Buffalo Law Review

Volume 34 | Number 3 Article 6

10-1-1985

The Takings Clause: Principles Or Politics?

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With love and appreciation for their insights, patience and enduring support, this Article is dedicated to my friend Diane Barr Quinlin; my friend and husband, Peter Allan Sandwall; and my children, Benjamin and Rachael Saller Bender.

I would like to thank Professor Richard Parker of Harvard Law School for his advice on earlier drafts. In addition I am indebted to Rebecca Blair and Elizabeth Deemer for their patient proof-reading.

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I. INTRODUCTION

THE fifth amendment to our federal Constitution provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[1] Since 1791 this has been a vital part of our federal constitutional structure and value system. The first recited clause is commonly called the due process clause; the second goes by many names, including the just compensation clause, the eminent domain clause and the takings clause.[2] The simple wording has generated centuries of debate and volumes of esteemed analyses. What do these simple phrases mean—particularly the twelve words of the takings clause? What are their underlying constitutional principles? Are their current interpretations consistent with those principles? And what role have political considerations played in their doctrinal development?

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

2. Most state constitutions contain their own due process and just compensation clauses. North Carolina is the only state without a constitutional just compensation provision, but its courts have read their state due process clause to require comparable results. 1 J. SACKMAN, P. NICHOLS' THE LAW OF EMINENT DOMAIN § 1.3 (rev. 3d ed., 1980 & Supp. 1984) [hereinafter cited as NICHOLS].

A. *Relationship Between the Due Process Clause and the Takings Clause*

Both the due process clause and the takings clause overtly refer to property. The due process clause guarantees that property will not be irrationally, arbitrarily or capriciously taken by government action.[3] It requires the government to act with a public purpose for the public good,[4] to treat similarly situated people equally, and to employ fair procedures before it can deprive any citizen of property, or for that matter, life or liberty. Procedural fairness is only one facet of due process. Investigations into the full contours of the due process fairness requirement have filled tomes of case reporters, scholarly law reviews, encyclopedic compilations and treatises. Opinions about its meaning vary greatly.

Many eminent jurisprudents attach a substantive component to due process. Even if not specifically articulated, courts often evaluate constitutional questions with an eye toward substantive due process or fundamental fairness.[5] Whether a court is deter-

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3. *See* Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-25 (1978); Railway Express Agency v. New York, 336 U.S. 106 (1949); Nebbia v. New York, 291 U.S. 502 (1934).

4. Our state and federal governments' powers are inherently, as well as constitutionally, limited by our country's fundamental republican themes and respect for individual autonomy. *See* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 55-93, 175-98 (1967); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969). The Supreme Court has consistently indicated that police power exercises, taxation and takings are restricted to public purposes because of our governmental structure and due process. For example, Justice Miller explained in Loan Association v. City of Topeka, 87 U.S. (20 Wall.) 655, 662-65 (1874), that a state could only use its police and taxation powers to enhance the general welfare. Justice Harlan wrote in Mugler v. Kansas, 123 U.S. 623, 661 (1887), that police power regulations that did not have a "real or substantial relation" to public safety, morals or health and that caused a "palpable invasion of rights" were invalid exercises of legislative power. For a further discussion of *Mugler* see *infra* notes 112-15 and accompanying text. In Missouri Pac. Ry. v. Nebraska, 164 U.S. 403, 417 (1896), Justice Gray wrote for the unanimous Court that a taking for a private purpose violated due process regardless of whether the government attempted to pay compensation. Justice Brennan, in his plurality dissent in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 656 (1981), stated the now familiar rule that police power regulations had to be substantially related to the advancement of the public health, safety, morals or general welfare, and that it was axiomatic that the public was to benefit from them.

Professor Laurence Tribe summarized the early understandings about the due process public purpose requirement. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-2 at 457 (1978). He stated: "[N]o form of legislative authority could be employed to serve private ends: taking, taxing, and regulation were all inherently linked to the public good and depended for their legitimacy upon the preservation of that link." *Id.* (footnote omitted).

5. Courts have engaged in semantic and legal contortions to avoid charges that they

mining if an unenumerated right is so fundamental that our con-

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were applying substantive due process standards to reach desired results. Judicial interference with social and economic legislation under the rubric of "substantive due process" became an anathema with the demise of the *Lochner* era. Despite the fundamental difference between the Supreme Court's actions during the *Lochner* era when it invalidated progressive economic and social legislation (by making political decisions) and what a court does when making fairness determinations as an inherent part of judging whether legislation accords with due process (by making principled decisions), these two phenomena have been confused. For a further discussion of *Lochner*, see *infra* note 118.

So long as both judicial processes bear the same label, judges will feel compelled to perform multi-veiled dances that permit them to sidestep cries of substantive due process while still finding constitutional hooks on which to hang decisions informed by either fundamental fairness or "political" considerations. (By "political" I mean decisions which are determined by dominant power relationships of groups, classes or individuals.) The resultant confusion is formidable. Because it has become taboo to justify a result on the basis of the substantive due process requirements of fundamental fairness, judges feel they must disguise what they are doing by manipulating other doctrines about which it is acceptable to write. The success of this technique has also resulted in its use by judges who are basing their decisions on the equally taboo political considerations of power relationships, primarily defined by wealth. Reasonably clear constitutional doctrines become unrecognizable forms in the process. All this occurs in order to legitimate particular results in particular cases. The newly sculpted rules are like unchecked viruses that continue to grow, infecting larger and larger portions of the doctrine's corpus. Eventually they can be used to justify results and support rationales that their original authors would find objectionable. The trouble that this peculiar rationalizing technique causes students of law pales against the more serious ramifications of having severely distorted constitutional doctrine to delimit the rights and interests of our national citizens, particularly, for my purposes here, in the takings clause area.

After a time, the principles inherent in and protected by specific constitutional provisions are buried in the sediment of other justifications (possibly to disguise fairness determinations, but even more disconcertingly, I would argue, to reach politically expedient results). It often takes legal archaeologists to unearth the shards and attempt to reassemble them. Whether this is a meritorious quest is a value judgment I leave to my readers. It is arguable that the new renditions of constitutional provisions more appropriately reflect the advances of civilization (after all, as Chief Justice Marshall admonished in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819): "[W]e must never forget, that it is *a constitution* we are expounding"), but it is also possible that they flow from the finely honed skills of the dominant classes in manipulating our legal and political systems to their own ends.

The characteristic flexibility and adaptability of our Constitution is as much a trap as an asset. If its language remains too obscure, malleable or undefined, it can become all-consuming, embracing most ideas at most times. Through its apparently stable form can pass results based on very contradictory principles, values and policies. Politically powerful groups can legitimatize many means to their private ends in the language of one or another constitutional clause. It is hard to imagine that our Constitution is supposed to mean all things to all people. Certainly it must have core principles and values that infuse its words and limit its applicability, no matter how eloquent are the words of the orators for the powerful private interests.

I find it ironic that our Constitution derives its great stability, not from its semantic flexibility to promote its core principles during changing times, but from its malleable language's apparent ability to reinforce and maintain the extant power structure. So long as

stitutional order protects it,[6] or that certain procedures are implicit in the concept of ordered liberty,[7] or that others do not comport with due process because they "shock the conscience,"[8] notions of substantive due process pervade the reasoning.

It is my considered belief that substantive due process principles of fairness are completely appropriate considerations for courts, whereas political decisions designed to perpetuate current patterns of domination inconsistent with the spirit of our national unity are not. The definition of substantive due process should be confined to fundamental fairness judgments. Power-reinforcing considerations should be excised from the concept so that it may again be used without opprobrium. If judges had the freedom to frame their rulings in the language of fundamental fairness/substantive due process, they would not be compelled to further distort other constitutional principles to achieve substantively fair results. Counterintuitive twists of doctrine would then be more apt to occur only in cases of political decisions; they would be immediately suspect, and harder to justify. If the development of legal doctrines requires ruse to effectuate our law's inherent principle of fairness, courts will use ruse to implement their decisions. If judges are encouraged to openly articulate the role substantive fairness plays in their decision-making process, manipulation and distortion will be greatly reduced.

The takings clause's physical intimacy with the due process clause,[9] as well as its simultaneous regulation of state behavior respecting private property, frequently cause its provisions to be

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the politically powerful can manipulate its words and shape its meanings to suit their general needs (while being cautious not to upset the oppressed or disadvantaged enough that they are moved to revolution), they will permit it to exist in its current form. Their primary objectives are to maintain their political and economic power and perpetuate the dominant ideologies. It may be that, despite its original purposes (or perhaps because of them, *see infra* note 21 and accompanying text), our Constitution has served to undermine its own founding ideals. But that is a theme for another essay.

6. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965).

7. Justice Cardozo used this language in Palko v. Connecticut, 302 U.S. 319, 325 (1937), *rev'd on other grounds*, 395 U.S. 784 (1969), to describe what was substantively included in the due process clause.

8. Justice Frankfurter explained in Rochin v. California, 342 U.S. 165, 173 (1952), that the due process clause requires states to "respect decencies of civilized conduct" and not use methods that offend "a sense of justice."

9. Both are part of the same amendment, U.S. CONST. amend. V.

confused with notions of due process. While at first blush this may sound inoffensive, it has disturbing results, particularly in regard to permissible governmental activities, the standard of review of legislative enactments, and remedies for unconstitutional action. The takings clause's "public use" limitation—"nor shall private property be taken for public use"—is confused with the due process requirement that legislation must have a public purpose or benefit. In addition, the limitations on judicial review of legislative ends and means that developed as a reaction to Lochnerian political decisionmaking in the name of substantive due process have been incorporated into the takings clause. Courts have been virtually forbidden from evaluating whether a legislatively sanctioned taking is for a public use,[10] even though judicial assessment of legislative ends may be a constitutionally justifiable check on governmental takings of private property, if viewed through a takings clause lens. If the substantive due process standard of review is applied to takings analyses, the judiciary is powerless to undo legislation that literally takes one person's property for the benefit of another who has more political power. Finally, remedies for violations of due process can, and arguably should, differ from remedies for unconstitutional takings. Remedial distinctions are meaningless if the clauses are confused.

When the two clauses are read to have identical requirements with respect to the treatment of private property, the takings clause becomes superfluous: takings and deprivations of property become synonymous; police power regulations of property use are equated with transfers of property to the government. Surely the framers would not have scrivened a totally superfluous provision into the bill of rights. Therefore, one goal of a takings clause student must be to distinguish between the requirements of due process and those inherent in the takings clause—that is, between deprivations and takings, and between public purpose and public use. Additionally, efforts must be made to discern the principles, policies and politics underlying these distinct provisions.

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10. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 238-39, 243-45 (1984); Berman v. Parker, 348 U.S. 26, 32-34 (1954).

B. *Relationship Between Takings and Deprivations*

Life, liberty and property are protected by our constitutional scheme. They are ours by right, and they can never constitutionally be denied for someone else's private pleasure or personal use. There are times, however, when the government may constitutionally require us to contribute parts of those rights to the common good. Those occasions are as strictly controlled as possible by the due process clause. If the government, consisting of our representatives, determines that it is in the public interest to deprive us of any fundamental right, it must follow the procedures prescribed by those representatives. The procedures must be more than reflective of the representative body's will; they must be fundamentally fair.

The due process clause also requires that the government have a public purpose before it may attempt to deprive us of life, liberty or property. The Constitution does not explicitly allow private interests to exert pressure on legislatures to enact laws benefitting those lobbyists' personal interests at the expense of other citizens' private rights.[11] If that untoward event occurs, a constitutional check gives courts (if the principle of judicial review is accepted as constitutionally required)[12] power to nullify the result as contravening constitutional standards. This check applies to legislation that effects deprivations of life, liberty or property. Property is specifically mentioned. Therefore, even absent the takings clause, the government would be constitutionally prohibited from depriving citizens of their property for private purposes or by unfair means. Working from the premise that the takings clause was not intended to be superfluous, I conclude that it must refer to a situation different from a deprivation of property without substantive or procedural due process.[13]

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11. That it happens in reality is evidence of the dichotomy between constitutional theory and political practice that infests much of our constitutional jurisprudence. The beautifully woven constitutional cloak provided by our foreparents has become threadbare in some sections. We rely on its protections, but the bitter winds of time have aged it badly.

12. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

13. This analysis creates an immediate problem related to the meaning and use of words in legal discourse. Is it realistic or appropriate to try to distinguish between "deprivations" and "takings"? Does it matter that the due process clause speaks of "deprivations" of property and the takings clause refers to property being "taken"? Is this a meaningless semantic debate? Or is it a throwback to the discredited formalistic style of legal analysis? I think not, but even if it is, it still seems vitally important to an understanding of the two

If takings and deprivations were identical for purposes of these two clauses, then it would appear that the framers of our Constitution intended to privilege property rights over personal rights to life and liberty.[14] This seems a necessary and logical conclusion from the fact that over and above protections against deprivations without due process, property—and property alone—is singled out in the takings clause. Even when due process is afforded and the government has acted reasonably, fairly and for a legitimate public purpose, its taking of private property is limited to public uses with just compensation.[15] Life, liberty and property

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clauses.

Formalism, as a school of jurisprudential analysis, has gone by the wayside. Few, if any, current legal scholars would call themselves formalists. The nomenclature bears negative connotations in legal circles. Perhaps notions of formalism need to be revised. Systematic constitutional distortions may require the reintroduction of a sophisticated, higher order formalism, in which words and phrases again have ostensibly stable meanings without unnecessarily rigidifying legal systems, policy choices, principles and values. This tentative call for a new species of formalism in constitutional jurisprudence may be no more than a transient overreaction to my current, heartfelt sense about the politically malleable, content-free character of constitutional protections. [For the purposes of this footnote, I am bracketing the debates about the meanings of words and texts generally.].

14. I acknowledge that there are serious debates about whether it should even matter what the framers "intended" when they wrote the fifth amendment, or what those who ratified it thought it meant. *See generally* Symposium, *Judicial Review and the Constitution—The Text and Beyond*, 8 U. DAYTON L. REV. 443 (1983), for discussions of varied approaches to constitutional interpretation. The battle between historical reconstruction and rational reconstruction, or interpretivist and noninterpretivist methodologies, rages on. Adherents to the school of historical reconstruction argue that we must interpret and understand documents by relying on what the writers intended in their historical perspectives. Rational reconstructionists find meaning in documents by studying them in light of current understandings. Because both schools start from such different premises, they cannot effectively argue with each other. It does not seem improper or inconsistent to me to select an interpretive strategy that blends the insights and intentions of historical drafters with contemporary understandings and the cumulative wisdom of the day.

15. The takings clause actually states that private property may not be taken for public use without just compensation. It does not declare that private property may not be taken for private use in so many words. However, it would be nonsensical to read that clause to permit the state to take private property for private use without just compensation, but require it to pay just compensation if it takes private property for public use. Therefore, it has been consistently agreed that the negative implication of the public use phraseology in the eminent domain clause is that the government has no constitutional power to take private property for private use. *See, e.g.*, 2A NICHOLS, *supra* note 2, § 7.01[2]; Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205 (1978); Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 SUP. CT. REV. 351, 365; Mansnerus, Note, *Public Use, Private Use, and Judicial Review in Eminent Domain*, 58 N.Y.U. L. REV. 409, 410 (1983) (I have intentionally listed student authors' names with their works throughout the footnotes because I believe they deserve the same respect as other legal scholars when their works are cited). In any case, the due process clause, which

are each protected against deprivations, yet if deprivations are accorded the same meaning as takings only deprivations of property would constitutionally require just compensation. Could the drafters have meant, by negative implication, that deprivations of life or liberty do not *require* just compensation, but deprivations of property do? No matter how great their regard for private property rights, it is difficult to imagine that the Constitution's authors revered and valued their right to protect their property from uncompensated government infringement over their same rights in life and liberty. Today's constitutional scholars would be hard pressed to read our Constitution as giving hierarchical preference to property rights, regardless of whether they approach the question from an interpretivist or noninterpretivist model. Therefore I again conclude, albeit by a different route, that deprivations of property were *intended* to be different from takings of property for purposes of applying the due process and takings clauses.

The Constitution does not say that citizens must be compensated for deprivations of property—only that they must be compensated for takings. It is easy to speculate about alternative wordings of the fifth amendment if compensation for deprivations had been intended or if deprivations and takings were supposed to be read with one meaning. One possibility that immediately comes to mind is: "No person shall . . . be deprived of life, liberty, or property without due process of law and just compensation." But it was not so phrased. That both contingencies—deprivation of property and taking of property—were addressed simultaneously supports the argument that those terms were intended to cover different factual circumstances. While we are constitutionally entitled to fair process whenever we are deprived of property, we are only constitutionally required to be justly compensated when our property is taken from our possession for a public use. The framers must have recognized that the government could not function for the common good if it had to compensate citizens for every "deprivation" of private property.[16] But they were willing to foist

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applies to every deprivation of property, would prevent a taking for private use by its own terms.

16. Even Justice Holmes, who ultimately did the greatest damage to the construction of the due process and takings clauses by trying to combine them into one concept, recognized that government would be hamstrung if it had to regulate by purchase. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922). *See infra* notes 128-44 and accompanying

the steep burden of compensation on the government when it totally and irrevocably dispossessed citizens of their property.

Deprivations of property are something less than the government's taking title, possession or total control; they are more properly defined as governmentally imposed restrictions on an owner's personal use or control of specific property. If a citizen still owns and controls the property, she can adjust her uses in a manner compatible with the majority's will (as represented by the law imposing the use restriction). She retains her personal autonomy to decide how to accommodate the state action that resulted in the deprivation. She may find alternative uses for the property; she may sell it to someone else; she may even end up benefitting from the government's restrictions. But if the government takes possession of her property, she loses all her options. She no longer has the autonomy of choice. No interest is left to sell, to use or to control. There is a qualitative difference between a deprivation of property and a "taking" of the same property, and the difference is related to options and personal autonomy.

Majoritarian decisions to take private property for public use intrude on personal autonomy, a highly revered interest within our governmental value system. But our polity does not absolutely preclude all such governmental intrusions. John Locke,[17] a father of our liberal vision of private property and personal rights, recognized that when human beings joined together into a civil society, they wilfully relinquished some of their personal liberty and autonomy for the greater benefits and protections of group existence. Their property was not totally immune from state interference.[18] Our governmental structure incorporates the power to tax, which is the power to take fungible property, so long as the tax is fairly imposed on all those similarly situated.[19] Our government is also empowered to deprive citizens of property in a non-

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text for a complete discussion of *Pennsylvania Coal.*

17. J. LOCKE, SECOND TREATISE OF GOVERNMENT (C. Macpherson ed. 1980).

18. When our Constitution was written, there seemed to be no question that the government had the inherent power to take private property for the public good. *See infra* notes 33-73 and accompanying text. If that seemed an impermissible assault on individual rights, the framers could have forbade it entirely in a bill of rights amendment. It is clear that they recognized that individual property interests must be occasionally subjugated to the common good.

19. Some libertarians argue that the power to tax is an impermissible moral restriction on personal liberty. *See, e.g.*, R. NOZICK, ANARCHY, STATE AND UTOPIA 265-68 (1974).

arbitrary, nondiscriminatory and non-capricious manner. But, it may not "take" our specific property for the public good without just compensation because such "taking" unfairly imposes upon our personal resources.

The takings clause originated as a device to mediate between individual property rights and the greater needs of the community. Citizens were not protected from having their property appropriated for the common good, but only from having to singly bear the burden of a public project that relied on acquisition of their private property.[20] Compensation was insurance against being coercively singled out to bear more than one's fair share of the expense of public works. The government's power to take an individual's land for public use was a sword against individual rights; just compensation provided individuals a shield from majoritarian tyranny. Part of the framers' motivation for including the takings clause may have been the fear that in achieving the public good, strong political majorities might impose unfair burdens on individuals, especially members of political minorities.[21] By requiring the majority to fairly compensate those asked to make a sacrifice, fear of majoritarian tyranny under a utilitarian calculus could be minimized.[22] There would also be some assurance that the public would act judiciously (and efficiently) in selecting the properties it would take.[23] This requirement to compensate for "takings"—a severe restriction on governmental flexibility necessitated by the intense interference with personal autonomy that takings create—was not necessary for lesser property

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20. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Armstrong v. United States, 364 U.S. 40, 49 (1960); United States v. Willow River Co., 324 U.S. 499, 502 (1945); Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893).

21. This clearly was Madison's motivation. He feared that the debtors and poor would join together as a political force and take the property of the rich and powerful. It is ironic that during the birth of our nation the propertied class feared the unpropertied majority. In the way it has worked for at least the last one hundred and fifty years, it has been more appropriate for the unpropertied majority to fear oppression by the economically secure and politically dominant minority. Query: Is this evidence of how the Constitution has been a tool to maintain the hegemony of the dominant, propertied class?

22. *See* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964)[hereinafter cited as Sax I]; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971)[hereinafter cited as Sax II].

23. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1217 (1967).

"deprivations." Other constitutional checks and balances could adequately protect individual interests.

Therefore, a police power regulation on the use of specific property, where the owner retains control and possession, should be considered a deprivation, not a taking.[24] This is consistent with the principles, policies and language of the fifth amendment, but it is not the rule of law as it stands today.

C. *Pertinent Questions in Takings Clause Inquiries*

The takings clause, as it currently functions, raises several critical questions:

(1) What is "property" that comes within the terms of the clause?[25] (2) When is property "taken"?[26] (3) What constitutes a

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24. Takings should also be distinguished from taxation. Takings refer to *specific* property rather than general, fungible property.

25. There are three major subdivisions of this question. The first asks: Whose property interests are protected? Professor Sax argues that private property rights must be weighed against public rights in the same property. Sax II, *supra* note 22, at 156-61. He defines private property rights as exclusive consumption rights because they benefit only those people who use or have them, and public rights as non-exclusive consumption rights that benefit many people in various degrees but have a greater community benefit than benefit to any individual. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 485 (1983) [hereinafter cited as Sax III].

The second component focuses on a definition of property—is it a "physical thing," a "bundle of rights," or an intangible entitlement?

A third subdivision challenges whether all things ordinarily contained under the aegis of property should remain there, or whether certain sorts of "property" should be redefined so as to be exempted from ordinary property rules, especially any taking by the government.

For some interesting essays on the concept of property see Ackerman, *Four Questions for Legal Theory*, 22 NOMOS 351 (1980); Becker, *The Moral Basis of Property Rights*, 22 NOMOS 187 (1980); Donahue, *The Future of the Concept of Property Predicted From Its Past*, 22 NOMOS 28 (1980); Grey, *The Disintegration of Property*, 22 NOMOS 69 (1980); MacRae, *Scientific Policymaking and Compensation for the Taking of Property*, 22 NOMOS 327 (1980); Minogue, *The Concept of Property and Its Contemporary Significance*, 22 NOMOS 3 (1980). *See also* B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); Humbach, *A Unifying Theory for the Just Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243 (1982); Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); Rogers, *Bringing People Back: Toward A Comprehensive Theory of Taking in Natural Resources Law*, 10 ECOLOGY L.Q. 205 (1982); VanAlstyne, *The Recrudescence of Property Rights as the Foremost Principle of Civil Liberties: The First Decade of the Burger Court*, 43 LAW & CONTEMP. PROBS. 66 (Summer 1980).

26. Does "taken" mean that the government must acquire title to one's property? Is physical invasion enough? Is diminution of its value a "taking"? Are regulations on uses of property capable of becoming "takings" requiring compensation? *See supra* text accompanying notes 11-23 and *infra* notes 104-44 and 216-41.

"public use"?[27] (4) What standard of review should a court use to assess the constitutionality of an exercise of eminent domain?[28] (5) Does the takings clause contain an inquiry into the fairness of the governmental action?[29] (6) If a government regulation so impairs a party's property right that this party believes the property right has been taken, does she have a federal constitutional right to bring an inverse condemnation suit seeking just compensation?[30]

With attention to these questions, this Article begins with the history of the takings clause and its interpretations, focusing on its eventual confusion with the due process clause. Section III elabo-

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27. Does "public use" mean "actual use or control by the public" or does it only require some ancillary public benefit? *See, e.g.*, Lewis, Comment, *Corporate Prerogative, "Public Use" and a People's Plight:* Poletown Neighborhood Council v. City of Detroit, 4 DETROIT C.L. REV. 907 (1982); Mansnerus, *supra* note 15; Meidinger, *The "Public Uses" of Eminent Domain: History and Policy*, 11 ENVTL. L. 1 (1980); Schwartz, Note, *Real Property—Eminent Domain—Expansion of the Public Use Doctrine to Include the Alleviation of Unemployment and Revitalization of the Economic Base of a Community*, 28 WAYNE L. REV. 1975 (1982); *see infra* text accompanying notes 75-104 and 150-68.

28. Should courts defer to any legislative declaration of public use, or should they make an independent assessment to see whether the taking is really for the public? For examples of writings advocating a stricter judicial review of public use determinations see Epstein, *supra* note 15, at 424-56; Epstein, *The Public Purpose Limitation on the Power of Eminent Domain: A Constitutional Liberty Under Attack*, 4 PACE L. REV. 231 (1983); Mansnerus, *supra* note 15, at 264-65. For an example of a writing advocating a totally different standard for assessing public use see Berger, *supra* note 15, at 225-46 (balancing condemnor's need against condemnee's harm).

29. Some aspects of this inquiry have been addressed in the discussion of the relationship between substantive due process and the takings clause. *See supra* note 5 and accompanying text. Many authors have written extensively on this subject. For some interesting writings see Costonis, *Presumptive and Per Se Takings: A Decisional Model For the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983); Haley, Comment, *Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation*, 54 WASH. L. REV. 315 (1979); Humbach, *supra* note 25; McFarlane, Comment, *Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process As a Superior Alternative to Takings Analysis*, 57 WASH. L. REV. 715 (1981-82); Michelman, *supra* note 23; Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583 (1981).

