed to retire the bond issue, the surplus could be used to pay the cost of this generation's future condemnation. If there were insufficient funds, a new bond issue would be sold. The sinking fund would be a perpetual one into which would be paid the tax revenues collected from the future generation (when they are the present generation) for the benefits received from the prior generation's condemnation. This fund would pay the debt service on the bonds which had been sold to finance the future condemnation. Other options might involve such schemes as an assignment of future development rights in nonpreservation property (a type of intergenerational TDR that would have a present market value) or a "reverse lien" on the property whereby the government promises to pay a certain sum in the future (which would run with the land and increase the present market value of the land).

an area previously determined to be ripe for a consideration of justice between generations. The preservation of an existing building, for example, could be analyzed by keying upon two separate elements: present market use and the preservation value to the next generation. If only the current market use were considered, a landmark might be unnecessarily destroyed, simply because the intergenerational element was not recognized. But if the intergenerational model were applied in part, the result might conform more closely to the desires of the relevant groups.

Similarly, many existing environmental programs at their base have strong, but unanalyzed, considerations of justice between generations. Most of the programs recognize, in a foggy way, the need to consider the next generation and to take a less dogmatic view of the present, but the source of that conflict—intergenerational justice—is not openly recognized. Conventional models, although obviously valid in most cases, are proffered as immutable rules. It is suggested that other, previously less dominant, elements such as justice between generations must also be considered for a proper analysis.

The recognition of intergenerational condemnation as an additional cause of action is a step towards correcting the inadequacy of current takings clause jurisprudence. Certainly, the recognition of such a category will not end the debate. Difficult questions will remain about how it should be applied, its relationship to other categories, and a host of other important concerns.[142] Thus, the recognition of intergenerational con-

142. Two areas, both of which relate to the role of the courts, would seem to be particularly significant. One critical area would encompass problems related to theories of representation as applied to future generations. In conventional political situations, claims may arise that a representative branch of government failed to fulfill its role and that judicial intervention was therefore needed because representation of the people was, for some reason, problematic. *See, e.g.,* Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985). As applied to intergenerational condemnation, application of this rationale might play a central role. Existing elective bodies can only problematically represent the needs of the next generation. Following the Madisonian tradition, the typical legislative body is structured so that the activities of the typical representative must be centered on re-election. *See, e.g.,* D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974). In such a scheme, issues of concern to yet-to-be-born voters have little importance. As currently structured, the legislative bodies have little incentive to work on behalf of the next generation, especially when the next generation's interests might diverge from the self-interests of the present electorate. Under this analysis, therefore, it would be important to correct any representational defect. To strengthen the position of future generations, such techniques as the appointment of attorneys to act as guardians *ad litem* for the next generation in the argument of cases, *cf.* C. STONE, SHOULD TREES HAVE STANDING? (1972) (recommending, *inter alia,* the appointment of a guardian for natural objects), the use of an agency-like Review Board staffed by persons from a variety of disciplines, *see, e.g.,* B. ACKERMAN, S. ROSE-ACKERMAN, J. SAWYER & D. HENDERSON, THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY 156-61 (1974) (setting forth such a proposal for environmental programs), or an activist role for the courts might be considered.

Another concern would be the treatment of intergenerational condemnation and redistribution of wealth. In a "well-ordered" society, the prevailing distribution of wealth is generally deemed to

demnation will not end the discussion about justice between generations, but it can begin it. What lawyers talk about can only be effective when the dialogue they employ directly considers the concerns behind legal doctrine rather than merely talking around them. There are certainly many ways to talk about intergenerational condemnation. The important thing, however, is that it should begin.

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be just. The ideal distribution may not be in effect, but the existing one is generally sufficient. If a judge views this component as satisfied in society, he or she would not view the judicial role as imparted with the power to deviate from the distributional changes which would follow the application of intergenerational condemnation. Whether the persons in the present or next generation affected by intergenerational condemnation were wealthy or poor would usually not be an issue of concern. *Cf.* W. BAUMOL & W. OATES, THE THEORY OF ENVIRONMENTAL POLICY 191-212 (1975) (environmental programs generally good for allocation of resources rather than distribution of income). A particularly egregious application, such as taking from many of the present poor to give to a few of the future rich, might create a degree of uneasiness sufficient to incite judicial action, but the usual position would be one of restraint. In contrast, a judge who viewed the prevailing distribution of wealth as unjust would have ample potential for innovation in an intergenerational condemnation case. If so inclined, a judge could systematically favor one segment of society over another. The existing or future poor would be favored and the existing or future rich would not be favored (or, conceivably vice versa). These scenarios could arise not only in the location of areas designated for intergenerational condemnation, but also in the collection and distribution of monetary benefits.