

STATE REGULATION OF SUBSTANDARD HOUSING AND THE FIFTH AMENDMENT TAKING CLAUSE: *DEVINES v. MAIER*

Courts have long struggled to define the scope of the Constitution's fifth amendment "taking" clause.¹ A typical taking occurs when a state uses its power of eminent domain to physically appropriate private property for public use.² Courts have extended the application of the taking clause to include state regulation³ that does not result in the

1. The fifth amendment taking clause states in part: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The fifth amendment taking clause conditions the government's power of eminent domain. The clause requires the government exercising its taking powers to pay compensation to the injured property owner. See *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878) (judiciary has authority to force state to pay compensation in accordance with taking clause). The Supreme Court has stated that the purpose of the taking clause is to prevent the government from burdening a few individuals with costs, which in all fairness, the public should bear. See *Armstrong v. United States*, 364 U.S. 40 (1960) (Court ruled that it is fair to require the federal government to pay compensation to merchants who held liens on vessels to which the government took title). The taking clause applies to state exercises of eminent domain through the fourteenth amendment. See *infra* note 2.

The Supreme Court first expressed its views on the taking issue in *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871). In *Pumpelly*, the Court held that the state took property when construction of a public dam led to flooding of the claimant's land. The Court required an actual physical invasion in its definition of a taking. *Id.* at 181.

2. The Supreme Court's ruling in *Chicago B. & Q.R.R. v. City of Chicago*, 166 U.S. 226 (1897), applied the taking clause to states through the fourteenth amendment. Municipalities' eminent domain powers also are restrained by the taking clause because municipalities are political subdivisions of states. See *Atlantic Coast Line R.R. v. City of Goldsboro*, 232 U.S. 548, 555 (1914) (courts must treat municipal ordinances as legislation enacted under the state's lawmaking power).

3. States enact the regulations at issue in taking claims pursuant to their police power. See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 412 (1922) (state statute restricting mining that caused subsidence of surface dwellings). See *infra* notes 25-39 and accompanying text for a discussion of *Mahon*. Using its police power, a state may restrict private property uses to protect public health, safety and welfare. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding a zoning ordinance forbidding industry in a residential area as a valid exercise of the police power). See generally 1 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* § 99 (1917) (discusses the types of regulation that are an appropriate exercise of the police power); Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36 (1964) (review of regulations that courts have considered takings); Stoebeck, *Police Power, Takings, and Due Process*, 37 *WASH. &*

actual physical invasion of property, but interferes with a property owner's rights to such an extent that the court considers the regulation a taking.⁴ One of the property rights that courts have considered to be deserving of fifth amendment protection is a tenant's leasehold interest.⁵ In *Devines v. Maier*,⁶ the Court of Appeals for the Seventh Circuit, however, held that the City of Milwaukee did not "take" a tenant's leasehold rights by ordering the tenant to temporarily vacate an uninhabitable dwelling.

The City of Milwaukee, acting pursuant to its housing code,⁷ ordered a tenant to temporarily vacate her apartment.⁸ The tenant claimed, *inter alia*, that the fifth amendment taking clause required the city to provide compensation before it could order her from her home.⁹

LEE L. REV. 1057 (1980) (reviewing judicial approaches used to decide which regulations are considered takings).

4. See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Justice Holmes, writing for the Court, provided little guidance to help future courts determine when a regulation is sufficiently intrusive for the court to consider it a taking. See *infra* note 33 and accompanying text.

5. *United States v. Petty Motor Co.*, 327 U.S. 372 (1946) (Court ordered federal government to pay compensation to tenants for the public use of tenants' building).

6. 728 F.2d 876 (7th Cir.), *cert. denied*, 105 S. Ct. 130 (1984).

7. MILWAUKEE, WIS., MILWAUKEE CODE OF ORDINANCES § 12-4 (1981). See *Devines v. Maier*, 665 F.2d 138, 143 (7th Cir. 1981). See also WIS. STAT. § 66.05 (1981). The ordinance authorizes the city to evict residents of a building that is "so old, dilapidated or . . . out of repair as to be dangerous, unsafe, unsanitary or otherwise unfit for human habitation." *Id.* at § 66.05(1)(a).

In response to blighted conditions that were contributing "to the development of, or increase in, disease, infant mortality, crime and juvenile delinquency," the City of Milwaukee enacted a housing code. MILWAUKEE, WIS., MILWAUKEE CODE OF ORDINANCES Ch. 51 (1981). See 665 F.2d at 145 n.3. These blighted conditions are "dangerous to the public health, safety, morals, and general welfare of the people." WIS. STAT. § 66.05(1)(a) (1981).