30. The following articles present the major arguments pro and con: Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable In Land Use Controls*, 15 RUTGERS L.J. 15 (1983); Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings,"* 8 HASTINGS CONST. L.Q. 517 (1981); Freilich, *Solving the Taking Equation: Making the Whole Equal the Sum of the Parts*, 1981 INST. ON PLAN., ZONING & EMINENT DOMAIN; Leeson & Sullivan, *Property, Philosophy and Regulation: The Case Against a Natural Law Theory of Property Rights*, 17 WILLAMETTE L. REV. 527 (1981); Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491 (1981); McNamara, *Inverse Condemnation: A "Sophistic Miltonian Serbonian Bog,"* 31 BAYLOR L. REV. 443 (1979); Note, *Takings Law—Is Inverse Condemnation An Appropriate Remedy for Due Process Violations?*—San Diego Gas & Electric Co. v. City of San Diego (1981), 57 WASH. L. REV. 551 (1981-82).

rates on the problems the Court has had in distinguishing between takings and police power deprivations or regulations. In Section IV I examine the role of political considerations and judicial personalities in moving the takings clause further from its principles. By juxtaposing the *Hawaii Housing Authority v. Midkiff*[31] case with a Michigan Supreme Court case[32] in Sections V and VI, try to illuminate the ramifications of the Court's current direction and analyze it in light of some respected theories in takings jurisprudence. Integrated throughout this analysis is a consistent image of resourceful, political, result-oriented constitutional decision-making that has been effectuated by a distortion of constitutional language and principles. I conclude that the Court has moved in a dangerous direction in interpreting the takings clause that ultimately jeopardizes the needs and interests of the less-empowered. Finally, I offer a suggestion that seeks a return to a more principled and less politically malleable interpretation of the takings clause.

II. Historical Background of the Takings Clause

A. *English and Colonial American Eminent Domain Concepts*

1. *Sovereign Power To Take Land.* Early English and colonial American eminent domain concepts had two distinctly separate components: government power to appropriate private property and just compensation.[33] The first element has been part of our Western understanding much longer than the second. Coinage of the phrase "eminent domain" is generally attributed to Hugo Grotius in the early seventeenth century, but existence of the concept predates his writings.[34] The roots of eminent domain may be traced back to biblical times and Roman law,[35] but renditions of the American derivation usually start with feudalism in the middle ages.[36] Eminent domain has thus been considered a universally

31. 467 U.S. 229 (1984).

32. Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981).

33. *See generally* 2A Nichols, *supra* note 2, § 7.1.

34. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 559-60 (1972).

35. 1 Nichols, *supra* note 2, § 1.12.

36. *Accord* New York City Hous. Auth. v. Muller, 155 Misc. 681, 179 N.Y.S. 299, 300 (1945).

recognized, inherent, and unlimited power of all governments.[37]

In feudal society, all landowners held their land by the grace of the sovereign. He was everyone's "land lord." He gave property and security to his noblemen in exchange for obligations of fidelity and payment of feudal dues. His nobles in turn divided their land up among their vassals. The king always maintained ultimate ownership. Feudalism was characterized by these status relationships. Feudal dues included levies on land, provision of supplies and food, and even military service. If a person failed to pay his dues, the king could make him forfeit his land grant, that is, disseisin him. What made things especially difficult was that there was nothing to stop the king from making continuous or repeated levies on the same property. One payment did not make you secure, like the payment of an annual land tax does. If the king needed additional revenues for war, his castle, festivities, or some cause celebre, he could demand additional monies. If the vassal was unable to meet these demands, he could lose his land or estate. The king could also use any land at any time as forests for his pleasure hunting.

Before the Norman Conquest, nobles elected the king.[38] Although they always selected a direct lineal descendant of the former king, immediately before the new king's coronation noblemen used their power of election to evoke certain guarantees regarding their rights to continued possession of their lands. This tradition was retained by William the Conquerer and his followers. Depending upon the forcefulness and character of the king, the value of these guarantees varied. Henry II paid them no heed. Richard I, the lion-hearted crusader, was rarely in England during his reign to hear his subjects' complaints about the formidable levies laid to support his wars and efforts. His younger brother, John I, was confronted with the cumulative wrath of the nobles. Because he was in dire need of their assistance, he reluctantly signed the Magna Carta at Runnymede in 1215. This document is often cited as the source of private property protection. Bosselman, Callies and Banta provide the following translation of

37. Kohl v. United States, 91 U.S. 367, 371-72 (1875); 1 NICHOLS, *supra* note 2, §§ 1.11 & 1.14[2].

38. E. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 53 (1973) [hereinafter cited as E. BOSSELMAN]. Much of this historical information has been distilled from this source.

what was article 39 of the 1215 document:

> No freeman shall be arrested, or detained in prison, *or deprived of his freehold*, or in any way molested; and we will not set forth against him, nor send against him, *unless by the lawful judgment of his peers and by the law of the land.*[39]

While this was certainly not a just compensation clause,[40] it was a precursor to our state and federal constitutional due process clauses. This provision of the Magna Carta, which became clause 29 when the charter was redrafted in 1225 during the reign of Henry III, was periodically ignored and reconfirmed by successive kings. Nonetheless it became part of the nobles' consciousness that their property was protected from the king's arbitrariness or excesses. [41]

In post-Middle Ages Britain, the concept evolved from protection against the king to protection against the state. It was this point that was stressed by Coke and later reaffirmed by Blackstone in his *Commentaries on the Laws of England.* Coke and Blackstone advocated the right of the people to have decisions about their private property made by Parliament, a representative body that ensured that the state would not lightly trounce on one's rights. Coke made numerous references to the Magna Carta as the source of due process rights for property and of parliamentary

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39. *Id.* at 56 *quoting* W. MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN (1905) (emphasis in the original); *see also* E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND (1795); Manne, Note, *Reexamining the Supreme Court's View of the Taking Clause*, 58 TEXAS L. REV. 1447 (1980).

40. Extensive research into the history of the just compensation notion is found in Chancellor Kent's decision in Gardner v. Trustees of Village of Newburgh, 2 Johns. ch. *162 (N.Y. 1816), where he attributed the requirement to natural law. As authority for his conclusion that compensation was required in that case, he cited Grotius, Pufendorf, Van Bynkershoek, De Vattel, Blackstone and the fifth amendment to the United States Constitution. Further reference to these writers as sources of the "right" to compensation are found in Berger, *supra* note 15, at 204; Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1931); Meidinger, *supra* note 27; Stoebuck, *supra* note 34, at 575 (where he traced the compensation requirement to ch. 28 of the Magna Carta which compelled bailiffs and constables to pay for corn and other provisions they took). For the original works see E. DE VATTEL, THE LAW OF NATIONS 96 (C. Fenwick trans. 1916); H. GROTIUS, DE JURE BELLI AC PACIS 385 (F. Kelsey trans. 1925); S. PUFENDORF, DE JURE NATURAE ET GENTIUM 1285 (C. & W. Oldfather trans. 1934); C. VAN BYNKERSHOEK, QUAESTIONUM JURIS PUBLICI LIBRI DUO 218-23 (T. Frank trans. 1930). *See also* French Code Civile art. 545; Constitutional Law of Belgium art. II; Fundamental Law of Holland art. 147.

41. Donahue, *supra* note 25, at 43.

sovereignty.[42] Blackstone did not object to the state's taking of one's property, but the taking could be done only by action of the legislature which was comparable to or a substitute for the owner's consent. If a person was denied due process he had a right to go to court.[43] Blackstone also suggested that even though the state had an inherent power to take private property when it was needed for public use, it had a natural law obligation to fully indemnify the condemnee.[44]

But neither Coke nor Blackstone would have considered it improper for a king or legislature to regulate the use of property. That was an accepted part of life. Since the Middle Ages, London had been covered by land use regulations. Bosselman, Callies and Banta included in their history excerpted sections of a proclamation by Queen Elizabeth in 1580 prohibiting further construction in the City of London to ameliorate problems of overcrowding.[45] The Parliament by 1588 had enacted an open space zoning law that limited construction to one house for every four acres.[46] There were even laws controlling the type of building materials permitted. So long as the laws were for the public benefit, justice was not offended. Colonial America was replete with land use regulations covering everything from overplanting of fertile land and what to plant,[47] to which land uses were considered noxious and forbidden. The regulations extended even to building specifications.[48]

2. *Just Compensation.* American colonists understood eminent domain property law to be a separate thing from government regulation for public benefit. They came to America distinguishing, in fact, if not in name, between police power regulations and exercises of eminent domain. It was not that government action resulting in a physical taking of property was unknown or unimagined; the colonists acknowledged the inherent power of the sovereign

42. E. COKE, *supra* note 39.

43. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Christian ed. 1855).

44. *Id.* at 138-39. *See infra* notes 49-62 and accompanying text.

45. E. BOSSELMAN, *supra* note 38, at 64-65.

46. *Id.* at 65-66, *citing* Act of Parliament in 1588, 31 Eliz. I C.7 (Statutes at Large, Vol. 6, at 409). This is not very different from the zoning law that was at issue four hundred years later in Agins v. City of Tiburon, 447 U.S. 255 (1980) (suburb of San Francisco zoned to prevent multiple housing in acre tracts).

47. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 66-68 (1973).

48. *Id.* at 82-85.

to take lands for the public good.[49] At that time in history, it was not the government's power to take property that was unsettled. What was unsettled was the requirement that the taking be compensated. Early colonial statutes that permitted appropriation of property for roads and public buildings only intermittently provided for compensation, and that compensation was limited to improvements. There was generally no compensation for undeveloped land. Each act of expropriation had to contain a specific clause providing compensation; without such a clause no compensation was required.[50]

The first eminent domain statute in the colonies was enacted in Massachusetts in 1639 for the building of roads.[51] By 1641 the Massachusetts Body of Liberties contained a provision requiring compensation to an owner if his goods or cattle were taken.[52] No analogous provision provided compensation for the taking of land at that time.[53] The same was true of Pennsylvania's and New Jersey's first eminent domain laws. Following Coke and Locke both states required due process (meaning in this context the owner's consent or parliamentary approval) before land could be taken, but made no mention of compensation.[54] Even as some states altered their laws to provide compensation for some government takings, there was still little opportunity for condemnees to make constitutional arguments about their rights to compensation.[55] Vermont and Massachusetts were the only states to include compensation clauses in their original constitutions before the

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49. Grant, *supra* note 40; Stoebuck, *supra* note 34, at 561-62.

50. Stoebuck, *supra* note 34, at 579-83.

51. 1 NICHOLS, *supra* note 2, § 1.22[2], citing Anc. Chart. 126 (1639).

52. E. BOSSELMAN, *supra* note 38, at 93.

53. By 1693 Massachusetts had enacted laws that compensated owners of improved lands whose properties were taken for roadbuilding. An Act for Highways, Mass. Colonial Statutes (ch. 23, 1693), cited in M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 63 & n.1 (1977).

54. M. HORWITZ, *supra* note 53, at 63-64. Both Pennsylvania and New Jersey considered their original land grants to contain excess property so that the state could eventually retake it for roads. Professor Stoebuck found that only Pennsylvania contained such a reservation. Stoebuck, *supra* note 34.

55. Professor Horwitz argued that the greatest impediments to just compensation clauses were the entrepreneurs who saw it as a threat to low cost development. M. HORWITZ, *supra* note 53, at 66. Because the tail end of the 18th and beginning of the 19th centuries were dedicated to economic growth, legislatures readily conferred condemnation power on private entrepreneurs who would promote economic development.

federal bill of rights was ratified,[56] followed by Pennsylvania in 1800.[57] Professor Horwitz announced that in 1820 less than a majority of states included a just compensation provision in their constitutions' eminent domain clauses.[58]

No doubt the strongest arguments for including a compensation provision in our Constitution were found in Blackstone's *Commentaries*. He was read extensively in the colonies[59] and spoke directly to this matter:

> So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an execution of power, which the legislature indulges with caution, and which nothing but the legislature can perform.[60]

In 1789, the American people ratified our federal Constitution. A forceful anti-federalist movement prevailed in its insistence that there be a bill of rights to protect the states and their

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56. E. BOSSELMAN, *supra* note 38, at 94-97.

57. M. HORWITZ, *supra* note 53, at 64.

58. Now all state constitutions, with the exception of North Carolina, have a specific just compensation clause. 2 NICHOLS § 6.01[3].

59. D. LOCKMILLER, SIR WILLIAM BLACKSTONE 169-75 (1938).

> When Blackstone's *Commentaries* were published (1765-69), Americans were his most avid customers. . . . An American edition was printed in 1771-72, on a subscription basis, for sixteen dollars a set; 840 American subscribers ordered 1,557 sets—an astounding response . . . and Blackstone's influence on American legal practice was at least potentially immense.

L. FRIEDMAN, *supra* note 47, at 88-89 (footnote omitted).

60. W. BLACKSTONE, *supra* note 43, at 138-39.

citizens from the general government.[61] Federalists initially protested the inclusion of a bill of rights as superfluous in light of the state constitutional bills of rights, and because the federal government was a totally different type of government from state governments. A bill of rights was a traditional Whig device to protect citizens against government oppression. In 1789, Federalist James Madison drafted a bill of rights and presented it in a speech at the first session of Congress. It included a just compensation provision directly after its due process clause: "No person shall . . . be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation."[62] The words were modified to the present form, but there is no record indicating why the clause was altered and shortened. No doubt the intent was the same, but the words have not necessarily been interpreted that way over the years. Should the word "taken" in our fifth amendment be equated with the concept of "relinquish" about which Madison first wrote? Does the lack of debate mean that there was no disagreement over intention? Is it possible that the debate was unrecorded? Why was it changed at all?

B. *Competing Early American Political Ideologies*

Many legal historians and philosophers have asserted that John Locke's theory of property is at the core of American property rights. In the late seventeenth century John Locke published his *Second Treatise of Government* which, among other things, explained the origins of private property. As a dedicated Whig, Locke wrote to justify his political resistance to the English monarchy and to protect his substantial accumulation of private wealth from governmental interference. American colonists in the eighteenth century found his work equally valuable to justify their political resistance to the English monarchy and to aid in structuring their new liberal, constitutional government.

For Locke, ownership of property was a natural right. Man, by his very nature, had a right to life, liberty and estates (which he later called property). In Locke's vision of the "state of nature,"

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61. *See generally* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 536 (1969).

62. 1 ANNALS OF CONG. 433-36 (J. Gales & W. Seaton eds. 1789).

man had perfect freedom and equality. God gave mankind the earth in common for its self-preservation and comfort and enabled man to use his labor to capture what he needed from nature to survive and improve his conditions.[63] In order to give him incentive to do so, God permitted man to appropriate land and resources through that labor. It was labor, after all that added value to the land or resource. Because each man "owns" himself, he unquestionably owns his own labor. When he mixes the labor he owns with something that mankind owns in common, he is entitled to appropriate that something as his private property. In other words, man owns himself, his labor and the fruits of his labor. Locke added a proviso that each man is only entitled to private ownership of as much of the common resources as he can use to his advantage without creating waste or spoilage.

Having established that man has these natural rights to life, liberty and property, Locke explained that man consented to relinquish his unbridled freedom in a state of nature and to join others in civil society chiefly to preserve his property rights.[64] The role of civil government, according to Locke, is quite limited—it is to protect and preserve man's natural rights, with a primary focus on property. Locke defined a liberal, contractarian state, premised on individual, natural rights. Individuals were joined together by social contract to protect those rights. Their motivation was self-interest and self-preservation. The government had only as much power as was directly given to it by the consent of a majority of society. Government's authority was derived from this consent and this consent alone. Government was truly a servant of the people for the protection of their property.

This model clearly influenced the drafting of our American constitution.[65] Locke's espoused reverence for property is seen in the fifth amendment's due process and takings clauses,[66] and fac-

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63. J. LOCKE, SECOND TREATISE OF GOVERNMENT, ch. 5, *Of Property*, § 26 (C. Macpherson ed. 1980).

64. *Id.*, ch. 9, *Of the Ends of Political Society and Government*, §§ 123-24.

65. R. WOLFINGER, F. GREENSTEIN & M. SHAPIRO, DYNAMICS OF AMERICAN POLITICS 41-42 (1980).

66. Professor Stoebuck argued that Locke's notions were the basis of the just compensation clause. He said that Locke and the writers of the Constitution supported a just compensation clause because they did not think one citizen should have to bear a greater share of the cost of government than any other citizen. This "just share" principle defined property as economic position and protected it from value diminution. Stoebuck, *Police Power,*

ets of his view of limited government are seen in the organization of our federal system.[67] Yet this was not the only philosophy at work at the time. There were echoes of feudalism and the politics of Rousseau and Aristotle in the implicit presumption of our Constitution that the community, or government, has a right to take property for public use. That provision, and some of the other constitutional language, can be interpreted to exhibit a competing, republican image of government.[68]

Whereas former analyses of the political ideology of the American Revolution spoke solely of liberalism and capitalism,[69] contemporary early American historiography acknowledges a competing ideology of republicanism.[70] This political philosophy tied into the radical Whig and "country" ideology of English Commonwealthmen whose theories of government found roots in classical Greece[71] and the Renaissance. Republics were peoples united in opposition to monarchy and tyranny. The republican image was of equal and independent yeoman farmers, self-reliant and selfless in their devotion to the commonweal, and bound by their commitment to public freedom and civic virtue.

This ideal of republicanism was as tied to property as the lib-

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Takings and Due Process, 37 WASH. & LEE L. REV. 1057 (1980). Judge Oakes emphasized Locke's influence on Madison, the primary drafter of our constitutional Bill of Rights. Oakes, *supra* note 29.

67. Blackstone picked up on Locke's writings and advocated this understanding of a representative government of limited power. As I noted earlier, Blackstone was widely read in the colonies. E. BOSSELMAN, *supra* note 38, at 90 (*citing* D. LOCKMILLER, *supra* note 59, at 169-75).

68. I am indebted to Professor Richard Parker of Harvard Law School for exposing me to this approach towards our political structure through his collected materials for his advanced constitutional law class entitled "Fears and Hopes in a Democratic Republic."

69. *See, e.g.*, L. HARTZ, THE LIBERAL TRADITION IN AMERICA (1955).

70. B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. 346 (1982); Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, 29 WM. & MARY Q. 49 (1972); *cf.* Berthoff and Murrin, *Feudalism, Communalism and the Yeoman Freeholder: The American Revolution Considered as a Social Accident*, in ESSAYS ON REVOLUTION (Kurtz and Huston eds.) (noting that republican ideology became severed from the reality of industrialized America in the first half century after the Revolution); Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629 (1982) (arguing that republicanism was already an antiquated ideology at the time of the Revolution).

71. These ideas derived directly from Aristotle's *Politics* and have periodically raised their heads from the sands. Republican ideology with a focus on its Greek roots was strongly advocated by Hannah Arendt in the middle of this century. H. ARENDT, THE HUMAN CONDITION (1958); H. ARENDT, BETWEEN PAST AND FUTURE (1961).

eral contractarian ideology of Locke, but property served a different role. For the republican ideologue property was a prerequisite to an interest in public affairs and the necessary independence to participate in public debate and decision-making.[72] This is a view

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72. Professor Mensch, in her informative article, *The Colonial Origins of Liberal Property Rights*, 31 BUFFALO L. REV. 635 (1982), recognized the role that property played in republican ideology, although she presented a very different image of the alignment of ideologies in colonial New York. She viewed colonial property rights through the dichotomy of voluntarism and hierarchy, rather than liberalism and republicanism. Voluntarism is defined as an ideology of republicanism's egalitarianism and self-sufficiency, combined with an Adam Smithian free market economy of independent producers, and a Lockean notion of entitlement to property through use and occupancy. Hierarchy manifested itself in Smith's alternative vision of capitalism in a nonperfect market that required extensive accumulations of wealth and capital for purposes of increased production and development. These accumulations of wealth, power and authority were nonegalitarian and hierarchical. This competing ideology to voluntarism invaded church, society and politics, as well as the economy.

While this is an interesting critical analysis of prerevolutionary American ideology of property rights, I personally find it unpersuasive. I cannot put Lockean individualism in the same school with republican communitarian notions. Professor Mensch repeatedly explained the New England land distribution model, as implemented on Long Island, that provided equal lots for all community members with a common area for the whole community's use. Community members' properties were subject to redistribution when new families entered the fold. It was commonly understood that people held their property for the community good, and that if people's shares became noticeably unequal or newcomers were unable to acquire equal lots, the community members were empowered to meet and "legislate" a new land distribution. There was no such thing as an overriding individual right to property. How could adherents of Locke's philosophy of individual, natural rights of property simultaneously adopt this type of republican social-political vision? To Locke, civil society was created to protect individual rights to property. For these egalitarian republicans, civil society was a social community working to promote its common good. Individualism was only valued to the extent that it advanced the good of all, and it was always subsidiary to communitarian values.

I would have to argue that a substantial portion of Lockean liberalism stood in opposition to republicanism. Locke's property notions of acquisition through use and occupancy (labor theory) supported republicanism, but Locke's theory just began there. He was quick to recognize that that principle only worked in a state of nature and as soon as money was coined and society developed, property could be acquired through capital and wealth rather than labor. At this point Locke's theory serves Professor Mensch's hierarchical ideology better than her voluntarism model. Those who had more land due to political favoritism and land grants did not acquire it through Lockean labor-based notions, but Locke's rationale supported their "right" to buy it, and if given to them, to retain it. Locke's civil society was organized to protect that very individual right. Republican societies did not recognize it as a right at all. One did not have rights against a republican government in the liberal sense in which we understand the word today.

In any case, disregarding for the moment Professor Mensch's characterization of the two competing ideologies, her work supports this section's thesis that republicanism was a vital, competing ideology in pre-revolutionary America and that it was directly tied to property "ownership." As part of the republican community a person had an equal share

of society under which property is held in trust for public benefit.[73]

If the takings clause was written with a social view of property rather than a Lockean libertarian notion, it would have to be applied differently. Protected property would take on a different character for different reasons. In addition, since republicanism is informed by notions of the common good, republican assessments of "public use" would differ from liberal, individualistic ones. This sketchy presentation illustrates that there are potential historical arguments that can be made to support alternative interpretations of the takings clause. It is not written in stone that the clause only protects investment-backed expectations or Lockean property interests. With these theories in mind, I will explore the further history of the takings clause and how it was dominated by Madisonian elitism rather than republican egalitarianism.

C. *America's Era of Rapid Development*

1. *"Public Use" Taken Seriously.* The eminent domain clause proclaimed that the government could take private property for public use if it compensated the former owner. A corollary to that belief was the doctrine that the government could not "take property from A and give it to B."[74] Throughout the eighteenth cen-

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of the common land and "property" on which to labor and live. It was possession of land that gave people independence and permitted them to be self-reliant and innovative.

73. Judge Oakes presented these competing American ideologies through the persons of Madison and Jefferson. *See* Oakes, *supra* note 66. He characterized Madison as having a "dominion" view of property that was Lockean, strongly capitalistic and highly individualistic in a Kantian sense. This view has been adopted by the Burger Court. Jefferson's ideology was social and more utilitarian, evaluating legal relations from the perspective of a social whole or community.

74. This oft-quoted doctrine is usually attributed to Justice Chase's *seriatim* opinion in Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). He used it as an example in explaining his natural law view that there are certain powers with which no people would entrust their legislature:

> There are acts which the federal, or state, legislature cannot do, without exceeding their authority. There are certain vital principles in our free republican governments, which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; to take away that security for personal liberty, or private property, for the protection whereof the government was established. . . a law that takes property from A and gives it to B: It is against all reason and justice, for a people to entrust a legislature with SUCH powers; and therefore, it cannot be presumed that they have done it. The genius, the nature, and the spirit, of our State

tury most American exercises of eminent domain were for public projects such as roads and government buildings, including hospitals, town halls, schools, courthouses, fire stations, almshouses, and public cemeteries.[75] America had been primarily an agrarian nation of simple virtues and needs. But, the whole vision of America changed by the end of the eighteenth century to one of capital development and resource exploitation.[76] It did not take state governments long to realize that eminent domain could be instrumental in accelerating economic production and growth.[77] Private property was sacrificed to the cause of progress—it underwrote America's age of development.[78] So, in the process, doctrines about private property rights, eminent domain, public use and private transferees were transformed.[79] The law was manipulated to foster growth at the expense of the formerly protected private property rights.

Before the Revolution, Massachusetts and other states had mill acts which authorized the establishment of mills by damming streams that ultimately flooded the lands of upstream landowners.[80] Despite the burden or harm caused to those whose lands were flooded, the courts approved these measures as valid exercises of eminent domain because of the important economic and productive values that the mills offered the communities. It was not difficult to meet the public use limitation because these gristmills were clearly open to the public for its use. In addition, those whose lands were flooded had available common law actions for

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governments, amount to a prohibition of such acts of legislation; and the general principles of law and reason forbid them.

Id. at 388 (emphasis deleted).

75. 2A NICHOLS, *supra* note 2, §§ 7.5111-7.5181.

76. *See* Meidinger, *supra* note 27; M. HORWITZ, *supra* note 53.

77. Scheiber, *Property Law, Expropriation and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232 (1973) (characterized the law of eminent domain as a product of policy-making on the state level).

"Various states, lacking a tax base and consequently the tax revenue necessary for economic development, often conveyed eminent domain power to certain private corporations to build facilities such as bridges, canals, turnpikes and railways," Lewis, Comment, *Corporate Prerogative, "Public Use" and a People's Plight*: Poletown Neighborhood Council v. City of Detroit, 4 DET. C.L. REV. 907, 912 (1982).

78. M. HORWITZ, *supra* note 53.

79. M. HORWITZ, *supra* note 53, at 31, 47. Much of the following textual material on the mill acts is based on this work.

80. Berger, *supra* note 15, at 206.

nuisance and trespass to complement the statutory remedies.

