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REGULATION (Police Power) V. TAKING (Eminent Domain)

CHARLES H. MERCER, JR.

“There is no set formula to determine where regulation ends and taking begins.”

Goldblatt v. Town of Hempstead,
369 U.S. 590, 594 (1962)

INTRODUCTION

In a nation characterized by rapid population growth and increasing environmental awareness the regulation of land use is increasingly important. When there is such regulation, the question naturally follows: Whether the regulation is a valid exercise of police power or whether it constitutes a “taking” under eminent domain provisions? On one side, environmentalists and government supporters might contend that a particular regulatory measure is a valid exercise of police power and is needed for the common good. On the other side, the developer and landowner may argue that their property is being “taken” by the government without compensation.

This question and the disputes over the correct answer have become more popular in the Seventies than at any previous time. Issues arise under the taking clause with respect to a myriad of programs affecting land—wetlands protection, control of the water supply, population control and residential development, to name a few.

The concern about these issues is no longer limited to the urban areas. It is nationwide. States are passing comprehensive statutes giving the state broader powers with respect to land control.¹ Local governments on both the county and municipal levels are also passing regulatory measures to protect the land and guard its use. And with this, the states are becoming increasingly sensitive to the constitutional problems which emanate from land use regulations.

The legislation and judicial holdings on this subject of land use reg-

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1. For example, Florida has passed an Environmental Land and Water Management Act which provides that large developments and developments in critical areas must obtain regional impact statements and be subject to state review. This Act can be found at Chapter 380 of the Florida Statutes.

Many states have also passed similar statutes and other statutes concerned with preservation of the environment.

ulation are all-encompassing. Measures may prevent construction, or establish construction setback lines along shorelines in order to protect our beaches from erosion; impose moratoriums on certain types of residential development to reduce population density, or impose restrictions on industrial developers to protect marshlands and other lands as a valuable flood plain or merely as scenic and recreation areas.

As we witness these efforts to regulate our land use, we find concepts such as unrestricted land use being questioned. We ask whether an owner can do anything he wishes with his land or whether the government may regulate the use of his land in the interest of the common good. We then may ask, assuming the government can regulate land, whether such a regulation is permitted to reduce the value of the land or to inhibit the owner's opportunity to make a profit on it.

As we recognize that we have a rapidly increasing population and that we will need to carefully preserve our lands and resources for residential development, water supply, recreation areas and a myriad of other reasons, we then come back to a hybrid of our first question: When has the regulation gone far enough to become a "taking" of private property?

A. BACKGROUND OF REGULATION VERSUS TAKING

The Fifth Amendment to the United States Constitution poses the most significant restraint on the regulation of land use—the "taking clause": "nor shall private property be taken for public use without just compensation."² This protection has been made applicable to the state by incorporation into the Fourteenth Amendment.³ In addition, every state, either through their constitution, statutes, or judicial decisions, has recognized similar rights in private property.⁴ For example, Article 1, Section 9 of the Constitution of the State of Florida provides that "[n]o person shall be deprived of life, liberty, or property without due process of law. . . ."⁵

The idea of requiring compensation for the taking of private property

2. U.S. CONST., AMEND. V, as noted in Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 UNIVERSITY OF FLORIDA LAW REVIEW 1, 2 (1972). [Hereinafter cited as BINDER].

3. *Chicago B. & Q.R.R. v. City of Chicago*, 166 U.S. 226 (1891) as noted in BINDER.

4. BINDER.

5. FLA. CONST., art. 1, § 9. See also FLA. CONST., art. 10, §§ 6(a), (b), which provides:

- (a) No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner.
- (b) Provision may be made by law for the taking of easements, by like proceedings, for the drainage of the land of one person over or through the land of another.

was not new to the framers of our Constitution. The concept went back some five and a half centuries to the Magna Carta in 1215.⁶ Section 39 of the original document provided that "[n]o freeman shall be . . . deprived of his freehold . . . unless by the lawful judgment of his peers and by the law of the land."

These words of the Magna Carta laid the foundation upon which the English government based its authority to impose land use regulations as early as the sixteenth century.⁷ There developed in England a tradition of the government's right to regulate the use of land if such regulation was reasonably related to the public purpose. As long as the regulation was designed to promote the public benefit rather than the personal benefit of the Crown, it was permitted. If land were actually "seized" for the public use, compensation was required.⁸

The colonists in early America brought with them many of the ideas of seventeenth-eighteenth century England. Ideas with respect to eminent domain were among these. So, although the issue of a taking was rarely raised in the early settlement since there was an abundance of land available, where it was raised, the same philosophy that had prevailed in England was followed. That is, the concept of taking referred to the actual seizure of lands by the government.⁹

When the framers of the Constitution wrote the Bill of Rights, a taking clause was included therein.¹⁰ The Constitution also provided for the establishment of a judicial system which would be utilized to interpret our laws. It would logically follow that this machinery would provide us with some interpretation of the confusing term "taking." Unfortunately, such has not been the case.