8. *Devines v. Maier*, 494 F. Supp. 992, 993 (E.D. Wis. 1980). From 1975 to 1978, the city ordered approximately 400 tenants to vacate their premises, almost all because of state and municipal housing code violations. See Brief for Appellants at 7, *Devines v. Maier*, 665 F.2d 138 (7th Cir. 1981). If a building's owner can bring the building up to code standards, the city may avoid destroying it by ordering the owner to make the necessary repairs. WIS. STAT. § 66.05(1)(a) (1981).

9. 494 F. Supp. at 994. The district court rejected tenant's taking claim, but conceded that courts may recognize regulations depriving a property owner of his rights as takings. *Id.* at 995. Nevertheless, the court asserted that the state does not take a property owner's rights when it regulates to promote public health and safety, even if the regulation destroys property rights. *Id.* The court relied on *Mugler v. Kansas*, 123 U.S. 623 (1887). See *infra* notes 15-24 and accompanying text for discussion of *Mugler*.

The court of appeals, facing the issue for a second time,¹⁰ rejected the tenant's taking argument and entered judgment for the city.¹¹

The Supreme Court first interpreted the fifth amendment taking clause in *Pumpelly v. Green Bay Co.*¹² In *Pumpelly*, the Court held that the state took a property owner's land when a public dam flooded neighboring property.¹³ Thus, the *Pumpelly* Court defined a "taking" as involving an actual physical invasion of private property.¹⁴

Eighteen years after *Pumpelly*, Justice Harlan, writing for the Court

The *Mugler* Court indicated that it is undesirable to burden a state's power to protect its inhabitants' safety with a compensation requirement. 123 U.S. at 669.

The district court pointed out that courts have never required the state to pay compensation to the owner of a dilapidated building for the costs of repair or destruction. 494 F. Supp. at 995.

On appeal, the tenant argued that the Supreme Court defined a regulatory taking in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978). Brief for Appellants at 18, *Devines v. Maier*, 665 F.2d 138 (7th Cir. 1981). Appellant claimed that under *Mahon* and *Penn Central* she is entitled to compensation if the state regulation completely destroys the value of her leasehold rights. *Id.* Appellant also asserted that she is entitled to compensation because the purpose of the taking clause is to prevent the state from unfairly burdening individuals with costs that the public should absorb. *Id.* at 20. *See supra* note 1.

The *Devines I* court agreed with both of appellant's arguments, and remanded the case to determine the amount of compensation that the state must pay. 665 F.2d at 146. The court emphasized the city's destruction of appellant's leasehold rights. *Id.* at 142. The court observed that because the public benefits from the housing code regulations, it is only fair to require the public to bear the cost of enforcing the housing code. *Id.* at 146.

10. *See infra* note 11.

11. 728 F.2d at 887. In *Devines II*, the court decided two issues. The tenant disagreed with the district court's method of computing the amount of compensation that the city must pay, while the city argued that because of language in two recent Supreme Court decisions, *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the court should reconsider its decision in *Devines I* granting the tenant's taking claim. *Id.* at 879.

In reversing its own *Devines I* decision, the Seventh Circuit stated that the "law of the case" doctrine, under which issues that a court decides on appeal become law on any subsequent appeal, is not a compelling limitation. *Id.* at 880. The court noted that it is not restrained by the law of the case doctrine if its previous decision is "clearly erroneous . . . and works a manifest injustice in the particular case." *Id.* (quoting *Luminous Unit Co. v. Freeman-Sweet, Co.*, 3 F.2d 577, 580 (7th Cir. 1924)).

12. 80 U.S. (13 Wall.) 166 (1871). *See generally* F. BOSSELMAN, D. CALLIES & G. BANTA, *THE TAKING ISSUE* 114-18 (1973) (tracing the history of the Supreme Court's taking clause decisions) [hereinafter cited as F. BOSSELMAN].

13. 80 U.S. (13 Wall.) at 181.