2. *"Public Use" Broadened.* Mill owners and prospective mill owners were dissatisfied with the non-exclusive remedies and argued that the continuing threat of lawsuits burdened them to the extent that they would have to forego building and developing. The Massachusetts legislature was convinced by this argument, and in 1795 it amended its mill act to create exclusive statutory remedies for flooded land.[81] This act became a model for many states. In effect, it gave mill owners the power (without prior court approval) to condemn private property to build their mills at prices that were unavailable on the private market through voluntary exchange or in the courts through adjudication.[82] Private property interests were blatantly subrogated to natural resource exploitation and economic development. The wicket became stickier when the mills changed from publicly operated gristmills to private manufacturing enterprises, such as paper mills, cotton mills and saw mills. To rationalize the devolution of this power to these privately owned and operated enterprises, the courts had to broaden their understanding of "public use" to encompass public advantage and overall community benefit.[83] Mill owners exerted continuous political pressure on legislatures to amend the mill acts to their further benefit. Their successes multiplied as the definition of public use became broader and more attenuated than its original meaning. By 1860, the Massachusetts Supreme Judicial Court declared that a public use was

> everything which tends to enlarge the resources, increase the industrial energies and promote the productive power of any considerable number of inhabitants of a section of the State, or which leads to the . . . creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community.[84]

The middle of the nineteenth century also brought the railroads. Courts were quick to make another exception to the original eminent domain interpretation prohibiting compulsory transfers from one private entity to another. Railroad development

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81. Act of Feb. 27, 1795, ch. 74, [1794-98] Mass. Acts & Resolves 443.

82. *See* Berger, *supra* note 15, at 226-31 (*citing* Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972)).

83. 2A NICHOLS, *supra* note 2, § 7.02[2].

84. Talbot v. Hudson, 82 Mass. 417, 425 (1860).

would have been impossible or incredibly more expensive and difficult without the power of eminent domain to condemn paths to lay its tracks.[85] The developing ideology of the day left courts no choice but to give full eminent domain power to these "instrumentalities of commerce."[86] First the courts declared railroads to be public service corporations and imposed upon them special obligations to serve the public, and then shielded them from liability for trespass, nuisance and damages as if they were public officials.[87] Public utilities were given the same status, as were turnpikes, bridges and canals. Just as with the mill acts, what started out with the idea of public use as being for the public benefit deteriorated to private use with incidental benefit to the public.

Almost all the cases in the nineteenth century are from state courts. The first United States Supreme Court decision about a state's exercise of eminent domain was *West River Bridge Co. v. Dix.*[88] The Court upheld the state's ability to condemn the bridge at issue and established a policy of great deference to state decisions that lasts to this day.[89] Since then the United States Supreme Court has consistently validated state decisions about public use and has supported state autonomy.[90] States have been given great latitude within the public use requirement. Only once has the Court overturned a state's action in this arena. In *Missouri Pacific Railway v. Nebraska,*[91] the Court simultaneously invalidated the state's exercise of eminent domain and ruled that the "public use" requirement of the fifth amendment takings clause applied to the states through the fourteenth amendment concept of due process:

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85. Berger, *supra* note 15, at 208.

86. Mansnerus, Note, *supra* note 15.

87. *See generally* Scheiber, *supra* note 77; Meidinger, *supra* note 27. Professor Meidinger gives some interesting statistics about the rapidity with which tracks were laid from 1830 until 1880. In 1830 there were almost no tracks; by 1840 there were 3,000 miles of tracks; by 1860 there were 30,000 miles of tracks; and in 1880 alone, the railroads laid 70,000 miles of tracks. *Id.* at 29.

88. 47 U.S. (6 How.) 507 (1848).

89. *See, e.g.*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); United States v. Lynah, 188 U.S. 445 (1903). *See also* Berger, *supra* note 15, at 213; Meidinger, *supra* note 27. It is my contention that the Supreme Court's failure to establish an interpretative floor for "public use" has emasculated the takings clause and resulted in a license for politically powerful private agents to take others' private property at prices below those available by open and voluntary exchange on the market.

90. Scheiber, *supra* note 77.

91. 164 U.S. 403 (1896).

"Taking by the State of [private property] for the private use of another is not due process of Law."[92] In the next year, the fifth amendment takings clause just compensation requirement was officially incorporated into the fourteenth amendment in *Chicago, Burlington and Quincy Railroad Co. v. Chicago.*[93] In *Rindge Co. v. County of Los Angeles,*[94] the Court reiterated that it would "regard with great respect the judgments of state courts upon what should be deemed public uses in any State."[95]

3. *A Narrowed "Public Use" Concept.* The trend toward a continuous broadening of the "public use" limitation on the eminent domain power was interrupted around 1837.[96] The judicial reaction began in New York, with some courts reacting negatively to broad interpretations of public use[97] in decisions like *Bloodgood v.*

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92. *Id.* at 417. It is ironic that the state was stopped in its tracks when it exercised eminent domain rights in favor of an individual property owner and against a railroad, instead of for it. It is hard to ignore the political positions of the parties in a case such as this. Permitting an individual to infringe on a railroad's apparently invincible property right countered the development ideology. It also threatened the course of domination by the rich and powerful political lobby—railroad companies.

Professor Meidinger concluded his article by emphasizing that any eminent domain policy reflects the relative political effectiveness of the parties who stand to benefit or lose. *See* Meidinger, *supra* note 27. Professor Horwitz called eminent domain a potent weapon for the redistribution of wealth from old property to new commercial, development property. *See* M. HORWITZ *supra* note 53, at 63. Things have not changed. Eminent domain power has been doled out in a politically and economically expedient manner throughout our history. It continues to be used in this manner today as we see in the *Poletown* case. *See infra* notes 258-316 and accompanying text.

93. 166 U.S. 226, 239 (1897). This was the first incorporated right from the Bill of Rights. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, *supra* note 4, § 11-2. Before the fourteenth amendment was ratified, the Supreme Court had decided that the takings clause did not apply to the states in Withers v. Buckley, 61 U.S. 20 (1857).

94. 262 U.S. 700 (1922).

95. *Id.* at 706.

96. 2A NICHOLS, *supra* note 2, § 7.623.

97. Those interpretations got further removed from any common understanding of the term "public use." In one illustrative case, Scudder v. Trenton Delaware Falls Co., 1 N.J. Eq. 694 (1832), a New Jersey court upheld the authority of a private corporation to take land for 70 mills along six miles of the Delaware River by resting its understanding of public use on the great benefit that would result from the mills' operation, even though the private owner would undoubtedly obtain the greater benefit. These types of broad decisions support my thesis that constitutional law is merely putty in the hands of the politically and economically powerful. If it is politically expedient, or conforms with a dominant ideology (like economic development or expansion), the public use limitation in the taking clause can be effectively eradicated. The principles are sacrificed to politics. While courts appeared to be developing constitutional doctrine and interpreting the public use phraseology, they were, in fact, eliminating it to give free reign to private business and developers.

Mohawk & Hudson Railroad Co..[98] A narrow "public use" test followed which required a showing that the public would actually be able to use the condemned property, rather than incidentally benefit from its use.[99] The midwestern and eastern courts which joined this bandwagon saw their roles as guardians of private property rights, not as economic calculators of utilitarian values that defined the common good as private, capital development.[100] This vision only shared the stage with the broad, liberal public benefit reading of the public use limitation; it never starred.[101]

The Western states entered their period of rapid development after the Civil War. They followed the pattern of using increasingly broader standards of public use to support resource development and economic growth. Theirs was a standard of "public expediency" and "site necessity."[102] Some western states declared explicitly in their constitutions that certain business development activities were public uses so that there was no question about the use of eminent domain power by these industries.[103]

By the twentieth century most of this exponential growth was completed. The nation was left with competing definitions of "public use." The United States Supreme Court left the interpretation of that phrase to state courts, who in turn generally deferred to their legislatures. A federal constitutional right—the right not to have one's property condemned for private purposes (or was that any longer the right?)—received no uniform protection from the political and economic pressures that plagued state legislatures. States were free to define the scope and dimensions of this federal right, practically to the point of reading the public

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As Professor Bruce Ackerman highlighted in a different context, there came to be a dichotomy between what a lay person would fit within the language of the takings clause and how it has been legally interpreted. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).

98. 18 Wend. 9 (N.Y. 1837).

99. 2A NICHOLS, *supra* note 2, § 7.2[1]; Special Project, *The Private Use of Public Power: The Private University and the Power of Eminent Domain*, 27 VAND. L. REV. 681 (1974); Mansnerus, *supra* note 15, at 413.

100. Berger, *supra* note 15, at 208; Lewis, *supra* note 27, at 913.

101. Berger, *supra* note 15, at 209; Mansnerus, *supra* note 15, at 414.

102. Special Project, *supra* note 99.

103. *E.g.*, COLO. CONST. art. II, § 14; IDAHO CONST. art. I, § 14. The Nevada Constitution generally allows appropriation of rights of way to the use of corporations upon payment of compensation. NEV. CONST. art. I, § 8. *Accord*, Scheiber, *supra* note 77; Lewis, *supra* note 27, at 915; Special Project, *supra* note 99.

use limitation out of the amendment. This was, and still is, the state of the law of public use. When the United States Supreme Court entered the field of interpreting the takings clause, it had to tackle the question of what constituted a taking under the fifth amendment for federal government activity and under the fourteenth amendment for state exercises of eminent domain. Ultimately it was also required to rule on what, if any, actual limits were imposed by the "public use" language of the takings clause. The remainder of this history will trace these major United States Supreme Court interpretations.

III. Major Supreme Court Takings Cases Before 1978

A. *Roots of the Takings v. the Police Power Controversy*

Perhaps the greatest debate in eminent domain legal scholarship is the relationship between a compensable "taking" and a noncompensable exercise of police power by a state. Do these concepts intersect to create a third class of "compensable regulations"? Police power is a state's inherent authority to regulate for the health, welfare, safety and morals of its citizens.[104] The fifth and fourteenth amendments to the Constitution limit that otherwise absolute power by requiring that all police power measures that deprive a person of life, liberty or property conform to due process standards. Like the police power, the power of eminent domain is an inherent governmental power that finds its limitations in the fifth and fourteenth amendments. The takings clause prohibits government from taking property for private use, and mandates that if it takes private property for public use, it must pay just compensation. The power of eminent domain has been described as a subset of the police power.[105]

The Supreme Court has never read the takings clause literally, yet when it first started approaching this matter, it had no difficulty distinguishing between compensable takings and noncompensable police power regulations. Taking did not only mean a direct governmental acquisition of title; it also included government caused total destruction of value or irreparable, permanent

104. It is believed that the phrase "police power" was authored by Chief Justice Marshall in Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 433 (1827); *see also* Bauman, *supra* note 30, at 52.

105. Berman v. Parker, 348 U.S. 26 (1954).

injury. In its first decision on the subject, *Pumpelly v. Green Bay Co.*,[106] the Supreme Court explained:

> It would be a very curious and unsatisfactory result, if in construing [the takings clause], . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in that narrowest sense of the word, it is not *taken* for public use.[107]

The Court defined "takings" to include any physical invasion of real estate by "superinduced additions of water, earth, sand or other material, or . . . artificial structure . . . so as to effectually destroy or impair its usefulness . . . ."[108] Destruction had to be total and the injury had to be irreparable and permanent to meet the *Pumpelly* test.

In 1878, the Court limited the *Pumpelly* physical invasion doctrine by concluding that only direct and permanent encroachments were compensable. Despite damage to plaintiff's property caused by the city as it built a tunnel under the Chicago River, the Court denied compensation in *Transportation Co. v. Chicago*[109] stating: "[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision."

A combination of the rules in *Pumpelly* and *Transportation* revealed that impairment of use alone was not enough; two comparable impairments, one with a physical invasion and one without, would be treated differently. The cases seemed to turn on the character of the governmental action,[110] and not on the extent of

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106. 80 U.S. (13 Wall.) 166 (1871).

107. *Id.* at 177-78.

108. *Id.* at 181. In *Pumpelly* the Supreme Court established what has come to be known as the "physical invasion test" for takings. The construction of a dam caused flooding on plaintiff's land. The Supreme Court determined that plaintiff's injury was compensable because his real estate was actually physically invaded. The Supreme Court , 111 years later, employed this same "physical invasion test" in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). *See infra* notes 242-55 and accompanying text for a further discussion of *Loretto*.

109. 99 U.S. 635, 642 (1878).

110. This factor was later incorporated into the *Penn Central* multifactor balancing test. *See infra* notes 167-87 and accompanying text for an exposition of Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

injury or diminution in value. This result was consistent with the tenor of the times which sought to encourage economic expansion at the expense of private property rights.[111]

In 1887, a Kansas brewery owner argued for a more expansive reading of the takings clause. In *Mugler v. Kansas*,[112] the brewery owner challenged a recently enacted Kansas law that prohibited the manufacture of intoxicating liquors. Among other things, the law made his pre-existing brewery worthless, which, he argued, took his property without just compensation in violation of the fifth amendment takings clause as made applicable to the states by the fourteenth amendment. The first Justice Harlan wrote the opinion, completely rejecting Mugler's claim, reasoning that governmental takings of property and exercises of police power are distinctly different in kind. Takings occur when the government acquires title to the property or uses it for its own advantage. In *Mugler*, the government did not take possession or control of plaintiff's brewery. It did that which is in its police powers—it prohibited a noxious use of property. Governments have a duty to protect people from public nuisances, and in meeting their obligations to the public, they cannot be burdened with requirements of compensation.

The brewery owner was free to make any *lawful* use he wanted out of his property.[113] The government did not exert any control over it, did not destroy it nor appropriate it. Justice Harlan recognized that there were some limits to the legitimate exercise of police power, but this case had not presented one of

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111. M. HORWITZ, *supra* note 53. *See supra* text accompanying notes 82-95.

112. 123 U.S. 623 (1887).

113. *Id.* at 667-69. To explain, the Court stated:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the state that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . .
>
> The exercise of police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.

Id. at 668-69.

them:[114] "[Courts] are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority."[115]

In 1894, the Supreme Court further expounded upon its role in evaluating the substantive fairness of a legislative police power enactment. In *Lawton v. Steele*,[116] the Court upheld the power of state agents to seize fishing equipment used in violation of fishing regulations.

Lawton established a three-part test, although the Court enumerated it as two parts, to evaluate the substantive due process of an exercise of state authority: "[F]irst, that the interests of the public generally, as distinguished from those of a particular class, require such interference: and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[117] Legislation must have a legitimate public end and the means used to achieve it must be both reasonably related to the end and not unduly oppressive to individuals. This case illustrated the close link between the due process and takings clauses.[118] Government "regulation" of property

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114. Bauman compared this "substance over form" due process argument to the "no set formula" approach courts now use to decide whether there has been a taking. *See* Bauman, *supra* note 30, at 34. He argued that it is erroneous to regard *Mugler* as a police power regulation versus taking case with dual standards for each inquiry, and then he counterposed it to Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), which he argued had a unitary standard for evaluating police power and takings on the same continuum. *Mugler* is a "health and safety measure" to prohibit noxious uses. This is a traditional function of government, and hence it is constitutionally sound not to consider the economic impact of such regulations. The problem is that zoning and land use regulations are for the "general welfare" and not "health and safety." *Mugler*'s rules, which work well for health and safety measures, are inapposite when the purposes of the enactment change.

115. *Mugler*, 123 U.S. at 661. Justice Harlan further explained:

> Nor can legislation [prohibiting a noxious use of property] come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law.

Id. at 668.

116. 152 U.S. 133 (1894).

117. *Id.* at 137.

118. *Mugler* and *Lawton* were the forefathers of *Lochner*-era substantive due process. Justice Harlan's comments about the potential limits on police power regulations were expanded by a libertarian, laissez-faire court to invalidate much progressive social and economic legislation of the day. This period in Supreme Court history is known by the name of its seminal case, Lochner v. New York, 198 U.S. 45 (1905), in which the Court over-

was subject to due process limitations (substantive and procedural), whereas government taking of property also had just compensation and public use limitations. The line between the two types of government action, which today is ambiguous and hazy, was then so clear to the Court that the next year it dismissed as meritless a claim by oleomargarine manufacturers that Pennsylvania's recently enacted law prohibiting oleo production unconstitutionally took their property.[119]

The issue came before the Court again in *Hadacheck v. Sebastian*,[120] when a brick manufacturing plant owner challenged a Los Angeles ordinance that made brickmaking an unlawful activity within city limits. This plant had been built outside the city limits, but as the city expanded, it came to surround the business. Despite the facial inequities of closing down a viable business whose only error was a misjudgment about the extent to which Los Angeles would sprawl into the suburbs, the Court sustained the regulation as a valid exercise of the police power to abate a nuisance.[121] Acknowledging that plaintiff's property was reduced in value approximately eighty-five to ninety percent, the Court reaffirmed its *Mugler* position that regulations and takings are two different animals and will not be treated in the same way. The Court reasoned that the city acted with a public purpose to abate the nuisance of a brickyard in a residential area, and the means it used

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turned New York legislation limiting working hours for bakers. Employing a strict means-ends analysis, the *Lochner* majority found no direct connection between the limits of working hours and employees' health. Ironically, Justice Harlan found himself dissenting from *Lochner* because he evaluated the government's ends and means as legitimate, rational and substantially related.

Lochner-era substantive due process analysis of economic and social legislation reached its demise in 1937 in West Coast Hotel v. Parrish, 300 U.S. 379 (1937). Since then the Court has exhibited great deference to legislative judgments in social and economic matters. As I argued in Section I and shall reargue later, this substantive due process deference for economic legislation is intimately linked to the Court's abstention from interfering in legislative declarations of what constitutes a public use for purposes of eminent domain jurisprudence. *See* Berman v. Parker, 348 U.S. 26 (1954). The reaction against this discredited Lochnerian substantive due process analysis has infected takings analysis. If due process and takings are separate issues, as they are separate clauses in the fifth amendment, then they should employ different tests to measure their legitimacy.

119. Powell v. Pennsylvania, 127 U.S. 678 (1888).

120. 239 U.S. 394 (1915).

121. On this same theory the Court also sustained provisions regulating billboards on residential streets, Thomas Cusack Co. v. Chicago, 242 U.S. 526 (1917); banning livery stables, Reinman v. Little Rock, 237 U.S. 171 (1915); and regulating building heights, Welch v. Swasey, 214 U.S. 91 (1909).

were reasonably related to achieving that end.[122]

Most people who read or hear about the *Hadacheck* case feel a great sense of injustice. I certainly do. There should be some remedy for the plant owner. But, that remedy should not result from a confusion of the police power with the takings clause. If one looks for a remedy in this one case by distorting the import of the constitutional principles and language, there will be unfortunate results in future cases. Distorted language tends to compound its own distortions like errant snowballs in avalanches. Therefore, despite my feeling that the Court erred by not finding an appropriate means to do justice in that case, I admire its adherence to the constitutional structure that separates exercises of police power from takings.[123]

The Supreme Court's clear vision of the distinction between police power and takings did not sit well with one Massachusetts Supreme Judicial Court judge. Justice Oliver Wendell Holmes, Jr. believed that the difference between a proper exercise of police power and an unconstitutional one was a matter of degree, not a matter of kind as Justice Harlan had indicated in *Mugler*[124] and as Chief Justice Shaw, also of the Massachusetts Supreme Judicial Court, said in his famous opinion in *Commonwealth v. Alger*.[125] Jus-

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122. *Hadacheck*, 239 U.S. at 408-14. Justice McKenna commented that the police power may be used to eradicate private interest obstacles that impede the progressive march toward the public or community good.

It is ironic that McKenna would make such an argument preferring community interests over private ones, when he was a stalwart in the Lochnerian majority overturning progressive social legislation because it trounced private liberty of contract. The irony is significantly reduced if we step back and view what interests were furthered in each case—the wealthier bakery owners over their labor force and the wealthier class of suburbanites over the single brickmaking factory. I can't help but wonder if *Hadacheck* would have been decided differently if it had been the plant owner against the workers in their neighborhood instead of against the rising economic class in the suburbs.

123. I believe there were other legal mechanisms through which justice and substantive fairness could have been accomplished in *Hadacheck*. I do not for a moment intend to convey a sense that rules should be uniformly and rigidly applied, even if blatant injustices result. I reject positions that elevate form over substance. Achieving fair and just solutions to problems does not require constitutional distortions so long as our Constitution rests on principles of fairness and justice.

124. Justice Holmes even expressed his dismay with *Mugler* in his personal correspondence. 1 HOLMES-LASKI LETTERS 473 (M. Howe ed. 1953), *cited in* Bauman, *supra* note 30, at 38.

125. 61 Mass. (7 Cush.) 53 (1853). The *Alger* decision followed on the coattails of another Shaw opinion, Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55 (1846), which spoke of the difference between police power and takings. These cases also found support

tice Holmes began expressing his opposing views on the matter in *Rideout v. Knox*,[126] where he stated:

> It may be said that the difference is only one of degree: most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be except by the exercise of the right of eminent domain.[127]

In 1902, when Holmes was already in his sixties, Theodore Roosevelt appointed him to the United States Supreme Court. In this forum he pressed his "difference in degree" formulation and by 1922, he wrote the opinion in what turned out to be the seminal eminent domain case, *Pennsylvania Coal Co. v. Mahon*.[128] In it he locked horns with Justice Brandeis who wrote a vigorous dissent.[129] So much has been written about *Pennsylvania Coal* that it seems unnecessary to do an extensive analysis here.[130] It was a bla-

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in earlier New York cases that distinguished between takings and police power with respect to regulations about cemeteries and internment of bodies within the city limits. *See, e.g.*, Coates v. Mayor, Alderman & Commonalty of New York, 7 Cow. 585 (N.Y. 1827); Brick Presbyterian Church v. City of New York, 5 Cow. 538 (N.Y. 1826).

Shaw's *Alger* opinion upheld a regulation that circumscribed the plaintiff's freedom to build a large wharf into Boston Harbor. He stated:

> We think it is settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. . . . This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it; which can be done only on condition of providing a reasonable compensation therefor. . . . Nor does the prohibition of such noxious use of property . . . injurious to the public . . . although it may diminish the profits of the owner, make it an appropriation to a public use, so as to entitle the owner to compensation. . . . It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and it is therefore not within the principle of property taken under the right of eminent domain.

61 Mass. (7 Cush.) at 84-86.

126. 148 Mass. 368 (1889).

127. *Id.* at 372.

128. 260 U.S. 393 (1922).

129. *Id.* at 416-22.

130. *E.g.*, B. ACKERMAN, *supra* note 25, at 163-66; E. BOSSELMAN, *supra* note 38, at 126-28; L. TRIBE, *supra* note 4, §§ 8-5 & 9-3; Bauman, *supra* note 30; Oakes, *supra* note 29, at 603-09; Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Stoebuck, *Police Power, Takings and Due Process*, 37 WASH. & LEE L. REV. 1057, 1062-65 (1980).

tant and undisguised contradiction of *Mugler*,[131] yet did not overrule it. Holmes, in his majority opinion, determined that the Kohler Act, a Pennsylvania statute designed to protect homeowners from the collapse of the surface of their property by prohibiting coal companies from doing underground mining that threatened surface subsidence, deprived the coal company of its property without just compensation. That regulation amounted to a taking because it made "it commercially impracticable to mine certain coal"—in other words, it went "too far."[132] Justice Holmes stated: "One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts."[133]

Holmes finally got his way. He altered the federal Constitution by interchanging the notions of takings and deprivations by police power regulations. By using a "difference in degree" test, he could measure all government actions respecting property, regardless of their character, on the same yardstick. Even if this was a reasonable policy to write into our Constitution, a position with which I cannot agree, he picked an outrageous case in which to do so.[134] It hardly seems possible that the same man who dissented in *Lochner* because it seemed to enact the judges' personal philoso-

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131. Of course, there are commentators who have managed to reconcile the two. Bauman said that *Pennsylvania Coal* "flow[s] from [*Mugler*] by a natural progression of thought." Bauman, *supra* note 30, at 39.

132. *Pennsylvania Coal*, 260 U.S. at 414. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

It is interesting to note that the U.S. Court of Appeals for the Third Circuit recently had before it a remake of the *Pennsylvania Coal* case. Keystone Bituminous Coal Assoc. v. Duncan, 771 F.2d 707 (3d Cir. 1985). A statute that was the Kohler Act in thin disguise was found constitutional because of deference to legislative decisions as required by Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). *See supra* text accompanying notes 309-16.

133. *Id.* at 413.

134. Bauman, who lauds Holmes' decision in *Pennsylvania Coal*, argued that a state should be treated differently depending upon whether it is acting for the public health or safety, or for the general welfare. Bauman, *supra* note 30. Applying that standard, which Bauman believed reconciles *Mugler* and *Pennsylvania Coal*, Holmes still should have upheld the law. It takes a very peculiar construction of the facts to find that a law designed to prevent houses from collapsing into underground mines is not a health and safety measure. Somehow, Holmes tried to explain that the Kohler Act case only involved one family and one dwelling. His arguments must have been as unconvincing then as they seem now, but he persuaded all the other Justices, except Justice Brandeis, to agree with him.

phies about society instead of assenting to the philosophy of the representative legislature[135] would find the legislative determination about "safety" in the Kohler Act so disposable.[136] I can only conclude that he decided this case in this fashion because it was a vehicle to promote his "difference in degree" philosophy.[137]

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135. In *Lochner*, the Supreme Court majority overturned a New York law that prescribed maximum working hours for bakers in an attempt to advance their health and safety. The conservative majority argued that this sort of legislation interfered with the parties' liberty of contract. Holmes dissented and chastised the majority for implementing their personal political-social-economic visions:

> This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways . . . . The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The fourteenth amendment does not enact Mr. Herbert Spencer's Social Statics . . . . [Some of the laws this Court has recently approved may] embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. . . . A reasonable man might think [the baker's maximum hour regulation] a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work.