Prior to the Civil War there was little occasion to consider the taking issue, and the concept of "seizure of lands by the government" remained the only interpretation. There are, however, two pre-Civil War cases from the state of Massachusetts which are noteworthy because of their impact upon the first U.S. Supreme Court cases on the subject. In *Commonwealth v. Tewksbury*,¹¹ Tewksbury removed sand and gravel from a beach he owned. This was done in violation of a statute which provided that anyone who removed sand or gravel from the beach should be fined. The court, in dealing with the issue of whether the limitation was a valid regulation of land use or was within

6. BOSSELMAN, COLLIES, AND BANTA, *THE TAKING ISSUE* 56 (1973) [Hereinafter cited as BOSSELMAN].

7. *Id.* at 60-75.

8. *Id.* at 39.

9. Note, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 *UNIV. OF CHICAGO L. REV.* 854 (1972-73) [Hereinafter cited as *LAND USE*].

10. BOSSELMAN, at 97-99.

11. 52 *Mass. (11 Met.)* 55 (1846), as noted in *LAND USE* at 863.

the definition of compensation, upheld the statute as a valid regulation of real property. It was found to be a "just and reasonable exercise of police power."¹² The court reasoned that the statute was a just restraint of an injurious use of property and said that the preservation of beaches is of great public importance.¹³

In *Commonwealth v. Alger*, a defendant violated a statute prohibiting the erection of a wharf in the Boston Harbor by constructing a wharf on his own property.¹⁴ The court, in finding the statute a valid regulation, pointed out a distinction between police power and eminent domain.¹⁵ The court stressed that the property owner holds property subject to the qualification that his use of it is not "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."¹⁶ Here, the wharf was deemed to be injurious to the community and the regulation found to be for the public good. Also, there was no actual seizure of any lands by the government.

In the last analysis, the view still prevailed that, for an owner to be entitled to compensation under the taking clause, "the property must be actually taken in the physical sense of the word."¹⁷

The Supreme Court of the United States first became involved with the taking issue in the case of *Pumpelly v. Green Bay Co.*¹⁸ Here, a state statute authorized the construction of a dam to control floods. The dam caused a flooding of the plaintiff's land. The Court held that the government's flooding of the land constituted a taking despite the lack of an actual physical appropriation to public use.¹⁹ Though the decision was expressly limited to the facts of the case, the holding on the theory of invasion did represent a slight expansion in the concept of a taking.

In 1887, in the case of *Mugler v. Kansas*, the Supreme Court gave its first complete discussion of eminent domain and police power.²⁰ In so doing, the Court stated its support for a strong police power. This case involved a Kansas statute which prohibited the manufacture and sale of intoxicating liquors and thereby made Mugler's brewery worthless. Mugler sued for compensation. The Court held that the statute

12. *Id.*

13. BOSSELMAN at 110-111.

14. 61 Mass. (7 Cush) 53 (1851), as noted in LAND USE at 865.

15. *Id.*

16. BOSSELMAN at 112.

17. SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW at 519-520 (1st ed. 1857), as noted in BOSSELMAN at 114.

18. 80 U.S. 166 (1871).

19. LAND USE at 867.

20. 123 U.S. 623 (1887).

was a valid exercise of police power. The Court made a point to distinguish *Pumpelly* (a physical invasion) and *Mugler* (no direct invasion) and further added that, although the statute might impair the use of *Mugler's* property, it did not constitute a taking since it was within the government's power to regulate property in order to abate a nuisance (the brewery presented a nuisance to the community).

In establishing the constitutional principle that police power does not constitute a compensable taking, Harlan said:

The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner.²¹

It was this case in which Harlan stated his famous principle that the difference between a police power regulation upon property and a public taking of property was a difference in *kind*—not degree. He argued that the *kind* of prohibition upon the use of property which acted to protect the public health and safety was not a taking. And so developed this test: Does the regulation have a rational relationship to the public welfare?²²

Another important case which follows in the line of *Pumpelly* and *Mugler* as cases expanding the "seizure" theory of a taking is *Hadacheck v. Sebastian*.²³ In this case there was a brick yard which had originally been located outside the city limits. Following an expansion of the boundaries of the city limits, the brick yard became within the city. The city had an ordinance which outlawed the operation of a brick yard within the city limits, thereby outlawing this brick yard. The Court sustained the ordinance as a valid exercise of police power, noting that the brick yard constituted a nuisance to the community as a result of its producing excessive smoke and odor.²⁴

Thus, in a little over a century the definition of a taking had expanded from the actual seizure concept to include the invasion theory of *Pumpelly*. The expanding support for police power was indicated by the development of the nuisance and noxious use theories of *Mugler* and *Hadacheck* which operated to make a regulation promulgated for the purpose of preventing a nuisance to the community a valid exercise of police power and *not* a taking.

21. *Id.* at 668-669.

22. *BOSSELMAN* at 120.