14. *See* F. BOSSELMAN, *supra* note 12, at 116.

in *Mugler v. Kansas*,¹⁵ distinguished police power regulations from eminent domain actions.¹⁶ In *Mugler*, the Court rejected a brewer's claim that the state "took" his brewery by enacting a statute that prohibited the manufacture and sale of liquor.¹⁷ Justice Harlan defined police power regulations as restrictions on the use of property that the state enacts to promote public health, safety or morals.¹⁸ According to Justice Harlan, the state does more than restrict the use of property in eminent domain actions. The state actually takes title and possession of the property.¹⁹ In an eminent domain action, then, the state acts more like an entrepreneur than a protector of public welfare.²⁰

Justice Harlan's police power regulation-eminent domain distinction sometimes is referred to as the "separate powers approach"²¹ because a court deciding a taking claim will first determine whether the state exercised its police or eminent domain power. Under this approach, a court will not consider a police power regulation a taking even if the regulation restricts a property owner's rights, because there is no actual physical appropriation of the property.²² Because the state has not taken property when it enacts a police power regulation, the state is not required to pay compensation.²³ In contrast, the state must always pay

15. 123 U.S. 623 (1887).

16. *Id.* at 668-69. See also Comment, *Inverse Condemnation and the Alchemist's Lesson: You Can't Turn Regulations Into Gold*, 21 SANTA CLARA L. REV. 171 (1981) (criticizing the Supreme Court's expanded application of the taking clause to state regulation).

A state's eminent domain power is premised on the state's right to exercise dominion over all property within its boundaries. See BLACK'S LAW DICTIONARY 470 (5th ed. 1979). The constitutional source of the eminent domain power is the fifth and fourteenth amendments. See also *supra* note 2. Most state constitutions also have provisions authorizing eminent domain. See D. MANDELKER, *LAND USE LAW* 15 (1982).

17. 123 U.S. at 668. The *Mugler* Court upheld the statute as a valid police power regulation based upon the statute's substantial relation to public health, safety and welfare. *Id.* at 661.

18. *Id.* at 659.

19. *Id.* at 668-69.

20. See Sax, *Takings*, *supra* note 3, at 39.

21. Comment, *supra* note 16, at 174.

22. See D. MANDELKER, *supra* note 16, at 16.

23. 123 U.S. at 668. Justice Harlan reasoned that burdening the state's police power with a compensation requirement would deter the state from regulating to promote public health, safety and morals. *Id.* at 669. A property owner may only challenge a police power regulation for its constitutionality. If the challenge succeeds, the court strikes down the regulation, but it does not require the state to pay compensation. *Id.* at 661.

compensation for an eminent domain action.²⁴

The Court expanded Justice Harlan's narrow interpretation of the taking clause in *Pennsylvania Coal Co. v. Mahon*.²⁵ The decision was to have a profound impact on the direction of taking law.²⁶ In *Mahon*, the holder of mining rights challenged a state statute which restricted mining that caused subsidence of surface dwellings.²⁷ Justice Holmes, writing for the Court, rejected Justice Harlan's separate powers analysis.²⁸ According to Justice Holmes, if state regulation "goes too far" the Court will consider it a taking.²⁹ Justice Holmes contended that police power regulations differ from eminent domain actions only in degree.³⁰ Justice Holmes' approach sets up a continuum, with police power regulations at one end and eminent domain actions at the other.³¹ Under the "continuum approach,"³² the police power regulation at some point "goes too far" and becomes a taking, thereby requiring the state to pay compensation.³³

Justice Holmes asserted that courts should use a balancing test to decide whether a regulation is a taking.³⁴ A court should weigh the public benefit from the regulation against the property owner's in-

24. See, e.g., *Sweet v. Rechel*, 159 U.S. 380 (1895) (if the state appropriates property it must pay compensation, even though the appropriation serves the public welfare).

25. 209 U.S. 393 (1922) (Brandeis, J., dissenting).

26. See Sax, *Takings*, *supra* note 3, at 39-40.

27. 260 U.S. at 412-13.

28. *Id.* at 415.

29. *Id.* The Court held unconstitutional as a police power regulation the state's attempt to restrict mining. *Id.* at 414. Justice Holmes contended that the state attempted to circumvent the taking clause's compensation requirement by labelling the statute a police power regulation. See *id.* at 413.

30. *Id.* at 416. Relying on *Mugler*, Justice Brandeis dissented. *Id.* Justice Brandeis argued that the statute was a valid exercise of the state's police power because it protected public health and safety. *Id.* at 422. Adopting the separate powers approach advocated by Justice Harlan in *Mugler*, Justice Brandeis maintained that the state is not obligated to compensate property owners for losses resulting from police power regulations. *Id.* at 417.