190 U.S. at 76.

136. Holmes specifically rejected the legislature's finding that this Act was for personal safety: "Furthermore, it is not justified as a protection for personal safety. That could be provided for by notice. Indeed the very foundation of this bill is that the defendant gave timely notice of its intent to mine under the house." *Pennsylvania Coal*, 260 U.S. at 414.

In other words, Holmes concluded that if you warn someone that their house might fall in, you have adequately protected their personal safety. Obviously, the Pennsylvania legislature had a different view when it opted to prohibit the event from occurring. It is extremely inconsistent for Holmes to object to the *Lochner* majority's invalidation of a law designed to protect bakers, yet to invalidate a different law designed to protect homeowners from the destruction of their homes.

137. This is an example of my "mastermind" theory of judicial opinion writing. There are other examples throughout this Article. The most commonly accepted example is Chief Justice Marshall's coup in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), in which he denied his Court jurisdiction to decide a particular case in which it was known he had a political preference, in order to assure that it would have jurisdiction in all future cases involving judicial review of congressional legislation. These are cases where judges shrewdly advance the political philosophies and ends of the politically empowered under the guise of a legal discourse in which they assert that the result is compelled by such legal

Pennsylvania Coal was decided during the heart of the *Lochner* era. The Court's conservative majority was regularly overturning progressive and protective legislation designed to aid labor, regulate prices and limit entry into the market, in favor of business interests. Holmes regularly dissented.[138] He knew that despite his disagreement with the Court's bent, it was going to continue to "enact Mr. Herbert Spencer's Social Statics." Therefore, in a case like *Pennsylvania Coal* which pitted an individual property owner against a business enterprise like a coal company, the conservative block would follow its economic and political leanings and hold for the coal company. If Holmes followed a path consistent with his views as expressed in other opinions—that legislatures may fashion laws to protect their citizenry as they see fit—he would have had to write another dissent. He also would have missed an opportunity to write his "difference in degree" analysis into the law. Since he could not garner enough votes to rule in favor of the ousted homeowners, he could not win anyway. Therefore, I suspect, he adroitly determined that if he sided with the majority, he could at least present his "difference in degree" theory in a majority opinion and get it to be the law of the land.

It was really only a "small" political compromise for such an important legal doctrine. The result would not change no matter which way Holmes voted, and he could be reasonably sure that if he wrote an opinion favoring the coal interests, he would get the votes of the majority, regardless of his rationale. His only resistance came from Justice Brandeis, who had so often been his compatriot in *Lochner*-era dissents. Of course, I do not know that this is what he thought or that this is what happened. It does, however, explain his otherwise inconsistent approach[139] and it coin-

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reasoning. In fact, they take constitutional principles, as embodied in constitutional clauses and language, and twist them for their own political ends.

138. *See, e.g.*, Weaver v. Palmer Bros. Co., 270 U.S. 402, 415 (1926); Adkins v. Children's Hosp., 261 U.S. 525, 567 (1923); Adams v. Tanner, 244 U.S. 590, 616 (1917); Coppage v. Kansas, 236 U.S. 1, 26 (1915); Adair v. United States, 208 U.S. 161, 190 (1908).

139. In addition to the inconsistency of this opinion with his *Lochner* dissent and the dissents he wrote in the cases cited in note 138, *supra*, Justice Holmes wrote the majority opinion in Block v. Hirsh, 256 U.S. 135 (1921), the preceding year. In *Block*, Holmes found that a rent control law was a reasonable means by which to deal with the housing problems in the District of Columbia during the War, even though it prohibited landlords from evicting tenants at the expiration of their leases (hence, temporarily appropriating the full use of the property at a fixed price below what the market would bring):

cides with his earlier opinions from the Massachusetts Supreme Judicial Court. How can *Pennsylvania Coal* legitimately be distinguished from *Mugler* and *Hadacheck*—cases the Court did not overrule? Can this opinion be reconciled with Holmes' majority opinion in *Block v. Hirsh*[140] or his dissent in *Lochner*? I can find no justification except his overwhelming desire to shape the takings jurisprudence into his "difference in degree" theory.

Regardless of his motivation, Holmes did make the "difference in degree" test part of American constitutional takings jurisprudence. But it did not answer all questions for all time. What

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> These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. But if to answer one need the legislature may limit height, to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. . . . Congress has stated the . . . danger to the public health in the existing condition of things. . . . Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present.

Id. at 156.

Why was it less reasonable for the Pennsylvania legislature to conclude that it promoted its citizens' health and safety by prohibiting surface subsidence from underground mining, than it was for Congress to conclude that it promoted public health by preserving the availability of affordable rental housing in Washington? Holmes spoke of a public exigency; but aren't collapsing houses a public exigency? If they collapsed due to earthquakes, would that be a public exigency? He would have had no difficulty in upholding legislation that would prevent further destruction or would help residents acquire adequate, safe housing. Holmes' emphasis on housing as being particularly imbued with the public interest also cuts against his decision in *Pennsylvania Coal*. A good argument could have been made that the Pennsylvania law was a reasonable means of dealing with housing problems because if a house does subside with the surface, the homeowners will have to find new housing. It could have been construed as a prophylactic housing measure in addition to its public safety and health purpose.

The limiting of bakers' work hours affected the economics of bakeries in New York, just as the rent control laws affected the economics of the landlords in the District of Columbia, and the Kohler Act affected the economics of coal companies in Pennsylvania. Holmes made no mention in his *Lochner* dissent that it would have been appropriate to provide compensation to the bakery owners for the diminution in their profits because the law had resulted in a taking. He did not find that the legislation in *Block* went too far. What characteristic of *Pennsylvania Coal* made it so different that diminution in value was a legitimate concern? The coal companies could still mine in any of their tracts where they would not cause the earth to collapse under a house or building. They still had control over their property—they could use it in any *lawful* manner; they could sell it and they could even exclude others from it. It would seem that underground activities causing houses to collapse are nuisances or noxious uses which the government has always been permitted to prohibit without the burden of compensation.

140. 256 U.S. 135 (1921). For a discussion of Holmes' majority opinion in *Block*, see *supra* note 139.

complicated the takings/police power debate even further was the Supreme Court's 1928 decision in *Miller v. Schoene*.[141] After *Pennsylvania Coal* seemed to *sub silentio* overrule *Mugler*'s and *Hadacheck*'s "difference in kind" rationale, the Court unanimously upheld a Virginia statute as a valid exercise of police power despite the plaintiff's claim that it took his property without just compensation. A Virginia statutory scheme required the owners of ornamental red cedar trees infected with cedar rust disease (which was not fatal to the trees) to cut them down because the disease spread to nearby apple orchards and was ruining the crop. The owners were paid for the cost of removing the trees and were allowed to retain the lumber, but they were not compensated for the value of the standing trees or the resultant decrease in market value of their property as a whole. There was no question in the Court's mind that Virginia had made a conscious decision to protect the apple orchard owners' properties at the expense of the cedar tree owners. Justice Stone wrote:

> [T]he state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been nonetheless a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the apple orchards within its borders to go unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public . . . . [W]here the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.[142]

Justice Holmes joined in that opinion. What is the difference between a state's choice to prefer apple orchards to cedar trees and a state's choice to prefer the preservation of homes and buildings to some limited kinds of mining? The only difference I can see is that the first choice promotes the economic prosperity of the state according to the Court's assessment, and the second does not. The Court never articulated that rationale. Even if that is the true basis for its decision, the Court pretended to justify its results on grounds other than the ground that the legislature made a wise

141. 276 U.S. 272 (1928).
142. *Id.* at 279-80.

economic decision in that case.[143] The Court avoided many difficulties by regarding *Miller* as a due process case; *Pennsylvania Coal*, on the other hand, was regarded as presenting a takings issue. But, "a rose by any other name would smell as sweet." It should be becoming more and more apparent that the Court has manipulated both the facts and the interpretations of constitutional language to reach its desired results, without concern for the principles behind the distinction between the due process and takings clauses. The Court left posterity with all the confusion embodied in the co-existence of *Mugler*, *Miller*, *Pennsylvania Coal*, *Block*, and *Hadacheck* as precedents. It is no wonder that takings jurisprudence has been in such chaos![144]

B. *Early Zoning and Urban Redevelopment Cases*

The 1920's saw two other interesting cases about the regulation of property. Despite the dominance of libertarian, economic due process arguments in those days, the Court garnered a majority in support of zoning regulations that clearly limited the freedom to use one's property as one might choose. Justice Sutherland, joined by Justices Holmes and Brandeis,[145] wrote a majority opinion for a divided court in *Village of Euclid v. Ambler Realty Co.*,[146] upholding on its face a zoning scheme that regulated the uses of property within delineated districts. Zoning laws were a valid form of police regulation, and they met the "public use" requirement of the takings clause. Even though a zoning and land use plan might restrict potential property uses, it would arguably

143. Holmes indicated in his *Lochner* dissent that the Court has no right to implement its own economic vision, but should respect the legislative judgment of state legislatures. Would the Court have reached the same result if the Virginia legislature had required that the cedar owners be compensated for the value of the standing trees and the diminution in property values? Or if it decided to allow the apple orchards to perish? Or finally, if it required that the affected apple trees be chopped down?

144. For just a few of the many cases and articles that refer to the unintelligibility of takings law, see Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); B. ACKERMAN, *supra* note 97, at 8; C. HAAR, LAND USE PLANNING 766 (3d ed. 1977); Bauman, *supra* note 30, at 19; Dunham, Griggs v. Allegheny County *In Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63; Epstein, *Not Deference, But Doctrine: The Eminent Domain Clause*, 1982 SUP. CT. REV. at 351, 353; Mandelker, *supra* note 30; Sax I, *supra* note 23, at 36-37.

145. Even though Holmes and Brandeis were on opposite sides of the fence in *Pennsylvania Coal*, they often sided together in *Lochner*-era dissents.

146. 272 U.S. 365 (1926).

benefit everyone by its uniform application to specific areas. Every citizen of the community benefits from having one area zoned as residential and another zoned as industrial, or one area zoned for multi-family dwellings and another for single family homes, or so goes the justificatory rationale. The Court acknowledged that it might be difficult to separate legitimate from illegitimate exercises of police power in zoning,[147] but decided to defer to legislative judgment whenever the validity of a zoning regulation was "fairly debatable."

Two years after *Euclid* the Court invalidated a specific application of a zoning law in *Nectow v. Cambridge*.[148] Nectow had been offered $63,000 for his property in Cambridge while it was zoned industrial. The city changed his zoning classification to residential, which significantly affected the value of the property. His property was adjacent to factories and railroad tracks, and the master who heard the case decided that it really did not have a practical residential use. The Court studied the zoning ordinance *as applied* to Nectow's property and could find no public interest in this use regulation. It is important to note that the Court invalidated the regulation under the fourteenth amendment due process clause, not as a taking. The requisite community interest in regulating this land was lacking. The public purpose or community interest standard was part of a due process analysis in *Nectow*. Since then, almost all zoning cases have been decided by state courts. The Supreme Court did not even agree to hear another zoning case until 1974.[149] Zoning regulations are therefore relatively invulnerable to constitutional attack.[150]

The Supreme Court encountered its next serious challenge in the tug of war between takings and police power in urban renewal

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147. The next year the Court upheld a requirement that portions of lots be left unbuilt. Gorieb v. Fox, 274 U.S. 603, 608 (1927).

148. 277 U.S. 183 (1928).

149. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

150. *See, e.g.*, Agins v. Tiburon, 447 U.S. 255 (1980), in which the United States Supreme Court affirmed a California decision upholding a zoning law that limited development to single family dwellings, outbuildings and open-space uses. There was also a density restriction that permitted only one residence per acre. The Agins claimed that the ordinance took their property without just compensation, but their plea fell on deaf ears. The Court explained that if a zoning law substantially advanced legitimate state interests and did not inflict irreparable injury on the landowner, it would be considered a valid exercise of police power and not a taking at all. *See infra* text accompanying notes 216-26 for further discussion of *Agins*.

cases. Various state courts tackled the problem before it ever got to the Supreme Court. They had almost uniformly decided that the elimination of city blight and slums was in the public interest, and therefore justified the taking of property with just compensation.[151] In 1937 the federal government enacted the United States Housing Act,[152] providing federal loans for slum clearance to build low-income housing. Naturally, states took advantage of these funds, and their courts sustained the exercises of eminent domain.[153] These properties were taken to construct public housing, thus it was easy to find a public use, as well as to justify the activity as a public health and safety measure.

An amended approach to slum clearance was taken by Congress when it enacted the District of Columbia Redevelopment Act of 1945[154] to eliminate sub-standard housing and blighted areas in the seat of government. Land would be acquired and assembled as before, but those portions of the assembled property that were not to be used for parks, schools, utilities or streets would be resold or leased to private development companies. The district plan called for at least one-third of the newly constructed dwelling units to be low-rent housing. This meant that it was possible for two-thirds of the property to be sold to private businesses at non-market prices. This was not the new plan's only difference. It also required taking more than sub-standard residential housing. It was an integrated plan for redevelopment of the entire southwest area of Washington, D.C., and required the acquisition of all pre-existing property, regardless of its current use.[155]

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151. The first case was in New York in the 1930's. The New York Court of Appeals, in New York City Hous. Auth. v. Muller, 270 N.Y. 333, 1 N.E.2d 153 (1936), decided that slum clearance was a legitimate public use, justifying the state's acquisition of property through its eminent domain power. The decision was based in part on the idea that private enterprise lacked the resources to renew old, deteriorated city neighborhoods on the large scale needed for urban renewal. Because of this market failure, eminent domain was needed to accomplish the necessary end for the public benefit.

152. Ch. 896, 50 Stat. 888 (1937) (current version at 42 U.S.C. §§ 1401-1440 (1982)).

153. 2A NICHOLS, *supra* note 2, § 7.43.

154. 60 Stat. 790, D.C. Code, 1951, §§ 5-701-5-719.

155. By 1949 the federal government enacted another type of urban redevelopment act for the states, similar to the D.C. enactment. The Act permitted resale of acquired and assembled property to private redevelopment enterprises. Housing Act of 1949 ch. 338, 63 Stat. 413 (1949) (current version at 42 U.S.C. §§ 1441-1490d (1982)). *See generally* Berger, *supra* note 39, at 215-16; Meidinger, *supra* note 27. In this plan the federal government would provide local agencies with three-quarters capitalization for urban redevelopment projects, and after the land was razed, it could be sold to private developers. There were

Owners of a relatively successful department store in the selected redevelopment area objected to the taking of their commercial property, which was not slum housing, to sell to private developers for their personal aggrandizement. In *Berman v. Parker*[156] the Supreme Court reviewed the owners' contentions that this program violated their fifth amendment protections against both deprivations of property without due process and takings for private use. Justice Douglas, writing for a unanimous Court, approved the plan while limiting the Court's role to evaluating whether Congress acted within the scope of its police powers. The legitimacy of an exercise of police power turns on whether the legislature acted with a public purpose. Public purpose was broadly defined in *Berman*:

> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it . . . . The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[157]

Not only is the definition of "public purpose" open to legislative determination, but if the legislature declares that its regulations or actions are in furtherance of the public interest, its declaration is "well-nigh conclusive." It is not for the judiciary to second guess this kind of legislative determination, except in the most extreme and outrageous situations of abuse. In other words, if the legislative ends exhibit an avowed public purpose, the legislation will be legitimated without further judicial inquiry. This radically uncritical assessment of ends is still too strict a review to apply to the selected means. Justice Douglas explained further that if a

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restrictions on how the land could be used, but development was not limited to public housing as it had been in the earlier act. Provisions were made for industrial and commercial development. This congressional action fostered many takings of property similar to that in the *Berman* case, *see infra* notes 156-66 and accompanying text, so when the Supreme Court agreed to hear *Berman*, the legitimacy of many local redevelopment projects was at stake. Most states had upheld this type of condemnation as being imbued with a public benefit (the broad public use standard), but some courts, most notably South Carolina, had not. Edens v. City of Columbia, 228 S.C. 563, 91 S.E.2d 280 (1956).

156. 348 U.S. 26 (1954).

157. *Id.* at 32-33. *Accord*, Villiage of Belle Terre v. Borass, 416 U. 1 (1974).

public purpose to a legislative enactment is apparent, the means selected to effectuate that purpose must be left to congressional determination and immunized from judicial review. This total abstention from review of social legislation represents an overwhelming confidence in the democratic legislative process.[158] This extreme deference to legislative judgment is an intricate part of takings law today.[159]

Legislative deference was not *Berman*'s only contribution to takings jurisprudence. *Berman* compounded the problem, which began with *Pennsylvania Coal*, of ignoring the distinction between the due process and takings clauses. In addition to opening the door to every sort of congressional determination of public purpose, *Berman* blended all means of effectuating police power ends by explaining that the power of eminent domain was just one of several equal means of achieving a legitimate public purpose. By describing eminent domain powers as indistinguishable from due process police powers, Justice Douglas effectively erased the "public use" requirement from the takings clause. It had seemed, before *Berman*, at least to the ordinary reader of the clause, that the takings clause contained a specific reference to "public use." Due process has always required that the government refrain from depriving a person of property without a public purpose.[160] Equating the due process clause's "public purpose" requirement with the takings clause's "public use" limitation made the latter provision superfluous. Legislation that took property without a public purpose prior to *Berman* would have failed the due process test before a takings analysis could even be performed. Using the same standard to test both the legitimacy of the government's exercise of police power and the constitutionality of the governmental right to take specific property conflates the two clauses. *Berman* did just that. Eminent domain was a means of achieving legitimate police power ends no different from any other. It was subject to no greater scrutiny than zoning regulations, prohibitions of public

158. This attitude has received great support of late by the so-called process-oriented or functionalist theorists. *E.g.*, J. ELY, DEMOCRACY AND DISTRUST (1980). It has also been subject to harsh criticism on the theory that many interests are denied effective access to the political processes that justify that kind of confidence. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981).

159. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

160. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); *see also supra* note 4 and accompanying text.

nuisances or taxation.

What *Berman* did was officially[161] approve the transfer of private property from one party to another so long as there was legislative approval.[162] Can this be viewed as anything but constitutional amendment by judicial fiat?[163] The *Berman* analysis is particularly worthy of attention because it laid the foundation for cases like *Hawaii Housing Authority v. Midkiff*,[164] where the legislature decided to redistribute land from the few to the many, and *Poletown Neighborhood Council v. City of Detroit*,[165] where I would argue the Michigan legislature decided to redistribute land from the many to the few.[166]

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161. This standard had been adopted by many states, but had never before been sanctioned by the Supreme Court.

162. I am not making an ultimate judgment on whether that transfer has a positive or negative normative valence. I only state unequivocably that it directly contravenes the language and import of the takings clause. Legal discourse was used to transform constitutional language into something inconsistent with its fundamental principles. This was not a case where the Court needed to distinguish between a taking and a regulation. This was an out-and-out taking, but the Court applied the same justificatory standards which are used for a regulation that only limits certain uses. This taking left the department store owners with no use of their property. How could the Court justify imposing a standard employed for zoning cases or other cases of regulatory interference with use of property to a case of taking? And how could the Court let that taking be for private uses in private hands? It must have been politically consistent with the dominant ideology of "urban renewal;" moving out the poor and disempowered to benefit the wealthy. If that is the case, I feel compelled to ask what could have motivated Justice Douglas to author this opinion? Is it consistent with his other judicial stands? Were his concerns for the environment and aesthetics greater than his concerns for the disempowered?

163. If the Supreme Court did, in fact, unilaterally excise the public use limitation from the takings clause, do the American people have any remedy for this emasculation of their rights?

164. 467 U.S. 229 (1984).

165. 410 Mich. 616, 304 N.W.2d 455 (1981).

166. *Berman* was used as authority for another hauntingly prescient case in New York. In Courtesy Sandwich Shop Inc. v. Port of New York Auth., 12 N.Y.2d 379, 190 N.E.2d 402, 240 N.Y.S.2d 1, *appeal dismissed*, 375 U.S. 78 (1963), taking property in a viable, old commercial neighborhood, filled with history and character (and certainly not a slum or blighted district), in order to construct the World Trade Center for private businesses and developers was constitutionally permissible. For two scholars' reaction against this decision, see Meidinger, *supra* note 27, and Epstein, *The Public Purpose Limitation on the Power of Eminent Domain: A Constitutional Liberty Under Attack*, 4 PACE L. REV. 231 (1983).

IV. The Takings Clause Renaissance: Cases After 1978

A. *Penn Central Transportation Co. v. New York City*

Before I proceed to an analysis of the Supreme Court's *Hawaii Housing Authority* decision of 1984, I would first like to discuss some of the Court's intermediary ruminations on the vagaries of the takings clause. Between *Berman* in 1954 and *Penn Central* in 1978, the Court made relatively insignificant contributions to takings jurisprudence.[167]

The true renaissance of Supreme Court interest in takings cases began with *Penn Central Transportation Co. v. New York City*,[168] where the owners of the Grand Central Terminal challenged New York City's Landmarks Preservation Law[169] for tak-

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167. Takings issues developed in some cases during this period, but while the subjects are interesting, they are not sufficiently relevant to discuss here: *see, e.g.*, City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974); National Bd. of YMCA v. United States, 395 U.S. 85 (1969); Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); United States v. Caltex, Inc., 344 U.S. 149 (1952); United States v. Causby, 328 U.S. 256 (1946).

The Court approached the takings issue directly in the 1962 case of Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962), when it used reasoning similar to that in Mugler v. Kansas, 123 U.S. 623 (1887) and Hadacheck v. Sebastian, 239 U.S. 394 (1915), in upholding an ordinance that prohibited sand and gravel excavation pit mining, even though the ordinance clearly deprived "the property of its most beneficial use." Justice Clark classified the ordinance as a safety measure within the state's reasonable exercise of its police power. Ironically, after citing *Mugler* and *Hadacheck*, Clark also discussed Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922). He conceded that a regulation could go so far as to become a taking, but determined that no evidence had been presented in the *Goldblatt* case to indicate that the mining prohibition reduced the value of Goldblatt's lot. While *Goldblatt* followed the Court's usual course of sustaining governmental exercises of police power, it left open the question of whether the Court would have found a taking if sufficient evidence had indicated that the value of the property was totally or almost totally destroyed. This case was remarkably similar to *Hadacheck*, but it was equally analogous to *Pennsylvania Coal*. No doubt the loss to Goldblatt was greater from this total mining prohibition than it was to the coal company in *Pennsylvania Coal*, where only mining likely to cause subsidence was prohibited. See Justice Brennan's dissent in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981), which is discussed later in this section, for a further twist in this type of analysis.

In 1974 the Supreme Court, in its first zoning case since 1928, upheld an ordinance limiting land use in a Long Island suburb. The ordinance mandated single-family dwellings and prohibited groups of three or more persons unrelated by blood or marriage from sharing the same living quarters (in an attempt to chase out "hippies" and students from Stony Brook). The Court reasoned that governments have great discretion in the exercise of their police power of zoning. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

168. 438 U.S. 104 (1978).

169. New York City, N.Y., 2 Admin. Code 474, ch. 8-A, §§ 205-1.0-207-21.0 (1976).

ing their property without just compensation or due process, in violation of the fifth and fourteenth amendments. Penn Central had leased its airspace over the Terminal to UGP Properties to construct a cantilevered, multi-story office building. The lease gave Penn Central one million dollars a year while the building was under construction, and guaranteed it at least three million dollars a year during the term of the fifty-year extendable lease.[170] The Landmarks Law required approval by the Landmarks Preservation Commission prior to any construction; this approval had been denied to Penn Central.

Justice Brennan wrote a lengthy majority opinion for six members of the Court[171] affirming the New York Court of Appeals' conclusion[172] that the law did not unconstitutionally take Penn Central's property, nor deprive it of the property without due process. Justice Brennan started his opinion by explaining that the purpose of the takings clause was to distribute the costs of public projects, and to prevent some individuals who happen to own property which the government needs from having to bear the full burden and costs of such projects alone. The costs of underwriting public programs by providing land are distributed through the takings clause's compensation requirement;[173] in this manner they are transferred from the single property holder to all citizens equally as taxpayers or bondholders. Even with this clear view of purpose, the Court had been unable to develop a "set formula"[174] for determining when justice and fairness require compensation and when they do not. Recognizing that every case ultimately involves an ad hoc, factual inquiry, the Court identified factors that needed to be balanced in order to determine whether

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170. *Penn Central*, 438 U.S. at 116; *id.* at 141 (Rehnquist, J., dissenting).

171. The majority included Justices Stewart, White, Marshall, Blackmun and Powell. *Id.* at 107. Justice Rehnquist filed a dissent in which Chief Justice Burger and Justice Stevens joined. *Id.* at 138.

172. 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977), *aff'd*, 438 U.S. 104 (1978).

173. Justice Brennan quoted from Armstrong v. United States, 364 U.S. 40, 49 (1960): "[The] Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Central*, 438 U.S. at 123. Justice Rehnquist also quoted this passage in his dissent. *Id.* at 140.

174. *Id.* at 123-24. The "no set formula" language originated in Justice Clark's opinion in *Goldblatt*, 369 U.S. at 594, and has been used repeatedly in Supreme Court decisions after it was reiterated in *Penn Central*.

a restriction on land use is invalid because the government failed to pay for the losses it caused.[175] These factors were: the economic impact of the regulation (especially on the claimant's "distinct investment-backed expectations"); the character of the governmental action;[176] the necessity of the restriction to the effectuation of a substantial public purpose; and the possibility of an unduly harsh impact on the owner's use of his property.[177] After measuring the Landmarks Law against these criteria, the majority concluded that the law did not effect a "taking": "The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford [other economic opportunities]."[178]

In this first modern reassessment of the takings clause, Justice Rehnquist evaluated the situation differently. Rather than merely prohibiting certain uses, he saw the New York law as placing affirmative duties on the owner of a landmark to preserve the property at his own expense.[179] To the dissenters, the very large burdens of landmark preservation were clearly imposed on a few site owners for the benefit of the community as a whole. Even though every possible profitable use of the property was not destroyed, Penn Central lost millions of dollars in potential revenues due to the law's prohibition against alterations without approval.[180] Jus-

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175. In addition to the cases it cited for these factors, the Court relied heavily on articles by Professors Michelman and Sax. *Id.* at 128. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

176. This analysis would involve a number of questions: Did the government acquire or take possession of the specific property to facilitate a unique public function? Was there a physical invasion of the property? Was the interference with property rights a police power regulation to promote the general health, safety or welfare or to abate a public nuisance?