23. 239 U.S. 394 (1965).

24. Here the court sustained a regulation as a valid exercise of police power, despite a 90 per cent diminution of value.

The late nineteenth century-early twentieth century was characterized by a period of rapid economic expansion and urbanization. Up to this point, most of the public takings of land consisted of the actual expropriation and physical taking of land for public use. When such taking occurred, the idea of compensation was simple. The seizure theory and the later invasion theory were sufficient to satisfy the needs up to this point.

Most of the regulatory control of land use prior to this expansion era consisted of simple regulation of brick yard operations, livery stables, fire regulations and building height restrictions.²⁵ The nuisance and noxious use theories were sufficient to satisfy these regulatory needs.

As business expanded and urbanization increased in the early 1900's, existing tests became inadequate. Government began to exercise its regulatory powers over economic activity as well as private property.²⁶ The idea of exactly what interests could be, and were being, regulated by the government became less tangible and more complex—perhaps too complex for the tests developed in the past.

By 1922, it appeared that a new, more comprehensive test for determining whether a regulatory measure was a valid exercise of police power or a taking was needed. Since the government had begun to regulate economic activity, it only followed that a test guaranteeing compensation to those who had their economic interests taken would be practical. A final element was the appointment to the U.S. Supreme Court of Oliver Wendell Holmes, Jr., who felt that the previous decisions of the Court did not establish a firm principle on the question of the distinction between police power and taking.

In 1922, in the case of *Pennsylvania Coal Co. v. Mahon*, the law with respect to the distinction between police power and taking was rewritten.²⁷ In this case, Justice Holmes reversed the Harlan principle of kind and, in so doing, reversed the entire line of cases on this issue. Holmes articulated the theory that the constitutional question turned primarily upon the *degree* of economic injury imposed by the government regulation.²⁸

In *Pennsylvania Coal*, the owner of a parcel of land deeded the surface away but reserved the right to remove the coal beneath. A later statute, the Kohler Act, forbade mining in such a manner so as to cause subsidence of any human habitation, or public street or building. The Court held that the statutory prohibition exceeded the states' police

25. *BINDER* at 3.

26. *Id.* at 4-7.

27. 260 U.S. 393 (1922).

28. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964) [Hereinafter cited as Sax].

power to protect the public health and safety against hazards and constituted a taking of private property without just compensation. The Court reasoned that, in effect, the government gained control of the property without paying for it.

Several key propositions came out of this case. First, the test which has become the basis for so many subsequent decisions was structured in this opinion:

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.²⁹

Second, it was here that the “diminution test” for a taking was born.

Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of diminution. When it reaches a certain magnitude, in most if not all cases, there must be an exercise of eminent domain and compensation to sustain the act.³⁰

Third, Holmes stated in his opinion the principle that “the question depends upon the particular facts.”³¹

It is in *Pennsylvania Coal* that we most clearly see the transition from the traditional concept of eminent domain as an appropriation of a proprietary interest, physical invasion and nuisance to a new concept of case-by-case resolution, the diminution theory and the balancing of the conflict between the public need and the private loss.³²

Since *Pennsylvania Coal* the Supreme Court has dealt with the issue of police power versus taking very rarely. In fact, many of the cases on the subject do not actually deal with the distinction between the two powers. For example, in the famous Euclidian zoning case, *City of Euclid v. Amber Realty Co.*, the Court never reached the issue of taking.³³ As a point of interest, Holmes voted with the majority to uphold the validity of the zoning provision involved in that case.

29. 260 U.S. 393, 415 (1922).

30. *Id.* at 413.

31. Is this the way Holmes rationalized his reversal of all the previous cases? It would appear that this is a possibility, as if he really considered this case on its facts, he would have decided that the mining regulation would prevent a nuisance to the homeowners on the land. The legislature passed the statute to prevent such a nuisance to these homeowners.

32. Sax at 28.

33. 272 U.S. 365 (1926).

In *Nectow v. Cambridge*, where a zoning classification was found to be invalid upon the ground that the loss of value to the property owner outweighed the value to be gained by the community, "taking" was not discussed *per se*.³⁴

Since these cases of the 1920's the only case to deal specifically with the issue of whether a regulation was an exercise of the police power or a taking is *Goldblatt v. Town of Hempstead*.³⁵ In *Goldblatt*, the appellant owned a tract of land on which the corporate appellant had been mining sand and gravel. An ordinance was passed to prohibit any excavation below the water table and to impose an affirmative duty to refill any excavation presently below that level. The appellant argued that the ordinance was an unconstitutional taking of their property. Here the Court did not find a taking, but failed to do so because of the failure of appellants to meet the burden of proof.