31. See Gordon, *Compensable Regulatory Taking: A Tollbooth Rises on Regulation Road*, 12 REAL EST. L.J. 211, 213-14 (1984) (analyzes the history and present status of the continuum approach).

32. *Id.* at 214.

33. In *Mahon*, Justice Holmes provided little guidance to aid courts in determining where to draw the line between police power regulations and eminent domain actions. Justice Holmes stated that deciding when a regulation becomes a taking depends on the facts of each case. 260 U.S. at 416.

34. *Id.* at 415-16.

jury.³⁵ In *Mahon*, Justice Holmes applied a "diminution in value" test³⁶ to measure the property owner's injury.³⁷ If the public need outweighs the property owner's injury,³⁸ the court will uphold the regulation without requiring the state to pay compensation.³⁹

Justice Holmes' continuum theory remains the predominant approach courts use to decide taking cases.⁴⁰ In determining whether a regulation should be considered a taking, however, courts have often used criteria other than the diminution in value test that Justice Holmes advocated.⁴¹ For example, some courts focus on the character

35. *Id.* See also D. MANDELKER, *supra* note 16, at 22.

36. 260 U.S. at 413. A court using the diminution in value test compares the value of the owner's property before and after regulation. *Id.* If the difference is large enough, the state must pay compensation for what the court recognizes as a taking. See D. MANDELKER, *supra* note 16, at 21.

37. For a discussion of the benefits and shortcomings of the diminution in value test, see Sax, *supra* note 3, at 50.

38. See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (Court used a balancing test to uphold a zoning ordinance that limited land uses to single family residence and open-space).

39. See F. BOSSELMAN, *supra* note 12, at 126, 138. See also *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978).

Courts, however, have not universally accepted Justice Holmes' approach. Six years after *Mahon*, the Supreme Court used Justice Harlan's separate powers approach to reject a taking claim. In *Miller v. Schoene*, 276 U.S. 272 (1928), the Court upheld a regulation ordering the destruction of red cedar trees without compensation. The trees produced a rust that damaged nearby apple orchards. *Id.* at 280. Justice Stone, writing for the Court, declared that "where 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." *Id.* at 279-80 (emphasis added). Justice Stone's separate powers approach in *Miller* is clearly inconsistent with *Mahon* because, under *Miller*, as long as the state's regulation is constitutional under its police power the Court refuses to recognize the regulation as a taking.

From 1930 to 1962, the Supreme Court left taking cases to the state courts. See F. BOSSELMAN, *supra* note 12, at 30-36 (analyzes state court taking decisions). In 1962 the Court returned to the continuum approach. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). In *Goldblatt* the Court upheld an ordinance that prohibited excavation below the water table. *Id.* at 598. Although the Court mentioned the separate powers approach advocated by Justice Harlan in *Mugler*, the Court clearly stated that a sufficiently intrusive regulation can be a taking. *Id.* at 594. The Court rejected the property owner's taking claim because the claimant failed to show sufficient financial injury. *Id.*

40. See generally Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1183-1201 (1967) (evaluating the merits of the different tests courts use in terms of how well they serve the fairness principle underlying the taking clause).

41. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), pro-

of the state's regulation rather than on the amount of harm caused to the property owner. If the state's regulation results in a physical invasion of the claimant's property, a court will consider it a taking and order the state to pay compensation.⁴² If, on the other hand, the state is merely regulating a property owner's "noxious use" of his property, a court is less likely to find a taking.⁴³ Another approach concentrates on the availability of alternative uses for the property after the regulation has been put into effect.⁴⁴ Courts using this approach will not recognize a state regulation as a taking unless the regulation leaves the

vides a good illustration. There, the Court held that a state statute authorizing a cable company to attach plates, boxes, wires, bolts and screws to the claimant's building was a taking. The Court asserted that when a state's regulation results in actual physical invasion of the property owner's land, a court should apply a per se rule of compensation. *See id.* at 421. *See also* Michelman, *supra* note 40, at 1184 (noting that courts always require compensation for a physical invasion). *Cf.* *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155 (1948) (federal regulation not a taking, regardless of the effect on claimant's property rights, without actual physical invasion).

42. A noxious use of property is a use threatening public health, safety or welfare. *See Sax supra* note 3, at 39. The state's regulation is merely a reaction to a problem the property owner created.