177. It is interesting to remember that the constitutional origin of the "unduly harsh" or "unduly oppressive" standard is found in the seminal due process case of Lawton v. Steele, 152 U.S. 133 (1894). *See supra* notes 116-19 and accompanying text.

178. *Penn Central*, 438 U.S. at 138. This conclusion on the takings clause issue comports fully with the due process standard for evaluating the legitimacy of a police power exercise found in Mugler v. Kansas, 123 U.S. 623 (1887). Justice Holmes' initial blending of the concepts thus came to full bloom in *Penn Central*.

179. *Penn Central*, 438 U.S. at 140, 146 (Rehnquist, J., dissenting).

180. Justice Rehnquist acknowledged that there may have been other acceptable designs for the airspace, but that none had been approved. He noted that Penn Central's plan to build the multistory complex above the terminal met all zoning, height and building code restrictions of the city. *Id.* at 145-46.

tice Rehnquist argued that there were only two situations in which government destruction of a property's use value would not be compensable: when the prohibited use was a nuisance, or when the law that prohibited a use was a comprehensive plan that benefited as well as burdened the restricted property owner. The first exception is distilled from cases like *Mugler, Hadacheck* and *Goldblatt*; the second is borrowed from Justice Holmes' language in *Pennsylvania Coal* requiring "an average reciprocity of advantage,"[181] which has often been quoted in zoning cases.[182] Because in Justice Rehnquist's analysis the *Penn Central* case fits neither of the exceptions,[183] and there was clearly an "inability of the owner to make a reasonable return on his property [which] requires compensation under the Fifth Amendment,"[184] Rehnquist would have remanded the case to determine if the transferable development rights[185] given to Penn Central constituted a "full and perfect equivalent for the property taken."[186]

The differences between the majority and dissent did not rest on their interpretations of the law, but on their evaluations of the facts. Justice Brennan saw a comprehensive plan where Justice Rehnquist did not. Brennan did not see a destruction of a "reasonable return" on the property where Rehnquist did. Justice Brennan noted how the building could still be used as it had been for the last sixty-five years and that, therefore, the law did not interfere with Penn Central's "primary expectation concerning the use of the parcel."[187] Justice Rehnquist found that the law destroyed the ability of the owner to get a reasonable return on his property. When there is substantial damage to the property's income-generating potential, a taking depends upon the character

181. Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922).

182. *Penn Central*, 438 U.S. at 143-47.

183. Nothing about the proposed Penn Central structure would have constituted a nuisance or been a noxious use. What Penn Central wanted to do was perfectly legal but for the prohibition in the Landmarks Law. For all adjacent sites, this construction would have been a permissible use. Justice Rehnquist used this fact to illustrate how this exposed the landmark site owners to unjust and unequal burdens with no reciprocal benefits. *Id.* at 146-47.

184. *Id.* at 149.

185. The New York law provided landmark owners with transferable development rights, an economically valuable substitute for the restrictions imposed on the property's use. *Id.* at 113-14.

186. *Id.* at 152.

187. *Id.* at 136.

of the invasion, not upon whether every possible use has been destroyed. For Justice Brennan the character of the invasion was the character of the government's action combined with the extent of the restriction on the property's total use; for Justice Rehnquist the character of the invasion was measured only by the dollars or profits lost. Nonetheless, both agreed that if all possibility of a reasonable return was destroyed, there would be a compensable taking.

B. *Andrus v. Allard*

The next year the Court took two more cases that raised takings questions. In *Andrus v. Allard*[188] the Court denied commercial Indian artifact owners' claims that regulations of the Interior Department[189] which prohibited them from selling legally obtained Indian artifacts made from eagle feathers (and those of other protected species of birds) constituted a taking without just compensation. The sellers had acquired the articles prior to the promulgation of the protective regulations, and they claimed that their property was now unmarketable. After being criminally prosecuted for violating the acts, commercial Indian artifacts dealers and appraisers sought declaratory and injunctive relief in federal district court in Colorado. A three-judge court found that the regulations were invalid with respect to items that had been preexisting and legally obtained, and enjoined interference with the trade, sale or barter of those items. A unanimous Supreme Court reversed.[190]

Justice Brennan's opinion for the Court relied heavily on his *Penn Central* "exposition of the Takings Clause."[191] There is no requirement that the government regulate by purchase,[192] and the

188. 444 U.S. 51 (1979).

189. The regulations were promulgated by the Secretary of the Interior in response to the Eagle Protection Act, 16 U.S.C. § 668(a) (1940) and the Migratory Bird Treaty Act, 16 U.S.C. § 703 (1918). They prohibited the import, export, purchase, sale, barter, or offer for purchase, sale, trade or barter of any protected birds, parts, nests or eggs lawfully acquired prior to the effective date of the act. 50 C.F.R. §§ 21.2(a), 22.2(a) (1978). The possession or transportation of these artifacts was not prohibited.

190. Chief Justice Burger concurred in the judgment without a written opinion. *Allard*, 444 U.S. at 68.

191. *Id.* at 65.

192. Justice Brennan seemed most enamored of the *Pennsylvania Coal* language that made this point: "Government hardly could go on if to some extent values incident to

takings clause preserves governmental regulations that meet the dictates of justice and fairness. Although Brennan reiterated the view that takings judgments must be made on a case-by-case basis and that there is no set formula for these decisions, he made some very interesting assertions about the types of property rights which are protected:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety. . . . It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking. . . . [L]oss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim.[193]

Justice Brennan emphasized his points by citation to the *Mugler* line of cases and Justice Brandeis' dissent in *Pennsylvania Coal*. He even distinguished Justice Holmes' *Pennsylvania Coal* finding that the Kohler Act's prohibition of certain mining amounted to a taking because it created a near total loss of profit opportunity. Brennan said that *Pennsylvania Coal* involved more than lost profits; there was also a physical restriction against removal of the coal.[194] In *Allard* there was no such physical restriction: Appellees had the right to possess, transport, donate or devise the commercially restricted items. This argument seems hardly credible, which probably accounts for its allocation to a footnote; but based on its inclusion in the opinion and the text quoted above, most readers would conclude that the Court's majority would not find an unconstitutional taking based upon impaired profitability or destruction of a property's best use.[195]

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property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal*, 260 U.S. at 413. This standard was also cited in *Penn Central*, 438 U.S. at 124.

193. *Allard*, 444 U.S. at 65-66 (citations omitted).

194. "It should be emphasized that in *Pennsylvania Coal* the loss of profit opportunity was accompanied by a physical restriction against the removal of the coal." *Allard*, 444 U.S. at 66 n.22.

195. This seemed in agreement with the tone of Goldblatt v. Town of Hempstead,

Even though he cited his *Penn Central* standard for evaluating takings, which had thoroughly confused takings and due process issues, Justice Brennan appeared in *Allard* to gravitate toward a due process standard for evaluating police power regulations. He cited all the appropriate due process cases and tried to distinguish *Pennsylvania Coal.* He recognized the constitutional principles involved, but he was not quite prepared to undo the history of constitutional distortion that had occurred. Nonetheless, reading *Allard's* language and focusing on *Penn Central*'s result, one gets the sense that the Court might have been laying a foundation for renewing the distinction between takings and due process deprivations.

Why did Justice Rehnquist join in this opinion after dissenting in *Penn Central*?[196] Aren't those two positions inconsistent?[197] In *Penn Central,* the landmarks law restricted a profitable, desirable use; here, the regulation against sale or trade restricted a profitable, desirable use. Justice Rehnquist found the first to be a taking, but not the second. These positions seem inherently incompatible, especially when applying a "bundle of rights" analysis. Justice Rehnquist affirmed his commitment to the "bundle of rights" theory of property law by his citation to *United States v. General Motors Co.*[198] in his *Penn Central* dissent;[199] but is there a legitimate distinction between the loss of the single strand of property rights to unconditionally dispose of or use the Terminal's airspace in *Penn Central* and the loss of the single strand of property rights to unconditionally dispose of or use the property in *Allard*? Could it

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369 U.S. 590 (1962), *see supra* note 167, but turned out to be an erroneous predictor of future cases, as seen in the Court's subsequent action, and Justice Brennan's plurality dissent in San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981), discussed *infra* notes 227-42 and accompanying text.

196. Questions are also raised as to why Justice Stevens joined the *Penn Central* dissent and *Allard* majority. Why did Chief Justice Burger concur in the *Allard* judgment but refuse to join in the opinion?

197. Is this inconsistency due to his inclination to use due process standards for police power regulations rather than to require compensation? I think not, because such a position would have been even more inconsistent with his *Penn Central* dissent.

198. 323 U.S. 373, 377-78 (1945).

199. *Penn Central,* 438 U.S. at 142-43 (Rehnquist, J., dissenting): "[T]he term 'property' as used in the Taking Clause includes the entire 'group of rights inhering in the citizen's . . . relation to the physical thing, as the right to . . . possess, use and dispose of it. . . . The constitutional provision is addressed to every sort of interest the citizen may possess'." (emphasis and citation omitted).

be that Justice Rehnquist was simply not sympathetic to the relatively small economic loss suffered by the artifacts dealers compared to the substantial financial losses to huge business enterprises in *Penn Central*? Do Justice Rehnquist's opinions turn on how much money is involved or the power of the party whose property is affected, rather than on any real legal distinctions?[200]

C. *Kaiser Aetna v. United States*

These questions were raised in another case decided in 1979. Justice Rehnquist wrote the six-person majority opinion in *Kaiser Aetna v. United States*,[201] in which the Court determined that the imposition of a navigational servitude on plaintiff's marina was a taking for which just compensation was due. Plaintiffs, lessees of a private Hawaiian pond,[202] consulted the Army Corps of Engineers before excavating a channel between that body of water and a navigable waterway in order to create a private marina for an adjacent community of approximately 22,000 people. They "invested millions of dollars" to complete the project. Then, when the marina was opened, the United States declared the channel and marina navigable waters subject to a navigational servitude and public access.

The majority conceded that it was within Congress' commerce clause power to promote navigation and to open the marina to the public, but it must first pay just compensation for the taking. It was a taking because it destroyed Kaiser Aetna's "right to exclude others," a valuable property right within the famous "bundle."[203] For purposes of the takings clause, the right to ex-

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200. I think so. I believe that Justice Rehnquist's decisions are politically and jurisprudentially motivated to maintain power in the hands of the wealthy and business interests. I call this Rehnquist's "money empowers" theory of constitutional property law. It is this type of political decisionmaking that undermines the principles of our Constitution. It is particularly assaultive of the whole structure of our legal system when those who employ this methodology, like Justice Rehnquist, are brilliant in camouflaging their true justification and values in traditional legal reasoning or discourse.

201. 444 U.S. 164 (1979). Justice Blackmun wrote a dissent in which Justices Brennan and Marshall joined. *Id.* at 180.

202. It is interesting that Kaiser Aetna leased their 6,000 acres from the Bishop Estate, one of the major Hawaiian landholders whose properties were the subject of Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). *See infra* notes 282-91 and accompanying text.

203. "In this case, we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the

clude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[204] Apparently the "right to exclude" stick is more valuable than the "right to dispose of" stick that was determined to be in *Allard*.[205] Somehow I cannot help but believe that the key to these takings cases for Justice Rehnquist and some other members of the Court focuses on the amount of money invested and by whom.[206] Justice Rehnquist[207] repeatedly emphasized the great sums of money expended in converting this pond to a marina on the assumption that it was private property.[208] He spoke of "millions of dollars" here and in his *Penn Central* dissent, but the amount of loss to the

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Government cannot take without compensation" (footnote omitted). *Kaiser Aetna*, 444 U.S. at 179.

204. *Id.* at 176.

205. Yet, in writing his *Penn Central* dissent, Justice Rehnquist, quoting from United States v. General Motors Co., 323 U.S. 373, 377-78 (1945), listed the major aspects of property as: "the right to possess, use and dispose of [it]." He never made mention of this valuable "right to exclude others," but specifically gave credibility and weight to the "right to . . . dispose of." *Penn Central*, 438 U.S. at 142-43 (Rehnquist, J., dissenting). The year after *Kaiser Aetna*, the "right to exclude others" also lost its preeminent status through Justice Rehnquist's opinion in PruneYard Shopping Center v. Robins, 447, U.S. 74 (1980).

206. Another interesting observation is that this case and Andrus v. Allard, 444 U.S. 51 (1979), where the Court reversed the judgment of the lower court, were cases brought in federal court. In cases brought in state courts, the Supreme Court has affirmed the state court decisions. Could this be related to Justice Rehnquist's view of federal-state relations? *But see* Lorretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (reversing a New York Court of Appeals decision which held that a cable television company's installation of its cable facilities, occupying portions of appellant's roof and the side of her apartment building, did not amount to a taking).

207. I feel compelled to make a disclaimer of sorts here. It may seem as though I think that Justice Rehnquist has the entire Court in the palm of his hand or hypnotized so that the other Justices jump through his hoops. Despite such appearances, I am aware that Justices Rehnquist and Burger are not the only voices on the Court. I must admit, however, that I have continually been surprised at how often their views seem controlling.

208. He also noted that the marina builders may have detrimentally relied on the failure of the Corps of Engineers' assent to the construction by mentioning that building the channel would potentially subject the property to public access through a navigational servitude:

> While the consent of individual officials representing the United States cannot 'estop' the United States, . . . it can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property.

Kaiser Aetna, 444 U.S. at 179. I find this argument unpersuasive because so much that we do is subject to the power of the government to establish laws as it sees fit in the public interest, and in most cases our expectancies must fail if inconsistent with the government's legitimate choice of action.

dealers in *Allard* was not worthy of protection or note. In *Kaiser Aetna* this great expenditure caused "the Government's attempt to create a public right of access to the improved pond to *go far beyond* ordinary regulation or improvement for navigation."[209]

D. *PruneYard Shopping Center v. Robins*

In 1980 the Court decided another case relevant to this inquiry, *PruneYard Shopping Center v. Robins*,[210] in which the takings issue was secondary or tertiary to issues of state-federal relations and free speech. High school students sought to enjoin the owners of a huge shopping center from denying them access to the mall to circulate political petitions. California's highest court interpreted its state's constitutional free speech provisions to require these shopping center owners to permit this activity so long as it was not disruptive. The owners appealed on the grounds, inter alia, that such a rule took their property without just compensation in violation of the fifth and fourteenth amendments. The United States Supreme Court unanimously denied the owners relief and sustained the California Supreme Court.[211] The Court applied the *Penn Central* multifactor balancing test, evaluating the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. Justice Rehnquist, writing for the majority, said: "There is nothing to suggest that . . . this sort of activity will unreasonably impair the value or use of [the] property as a shopping center."[212] In other words, there was no evidence of interference with reasonable investment-backed expectations. Although the invasion was clearly physical, the Court relied on the fact that it was temporary.

The majority even noted that the owner's right to exclude others was not an "[essential right] to the use or economic value of their property."[213] Why, when the right to exclude unwanted people from private property was an essential right to the owners

209. *Id.* at 178 (emphasis added) (citing *Pennsylvania Coal*, 260 U.S. 393 (1922)).

210. 447 U.S. 74 (1980).

211. *Id.* Justice Rehnquist wrote the majority opinion, which enabled him to further expound on his ideas about federalism and states' rights. There were separate concurrences by Justices Blackmun, Marshall, Powell and White. *Id.*

212. *PruneYard*, 447 U.S. at 83.

213. *Id.* at 84.

of a marina open to a community of approximately 22,000 people (Rehnquist's emphatic conclusion in *Kaiser Aetna*), was the right to exclude not an essential right less than six months later to the owners of a shopping center open to the public (in Pruneyard)? Was it that the free speech implications of the California case outweighed any private property interest?[214] Or was it a Rehnquistian analysis that relied more on the loss of investment expectations than the destruction of sticks of rights in the property bundle? Justice Rehnquist backtracked on his *Kaiser Aetna* assertions about the essential nature of the right to exclude others—now not every destruction of the right to exclude others is a taking. The question is whether destruction of the right results in destruction of profits or economic return. This inquiry does not protect the "dominion" interest in property which some scholars have defined as the focus of the Burger Court's property decisions.[215] It does protect capital investment—a dollars and cents issue. The proper methodology is not a multifactor balancing test, but a test measured by potential profits or dollars lost.

E. *Agins v. City of Tiburon*

In 1980 the Court seemed ready to decide a volatile takings issue concerning remedies for regulatory takings.[216] Instead of finally deciding whether inverse condemnation is a constitutionally required remedy for excessive regulation of property, the Court skirted the issue in *Agins v. City of Tiburon*.[217] Justice Powell wrote

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214. Probably not, since the Federal Constitution apparently permits the exclusion of political speakers from privately owned shopping centers. *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Hudgens v. NLRB, 424 U.S. 507 (1976).

215. *See, e.g.*, Costonis, *supra* note 29; Radin, *supra* note 25; VanAlstyne, *supra* note 25.

216. Eminent domain scholarship was riddled with debates about the proper remedy for excessive regulation. Some scholars argued that overregulation was a violation of due process and the appropriate remedy was invalidation of the violative ordinance or law. Others contended that overregulation was a "regulatory taking" and therefore, the burdened landowner was entitled to damages equal to the just compensation he would have received had the government initiated condemnation proceedings. *See supra* note 30 for articles which give a general understanding of the issues raised and the general debate. The latter remedy is called inverse condemnation, because the court action is initiated by the landowner instead of the government to force the condemnation. If the regulation is excessive, but not deemed a taking, the remedy is an action in mandamus or for a declaratory judgment invalidating the offensive provision. It is not within the scope of this paper to elaborate on the debate.

217. 447 U.S. 255 (1980).

the opinion for a unanimous Court. The City of Tiburon prepared a general plan for land use and open-space land development which included zoning ordinances with density restrictions that limited the Agins' use of their five acre tract to the construction of one to five single-family dwellings.[218] The Agins, who had purchased their property prior to the adoption of the plan and ordinances, sued the city for two million dollars in damages for inverse condemnation,[219] and for a declaration that the zoning ordinances were facially unconstitutional because they violated the just compensation clause.

The California Supreme Court decided that the zoning ordinances did not deprive the Agins of their property without just compensation and that, in any event, the only remedies for excessive exercises of police power restricting land use are mandamus and declaratory judgment.[220] The United States Supreme Court never reached the issue of the appropriate remedy for a regulatory taking, because it agreed with the California court's assessment that the suburban San Francisco zoning ordinances did not on their face effect a taking.[221] Justice Powell explained that takings questions require a "weighing of private and public interests,"[222] because a finding that a zoning ordinance "took" a landowner's property would redistribute the burden of a police power exercise from one private property holder to the public at large. Zoning or land-use takings occur "if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."[223] In other words, a taking occurs if there is a diminution in market value that includes preventing the best use of land, extinguishing a fundamental attribute of ownership, or impairing reasonable investment expectations.[224] Zoning ordinances that assure careful development of

218. The city was required to prepare this plan by state law. Cal. Gov't Code §§ 65302(a), (e) (West Supp. 1979). The zoning ordinances at issue were: Tiburon, Cal., Ordinances Nos. 123 N.S. and 124 N.S.(June 28, 1973).

219. The city abandoned its original attempt to condemn the property through eminent domain proceedings. *Agins*, 447 U.S. at 257 n.1.

220. Agins v. City of Tiburon, 24 Cal.3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

221. The zoning ordinances were tested on their face rather than as applied because the Agins had not attempted to get a development plan approved. *Agins*, 447 U.S. at 260-63.

222. *Id.* at 261.

223. *Id.* at 260 (citations omitted).

224. *Id.* at 262.

residential property are legitimate exercises of police power. They are also fair to property owners who benefit from restrictions on neighboring lands even as they are burdened by restrictions on their own.[225] Justice Powell, apparently with the Court's agreement, avoided the remedies issue in *Agins* and sustained an open-space zoning ordinance[226] merely by reiterating takings buzzwords and not really saying anything interesting or new.

F. *San Diego Gas & Electric Co. v. City of San Diego*

After the Court failed to answer the remedies issue in *Agins*,[227] hopes for its resolution hinged on *San Diego Gas & Electric Co. v. City of San Diego*.[228] The result was a mixed bag of opinions. Justice Blackmun's majority opinion represented the conclusion of five members of the Court[229] that the Supreme Court lacked jurisdiction to decide the case. It found the California opinion to be inconclusive on the takings matter and required a remand to resolve the factual dispute concerning whether there was an uncompensated taking. Having determined that there was no "final judgment" below, the Court found itself lacking jurisdiction under federal law.[230] Justice Rehnquist concurred separately, agreeing that jurisdiction was lacking, but also lending his support to "much of what is said in the dissenting opinion of Justice Bren-

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225. This is set forth by Justice Holmes' "average reciprocity of advantage" analysis in Pennsylvania Coal v. Mahon, 260 U.S. 393, 415 (1922).

226. These types of ordinances support environmental concerns, but they often work as exclusionary zoning measures by limiting zoned-area property ownership to the very wealthy.

227. Gus Bauman explained the tension in the property bar about the expected resolution of the inverse condemnation question. Bauman, *supra* note 30. *Agins* was so important that amicus briefs were filed by the federal government, 23 organizations, 16 states, and 105 California cities and counties. *Id.* at 47. Six days after the Court handed down the disappointing *Agins* opinion, it agreed to hear San Diego Gas & Elec. v. City of San Diego, 447 U.S. 919 (1981), which again presented the inverse condemnation issue. Ironically, both *Agins* and *San Diego Gas* were before the Court in the same conference, but *San Diego Gas* was not accepted for review until eight months after the jurisdictional statement was filed. *Id.* at 97. San Diego Gas and Electric Company was one of the amicus curiae in the *Agins* case. For the *San Diego Gas* arguments there were amicus briefs from the federal government, 18 organizations, 18 states and 26 California cities and counties. *Id.* at 47.

228. 450 U.S. 621 (1981).

229. Justice Blackmun was joined by Chief Justice Burger, Justices White, Rehnquist and Stevens. *Id.*

230. 28 U.S.C. § 1257 (1982).

nan."[231] That vigorous dissent carefully set out Justice Brennan's revised theory of takings law. It was joined by Justices Stewart, Marshall and Powell. If Justice Rehnquist's vote is added, a majority of the Court would seem to support the remedies espoused by Justice Brennan.[232] It is not surprising to find Justice Rehnquist supporting this dissenting opinion, because his written opinions suggest that he is more likely to define governmental regulatory activity as a compensable taking. What is surprising is Justice Brennan's stance.

San Diego Gas and Electric Company purchased 412 acres as a site for a nuclear power plant and convinced the city to change the area's zoning from agricultural to industrial use. In 1973 the city rezoned much of that acreage back to agricultural and open-space uses, and planned to purchase the power company's land by eminent domain; however, the purchase was contingent upon the passage of a bond issue. The bond issue lost and San Diego Gas sued the city for six million dollars in damages for inverse condemnation. The power company won three million dollars at the trial level, but after a long journey through the California court system, the case was finally resolved in the city's favor with a denial of inverse condemnation damages.

In his dissent, Justice Brennan reasoned that:

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it. From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally as great from creating a wildlife refuge through formal condemnation or increasing electricity production through a dam project that floods private property. . . . It is only logical, then, that government action other than acquisition of title, occupancy or physical invasion can be a "taking," and therefore a *de facto* exercise of the power of eminent domain, where the effects completely deprive the owner of all or

231. *Id.* at 633 (Rehnquist, J., concurring).

232. It is important to remember that Justice O'Connor has replaced Justice Stewart since that time and has not expressed her views on inverse condemnation. Rehnquist may also qualify his agreement in aspects yet unexplained. Nonetheless, it is possible that other members of the *San Diego Gas* majority, who failed to reach the merits because of the alleged jurisdictional problem, would agree with Justice Brennan's formulation.

most of his interest in property. . . .

In my view, once a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.[233]

Justice Brennan cited with approval Justice Holmes' "difference in degree" formulation from *Pennsylvania Coal* and found that the California court's conclusion that there is no such thing as a regulatory taking for the purposes of just compensation was contrary to this precedent. He was persuaded that a finding of a regulatory taking, even though it was potentially temporary, was consistent with other Court cases that recognized temporary, reversible takings as compensable.[234]

What could have prompted this dissent? Is it consistent with Justice Brennan's other opinions? His previous takings opinions applied a multifactor balancing test implying that there was a point at which regulations could go too far and become takings, but he never seemed to find a case that reached that far.[235] It is understandable why Justice Rehnquist would agree that San Diego Gas should have been compensated for its alleged multi-million dollar loss, but why Brennan? Dollar amounts of loss did not seem dispositive to him before. He specifically said so in *Allard*.[236] What else was there in *San Diego Gas*? How is this different from *Kaiser Aetna* where he dissented?[237]

The character of the government action seems less intrusive in *San Diego Gas* than it did in *Kaiser Aetna*, and the economic impact in each seems comparable. In *San Diego Gas*, the power company did not even lose the "right to exclude." Why is it different from *Allard* where the artifact owners' retention of the right to possess and transport their property precluded the regulation

233. *San Diego Gas*, 450 U.S. at 652-53.