With respect to the Court's discussion of a taking, it represents mere dicta and not a case holding. But the dicta does demonstrate the ambiguity of the Supreme Court's position on the police power-taking issue.³⁶ In *Goldblatt* the Court said, "There is no set formula to determine where regulation ends and taking begins."³⁷ The Court further added:

. . . the ordinance completely prohibits a beneficial use to which the property has been previously devoted. However, such a characteristic does not tell us whether or not the ordinance is unconstitutional. It is an oft-repeated truism that every regulation necessarily speaks as a prohibition. If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation.³⁸

Goldblatt re-establishes the Court's continuing position of ambiguity and of refusing to adopt a binding principle on this issue. It refers to *Pennsylvania Coal* and indicates that *Pennsylvania Coal* continues to set the parameter for all cases on the police power-taking issue.

But, by stating that "there is no set formula," *Goldblatt* also indicates that, although *Pennsylvania Coal* is the grandfather case, perhaps the

34. 277 U.S. 183 (1928). In another case, *Miller v. Schoene*, 276 U.S. 272 (1928), the Supreme Court upheld the validity of an ordinance which required the destruction of diseased red cedar trees without compensation to the owners on the ground that the rust from those trees endangered neighboring apple orchards. This was done in the name of public concern, as the only way to protect the orchards.

35. 369 U.S. 590 (1962).

36. Sax at 28.

37. 369 U.S. 590, 594 (1962).

38. *Id.* at 592 and 594.

Court really is without a satisfactory rationale for defining the distinction between the police power and the taking. As Sax points out, the Court

operates haphazardly, using any or all of the available, often conflicting theories, without developing any clear approaches to the constitutional problem.³⁹

B. THEORIES FROM CASE HOLDINGS AND SCHOLARS

Theories from Case Holdings

Up to this point we have seen one set guideline or formula to answer the question of when there is a taking. However, based upon the rules promulgated by the Court over the years, it is apparent that a few theories have emerged.

In summarizing the theories, it is important to keep in mind that a couple of the tests are sufficient for clear cut determinations but are too simple for more complicated situations. None of the tests appears to satisfy the needs in today's world where there is regulation of complicated economic interests and expanded definitions of property. Finally, despite the applicability of a certain test to a particular situation, on the whole the Court often appears to blend one or more of the tests in making its determination. Keeping this in mind, we turn to these theories.

The oldest theory upon which the courts will find a valid taking is the invasion theory. Here, the government physically encroaches upon the land and occupies it.⁴⁰ This is done by a formal transfer of title in the name of the government, by other formal appropriation, or by physical invasion.⁴¹ This simple, straightforward test of "compensation when there's invasion" began to lose its efficacy as the only test around the turn of the century when the economy, public needs and regulatory needs became more complex and necessarily required the government to exercise greater regulatory power over private property and economic activity.⁴²

Noxious Use Theory

The noxious use theory is an outgrowth of the original laws of nuisance.⁴³ It was designed to cover those situations in which the govern-

39. Sax at 28.

40. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation Law,"* 80 HARV. L. REV. 1165, 1184 (1967) [Hereinafter cited as Michelman].

41. *Id.* at 1186.

42. BINDER at 3.

43. *Id.*

ment regulated the use of land which was being utilized by a property owner in a noxious, harmful or wrongful manner.⁴⁴

This theory was adopted in response to the need to regulate such operations as brick yards, livery stables and fertilizer plants. A noxious use, or nuisance use, was viewed as "merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard."⁴⁵

The modern version of this theory is the "creation of the harm" test.⁴⁶ Under this test, the person who brings on the problem is in no position to complain about that problem and the regulatory measure emanating therefrom. While as a general rule, established economic interests cannot be diminished merely because of a resulting public benefit, that rule does not apply where the individual whose interest is to be diminished created the need for public regulation by his own conduct. For example, a regulatory measure imposing a safety regulation upon a property owner without compensation may be justified where the property owner created the safety hazard.⁴⁷

Diminution of Value Theory

One of the contributions of *Pennsylvania Coal* was to devise a test emphasizing the extent of the loss—the diminution of value test.⁴⁸ Despite having established this test, the Court often fails to follow it. By the Court's own admission, the comparison of values is not always conclusive.⁵⁰

The test emphasizes the degree, or magnitude, of the harm and is used when there is no physical invasion or nuisance⁵⁰—when the degree of harm increases, the claim to compensation becomes more compelling.⁵¹ Since the determination does turn on the degree of the quantitative diminution of value, this theory necessarily involves definitional problems of property.

Theories from the Scholars

In addition to the above three theories formulated by the Supreme Court, there are four major theories espoused by scholars which merit consideration.

44. Sax at 48.

45. BINDER at 3.

46. Sax at 48.

47. *Id.*

48. See the discussion of *Pennsylvania Coal* appearing in paper, *supra*.

49. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

50. Michelman at 1190-91.

51. *Id.*

*The Enterprise Test*⁵²

Proposed by Professor Sax, the enterprise test views property as fluidity rather than fixity. Property becomes an economic value and "a multitude of existing interests which are constantly interrelating with one another."⁵³

The interests of the government are divided into two roles: entrepreneurial and mediatory. As entrepreneur, the government operates a business: schools, offices, an army and much more. In order to run this vast enterprise, the government needs money and economic resources. It may attempt to resort to the property of its citizens to acquire such resources.