The states' power to terminate noxious uses without paying compensation is an extension of the states' traditional power to abate nuisances. *See Michelman, supra* note 40, at 1196-1201. State courts first allowed the government to abate nuisances, without paying compensation, in the nineteenth century. *See, e.g., Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53 (1851) (statute enjoining erection of wharf beyond certain boundaries not considered a taking, but instead is a noncompensable prohibition of a nuisance); *Presbyterian Church v. Mayor of New York*, 5 Cow. 538 (N.Y. 1826) (city did not take property rights when it prohibited use of land as a cemetery; cemetery was a nuisance because city officials believed burying the dead produced unhealthy vapors). *Accord* 1 P. NICHOLS, *supra* note 3, at § 104 (states' authority to eliminate nuisances without paying compensation limited to situations where the property right has little value).

Early in the twentieth century courts continued to use the noxious use-nuisance theory to reject taking claims. *See, e.g., Miller v. Schoene*, 276 U.S. 272 (1928) (upholding state statute that authorized destruction of red cedar trees because of the harmful rust that they produced); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (upholding ordinance that prohibited brick manufacturing in a residential area because of the smoke produced).

43. In *Penn Central*, the city's landmark law prohibited the claimant from building a high-rise office building on top of Grand Central Station. Justice Brennan, writing for the Court, rejected the claimant's argument that the city took its air rights. *Id.* at 138. Justice Brennan contended that the law did not hinder the claimant's "primary" expected use of the land. *Id.* at 136. Justice Brennan pointed out that the law provided the claimant with an adequate remedy — the right to transfer its development rights to a different area. *Id.* at 137. *Accord Agins v. City of Tiburon*, 447 U.S. 255 (1980) (upholding zoning ordinance because claimants were "free to pursue their reasonable investment expectations").

44. D. MANDELKER, *supra* note 16, at 21. *See also Village of Euclid v. Ambler*

claimant with no reasonable use of the property.⁴⁵ Because of the myriad of approaches to the taking issue,⁴⁶ courts have decided such claims largely on an ad hoc basis.⁴⁷

Even though taking cases seldom are decided by applying a general rule of law, state regulation of substandard housing is one area in which courts consistently have refused to find a taking.⁴⁸ Under Justice Harlan's separate powers approach, a state regulating pursuant to its housing code does not take property as long as the regulation is a valid exercise of the state's police power.⁴⁹ A housing code is a valid exercise of the police power if it is "substantially related" to public health, safety or welfare.⁵⁰ Under Justice Holmes' continuum approach, housing code enforcement is not sufficiently intrusive to constitute a taking.⁵¹ Thus, regardless of whether a court uses the separate

Realty Co., 272 U.S. 365 (1926) (upholding zoning ordinance that restricted land to residential use, even though the ordinance caused 75% diminution in value).

45. One author remarked that, "[t]hese tests are rather like a blind person's attempt to describe an elephant; they are insufficient because no one test is definitive in all factual situations." Comment, *Inverse Condemnation*, *supra* note 16, at 176.

46. See *Penn Cent.*, 438 U.S. at 124 (1978).

47. See, e.g., *Miles v. District of Columbia*, 510 F.2d 188 (D.C. Cir. 1975) (municipality may use police power to destroy, without paying compensation, a building that is a threat to public safety or health); *Traylor v. City of Amarillo*, 492 F.2d 1156 (5th Cir. 1974) (upholding a city ordinance authorizing destruction without paying compensation of unrepaired nuisances); *Baker v. Mueller*, 222 F.2d 180 (7th Cir. 1955) (municipality may use police power to destroy, without compensation, buildings that are a nuisance or are dangerous to public safety); *Jackson v. Davis*, 530 F. Supp. 2 (E.D. Tenn. 1981) (city's condemnation of a building that violates electrical wiring regulations not considered a taking); *Housemaster Corp. v. City of Kenner*, 374 So. 2d 1240 (Sup. Ct. La. 1979) (city may destroy dilapidated apartments without paying compensation because apartments threatened public safety); *City of Paterson v. Fargo Realty Inc.*, 415 A.2d 1210 (N.J. Dist. 1980) (city may destroy, without paying compensation, fire damaged building that threatens public safety); *Cf. Blume v. City of Deland*, 358 F.2d 698 (5th Cir. 1966) (city may destroy unsafe building and place a lien on building for cost of demolition); *Schneider v. District of Columbia*, 117 F. Supp. 705 (D.D.C. 1953) (city may condemn slum housing without paying compensation). *Contra* *Yonkers Community Dev. Agency v. Morris*, 335 N.E.2d 327 (Ct. App. N.Y. 1975) (city taking public property pursuant to urban redevelopment plan must pay compensation).