234. The temporary/permanent question was prescient of the discussion in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

235. In the past, Justice Brennan only cited Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), for its language about how government could not afford to regulate by purchase. In Andrus v. Allard, 444 U.S. 51 (1979), he distinguished Justice Holmes' *Pennsylvania Coal* majority opinion and even cited Justice Brandeis' dissent with approval. In *San Diego Gas* he cited Holmes' opinion as firm authority for the idea of compensable regulatory takings. *San Diego Gas*, 450 U.S. at 647-50 (Brennan, J., dissenting).

236. *Allard*, 444 U.S. at 59-60.

237. *Kaiser Aetna*, 444 U.S. at 179 (Brennan, J., dissenting).

from being a taking in Justice Brennan's analysis? There is no indication that San Diego Gas was deprived of the rights of possession or exclusion, the rights to sell, trade or devise the land, or even the right to use it within limitations. They had as many rights under this zoning law as Penn Central had under the Landmarks Law, and in reality, both had equally frustrated investment-backed expectations, if that is to be the measure. These laws did not infringe on individual (or even corporate) autonomy to the degree required to invoke the principles supporting the takings clause. Maybe the property's best or most profitable use as a nuclear power plant site was destroyed, but Justice Brennan could not have been more clear in *Allard* that loss of the most profitable use does not necessarily constitute a taking.[238] Have the constitutional principles respecting autonomy and fair distributions of government-imposed burdens on private resources been completely subordinated to questions of pure economic profit and loss or political power?

The public purpose of an open-space zoning regulation is as undeniably legitimate as a landmarks preservation law.[239] San Diego Gas gets the benefit of the open-space use as much as any other resident. This is the rationale that has consistently supported the impositions of zoning laws, as well as landmark preservation laws, without requiring governmental compensation. Why did Justice Brennan's inquiry arrive at a different conclusion in *San Diego Gas* than it did in *Penn Central* or *Allard*?[240] Has Justice Brennan changed his mind about what he believes to be the underlying principles?[241] Does he now see different interests at stake in the takings questions? Would he decide *Penn Central* differently today on its facts? How about *Allard*?

G. *Loretto v. Teleprompter Manhattan CATV Corp.*

The *San Diego Gas* plurality's odd twist in takings reasoning, though admittedly only part of a dissent, was followed by another

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238. *Allard*, 444 U.S. at 59-60.

239. *Accord, Agins*, 447 U.S. at 261.

240. Or, for that matter, *Loretto*, 458 U.S. at 419.

241. Bauman, *supra* note 30, at 98-99, congratulated Brennan on his opinion in *San Diego Gas*, and stated that it is the epitome of Brennan's civil libertarian perspective. Needless to say, I disagree.

bizzare decision. *Loretto v. Teleprompter Manhattan CATV Corp.*[242] was as strange in its result as in its alignment of Justices. Justice Marshall wrote the majority opinion which re-established a per se rule[243] for takings; this rule is based on physical invasions, regardless of their magnitude, their degree of intrusion, or their level of interference with investment-backed expectations. It is true that some older cases used a physical invasion test to determine if there had been a taking. While the rationale of the *Loretto* majority opinion might make sense in the abstract, it seems very inappropriate when applied to the facts of this case. I can only presume that the majority was haunted by a slippery slope notion when it envisioned the consequences of a different rule.[244] Nonetheless, the issue and facts did not have to be framed in the manner selected by the Court. The structure the Court imposed on the problem tainted the outcome.

A New York law to facilitate tenant access to cable television[245] required landlords of residential property to permit cable installation on the rooftops of their rental property and prohibited them from charging their tenants for this service. Regulations promulgated pursuant to the statute provided a one dollar payment by the cable company to the landlord for the "use" of the roof space. Installations involved the connection of directional taps and a cable slightly less than one-half inch in diameter.[246] An

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242. 458 U.S. 419 (1982). Justice Brennan, who managed to get Justice Marshall's vote for his *San Diego Gas* dissent, could not join Justice Marshall's majority in this opinion. Instead he joined Justices Blackmun and White in their dissent.

243. Professor Costonis wrote a long article discounting this per se rule and proposing a presumptive takings model. Costonis, *Presumptive and Per Se Takings: A Decisional Model For the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983).

244. Justice Marshall supported his conclusion that *any* physical "occupation is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner," *Loretto*, 458 U.S. at 436, by the following logic:

> The traditional rule [that any physical occupation or invasion is a taking] also avoids otherwise difficult line-drawing problems. Few would disagree that if the State required landlords to permit third parties to install swimming pools on the landlords' rooftops for the convenience of the tenants, the requirement would be a taking. If the cable installation here occupied as much space, again, few would disagree that the occupation would be a taking. But constitutional protection for the rights of private property cannot be made to depend on the size of the area permanently occupied.

Id. at 436-37 (footnote omitted).

245. N.Y. EXEC. LAW § 828 (McKinney Supp. 1982).

246. *Loretto*, 458 U.S. at 443 (Blackmun, J., dissenting).

apartment building owner, who had purchased the building with these affixed attachments, filed a class action suit against the cable company for trespass in which she alleged that the New York law effected a taking without just compensation. The city intervened and prevailed through the New York court system. The New York Court of Appeals decided that the law did not perpetrate a taking because there was no interference with any reasonable investment-backed expectations and it did not have an excessive economic impact.[247] The United States Supreme Court reversed the "no taking" finding.

Justice Marshall claimed that he was applying the *Penn Central* multifactor balancing test by making an ad hoc, factual inquiry into the economic impact of the regulation, its extent of interference with investment-backed expectations and the character of the governmental action. Yet, he did not balance these factors at all. The balance was short-circuited by his conclusion that a government-authorized physical occupation is always a compensable taking regardless of any other considerations.[248] The other factors of the balancing test only come into play to assess the proper amount of compensation. This is a rigid rule.

Justice Marshall believed he was compelled to find a taking by the bundle of rights theory of property. He explained that when the government permits a permanent physical occupation of property, it effectively destroys a portion of each of the strands (rights) in the bundle, rather than just interfering with a single strand.[249] This analysis seems very strained. Mrs. Loretto was not deprived of her right to lease the building to tenants for profit, to possess it, to dispose of it, or to exclude others from it. It is true that she could not rent the space on the roof occupied by the unobtrusive cable equipment, but there was absolutely no evidence that she intended to rent it, or that there was even a market for it.[250] How

247. Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 440 N.Y.S.2d 843, 423 N.E.2d 320 (1981), *rev'd* 458 U.S. 419 (1982).

248. *Loretto*, 458 U.S. at 426.

249. *Id.* at 435.

250. Certainly if the Court in Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), did not find in favor of the regulated sand and gravel pit owner because there was insufficient evidence that the property lost all its marketable value, there is insufficient evidence in *Loretto*. But Justice Marshall does not require any evidence of loss or diminution in value, or even harm. A physical invasion is per se harmful; its very existence is "going too far."

is *Loretto*'s physical invasion different from *Pruneyard*'s? Where was the physical invasion of the marina in *Kaiser Aetna*? Why don't the regulations in *Agins*, *Penn Central* or *Allard* cut across all strands of the property bundle as much as the regulation in *Loretto*? In all cases some freedom of property use is curtailed, but in none is the property "taken" in the layperson's understanding of the word. Could this "physical invasion" test be a distinction with less than a real difference?[251] There was no physical invasion here—merely a simple police power regulation with minimal (if any) effect on autonomy or rights in property.

Despite Justice Marshall's slippery slope argument, isn't this case the epitome of form over substance? Why couldn't the Court frame the issue in terms of a regulation that required an affirmative duty (that is, for residential landowners to permit tenants access to cable television) or prohibited a detrimental use (charging tenants for cable television access) rather than as a law that permitted a permanent physical occupation? And why is this regulation permanent when other regulatory takings are temporary? Couldn't the law change and the cable company be required to remove its equipment?[252] The characterization predetermined the result. Maybe it was so framed because if the Court approached it as a possible "regulatory taking," instead of a physical occupation, it would have been required to resolve the inverse condemnation issue that it had thus far avoided.

Justice Blackmun wrote a caustic dissent that received Justices

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251. I would venture to guess that it is a reasonable rule which, if correctly applied, reflects the principles embraced by the takings clause. But its application to this case is so blatantly erroneous that I question its utility. If a majority of the Justices on the United States Supreme Court can be convinced that a regulation requiring landlords to provide cable hook-ups for their tenants is a physical invasion, then the test is as worthless as the power of lawyers to manipulate it.

252. It is also interesting that Justice Marshall categorized the "taking" as permanent. If it were regarded as a "regulatory taking," the government action could be viewed as temporary because the government could rescind the statutory permission. *See San Diego Gas*, 450 U.S. at 636-61 (Brennan, J., dissenting). Justice Marshall concurred with this reasoning in the *San Diego Gas* dissent, but he would not apply it in *Loretto*. In addition, temporary physical invasions have been sanctioned by the Court as not effecting takings, where they did not interfere with the use value of the property. *See PruneYard Shopping Center*, 447 U.S. at 82-85. It would be preposterous to claim that the cable installation interfered with the rental value of Mrs. Loretto's apartment building. She even bought the building with the cable equipment already installed! Rather, there is no doubt that it enhanced the property's value. Why isn't this an appropriate regulation on which to apply the "average reciprocity of advantage" test of Holmes and the zoning laws?

Brennan's[253] and White's support. He accused the majority of "reduc[ing] the constitutional issue to a formalistic quibble," "resorting to bygone precedents," and composing "an archaic judicial response to a modern social problem."[254] Justice Blackmun recognized that the majority's construction of the issue would "encourage litigants to manipulate their factual allegations to gain the benefit of its *per se* rule."[255] The constitutional inquiry must determine whether the State has sanctioned some minimal use of an owner's property. "Any intelligible takings inquiry must also ask whether the *extent* of the State's interference is so severe as to constitute a compensable taking in light of the owner's alternative uses for the property."[256]

This is where constitutional takings jurisprudence stood in 1984 when the Court decided *Hawaii Hous. Auth. v. Midkiff*.[257] The Court had been trying to articulate a workable formula for drawing a predictable (or even reasonably predictable) line between compensable takings and noncompensable exercises of police power. A multifactor balancing test was established in *Penn Central*, but was eroded by Justice Rehnquist's "money empowers" test, Marshall's "per se physical invasion" test and Brennan's retreat in his *San Diego* dissent, evincing a "deprivation of owner's expected use" test. The Court repeatedly avoided deciding the issue of constitutionally required remedies for regulatory takings. Questions of what constituted a public use and standards of judicial review had been put on the back burner in Supreme Court jurisprudence since the mid-1950's. These issues had been left solely to the state courts. The Court finally confronted them in *Hawaii Housing*. However, before reviewing the Court's resolution of the issue of the constitutional legitimacy of a land redistribution scheme that transferred privately-owned land to other private individuals, it would be helpful to study a seminal Michigan case involving a private transferee taking.

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253. Why did Justice Brennan dissent here after writing what he did in *San Diego Gas*? Was *San Diego Gas* an aberration? Was it the result of a particularly persuasive law clerk who left before *Loretto* was decided? Or are these results reconcilable? Justice Brennan regarded the *San Diego Gas* case as a regulatory taking. Why didn't he see this the same way?

254. *Loretto*, 458 U.S. at 442, 446, 455 (Blackmun, J., dissenting).

255. *Id.* at 451.

256. *Id.* at 453-54 (emphasis in original).

257. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

V. POLETOWN AND HAWAII HOUSING AUTHORITY

A. *Poletown Neighborhood Council v. City of Detroit*

In the early 1980's, this country was in the throes of a violent recession; one of the hardest hit by this economic downturn was the Detroit automobile industry. From this backdrop, *Poletown Neighborhood Council v. City of Detroit*[258] epitomizes the pain and disgrace that desperate economic straits impose on individuals and communities.

The *Poletown* case arose from a suit by a neighborhood council and area residents to enjoin the city of Detroit from condemning[259] their residential property in order to transfer it to General Motors (GM) for the construction of an automobile assembly plant. With the decline of American automobile sales, GM decided that it was absolutely necessary to construct a new assembly plant designed and tooled for a more competitive species of car. It had already announced in 1983 that it intended to close its Cadillac Assembly and Fisher Body plants, which employed over 10,000 area residents,[260] and that it was seeking a location for its new factory. Aware that labor costs were noticeably lower in the non-unionized South, GM investigated building its plant there. Detroit, which was coping with catastrophic unemployment,[261] recognized that if the new GM facility was constructed inside the Detroit metropolitan area it could retain 6,000 automotive industry jobs, which, by the multiplier effect, could create 20,000 jobs in services and allied industries.[262] The new plant would also re-

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258. 410 Mich. 616, 304 N.W.2d 455 (1981).

259. The city was granted eminent domain power in an Economic Development Corporations Act. MICH. COMP. LAWS § 125.1601-125.1636 (Supp. 1981) (MICH. STAT. ANN. § 5.3520(1)-5.3520(36) (Callaghan 1982)).

260. This employment statistic was taken from Lewis, *supra* note 27, at 907, 924 n.106, citing Betzold, *Push Comes to Shove*, Detroit Metro Times, Nov. 13, 1980, at 8, col. 1.

261. The general unemployment rate in the Detroit area was at this time 18%. For black residents the rate was nearly 30%. *Poletown*, 410 Mich. at 647, 304 N.W.2d at 465 (Ryan, J., dissenting). In January 1980, Chrysler's Dodge Main plant in this same area of Detroit closed its doors due to the economic strain on the auto industry causing the loss of 3,000 jobs. A large Uniroyal Tire plant had also recently closed. Bukowczyk, *The Decline and Fall of a Detroit Neighborhood: Poletown vs. G.M. and the City of Detroit*, 41 WASH. & LEE L. REV. 49, 60-61 (1984).

262. *Poletown*, 410 Mich. at 650-51, 304 N.W.2d at 467; Bukowczyk, *supra* note 261, at 61. Ultimately, GM reduced its expected hirings to 3,000 jobs. Blonston, *Poletown: The Profits, the Loss*, Detroit Free Press (Special Magazine Supplement), Nov. 22, 1981, at 56-57.

present fifteen million dollars in property tax revenues.[263] GM was fully cognizant of its position of power. It offered to remain in the Detroit area (something it did not need to do) if the city would rapidly (1) provide it with a rectangular parcel of land consisting of 450-500 acres, adjacent to railroad lines, yards, and with highway access,[264] (2) prepare and grade the selected site for construction and then sell it to GM at a discount price,[265] (3) supply all necessary utility connections and (4) give it certain tax breaks.[266] Detroit's Community and Economic Development Department surveyed nine sites that ostensibly met GM's predefined criteria and determined that only one was feasible, a 465-acre area consuming 320 acres of Detroit proper and 145 acres of the adjacent community of Hamtramck.[267] Within this area was a neighborhood called "Poletown" because of its ethnic Polish roots and its site as the cultural center of Detroit's Polish community. Despite its name and its substantial composition of elderly Polish families (thirty to thirty-five percent), Poletown was a racially and ethnically mixed, urban community.[268] It was half black (forty to sixty percent), and it was also populated by Filipinos (two percent), Ukranians (two percent), Yeminis (one to four percent), southern whites (two percent) and ethnic Albanians primarily from Yugoslavia (five to ten percent).[269] Assembly of the land for the proposed Central Industrial Park (CIP) required the acquisition of

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263. At least this was the conclusion of the *Draft Environmental Impact Statement: Central Industrial Park, The Cities of Detroit and Hamtramck, Michigan*, at II-5 (Oct. 1980) [hereinafter cited as *Draft Environmental Impact Statement*]. This $15 million figure ignored the fact that GM negotiated a tax abatement for 12 years.

264. GM demanded title to the entire site and the rail marshaling yard by May, 1981. *Poletown*, 410 Mich. at 655, 304 N.W.2d at 469 (Ryan, J., dissenting).

265. GM eventually paid $8 million for 465 acres that it cost the city over $200 million to purchase and clear. 410 Mich. at 656, 304 N.W.2d at 469 (Ryan J., dissenting).

266. *Id.* at 650, 304 N.W.2d at 467; Schwartz, Note, *Real Property—Eminent Domain—Expansion of the Public Use Doctrine to Include the Alleviation of Unemployment and Revitalization of the Economic Base of a Community*, 28 WAYNE L. REV. 1975, 1976 n.3 (1982).

267. *Poletown*, 410 Mich. at 636-37, 304 N.W.2d at 460 (Fitzgerald, J., dissenting). Hamtramck is an urban community completely surrounded by Detroit.

268. Poletown was far from the heights of prosperity. With the deindustrialization of Detroit in the 1950's and 1960's, Poletown lost a lot of its younger population. It also was hurt by the economic blight of the 1970's. Poletown was depressed, as were many other American communities in the late 1970's and early 1980's, but it was not a slum. Bukowczyk, *supra* note 261, at 57-60.

269. *Draft Environmental Impact Statement, supra* note 240, at K-1 to K-4; Bukowczyk, *supra* note 261, at 62; Lewis, *supra* note 27, at 908-09.

1,176 structures—the old Dodge Main plant, 1,362 households and 143 other businesses and buildings including 16 churches, 3 schools and a hospital[270]—and the displacement of more than 4,200 people.[271] After negotiations with GM, the Detroit Common Council approved the CIP boundaries in July 1980; the city started acquiring the property;[272] and a "Project Plan" and "Draft Environmental Impact Statement" were prepared for submission to the Detroit Economic Development Corporation. By the end of October 1980, the city's Community and Economic Development Department sent a recommendation to the Detroit Common Council to approve the plans for the CIP. The council did, declaring the project "a public purpose . . . for the use and benefit of the public."[273] The mayor affixed his signature on November 3, 1980.

For those residents that could not be persuaded to voluntarily relinquish their homes, the city utilized Michigan's recently enacted "quick take" law, which provided that a condemning agency's determination of necessity for a taking was binding on a court, and that title could pass even before a compensation settlement had been reached.[274] An organization of area residents, churches and businesses formed to resist the takings and defend their neighborhood. They received support from Ralph Nader's team and other sympathizers.[275] The community, however, was divided over the issue. Condemnation had the support of GM, the federal Department of Housing and Urban Development

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270. Bukowczyk, *supra* note 261, at 62; Lewis, *supra* note 27, at 909-10.

271. The original estimate of affected people was 3,438, as reported in Justice Fitzgerald's dissent in *Poletown*, 410 Mich. at 645 n.15, 304 N.W.2d at 464 n.15. This revised figure of actual dislocatees is cited in Mansnerus, *supra* note 15, at 419 n.50.

272. Four-fifths of the property was acquired by voluntary settlements. Bukowczyk, *supra* note 261, at 64; Lewis, *supra* note 27, at 909 n.14.

273. *Poletown*, 410 Mich. at 653, 304 N.W.2d at 468 (Ryan, J., dissenting). This dissent contains the timetable within which the City completed the entire project from conception to final approval.

274. *Poletown*, 410 Mich. at 658, 304 N.W.2d at 470 (Ryan, J., dissenting); MICH. COMP. LAWS §§ 213.51-213.77 (Supp. 1981) (MICH. STAT. ANN. §§ 8.265(1)-8.265(27) (Callaghan Supp. 1982)).

275. Bukowczyk, *supra* note 261, at 64; Lewis, *supra* note 27, at 908 n.9; Mansnerus, *supra* note 15, at 419 n.47; Blonston, *supra* note 262. Protests were organized, some including acts of civil disobedience for which protesters were arrested, but the groups could not even save the Immaculate Conception Church, one of the area's landmarks, from condemnation. Bukowczyk, *supra* note 261, at 65.

(HUD),[276] the Carter and Reagan Administrations, United Auto Workers union, many young families in the area, and the Archdiocese of Detroit. Finally, the Poletown Neighborhood Council and ten residents filed suit in Wayne County Circuit Court in October 1980. After a ten-day nonjury trial, the trial court found for the city concluding that the takings were necessary, and dismissed the complaint on December 9, 1980. Through an accelerated appeals process, the Michigan Supreme Court heard the case before there was a lower appellate court decision. As quickly as the trial court resolved the issue, the Michigan Supreme Court handed down its per curiam opinion, acting ten days after oral argument.

The short majority opinion narrowed the question to whether the taking was for a public or private use. Following *Berman v. Parker*[277] and one of its own cases,[278] the Michigan Supreme Court acknowledged its limited role in evaluating a legislative determination of public purpose or public use.[279] Despite the strong evidence of public purpose, the Court imposed an allegedly stricter scrutiny on the taking: it required clear and significant proof of public benefit in response to the allegations that the condemnations were primarily benefiting GM, a private party. Nevertheless, the taking satisfied this heightened scrutiny because of its importance to the people of Detroit and the state.[280]

Two dissents, by Justices Fitzgerald and Ryan, followed. They both agreed that public use and public purpose were not synonymous. Taxation requires a public purpose; eminent domain requires a public use. Michigan law, while using the terms incautiously, distinguished between the concepts, even though the United States Supreme Court did not. Justice Fitzgerald pointed out that Michigan always used a "narrow" interpretation of public use, except in the slum clearance cases, which were clearly distinguishable because their purpose was to clear the slums—when that was finished their purpose was served. Permitting a taking in this case would require a broad public use interpretation unprecedented in Michigan law, that would rest on a primary purpose of taking land to sell to a private business. Until the land is success-

276. HUD even agreed to fund the buy-out.
277. 348 U.S. 32 (1954).
278. Gregory Marina, Inc. v. Detroit, 378 Mich. 364, 144 N.W.2d 503 (1966).
279. *Poletown*, 410 Mich. at 632-33, 304 N.W.2d at 458-59.
280. *Id.* at 634-35, 304 N.W.2d at 459-60.

fully cleared and sold to GM, the "public use" of the taking is not achieved. This is not a true "public use," but an incidental public benefit.

Justice Ryan was even more forceful. He attributed the entire project to GM—it was their plan, their decision where and what to build, and their deadlines. No obligations of any kind were placed on GM as to their timetable for completing construction,[281] or whether they had to hire Detroit residents or even a specific number of workers. The dissenters insisted that in cases like this, where the primary beneficiary of a taking is a private business, the government was without constitutional authority to expropriate land.

The case brings to the surface the twists that have inveigled into our constitutional value system at an unarticulated level. Detroit's submissive posture to GM's dominant, powerful economic leverage contorts the constitutional values written into takings clauses across the nation. Private corporate interests are translated into public interests, and then true public interests (like community cohesion) are ignored and overlooked. *Poletown* is a Michigan case decided on Michigan's interpretation of its own constitution, but it has broad implications for our society, other states and our federal takings clause. We must ask what our values are and why. We must ask what our constitutions protect and what principles they respect, but will not bend for. Michigan's constitution arches its back until it lays prostrate in the *Poletown* decision. Economic interests, as defined by an oligopolistic corporate enterprise, are the highest values. The community was faced with problems of great magnitude that involved economic necessity, but economic necessity need not have been resolved by one corporation's vision that conveniently improves corporate profits. Why weren't other options taken? Why did economic power equate perfectly with political power? *Poletown* represented a survival of the fittest story, where the fittest was a megacorporation that could wield political clout in the face of a desperate community. It illustrated a brutal social Darwinism, retreating from advancements we have made as

281. While the city lived up to its obligations by expediting the condemnations and acquisition of the land, GM's construction has been continuously delayed. The original expectation of opening the plant in the summer of 1983 had been postponed until at least the summer of 1985. Bukowczyk, *supra* note 261, at 68; Lewis, *supra* note 27, at 926 n.112.

a civilized people; it was utilitarianism where utility was defined in terms of corporate, economic prosperity instead of social cohesion and mutual advancement.

B. *Hawaii Housing Authority v. Midkiff*

The *Poletown* case received extensive national media coverage.[282] It probably came to the attention of some members of the United States Supreme Court prior to *Hawaii Housing Authority v. Midkiff*.[283] Could the Supreme Court's decision in *Hawaii Housing Authority* have been a comment on, or covert support for, government exercises of eminent domain primarily for "private benefit" as in *Poletown*? Was *Hawaii Housing Authority* a perfect vehicle for shaping law in the Burger/Rehnquist image, just as *Marbury v. Madison* was for Justice Marshall and *Pennsylvania Coal* was for Justice Holmes?[284]

In 1967 the Hawaii legislature enacted the Land Reform Act[285] which permitted the government to condemn large landholdings[286] and sell them to current, private lessees living in sin-

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282. *E.g.*, CBS Reports, "What's Good for General Motors . . . ," 1981; Safire, *Poletown Wrecker's Ball*, N.Y. Times, Apr. 30, 1981, at A31, col. 7; Wylie, *A Neighborhood Dies so GM Can Live*, The Village Voice, July 8-14, 1981, at 1, col. 1.

283. 467 U.S. 229 (1984). Even if it had not, it was cited and distinguished in Appellant's Brief at 34-35, *Hawaii Hous. Auth.*, 467 U.S. 229 (1984).

After reviewing a draft of this Article, Professor Richard Parker of Harvard Law School commented that although it is clear that I, as author of this Article, am very interested in the relation between *Poletown* and *Hawaii Housing Authority*, he did not find this small piece of evidence sufficient enough to conclude that the United States Supreme Court was also thinking of *Poletown*, or a situation like it, when it decided the Hawaii case. He may be right, in which case the entire premise of this last Section is fallacious. I do not believe he is (although I recognize that it is a powerful point), but I possess no further evidence to support my position. In addition to the news media coverage and the case being cited to the Court in the briefs, I would note that anyone doing research into recent decisions about "public use" or "private transferees" at the time the *Hawaii Housing Authority* case was being decided could not miss the plethora of articles mentioning the *Poletown* case and its implications. It would have been impossible to do a respectable job of researching these issues without confronting the impact of any decision in the Hawaii case upon cases like *Poletown*. I have sufficient respect for those persons selected as United States Supreme Court judicial clerks to believe that they found these articles and the *Poletown* case. I leave it up to you to decide whether, after this information was brought to their attention, the Court considered it in deciding the *Hawaii Housing Authority* case.