As mediator, the government governs for its people, resolves conflicts between its citizens, and operates for the health, safety and general welfare of the citizens. In so doing, it may be necessary for the government to acquire the property of its citizens.

It is admitted that regardless of which role the government plays, if it takes property, the property owner loses economic value. Since we must have a workable rule to guard the interests of the government and its citizens as well as the interests of the individual property owner, in certain circumstances the property owner may be forced to suffer the economic loss without any compensation.

The losses to individual property owners arising from government activity in its role as entrepreneur result in a benefit to the government enterprise; losses arising from government activity as mediator result in a resolution of conflict between competing private economic claims and produces no benefit to a government enterprise. In the former situation where an economic loss is incurred by a property owner as a result of government enhancement of its resource position in its enterprise capacity, a taking would occur and compensation would be required. In the latter situation, where the loss is incurred as a result of the government's acting in a mediatory and arbitral role, the loss is viewed as a noncompensable exercise of police power. No physical invasion, nuisance, or diminution tests need be satisfied.

If this theory is applied to the aforementioned *Goldblatt* case, the ordinance would be a clear cut, no compensable exercise of police power, as it did not add to the resources of the government enterprise.

52. The Enterprise Theory has been proposed by Professor Joseph L. Sax. See Sax, *supra* note 28; Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

53. Sax at 61.

*Eradication of Evils Approach*⁵⁴

Proposed by Professor Dunham, this theory is similar to the traditional "creation of the harm" test developed under the noxious use theory. According to Dunham, under the eradication of evils approach, "regulation without compensation requires a causal relationship between the regulated activity and harm."⁵⁵ This test was originally constructed in *Nashville, C. and St. Louis Ry. v. Walters*.⁵⁶ Brandeis stated that while the police power did embrace regulations designed to promote the public welfare as well as health and safety, this did not justify requiring a single person to bear the cost of advancing the public interest. He wrote that "the imposition must bear some reasonable relation to the evils to be eradicated or the advantage to be secured."⁵⁷

Under this theory, a property owner might be compelled to bear the external costs of his activities. If his factory creates pollution, he is required to pay for it, much like the situation with the noxious use test.

This theory recognizes that the state has an interest both in promoting the general welfare by securing beneficial use and development of property and in preventing harmful development of property. It clearly draws a distinction between these two interests when it comes to the government's power to take the property of a private individual in order to accomplish one of the interests. There is a clear distinction between compelling a property owner to do something for the general welfare without compensation and requiring the owner to bear the cost of his own harmful activity. Under the eradication of evils approach the former could not be done; if property were taken from an owner for the public benefit, compensation would be required. With respect to the latter illustration, a regulation designed to inhibit a property owner's continuing a harmful activity would be a valid exercise of police power, requiring no compensation.

With reference to the *Goldblatt* case it appears that the facts and some of the language of the majority opinion support the requirement that "the prohibition or regulation must compel an owner to eliminate a public evil created by him and cannot compel him to act only to promote the public interest by providing without cost something the public wants."⁵⁸

54. The Eradication of Evils Approach has been proposed by Allison Dunham. See Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUMBIAN L. REV. 650 (1958); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. COURT REV. 63 (1962).

55. Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. COURT REV. 63, 75 (1962). [Hereinafter cited as Dunham].

56. 294 U.S. 405 (1935) as noted in Dunham at 73-74.

57. *Id.* at 74.

58. *Id.* at 75.

*The Fairness Test*⁵⁹

. . . the only 'test' for compensability which is correct in the sense of being directly responsive to society's purpose in engaging in a compensation practice is the test of fairness: is it fair to effectuate this social measure without granting this claim to compensation for private loss thereby inflicted?⁶⁰

Under Michelman's fairness test, government undertakings which have the prima facie effect of impairing the rights of an individual owner would be forbidden unless compensation payments or other satisfactory corrective measures were employed to equalize the impact. If it could be shown that some other rule would work better for the person whose interests are being affected by the government's undertaking, a departure from the above "full compensation" rule might be appropriate.

In determining what constitutes fairness in compensation, we would consider several factors: the disproportionateness of the harm a measure inflicts on individuals, the likelihood that those harmed were in a position to extract balancing concessions, and the clarity with which "efficiency" demands the measure.

This theory represents the most theoretical approach to the compensation including a discussion of utilitarian policy, and except for the basic definition above, any comment with respect thereto must be expansive as a result of the complexity of the theory.⁶¹

*The Balancing Test*⁶²

As one might expect, when using the balancing test to determine whether or not compensation is required, we weigh the benefit conferred upon the public against the burden cast upon the private property. When there is an infringement upon private property so substantial as to outweigh the public benefit, a taking occurs. This is one of the oldest proposed theories on the issue, yet it has never been adopted by the courts. It has been suggested that the balancing test was utilized in *Pennsylvania Coal* in the discussion of the "magnitude of the harm," yet it was not formally mentioned.

Several elements, or factors, are to be considered in light of this test.

59. The Fairness Test has been proposed by Frank I. Michelman. See Michelman, *supra* note 40.

60. *Id.* at 1171-1172.

61. Harris, *Environmental Regulations, Zoning, and Withheld Municipal Services: Takings of Property by Multi-Government Action*, 25 UNIV. OF FLA. L. REV. 635, 673-75 (1973).

62. The Balancing Test has been supported by a number of scholars and legal writers. See Netherton, *Implementation of Land Use Policy: Police Power vs. Eminent Domain*, 3 LAND AND WATER L. REV. 33 (1968). [Hereinafter cited as Netherton].

First, with respect to the property owner, the *degree* to which the use of his property is being restricted is important. This does indeed bring back reflections of *Pennsylvania Coal*, in which Holmes articulated that the question of compensation turned primarily upon the degree of economic injury imposed by the government regulation.⁶³

If this factor is considered, it is clear that an invasion would be a "taking." Likewise a restriction forcing a property owner to use land for a state function would be a taking. These are examples of total takings of property. However, if the ban on the land is not total, but rather is a substantial restriction upon the use of the land, the question of whether there is a taking is more difficult. In pondering the question, we would consider the extent of the restriction, the diminution of value it presents (also from *Pennsylvania Coal*), and the effect of the restriction upon the owner's property. The more adverse the effect on the owner's property, the more compelling is the argument for a taking and the more compelling the reason for the restriction would have to be in order for a court to find that there is no taking. In considering this factor, a court would also consider whether a less restrictive, reasonable alternative could have accomplished the same result.

A second factor, on the other side of the scale, is the nature of the interest which the state is trying to protect. The strength of the state's argument in a police power versus taking controversy varies with relation to the public importance of the regulatory measure. For example, protection of a water supply would probably be considered more important than the promotion of aesthetics. It is to be noted, however, that today, with the emphasis on planned development and environmental protection, any of the state's objectives to protect the public health, safety and general welfare will be weighed more heavily than before.

Other factors are also to be considered. One looks to the economic consequences a regulation might have on the entire community. And, in line with the "creation of the harm" and "eradication of evils" approaches, one considers who created the problem which is being regulated. Naturally, if a property owner created the problem, the scales would tip against him.

C. SEARCHING FOR A FEW PRINCIPLES

In determining the common thread running through eminent domain-police power regulation cases, the one determinative element appears to be that derived by Holmes in *Pennsylvania Coal*—"the question depends upon the particular facts."⁶⁴ As Netherton writes:

63. Sax, *supra* note 28.

64. *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393, 413 (1922).

It is in this area of the police powers positive aspects that the lines of distinction become blurred, and courts have trouble developing consistent patterns to describe those situations in which non-compensable regulation of land use will be permitted and those in which acquisition with compensation will be required. Accordingly, when regulatory measures have been challenged as unconstitutional, courts have tended to limit the scope of their decisions to the issues and circumstances before them, declaring that it is not in the nature of things that any definitive list of the police power's applications can be drawn up. They have, moreover, consciously resisted pleas to substitute judicial judgment for legislative judgment on the merits of regulatory measures where any reasonable basis for the action was demonstrated. Prediction of what the courts will decide as to the validity of proposed applications of the police power to land use is, therefore, more reliably based upon an understanding of the basic nature of the power and the factual setting in which it is applied than upon any tally of the courts' historic handling of regulatory laws.⁶⁵

So if one is concerned with predicting the outcome of a particular case, he ultimately searches for the principle established in those cases which have factual situations similar to the case with which he is concerned. The number of particular factual situations is tremendous, and one paper could not attempt to extract the principles emanating from each one. Not only would such principles vary with the facts, but they might also vary with the jurisdiction. But at least one book does attempt to take the factual situations in modern taking cases and categorize them "according to the most common type of land use regulations that give rise to litigation under the taking clause."⁶⁶ Though we will not attempt to recapitulate the findings in that book, it is important to mention the areas enumerated therein:

1. Regulation of Mining
2. Regulation of Flood-Prone Areas
3. Regulation for the Protection of Wetlands or Estuarine Areas
4. Regulation to Create Open Space in New Subdivisions
5. Regulation for the Protection of Beach Lands
6. Regulation to Control Population Density and Preserve Agricultural Land
7. Regulation for the Preservation of Historic Buildings or Districts
8. Regulation of Signs and Related Aesthetic Considerations
9. Regulation for the Purpose of Phasing or Timing Residential Development

In examining cases in each of these areas, we notice that varying conclusions are reached depending upon the classification and even

65. Netherton at 37-38.

66. BOSSELMAN at 141-194.

upon a sub-classification given the particular facts and circumstances of each individual case. But one common thread that is observed is the frequent citation to *Pennsylvania Coal*. Further comments attempting to establish a few principles will be discussed *infra*, but first a few comments on a couple of the above-listed "types of regulatory measures" will be made.