284. If my speculations are correct, this would be another example of the "mastermind" theory I referred to earlier and discuss again at the end of this Section. *See supra* note 137 and *infra* note 316 and accompanying text.

285. 1967 Hawaii Sess. Laws Act 307, as amended HAWAII REV. STAT. ch. 516 (1977).

286. The act only applied to development tracts of at least five acres.

gle-family dwellings on one acre residential lots. The Act was a reaction to Hawaii's unique, concentrated landholding system[287] with its roots in a feudal tenure system that was originally controlled by one island high chief, subinfeudated to lower chiefs, and then again to their tenants and farmers. Many homeowners in Hawaii owned their homes, but leased the land beneath them. Leases ran for fifty-five or ninety-nine years, and provided that rentals were to be renegotiated after twenty-five to thirty years. At renegotiation time, land rents often increased 400 to 1000 percent for the next ten to fifteen years of the remaining twenty-five to thirty year term, and could then be increased again.[288] The Hawaii legislature determined that the oligopolistic landholding patterns were inimical to the public health, welfare, and safety of Hawaiian citizens, justifying reform of the system. They used the state's power of eminent domain, rather than its police power of regulation, at the request of the large landholders who convinced the legislature that the involuntary nature of condemnation absolved them of the excessive tax burdens that would attach to voluntary sales.[289] It was these potential tax consequences of sale, due to the properties' low or zero bases, that motivated many large landholders to retain rather than sell their land interests in the first instance.

The complicated statutory condemnation scheme provided that if a certain number of owners of single family houses who leased in the same tract petitioned the Hawaii Housing Authority (HHA), alleging their desire and ability to purchase the land underneath their residences, the agency would hold a hearing to determine whether there was a "public purpose" justification for condemning the land. If it would serve a public purpose to condemn the property, HHA was empowered to purchase the land, by voluntary or forced sale, and immediately offer to sell it in fee

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287. Justice O'Connor explained in her majority opinion that:

> [W]hile the State and Federal Governments owned almost 49% of the State's land, another 47% was in the hands of only 72 private landowners. . . . The legislature further found that 18 landholders, with tracts of 21,000 acres or more, owned more than 40% of this land and that, on Oahu, the most urbanized of the islands, 22 landowners owned 72.5% of the fee simple titles.

Hawaii Hous. Auth., 467 U.S., at 232. *See also* 1975 Hawaii Sess. Laws Act 184, § 1, and Act 186, § 1 (legislative findings) [hereinafter cited as 1975 Hawaii Sess. Laws].

288. 1975 Hawaii Sess. Laws, *supra* note 287.

289. *Hawaii Hous. Auth.*, 467 U.S., at 235.

simple to the current tenant, with retention of a right of first refusal for resales within the next ten years. The Act made provisions for up to ninety percent financing, and for the disposition of property when the tenant residing on it refused to purchase. After trustees of the Bishop Estate[290] were required by the HHA to sell certain properties in conformance with the Hawaii Land Reform Act, they sought a declaratory judgment and injunction in United States district court to invalidate the Act as violative of the "public use" requirement of the fifth and fourteenth amendment takings provisions.[291] The district court found that the legislative exercise of authority was consistent with the "public use" requirement and the state's police power, thereby granting summary judgment for the defendant HHA.[292]

The trustees appealed to the Ninth Circuit Court of Appeals where they prevailed.[293] Judge Alarcon interpreted the Hawaii statute as a blatant effort "to take the private property of *A* and transfer its ownership to *B* for his private use and benefit."[294] He traced the history of the public use requirement and found that it reflected James Madison's all-consuming fear that a majority of unlanded citizens would tyrannize the wealthy landowners.[295] The Hawaii legislation was *the very thing* the takings clause was intended to prevent. Judge Alarcon spent a substantial portion of his opinion distinguishing categories of takings that had been permitted despite the "public use" limitation, even though they at first glance might seem to transfer property from *A* to *B*, and specifically distinguished *Berman v. Parker*.[296] Alarcon argued for more stringent judicial review in eminent domain than in other police power exercises. Judge Poole's concurrence acknowledged

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290. The Bishop Estate was one of the largest landholdings. As an aside, it was the owner of the converted Hawaiian lagoon leased to Kaiser Aetna in Kaiser Aetna v. United States, 444 U.S. 164 (1979), discussed *supra* text accompanying notes 201-09.

291. Other aspects of the case are not relevant to this Article.

292. Midkiff v. Tom, 483 F. Supp. 62 (D. Hawaii 1979). The named defendants were the commissioners of the Hawaii Housing Authority, its executive director and the HHA itself. Intervenors included multiple community associations seeking to undermine the oligopolistic landholding system.

293. Midkiff v. Tom, 702 F.2d 788 (9th Cir. 1983), *rev'd*, Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). The case was argued to the panel in October, 1981, and a decision was not handed down until March 28, 1983. The decision was split two to one.

294. *Id.* at 790.

295. *Id.* at 791-93.

296. 348 U.S. 32 (1954).

his firm agreement with Judge Alarcon's assessment of the public use issue, but he wrote separately to answer dissenting Judge Ferguson's assertions that the federal court should have abstained from deciding the issue.[297]

Judge Ferguson dissented because he believed that interests of comity and federalism counselled the federal courts to abstain from deciding the merits of this case.[298] He also felt compelled to dissent because he believed the majority compounded its error of reaching the merits by incorrectly characterizing the facts, and misunderstanding the relevant law. Ferguson argued that *Berman* and other cases required that a state legislative determination of public use be given the greatest deference.[299] He determined that the Hawaii Land Reform Act was constitutional.

The United States Supreme Court unanimously reversed the Ninth Circuit.[300] Justice O'Connor wrote her first takings clause opinion. After discussing the abstention issue and deciding that the federal courts had not erred in reaching the merits, she quoted extensively from *Berman* concerning the deference owed by courts to legislative determinations of public use and public purpose.[301] She reworded *Berman*'s conclusion that the " 'public use' requirement is . . . coterminous with the scope of a sovereign's police powers. . . . Where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."[302] She noted that the Act's purpose to regulate oligopoly reflected a classic exercise of police power; once the purpose was determined to be proper, the legislature's choice of means was not subject to review.[303] A compensated taking motivated by a private purpose of taking from *A* solely to benefit *B* could not meet the legitimate governmental purpose test,

297. *Id.* at 798-99 (Poole, J., concurring).

298. *Id.* at 807-19 (Ferguson, J., dissenting).

299. *Id.* at 813.

300. Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (Marshall, J., took no part in the decision).

301. *Id.* at 238-39. The Court explained: "Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the takings power." *Id.* at 243-45.

302. *Id.* at 239-40.

303. "[I]t is only the takings purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." *Id.* at 243-45.

but that was not an issue with the Hawaiian legislation because it was clearly not enacted to benefit a particular class of identifiable individuals, but to attack the social evil of oligopoly.[304]

What does *Hawaii Housing Authority* mean in terms of takings jurisprudence? It adopts an extremely broad definition of "public use,"[305] reaffirms *Berman*'s integration of the public use and public purpose doctrines, and removes determinations about governmentally required private property transfers from judicial consideration.

It is no mystery to students of our current Supreme Court that Justice O'Connor's views are closely aligned to Justices Rehnquist's and Burger's. Why would she, Rehnquist and Burger uphold a land redistribution scheme that distributes from the few to the many, or from the wealthy to the less wealthy? This sort of social and economic legislation does not usually rally their support. Is the Constitution so absolute and definitive that they were compelled to uphold this plan despite their views about property rights? Have they changed their views, or can we infer ulterior motives for the *Hawaii Housing Authority* decision?

I am again led to my "mastermind theory" of judicial decisionmaking. Regardless of statements by jurists that certain decisions are required by the Constitution, I contend that the Consti-

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304. It may seem ironic that here the Court's regular majority block is assailing oligopoly and jeopardizing politically and economically powerful interests, but it was necessary in order to find a legitimate public use/purpose. That majority would have gone to great pains to avoid saying that redistribution was a legitimate public use for the eminent domain clause. Had it not included a concept like oligopoly, it may have had to call redistribution a proper purpose, and thus threaten more politically powerful entities than it was willing to. By referring to oligopoly, it never directly assented to redistribution; and by extensively describing how this case turned on Hawaii's *unique* land allocation system, it left an opening to distinguish it from other redistributive plans. The combination of the oligopoly language and reference to Hawaii's uniqueness could effectively prevent this case's application to any other land or property redistribution scheme.

305.

> The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. 'It is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use.'

Id. at 243-44 (citation omitted).

This language is reminiscent of the 1860 Massachusetts Supreme Judicial Court opinion in Talbot v. Hudson, 82 Mass. 417 (1860). *See supra* text accompanying note 84.

tution has become a wholly malleable document that compels no particular result. The most it requires is that constitutional decisions conform to a style of legal opinion drafting, a form of legal discourse that rationalizes results by reference to constitutional provisions and precedents. Any drafted opinion that can muster majority support on the Court becomes what the Constitution "compels." The result or rule can differ entirely from a former court's "interpretation," or even from the same court's earlier pronouncements. The requirement of reference to constitutional precedent serves only to put rhetorical reins on total judicial abandon. Constitutional decisionmaking has become political decisionmaking—political results translated into legal rationalizations. Justices ask themselves how they want their society structured; what theory they believe would promote the dominant ideology of the day; what they think the rules *ought* to be; and what they want the result in a particular case to be. They know where power lies, and they know how to keep it there. Most judges, whether appointed or elected, are politicians, or have strong political allies that have campaigned for their appointment or financially aided their campaigns. They know they have authority to sustain the hegemonic power structure that put them where they are, and to do so in the guise of value neutrality and constitutional constraint. Not all judges have these values, but I believe that a primary motivation in constitutional interpretation has become reinforcement of the dominant power structure. Assuming this is the case, is the Hawaiian land distribution scheme an exception to that rule? Does it defy the dominant power structure by redistributing wealth? Why was it affirmed?

I have found three reasons. The first is that, while land was redistributed in Hawaii, it was hardly redistributed to the poor or disempowered. The organizations and homeowners who leased from these large estates and benefited in the Hawaii litigation represented upper and middle class families.[306] Most of them owned expensive homes in exclusive developments. The problem in Hawaii was a simple market failure to properly allocate land among those who could afford it. No party in enacting the legislation was

306. *See* Brief for Appellant at 35, Brief for Appellees at 67-68 n.169, 75, *Hawaii Hous. Auth.*, 467 U.S. 229. *See also The Supreme Court, 1983 Term*, 98 HARV. L. REV. 87, 225-36, 232 n.66, 233 n.76 (1984).

advocating land distribution to those, who by reason of social, economic or political conditions, were unable to afford it even if it was available. The Hawaii scheme was not even an example of the Rawlsian difference principle at work,[307] wherein primary goods are distributed in a manner that benefits the least advantaged. The newly entitled homeowners were, in fact, both economically and politically powerful. The approved redistribution system did not noticeably alter the political power structure and hence was not a "dangerous" decision for the United States Supreme Court to uphold.[308]

Second, the *Hawaii Housing Authority* decision is quite consistent with the dominant Supreme Court and conservative "Republican"[309] notions of federalism and states' rights which accede to state determinations of issues that impact on federally guaranteed rights.[310] This Supreme Court has declared that states have the power to define what property rights will be protected by the federal constitution.[311] Therefore, in continuing to shift the balance

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307. J. RAWLS, A THEORY OF JUSTICE, ch. II, §§ 10-13 (1971).

308. I would speculate that had the scheme given land rights and their concomitant political power to the traditionally under-represented and disempowered lower classes, it would have been so threatening to the Court's majority that the Justices would have found in favor of the original landed aristocracy. They could have adopted an approach similar to Judges Alarcon's and Poole's in the Ninth Circuit, or the *Poletown* dissents' arguments, that the challenged scheme was no more than a blatant private transfer from *A* to *B*, which is forbidden by our Constitution. Or they could have decided that economic redistribution may only be done through taxation and that eminent domain is never a constitutional means by which to redistribute. Eminent domain is available to permit the government to acquire land for specific public uses, not to give it away to new owners.

If they could not get a majority to agree on a particular rationale, but still did not want to permit a distribution from the wealthy to the truly poor and powerless, they could have resorted to a procedural solution. The Court could have refused to take the case, or it could have argued that the federal courts should have abstained from deciding the merits. In other words, there were legitimate, available legal tools, as there are in every case, to reach either desired end. If the redistribution (and the rule it required) was politically uncomfortable for the majority, it could have found it improper.

309. In this context, "Republican" refers to one of the two major United States political parties currently led by President Ronald Reagan and committed to a party platform that strongly advocates states' rights and the minimalization of federal power.

310. *See generally* text accompanying notes 210-15. *Accord* Howard, *The States and the Supreme Court*, 31 CATH. U.L. REV. 375 (1982); Bartow, *Safeguarding Federalism—Changing Conceptions of the Judicial Role: From NLC to EEOC and Beyond*, 55 TEMP. L.Q. 889, 943 (1982).

311. *See, e.g.*, Texaco, Inc. v. Short, 454 U.S. 516, 525 (1982); Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 161 (1980); Flagg Bros. v. Brooks, 436 U.S. 149, 160 n.10 (1978); Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

from federal power to state power, the Court may have decided it was best to permit the Hawaii legislature this unbridled freedom. Clearly this position grants states unfettered discretion in the use of their eminent domain powers, but I think it was only an acceptable, ancillary effect of the Court's decision. I believe they had a different motivation for finding in favor of the Hawaiian legislation.

Because these first two reasons acted as added incentives to approve the Hawaiian takings, the majority was able to use this case as a vehicle to promote its economic and political ideology. By doing this in a case in which the result seems incompatible with the majority's philosophy, the majority was better able to disguise the political nature of its decision. The Court presented the result in a manner that is unlikely to be duplicated, but the rule it provided fosters the majority's political inclinations and applies to a multitude of situations. Of course, the majority structured the opinion so that it appears compelled by legal rules. The irony is that a decision like *Hawaii Housing Authority* can ultimately be unanimous. Since at first blush the result seems contrary to the majority's ordinary leanings, it is likely (or possible) that it is a result compatible with the usual dissenters' philosophies and politics. Those holding minority views on the Court may have approved this result because they actually believe in dismantling oligopolies and/or redistributing wealth or land to the poor or many. By couching the opinion in terms of disrupting oligopolies, and agreeing to a result that appeared to be redistributive, Justice O'Connor was able to get their assent. (How could they dissent to the decision if they approved of the scheme)? The majority made certain, however, that the results would be limited by their emphasis on the uniqueness of the Hawaiian situtation. In the meantime, the case gave them a perfect opportunity to promote a rule that would have a political effect they desired. This third reason for deciding *Hawaii Housing Authority* in this fashion is by far the most shrewd. It is also purely speculative. This is how I envision the underlying rationale; perhaps because it sparks the flames of my "mastermind" theory of judicial opinion writing.

To reiterate, as applied to *Hawaii Housing Authority*, the majority, who would ordinarily be ill-disposed to permit the transfer

of land from the wealthy few to the many,[312] did just that, and attributed its decision to compelled compliance with constitutional doctrine. In this fashion, the Court gave its *sub silentio* approval to the kind of private transfers that occur in cases such as *Poletown*. The *Hawaii Housing Authority* decision could have been written as the appeal from *Poletown*. As did the Michigan majority in *Poletown*, it required deference to the legislature,[313] collapsed the concept of public use into public purpose, and approved compulsory transfers between private entities. What the United States Supreme Court may have done is disguise within the confines of an unlikely case a rule that permits an economically dominant and politically powerful private enterprise to coerce a manipulable government into using its eminent domain power for the firm's benefit. It may then acquire private property for its own use and profit with incidental, if any real, benefits to portions of the public. A broad definition of "public use" has historically benefited private business and economic development rather than the less politically or economically powerful groups.[314]

The advantage to the Court of deciding a case with a factual setting such as that in *Hawaii Housing Authority*, as opposed to that in *Poletown*, was that it could avoid the more complicated issue of whether there are certain property interests (like community) that should be inalienable, or privileged and protected by stricter standards for takings.[315] Moreover, by deciding the *Hawaii Housing Authority* case instead of one like *Poletown*, the Court could avoid the more politically and morally sensitive issues of dislocating people from their homes and community, thereby destroying a discrete ethnic, racial or socio-economic community. The rule that a legislative determination of public use/purpose in the context of an eminent domain transfer to a private party is sacrosanct is now

312. Of course, as explained above, this was only a select group of "the many," and hence more palatable to our conservative judiciary in the Supreme Court.

313. The Michigan Supreme Court allegedly required a heightened scrutiny of the legislative determination, but as the dissenting Justices and some commentators noted, it was heightened in name only and not in reality or effect.

314. *See supra* notes 81-95 and accompanying text for an illustration of how the broadened concept of public use enlarged the coffers of private mills, railroads and utilities in the past. *See supra* notes 146-66 and accompanying text for an explanation of how private developers were enriched by urban redevelopment plans in the name of a broad public use principle. Is *Poletown* at all different when viewed in this historical perspective?

315. *See infra* text accompanying notes 319-36.

firmly entrenched, so the Court can avoid taking *Poletown*-type appeals to make that point, while artfully avoiding the more difficult social, economic, political and moral issues. *Hawaii Housing Authority* was a safe case to decide, in that people did not have to be uprooted from their homes, and no real economic or social redistribution occurred (only a market failure was corrected). This clever approach to constitutional decisionmaking, where a judge writes an opinion that has an unsympathetic result in the case *sub judice* in order to promote a rule that furthers the dominant political ideology in most other cases, is what underlies my so-called "mastermind theory."[316]

VI. POLETOWN VERSUS HAWAII HOUSING AUTHORITY

What is the confluence of *Poletown* and *Hawaii Housing Authority*? Where do their courses diverge? Can these cases be distinguished, or must both exist if one exists? If they must exist together or not at all, is it better to have both or neither?

While *Hawaii Housing Authority* did not specifically proclaim that redistribution from the wealthy to the poor is a "public use/purpose," it theoretically supported a legislative program designed to achieve that end.[317] I would like to think that our Constitution has room for this type of legislatively-sanctioned social and economic reorganization.[318] Minimally, in order to

316. See, for example, the discussion of Justice Holmes' strategy in *Pennsylvania Coal, supra* notes 128-44 and accompanying text; *see also* Justice Rehnquist's approach in *PruneYard, supra* notes 210-15 and accompanying text. This was the same technique used by Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), where he denied his Court's jurisdiction to decide the case before him in order to promote his theory of the supreme authority of the Court to review the constitutionality of legislation. If the Court does something that appears humbling or admits to a lack of power or takes what appears to be a stance that is contrary to one's expectations based on the Justice's or Justices' views as expressed in other opinions, it is reasonable to question what further benefit is derived from that posture. In many cases that particular stance or acquiescence may be a disguise for promoting a subtler political-social-economic philosophy that mimics the Court's and society's dominant ideology and political power structure.

317. Under *Hawaii Housing Authority* it would probably be necessary to argue that the situation was highly unique (like Hawaii's feudal tenure system) and that it served a public purpose other than pure redistribution (like oligopoly).

318. As an aside, I would like to elaborate on the genesis of this Article. After first reading *Hawaii Housing Authority* in U.S. Law Week, it was my original intention to argue for the legitimacy of extending the *Hawaii Housing Authority* rule to a similar system of oligopolistic land control in West Virginia and Appalachia generally. By employing analogous provisions, I hoped to argue that the West Virginia legislature could draft legislation

achieve this result, a court would have to employ a rule of total deference to state and local legislative determinations, as in *Hawaii Housing Authority*. Yet, that same rule of unquestioning deference justifies economic reorderings from the many to the few,

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that returned previously severed subsurface mineral rights to the surface owners who resided on the property. Such a scheme would conform to the *Hawaii Housing Authority* requirements so long as the legislature could justify the property transfer as having a public purpose or producing a public benefit. In addition to the readily available oligopoly argument, an argument could be constructed based on another kind of market failure, which has produced West Virginia's severe poverty, and has been exacerbated by foreign and corporate ownership of state mineral resources: just as alleviating severe unemployment was a "public use" in *Poletown*, alleviating severe poverty would be a "public use" in West Virginia. (I am not convinced that this is a good argument, probably because of my reluctance to rely on any of *Poletown*'s reasoning). But, if one sticks to the *Hawaii Housing Authority* logic, this plan would be legally defensible.

Financing the arrangement might be more difficult than passing constitutional scrutiny, but as in Hawaii, a fund could be established that would loan up to 90 or 95% of the purchase price to the surface owners. I would think West Virginians would be supportive of a bond issue for that purpose. The surface owners, who by this legislation would be entitled to purchase the mineral rights underneath their surface, would be free, within environmental and legislative constraints, to lease (under more equitable terms and shorter duration leases) their subsurface mineral resources to interested parties at competitive market prices. If they did not conserve or use their mineral resources themselves, the leasing fees would enable them to make their mortgage payments. According to *Hawaii Housing Authority*, this would seem to be a constitutionally supportable means to rectify some of the grave inequalities of wealth and inequities of distribution in current Appalachian mineral holdings.

While I doubted that this is the sort of arrangement that would meet with the United States Supreme Court majority's visions of takings law, it would be consistent with the *Hawaii Housing Authority* rationale. This rationale would also appear to leave room for transfers of run-away or faltering businesses to employees. In a *Poletown*-type situation, it would justify the state's taking a failing business that has oligopolistic control over the job market, more so than the converse in which the oligopolist takes homes and a community to maintain its control over the market and local employment.

The potential for redistribution from the few or wealthy to the many or needy is remarkable under the *Hawaii Housing Authority* rationale, assuming that courts do not repeatedly use its language about the unique character of the Hawaii landholding system to distinguish it. The problems would then involve financial or economic impediments, not constitutional ones. On its face this seems a constitutional precedent worth preserving and utilizing for these ends.

Since my initial fascination with its possibilities, however, I have become disenchanted with the obvious manipulation of constitutional principles that brought about the *Hawaii Housing Authority* result. If the integrity of constitutional doctrine is so easily disposed of, then it seems best to use that decision in this manner to politically and economically empower the masses. While a denunciation of the *Hawaii Housing Authority* rule for its lack of consistency with inherent and fundamental constitutional principles might jeopardize the probability of achieving such highly desirable results, it may ultimately benefit those same people by reducing the degree of control of constitutional processes now in the hands of the economically and politically powerful minority.

from the disempowered to the powerful, from individuals to corporations, as happened in *Poletown*. I would like to think that our constitutional law protects against this sort of government-imposed property transfer. Is this asking to have one's cake and eat it too? How can the *Hawaii Housing Authority* opinion exist without also sanctioning the *Poletown* result? Is there something about one "taking" as opposed to the other that truly offends our constitutional principles? Or do any conceivable distinctions place form over substance, create technical distinctions without actual differences, and use legal wordplay for political ends?

A. *Nature of the Property Interest.*

One means of distinguishing *Poletown* from *Hawaii Housing Authority* is to redefine the nature of the property interest protected by the eminent domain clause, and exempt from that clause certain "property" interests that are incapable of being justly compensated. Professor Margaret Radin analyzed the feasibility and legitimacy of a distinction between fungible property and personal property, as defined by their relationship to personhood.[319] Part of the way in which human beings assert their autonomy and project their personality is through their relationships with "things" or property.[320] Property connected to personhood is property that develops and defines an individual's autonomy or personality.[321] Her theory holds that fungible property rights,

319. Radin, *supra* note 25, at 986. Professor Radin noted that this distinction is similar to C. Edwin Baker's dichotomy between valuing activities for their extrinsic, instrumental effect and/or their intrinsic, substantive character. *Id.* at 986 n.102.

Other authors have dichotomized property rights. Professor Carol Rose noted two divergent purposes for property: acquisitive, for wealth and strength, and political, for independence and participation. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984). Professor Charles Donahue spoke of property for security and property for power. Donahue, *The Future of the Concept of Property Predicted From Its Past*, 22 NOMOS 28 (1980). Karl Polyani wrote about property for production and property for consumption. K. POLYANI, THE GREAT TRANSFORMATION (1944). Morris Cohen divided property into property for power and property for use. M. COHEN, LAW AND THE SOCIAL ORDER 41-68 (1933). Karl Marx is reknowned for his distinction between property for use and property for exchange, as measured by its value.

320. Professor Radin borrows heavily from Hegel for this analysis. Radin, *supra* note 25, at 991-1013.

321. Property so defined, if intimately related to personhood, may be so unique and personal that it can never be subject to compulsory transfer. Some property could be so "special" that its status or definition removes it from any prospect of government expropriation. Property can be viewed as a continuum from intimately personal things to fungible

such as investment interests that can be easily converted into dollar amounts, may be more readily "taken" than personal property rights which directly integrate the personality and autonomy of the person with the "thing" or object that is the subject of a disputed "taking." She first explained this theory by using illustrations such as a wedding ring or photograph that has enormous personal value to the owner, but little or no comparable exchange value on a market. A wedding ring to its owner is irreplaceable; to the store owner who sells wedding rings for a living, its loss is easily compensable in money. This reasoning applies to the takings clause as follows: a property right or interest in one's home, residence, community or neighborhood should be given clear hierarchical preference (greater protection from infringement or loss) over ownership of rental property for investment purposes. Investments are fungible because they are less clearly connected with personhood, can fairly be converted into money, and hence are capable of being justly compensated. This hierarchy results in the priority of a tenant's right of possession over a landlord's investment-ownership right when they come in conflict, because a tenant's property right to possession is more closely related to the tenant's personhood than a landlord's ownership rights in the residential property leased to that tenant.[322]

Analogously, this fungible/personal property rights dichotomy works well in justifying different results in *Hawaii Housing Authority*, and *Poletown*. In *Poletown* people were forced to relinquish their homes and community, property interests most closely aligned with personhood that are of the highest order on the continuum between personal and fungible property. Radin suggests that some items or objects, such as these, "may be so close to the personal end of the continuum that no compensation could be 'just.' "[323] In *Hawaii Housing Authority*, however, landowners were

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investments for profits only. As property moves from one end of the continuum to the other, it should be less protected from governmental interference or conflicting private claims. *Id.* at 1014-15.