With respect to Beach Protection Regulations,⁶⁷ cases involving such regulations often turn on title theories "which hold that the owner of adjoining land has never had, or has relinquished, his right in the property."⁶⁸ In Oregon, for example, the legislature applied the theory of customary law in order to make a declaration of public rights in beach land and the Supreme Court approved regulations prohibiting construction on the ocean side of the vegetation line stretching along the Oregon coast.⁶⁹

One of the most actively litigated land use areas is that involving regulations to create open space in new subdivisions.⁷⁰ This includes requiring subdivision developers to dedicate land to provide park and recreation plans for the subdivisions, and to supply streets and sewers. Such requirements are usually upheld.

Regulations for the purposes of population control and preservation of open spaces include zoning provisions which provide for large lot sizes and deep building setbacks.⁷¹ As a general rule, such provisions are deemed valid for reasons ranging from preservation of area character and environmental necessity to the need to develop areas in accordance with the available road, fire, water and sewer facilities. In stating that the above reasons are valid reasons for regulating land use, the writer would point out that where such regulation would commit "significant economic injury" to the property owner, the regulation will probably be found invalid.⁷²

An increasing sympathy to the regulation of land use for aesthetic purposes has emerged in recent years.⁷³ As with regulatory measures affecting population control, regulations here are also tied to a balance between aesthetic judgment and economic considerations. Such a balance is applied on a case-by-case basis to determine whether the provision is valid.

67. *Id.* at 164-168.

68. *Id.* at 167.

69. *Id.*

70. *Id.* at 168-175.

71. *Id.* at 175-182.

72. *Id.* at 177.

73. *Id.* at 188-192.

Three Apparent Principles

Leaving the "common types of land use regulation" and the idea of defining a taking on a case-by-case method, we turn to the consideration of a few principles gleaned from the few Supreme Court decisions and the many federal appellate and state decisions.

From our first section on the background of the distinction between police power and taking, we are aware that the Supreme Court has written many decisions on the subject of police power *or* "taking," but it has rarely dealt with the distinction between the two.

From the lower federal and state courts we have a myriad of opinions dealing with numerous types of regulatory provisions and encompassing practically every type of factual situation. But once again, there is a dearth of opinions on the exact distinction between police power and taking.

From our readings of articles and publications by the scholars in the field we find agreement among them that there is confusion about any definitional distinction between police power and "taking" and that there is no concrete common thread that appears throughout cases on the subject. They refer to the present state of the law on the distinction as "a crazy-quilt pattern," "devoid of helpful explanatory data," and "unsatisfying."⁷⁴ Professor Sax writes:

Few legal problems have proved as resistant to analytical efforts as that posed by the Constitution's requirement that private property not be taken for public use without payment of just compensation. Despite the intensive efforts of commentators and judges, our ability to distinguish satisfactorily between 'takings' . . . and the exercise of the police power . . . has advanced only slightly since the Supreme Court began to struggle with the problem some eighty years ago.⁷⁵

Despite the scholars' agreement that there is a lack of consistency in the opinion of our courts, they have still attempted to establish a few guidelines or principles which are to be looked for when one is studying factual situations and/or cases on the subject.

The first such principle is that there is a correlation between the nature of the public purpose which the regulation is designed to achieve and the willingness of judges to uphold the regulation.⁷⁶ Under this principle

. . . novel and nontraditional policy goals, perceived as lacking in broad community acceptability, have sometimes failed to obtain ju-

74. *Id.* at 195-196.

75. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). [Hereinafter cited as *Takings*].

76. BOSSELMAN at 197.

dicial approval. Objectives with a strong historic pattern of social approval are thus more likely to survive constitutional attack. . . .⁷⁷

This principle can be observed most clearly in the invasion and nuisance theories. When a regulation is designed to prevent a nuisance, it is usually held by the courts to be a valid exercise of police power and no compensation is required.⁷⁸ For example, in *Hadacheck v. Sebastian*, where the court upheld a city ordinance outlawing the operation of a brick yard, this principle was used to find the brick yard a nuisance.⁷⁹ Therefore the ordinance was a valid exercise of police power—not a taking.

It is to be pointed out that the courts are more likely to find a regulatory measure to be within the exercise of police power when the regulation affects and benefits a large segment of the population.⁸⁰ Here, a balancing test is utilized, balancing private detriment against the public benefit. Where the former is so severe that it is not offset by the latter, the determination will fall in favor of finding a taking. (Remember the Balancing Test, *supra*).

As a general rule, the courts will find a regulation invalid as an exercise of police power when it acts to enrich the government in its proprietary capacity at the expense of the individual property owner.⁸¹ For example, when the government acts in its capacity as the operator of our roads and schools, it is treated as a private enterprise and regulations related thereto will be deemed to be invalid. Rather such regulations will be classified as takings and compensation will be required. (Remember the Enterprise Test, *supra*).