322. Radin, *supra* note 25, at 995-96, explained that Professor Ackerman's defense of the imposition of a warranty of habitability on residential tenancies conforms with the argument that private law ordering should not permit fungible property rights to prevail over personal property rights that implicate personhood notions of autonomy and self-definition.

323. *Id.* at 1005. She acknowledged that this has not been accepted as a viable theory for an implied limitation on eminent domain takings, but she alluded to some instances

not severed from their residential property or communities at all. The property subject to eminent domain condemnation was property held for investment purposes that was fungible in terms of wealth.[324] Fungible property, held for investment or wealth purposes, by this account is not immune from exercises of eminent domain power.[325]

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where group property rights were given enhanced protection. *Id.* at 1006. Her primary reference is to Native American group claims to territory, but her argument would be equally useful for a community such as Poletown, defined by its ethnicity or even by its community-group cohesion.

While I like the theme of Professor Radin's theory, and the idea of dividing property rights in terms of their tangible and intangible values, I find it difficult to apply in most cases. There are the extreme examples of the business tycoon who derives her personal identity from the business she built from scratch and the millionaire who defines herself in terms of her 50-room castle on a 500 acre estate. There is the question of what to do about the holdout who refuses to sell a lifelong home that is blocking a necessary interstate route. I do not know how to resolve these hypotheticals under her model.

I believe that her theory is most powerful in terms of community or group rights because they are of a different nature than even personal property rights of the highest order. In either case, it is the intangible aspect or value that enhances the required protection, but unlike a home or a wedding ring or an apartment, a community or group does not have any real tangible element. Communities tend to be connected to places, so that divorcing them from place can leave them physically unable to maintain their cohesion; but the sense, bond and affection of community, and the sense of self-identity that comes from it, is not the place itself and contains no physical component. It can never be replaced by any physical thing (money or otherwise). Because community is virtually irreplaceable, and indistinguishably bound up with identity, it should never be sacrificed for property interests of any order. If its existence is dependent upon property rights, then those property rights must be preserved to preserve this other value called community.

This analysis takes community out of the realm of property interests entirely and places it on a higher plane. It is different from Professor Radin's theory, because she always works within the property concept; but it is also similar in that it focuses on something (in this case an intangible) that is constitutive of a person's identity. That constitutive sense of community is the framework of communitarian analyses. *See, e.g.*, M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). When I apply her analysis to *Poletown* and *Hawaii Housing Authority, see infra* text accompanying note 324, I shall apply it to the "community" property interest, rather than the specific personal interests in one's home.

324. It is arguable that the owners defined themselves with respect to the power they maintained through their huge landholdings, so that their ownership of this investment property was intimately connected with their personal autonomy and self-definition. That argument can be countered by the rationale that if wealth is the source of their power, just compensation adequately replaces this wealth-loss (of land) with another comparable source of wealth (money), so that their personal power is not diminished. This case seems more easily reconciliable with Radin's theory than the ones of the self-made millionaire and business tycoon, above. *See supra* note 323.

325. Professor Radin discussed this distinction of wealth-loss versus object-loss in respect to Professor Bruce Ackerman's PRIVATE PROPERTY AND THE CONSTITUTION 112-67 (1977). Ackerman argued that courts are more likely to protect a layman's concept of property as represented in discrete objects than property as defined as net worth.

Professor Radin further established a hierarchy of personal property interests: personal property connected to one's autonomy, personhood, or group identity has a prima facie preference against any form of government interference (eminent domain, due process, fourth amendment) or against cancellation by conflicting fungible property rights. Even personhood interests that are not embodied in property should have prima facie priority over fungible property rights that conflict with them.[326]

In some ways Professor Frank Michelman acknowledged this personhood interest in his seminal 1967 article about just compensation, but he disguised it in economic, utilitarian and fairness language.[327] Michelman framed his argument in terms of a utilitarian calculus that placed great weight on "demoralization costs":

> [these costs] are defined as the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.[328]

For those things in which we have our identities most invested, like a community, the ability of society to adequately compensate for such a loss may be so far-fetched or non-existent that

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326. Professor William Rodgers established a "tripartite conception of property" where the highest level personal property interests of Professor Radin are called "core 'human' property interests" and may not be taken except by the owner's consent; an intermediate level of fungible property interest may be taken if compensation is paid; and social property in the resource commons which belongs to the community may be redefined to the owner's detriment without compensation. Rodgers, *Bringing People Back: Toward A Comprehensive Theory of Taking in Natural Resources Law*, 10 ECOLOGY L.Q. 205, 230 (1982). His social property classification is similar to ideas articulated by Professor Sax. *See infra* text accompanying notes 333-36.

327. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

328. *Id.* at 1215. Professor Michelman summarizes:

> In sum, we must remember that the utilitarian's solicitude for security is instrumental and subordinate to his goal of maximizing the output of satisfactions. Security of expectation is cherished, not for its own sake, but only as a shield for morale. [One must] admit that not all capricious redistributive effects are totally demoralizing, and utilitarian theory can tell us where to draw the line between compensable and noncompensable collective impositions. An imposition is compensable if not to compensate would be *critically demoralizing*; otherwise, not.

Id. at 1213 (emphasis added).

demoralization costs will always significantly outweigh the other factors in an eminent domain calculation. It is undoubtedly demoralizing to realize that one's community, an intangible association that is constitutive of self-identity, can be sacrificed for the profit of a multi-billion dollar private corporation whenever that corporation finds a government that is vulnerable because of high unemployment or recession. Thus, the demoralization of Poletown residents and their sympathizers, such as Ralph Nader's groups and those moved by the media accounts, may prohibit an exercise of eminent domain,[329] whereas the *Hawaii Housing Authority* case is less likely to evoke such a demoralizing attitude in the general populace or even among those whose property is taken.[330]

I clearly recognize the gravity of the economic plight that had befallen Detroit and much of the nation in the early 1980's. I do not mean to suggest that nothing could be done requiring sacrifices from Detroit or Hamtramck citizens to ameliorate the serious dilemma within the region. I only suggest that the taking of a community, and its equation with fungible or real estate property interests as if it were freely exchangeable for money, and the giving of it to a private business (to let it increase its slipping profits and maintain its control and power over the labor market) seems unbalanced and demoralizing. There certainly were other possible solutions. If demoralization costs are a good measure, it may have

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329. There is no doubt that loss of job may have an equally devastating effect on self-identity. Loss of community and loss of job should be equally protected against eminent domain. It has been argued to me that if the community had not been taken, jobs would have been lost and the result would have been that the same people would have lost their homes and community. That is possible. It is also possible that alternative solutions could have been reached. So long as our law is construed as leaving the option available to sacrifice community for private business' promises of jobs, there is little incentive to explore less "demoralizing" options.

330. *But see* Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981), wherein he argued that the fault with the *Poletown* decision, if any, was a "process"-based fault. Because Michelman equated the right to property with a political right (in many ways analogous to the arguments of the Greeks and early republicans, *see supra* notes 63-73 and accompanying text), the taking of the Poletown residents' property rights might have effected a taking of their political power rights. *Accord* Michelman, *Process and Property in Constitutional Theory*, 30 CLEV. ST. L. REV. 577 (1982). The impropriety of the taking to Michelman was not how it affected a utilitarian calculus containing a demoralization factor, but in its disenfranchising impact. For a further discussion about the "civic property" tradition that views property as a source of political empowerment, see Rose, *supra* note 319.

been less demoralizing (and more efficient) to condemn GM's property and give it to Detroit citizens.[331] If the personal/fungible property distinction is meritorious, the latter suggestion would also be more appropriate. The rights that the city of Detroit chose to infringe were those closest to personhood and self-identity. There were lower order rights that could have been sacrificed instead.[332]

After years of study, Professor Sax has reworked his theories about eminent domain by redefining property interests that are eligible for heightened protection under the takings and due process clauses.[333] In Sax II he promoted the concept of spillover effects to delimit proper governmental authority to regulate private property ownership and use, and he included in the definition of constitutionally protected property the public's equally weighty interests in all land uses that have extraterritorial effects. In Sax III he discussed expanded notions of property protected by the takings clause. He viewed the most recent developments in property law as representative of a change in values from exclusive (private), developmental property rights to non-exclusive (public, community), preservation property interests. Over the years, expectations and values in society have changed. Professor Sax concluded that there is now a concentrated focus on community values, neighborhoods, open spaces, environmental purity and aesthetics, and historic, wildlife and nature preservation. We now understand how the old system, which focused on development, misallocated land rights and benefits. As a society, we have learned that the costs associated with further development in-

331. If Detroit could amass the $200 million necessary to condemn and clear the land for GM, it could have found alternative means to remedy the unemployment problems. Why could it not have required GM to build elsewhere (where business or investment property was sacrificed instead of community), or to build vertically instead of horizontally (so as not to have to destroy a whole community)? Why did it unquestioningly accept GM's criteria? Why were the pleas and protests of the community unpersuasive? Why didn't Detroit construct a plant itself, or purchase a business to employ its citizens? Who participated in these decisions?

332. It appears that instead of evaluating the hierarchy of property interests and choosing to interfere with the lowest, Detroit and GM evaluated the hierarchy of political power and economic rank, and chose to interfere with the lowest. The problem is the hierarchies are not interchangeable. The propriety of choosing the lowest from one model does not equate with the propriety of choosing the lowest from the other.

333. See the evolution of his theories in Sax I and Sax II, *supra* note 23, and Sax III, *supra* note 25.

crease at a greater pace than the benefits it bestows on the public. These lessons have taught us, Professor Sax argued, that property rights and interests must emphasize social coherence, neighborhood character, and community stability. Instead of using eminent domain to promote private economic development, we must use it to benefit community and environmental interests.

Developmental property rights should increasingly yield to these community values and interests. An analogy can be made to Professor Radin's personal/fungible property dichotomy. Community and personal property should be protected from being taken and given the highest hierarchical value. The barriers to destroying community stability or character should be formidable compared with the barriers to destroying fungible investment interests.[334] Our society's values have matured to recognize that neighborhood, community, security, safety and nature are nonconvertible into money. There is no just compensation for their loss. Therefore a clause that permits the taking of property if just compensation is paid cannot apply to them. The "property" simply cannot be taken.

Professor Sax acknowledged that *Poletown* was an exception to this trend,[335] but argued that the course of noncompensation for withdrawn development rights illustrates a fundamental redefinition of property to public from private. If his insights are applied to situations like *Poletown* and *Hawaii Housing Authority*, it is likely that GM would not have prevailed over community values in Poletown, but the community associations would have prevailed over the remaining landed aristocracy in Hawaii. His theory is uplifting, but it does not seem to comport with the Supreme Court's articulated views in recent takings versus regulation cases. Rather, Justice Rehnquist's "money empowers" theory of what constitutes protectible property, which focuses on investments, profits and wealth-loss,[336] seems to predominate.

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334. It is my opinion that they should be insurmountable unless the community coherence is based on or rooted in a discriminatory animus (racist or classist) that does not recognize all peoples' equality.

335. Sax III, *supra* note 25, at 489.

336. *See* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980); Kaiser Aetna v. United States, 444 U.S. 164 (1979); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (Rehnquist, J., dissenting). *See also* Andrus v. Allard, 444 U.S. 51 (1979), where Rehnquist joined the majority decision.

B. *Standard of Review.*

The first approach to achieving favorable results in *Hawaii Housing Authority*, while disallowing the GM taking in *Poletown*, is redefining what type of property can be taken by eminent domain. A second means of reconciling the *Hawaii Housing Authority* situation with *Poletown*, so that a taking would be permissible in the first instance but not in the second, is to alter the standard of review depending upon the "fundamental" nature of the property interest or to heighten the review of legislative determinations of "public use." Because "public use" is a special, constitutionally expressed limitation on the eminent domain power, it should not be relegated to the same standard of review as the due process clause. Rational basis review, which is the standard due process review of legislation, is inadequate where legislation infringes upon a right that has special constitutional status. The Court employs a heightened scrutiny for discriminations based on race, gender, legitimacy or alienage; for legislation that affects free speech or free exercise of religious rights; for privacy rights, rights of marriage, reproduction or bodily autonomy and for other "fundamental rights." Confusion arises about whether heightened review should accompany certain property rights, as fundamental rights, or whether it should accompany the public use determination, as a constitutionally imposed limitation on eminent domain. Several commentators have recommended an intensified scrutiny by courts where private property rights are taken or regulated.[337]

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337. They represent a spectrum of perspectives from libertarian to communitarian and the radical left. *See generally* Epstein, *supra* note 15 (seeks more serious scrutiny of the public use issue by courts; admonishes courts for equating public use and public purpose and then looking for indirect benefits); Epstein, *The Public Purpose Limitation on the Power of Eminent Domain: A Constitutional Liberty Under Attack*, 4 PACE L. REV. 231 (1984) (recommends vigilant enforcement of constitutional barriers against overreaching exercises of eminent domain as a result of his disapproval of *Poletown*); Lewis, *supra* note 27, at 929 ("[i]f the legal realm, when confronted by such [economic] necessity, lacks clear standards and values, then it risks serving as little more than a legitimatizing agency offering ex post facto sanctioning to the agents of corporate power and prerogative"); Mansnerus, *supra* note 15 (full rationality review with objective standards and a full factual hearing); McFarlane, *supra* note 29 (argues for a substantive due process approach that analyzes the rationality of the means of achieving the public purpose and does a substantive fairness balance); Meidinger, *supra* note 27 (posits a strict public benefit test, requiring proof that the improvement will enlarge the pie, that the taking is necessary to carry out a public purpose and that under a stringent cost-benefit analysis there is greater public good than private injury);

The *Poletown* majority in its per curiam opinion claimed that it gave closer scrutiny to the GM transfer because the direct transferee was a private business. It is hard to imagine what that heightened scrutiny consisted of, as noted by both dissenting justices. If that is an example of strict or even middle-tier scrutiny, and it can be accomplished without an enumeration of the factors that the Court considered or an explanation of how they were balanced or resolved, then it is apparent that heightened scrutiny leaves the judiciary with the same free hand as mere rational basis review to legitimate dominant, economic power values. Closer scrutiny is supposed to provide additional protection to rights or values that might otherwise be vulnerable to majoritarian tyranny. In *Poletown*, it was only a justificatory label for acquiescing to another equally pernicious tyranny, the tyranny of economic class power. The majority opinion did not mention whether public use required any degree of public control. It accepted the legislative declaration that there would be a benefit in the form of increased employment without any analysis of the relationship between the harm to the sacrificed community members and the benefit to the public at large; the degree of benefit to the public compared to the required expenditure of public funds; the number of actual jobs saved; the real, primary beneficiary of the land transfer; or alternative and less intrusive means of achieving the desired effect. It is difficult to understand what the Court meant when it stated that it performed a more careful review of this transfer than others.

Applying strict scrutiny to reclassified or redefined property rights may be a more valuable approach. "Community" could be declared a fundamental right, so that any government action that discriminated against or harmed a community would have to be carefully scrutinized. Any time a taking detrimentally affects other public or social rights, such as health, safety or preservation of the environment, courts should also scrutinize it more closely.Takings

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Oakes, *supra* note 29 (courts must give substantive due process protection to certain property rights that represent the personhood, liberty, social and public interests—these rights deserve judicial review and to not give review is a choice); Schwartz, *supra* note 27 (recommends that courts take a closer look at the necessity requirement of "public use" and that they require public control); Stoebuck, *Police Power, Takings and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980) (notes that many writers have recommended solving the takings problems by legislative action, but that takings are problems for the courts which must set minimum standards of what constitutes permissible transfers).

of investment property, since it is fungible and monetarily compensable, might only be entitled to rationality review. In such cases, great deference to the legislature might be appropriate. A final approach would be to use different standards of review for takings where the government is the transferee from those where there is a private transferee.[338] Transfer to private parties should require a stricter standard of review, that is, more intense judicial evaluation.

In any case, when the Supreme Court decided upon the appropriate level of review for takings in *Hawaii Housing Authority*, it gave seemingly absolute deference to legislative judgments. As the law now stands, a state legislature is free to find a public use or purpose in private transfers from the few to the many or the many to the few; from the rich to the poor or the poor to the rich; from a person to a corporation or a corporation to a person; and from fungible, investment property to personal property or personal property to investment, development property. The public need not benefit directly. It does not even have to be a major beneficiary of the forced property transfer.

When a court abstains from critically examining a taking, it renders the "public use" language in the fifth amendment meaningless. "Public use" would only mean that an eminent domain exercise is legislatively sanctioned. Yet, we all know from other areas of law that legislatures do not always act constitutionally. Their powers are not limitless, and sometimes they exceed them or act in a manner that unconstitutionally infringes on other rights. They are subject to intense, immediate political influences. The distanced and unpressured reflection that courts can lend to the process may reveal that a particular legislative action is prohibited by constitutional values or principles. But under the lowered *Hawaii Housing Authority* standard of review, the powerful can create "public uses" through effective legislative and political lobbying, assuming that the legislature is the only judge.[339] The poor, disenfranchised or underrepresented communities may have

338. For discussions of this type of distinction, see Ross, *Transferring Land to Private Entities by the Power of Eminent Domain*, 51 GEO. WASH. L. REV. 355 (1983); Sax I, *supra* note 23.

339. Even though judges are often motivated by similar types of political allegiances, they clearly have a better opportunity for a deliberate, considered weighing of all sides than do legislators.

their property taken because they do not have meaningful access to the political processes.[340]

C. *Redefining "Public Use".*

Public use has been variously defined over time to accommodate different goals.[341] The definition was expanded whenever it was necessary to promote economic development or business interests of the most politically powerful groups. The Supreme Court in *Hawaii Housing Authority* failed to narrow this definition. As a result, public use may now signify an enormously broad spectrum of acceptable activities. Perhaps the most effective approach to creating a constitutional takings theory that would permit a transfer like the one in *Hawaii Housing Authority* and prohibit a transfer like the one in *Poletown* is to clearly and unmistakably redefine public use. Public use should mean public access or control; it should mean that when property is involuntarily transferred, the public (or a greater number of people, not corporations or business interests) acquires greater rights or interests in the property than it had before the transfer. Indirect or consequential benefit to the public cannot meet this public use definition. All transfers to private businesses, corporations or developers would fail. Private enterprises would have to find other ways to acquire and assemble land. If the government chose to finance or underwrite these activities, it would have to employ different means. A "public use" definition that permitted the government to tear down neighborhoods for urban redevelopment would contravene this constitutional limitation. If the public desires the benefits of such changes, it would have to make such a commitment itself. It cannot pass the task to private developers, who reap profits while using public eminent domain power to assemble property, and government-backed, low interest loans to finance their private enterprises. In the same way, if the public needed to retain and create jobs, it could not feed GM carrots in hopes that it will ultimately offer some employment to local citizens. Public use must mean public access and control. It necessarily involves transfers from the few to the many; from the wealthy to the less

340. *See* Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981).

341. *See supra* notes 74-103 and accompanying text.

wealthy or poor or needy. It cannot mean the reverse. This redefinition of public use would still permit the *Hawaii Housing Authority* redistribution, but would prevent another *Poletown* from happening.

D. *Barring All Private Transferees.*

Finally, a takings problem could be solved by barring all exercises of eminent domain in favor of private transferees. Certainly this is a feasible result, and it adheres to a literal reading of the takings clause. This approach may even be preferable, though it makes Hawaii-type land redistributions impossible under the takings clause. In the long run, it may be better to make such a sacrifice, than to permit more community destructions like *Poletown* under a rule that freely permits both takings.

VII. CONCLUSION

The takings clause, embedded in the fifth amendment, is extremely complicated. Its underlying principles, its meaning, its requirements and what it empowers the government to do have been the subjects of debate for the last 150 years. Its application is ultimately and directly related to value systems, and the integration of those values in our constitutional scheme. Of more import today, however, the clause's application is tied to principles and politics. If our Constitution is to have any meaning beyond political expediency, it must contain some unbending principles expressing a hierarchy of values. The highest values must be affirmatively preserved and protected by the government from public and/or private encroachments. For constitutionally-enshrined values of a lower order, the government may only have a duty to refrain from their violation or infringement. In whatever fashion they are ranked or treated, however, constitutional values ensconced in constitutional principles must be above political whims or fancies.

If an interpretation of the takings clause is wholly dependent upon the immediate social, economic, or political visions of legislatures or judges, then it has no internal, inviolable constitutional principles or value structure. This is the major source of confusion in takings jurisprudence. Leaving interpretations of the takings clause to manipulation by localized political temperaments

has permitted highly contradictory results like the *Poletown* and *Hawaii Housing Authority* cases. Those results may occur anyway in our political society, but they should not be legitimated by the takings clause.

Social and economic questions are inherently political. This was the lesson of the *Lochner* era. Political questions belong to legislatures. Legislatures have an arena in which to debate appropriate solutions, get continuous public input, seek expert advice, investigate alternatives and design new programs. Legislative powers to remedy or solve political dilemmas are broad, but not limitless. They are "trumped" by constitutional principles and values that may not be encroached in the process of finding solutions. Certain means of ameliorating problems are prohibited. For instance, a legislature cannot decide to remedy problems of the homeless by jailing them or confining them in state mental health institutions. It cannot eliminate crime by executing all criminals or even all repeat offenders. These limits exist because our Constitution values life and liberty over political expediency. This motion is partially derived from the substance of the due process clause, and partially from the "penumbras" that implement core constitutional values. In the same way, our constitutional principles put limits on what the legislature may do to remedy problems of unemployment or market failure in wealth distribution. If those limits are in the Constitution, they are in the same place as the other limits—the due process clause and the ordered liberty created by the Constitution as a whole. The principles include a republican respect for individual autonomy and community cohesion. All constitutional clauses must be interpreted in light of those principles and values. In this sense, the protections against unfair encroachments on property are identical to protections of life and liberty. They are to be judged from a perspective of constitutional values and not political expediency.

Cases like *Poletown* and *Hawaii Housing Authority* represent a recent movement toward aggressive use of eminent domain power to remedy social and economic problems. This trend began with the *Berman*-style urban redevelopment cases. The takings clause, however, was not designed for these ends. Such political questions must be decided by legislatures and then ultimately tested in courts, if challenged, to see if the legislatures have transgressed inviolable constitutional principles. Eminent domain has different

historical and ideological roots. It was and is a logistical tool by which a government can make necessary property adjustments so that it, as the representative of the people, can proceed in serving them in its governmental capacity. It was originally used by governments to take land to build roads and construct government buildings. It does not ask how property rights should be defined, which ones should be protected, under what circumstances they may be taken, or how far a regulation may go. It encompasses one constitutional principle—just distribution of the costs of public projects—so that when the government requires a citizen to transfer to the government total ownership and control of her specific, named property which has been deemed uniquely necessary for a public project, that citizen shall be justly compensated for her loss. By requiring compensation from government funds, the takings clause transfers the costs of the project from the single property owner to all citizens equitably. That was its purpose and that should be its sole use.

Now, however, the takings clause is used to take land for private businesses (not for government use) or for public redistribution. Whether or not these ends are laudatory, they should have nothing to do with the takings clause. I have concluded that the takings clause has been violently distorted and misused. Neither *Hawaii Housing Authority* nor *Poletown* belongs within its reach. My recommendation is that the takings clause should be restricted to a small variety of cases in which the government acquires real property ownership, possession or full control (restrictions on use would never be takings) for government projects that service the public.[342] In only those cases is the government constitutionally permitted to acquire property, and thereby required to provide just compensation. Other cases that test other constitutional values and principles may be appropriately evaluated under the due process clause or other constitutional clauses, but should not be framed in terms of takings questions and should not rely on the clause's limited language. By placing political questions in the takings clause where they do not belong, courts have distorted it be-

342. For cases where government action causes or is responsible for destruction of private property (e.g., flooding cases), private law civil remedies should be available. These are tort and nuisance cases, not constitutional takings cases. Problems of sovereign immunity barriers to recovery need to be solved through other mechanisms than the takings clause.

yond comprehension. They have made the word "take" seem to include "restrict," "deprive" or "regulate"; they have made the phrase "public use" mean "private use with incidental public effects" or "transfers to private individuals." Such distortions of constitutional clauses make the Constitution appear to have no core meaning or value structure; it becomes a mere toy for politicians. Efforts should be made to dispel this effect. One small step would be to bring the takings clause back within its reasonable semantic limits.

Whether or not the Constitution, under other provisions, permits or prohibits the results reached in *Poletown* or *Hawaii Housing Authority*, neither outcome should be decided by reference to the takings clause. Political solutions to economic and social problems involve value judgments that are not part of this clause. Takings clause challenges to those solutions should be dismissed by the courts. Political remedies for economic and social ills can only be successfully challenged if they infringe upon fundamental constitutional values or principles—only then may a court intervene. In those cases legislative actions must be subjected to strict judicial scrutiny, because constitutional values may not be sacrificed for immediate political results. If no fundamental rights or values are involved, then a rational basis analysis may be sufficient. But the takings clause is not involved in these questions at all. The takings clause should not be an issue in any case unless the government transferred private property to itself for the service of its citizens.

If we want the Constitution to maintain our respect, we must treat it respectfully. We must affirm its core principles and value system. We must not distort its phrases so their meanings seem no more than lawyers' play or politicians' whims; we must not allow political consequences to occur without regard to their effects on fundamental rights. It might ultimately turn out that a change of approach in constitutional analysis would create no real difference in results. I hope that would not be the case. But even if it were, a change in patterns of constitutional interpretation that would restore the Constitution to its rightful place as a meaningful set of principles for our nation would be, in itself, invaluable.