The second principle is that "the validity of a regulation often varies with its suitability to the property to which it is applied."⁸² Under this principle, when an owner argues that a regulatory measure injures his property, the court will look to the individual facts and circumstances and see how the regulation affects the regulated piece of property with respect to the neighboring land. For the regulation to be valid as an exercise of police power, the use permitted on the property affected by such regulation must be the kind of use that could reasonably be undertaken on the property.⁸³ In the event that the regulation affects the property in a way so that its use is highly incompatible with the

77. Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CALIF. L. REV. 1, 14 (1970-71).

78. See the Supreme Court Cases discussed in this paper.

79. 239 U.S. 394 (1915).

80. BOSSELMAN at 199.

81. *Id.* at 200.

82. *Id.* at 204.

83. *William Murray Builders, Inc. v. City of Jacksonville*, 254 So. 2d 364 (Fla. App. 1971), as noted in BOSSELMAN at 205.

uses of surrounding property, the court may find such regulation to be a taking. This finding of a "taking" is based on the idea that the regulation lacks logical rationale and only works to harm the property owner by inhibiting his use of his property. (Remember the Eradication of Evils Approach, *supra*, and the Creation of the Harm Test, *supra*).

The third and final principle pronounced by the scholars is that the extent of the loss of the private property owner is a significant element in the determination of whether the regulation is a valid exercise of police power or a taking.⁸⁴ There is no mathematical formula to determine when the loss is enough to constitute a "taking" nor is there a precise monetary loss value at which the courts will hold that a taking occurred. The general rule appears to be that the financial loss *of and by itself* is not alone sufficient to determine whether a taking occurred. We are reminded of the case of *Hadacheck v. Sebastian*, where the court sustained a regulation as a valid exercise of police power despite the fact that the value was diminished by over 90 per cent.⁸⁵ Although the value of the property was diminished from \$800,000.00 to \$60,000.00, the court held this loss of value to be insufficient to find a taking. Professor Sax points out that if the governmental regulation operated so as to make a private right essentially worthless, it would be held to be a taking of property for which compensation must be paid.⁸⁶ But *Hadacheck* would appear to question this assertion, considering the degree of the loss of value. At any rate, the financial loss incurred is a relevant consideration, but not a decisive one. (Remember the Diminution of Value Test, *supra*).

CONCLUSION

From the few cases reported by the Supreme Court we have seen the definition of taking expand from the strict construction interpretation requiring an actual seizure of lands to the several-pronged rule of *Pennsylvania Coal* which was designed to meet more adequately the needs of a growing industrial state and economy.

Since *Pennsylvania Coal*, the Supreme Court has refused to hear cases arising under the taking clause except in very rare instances. And the Court has been particularly cautious about dealing with the distinction between police power and a taking. This issue and collateral matters related thereto have been left to the lower federal courts and state courts. As a result of the lack of leadership from a central court, we have no binding principle to tell us *per se* when a regulation is an exercise of police power or a taking. Rather, we must look to the facts

84. *Id.* at 207-208.

85. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

86. *Takings* at 152, 156.

of each individual case and search for reported cases in our particular jurisdiction which have similar factual situations.

Despite this inconclusive, and perhaps seemingly chaotic state of the law, we were able to extract a few rules from Supreme Court cases, some relevant theories from scholars in the area, and three actual principles as seen by these scholars. Based on these principles we can conclude by recapitulating a few guidelines, or common threads, which the courts appear to follow when confronted with the question of whether a regulation is a valid exercise of police power or a taking.

First, it appears that the courts are more favorably disposed to regulations which are designed to eliminate nuisances. Second, they prefer that the regulation have a strong public benefit; that is, benefit a large area and a large segment of people as opposed to being merely a local regulation. In this light, an idea with an historic pattern of social approval is more likely to gain approval.

Third, the courts prefer that the regulation be suitable to the particular piece of property and that it not cause any type of harm to the property. Fourth, the courts look for any reduction of value in the property. As a rule, a lesser diminution of value indicates that the court will be more favorably disposed towards finding a regulatory measure to be valid as an exercise of police power. Finally, there is a balancing test being continuously conducted with respect to each of these guidelines. For example, on the question of the public benefit, the court will weigh this public benefit against the private detriment the regulation might cause.

Looking back at the old and new theories discussed herein, we note that the nuisance theory, enterprise test, eradication of evils approach, fairness test, and balancing test all play a part in our five common threads.

As for the future, in what direction shall we proceed? A return to strict construction? Continuation of the case-by-case determination with an implicit utilization of our five principles? Or a formal adoption of these principles (and others) into a decisional rule? With the probability that the courts will be increasingly faced with determining the distinction between a regulation and a taking, it would appear that the adoption of some type of decisional rule (although it may still have some elasticity) would be a step in the right direction.