48. See *supra* note 23 and accompanying text.

49. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

50. See *supra* note 47.

51. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court stated in dictum the following:

States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation to all economic injuries that such regulation entails . . . our holding today in no way alters the

powers or the continuum approach, a court will not consider a state's regulation pursuant to its housing code a taking.⁵²

Recently, the Supreme Court, in *Texaco, Inc. v. Short*,⁵³ relied on a novel approach to reject a property owner's taking claim.⁵⁴ In *Texaco*, a holder of mineral rights challenged the constitutionality of a state statute⁵⁵ that divested him of his mineral rights.⁵⁶ The statute requires a holder of mineral interests to either use the interest⁵⁷ or file a statement of claim within twenty years of acquisition of the right.⁵⁸ If the holder of the mineral rights fails to use them, and neglects to file a statement of claim, the rights revert to the current owner of the property's surface.⁵⁹ In ruling on the statute's constitutionality, the Court first noted that it is the state, not the Constitution,⁶⁰ that creates all property rights, including mineral rights.⁶¹ The Court next stated that because it is the states that create property rights, it is constitutional for a state to place reasonable conditions on the retention of such rights.⁶² If a property owner fails to satisfy the requirements that a state places on the retention of a right, then the property owner loses

analysis governing the State's power to require landlords to comply with building codes.

Id. at 440. For a discussion of *Loretto*, see *supra* note 41 and accompanying text.

52. 454 U.S. 516 (1982).

53. *See id.* at 530.

54. The statute is the Dormant Mineral Interests Act, IND. CODE ANN. §§ 32-5-11-1 to 32-5-11-8 (Burns 1980).

55. 454 U.S. at 518.

56. The Act defines the "use" of a mineral interest as the production or attempted production of minerals, or the payment of rent, royalties or taxes for the interest. IND. CODE ANN. § 32-5-11-3 (Burns 1980).

57. *Id.* at 32-5-11-1.

58. *Id.*

59. 454 U.S. at 525. The Court cited *Board of Regents v. Roth*, 408 U.S. 564 (1972) (holding that under state law an untenured professor has no property interest and thus is not entitled to a hearing).

60. The Court noted that Indiana state law creates mineral interests. 454 U.S. at 525-26. *See also* IND. CODE ANN. § 32-5-11-2 (Burns 1980).

61. 454 U.S. at 526. The Court made a similar argument in *Arnett v. Kennedy*, 416 U.S. 134 (1974). In *Arnett*, a civil service employee claimed that he had a constitutional right to a hearing before the federal government could discharge him. The Court held that the same statute that the claimant argued provided a property right also limited the right by denying the opportunity for a hearing. *Id.* at 153-54. The Court concluded that the claimant must "take the bitter with the sweet." *Id.* at 154.

62. 454 U.S. at 529.

his right.⁶³

Applying this reasoning to the facts in *Texaco*, the Court concluded that because the claimant did not use his mineral interest or file a statement of claim as the statute required, his mineral rights lapsed.⁶⁴ The Court asserted that the claimant's neglect resulted in the complete divestment of his mineral rights and thus he possessed no rights for the state to take.⁶⁵ The Court emphasized that the claimant's disregard for the statutory requirements caused the lapse of the right, rather than any state conduct.⁶⁶

In *Devines v. Maier*,⁶⁷ the Seventh Circuit Court of Appeals, responding to the Supreme Court's *Texaco*⁶⁸ opinion, reversed its prior decision⁶⁹ (*Devines I*) by finding that the City of Milwaukee did not take a tenant's leasehold rights when it ordered her to temporarily vacate her uninhabitable dwelling.⁷⁰ The *Devines I* court, using a continuum approach⁷¹ and employing the "diminution in value" test,⁷² considered the city's enforcement of its housing code a taking.⁷³ Following the Supreme Court's *Texaco* opinion, the court of appeals altered its analysis of *Devines*, and rejected the tenant's claim that the city's regulation constituted a taking.⁷⁴

63. *Id.* at 526. The Court pointed out that the Indiana statute is similar to state recording acts and statutes of limitation. In each case the property owner's rights lapse because he fails to fulfill statutory requirements. *Id.* at 526-29.

64. *Id.* The Court noted that the statutory provision requiring the filing of a statement of claim is not itself a taking. *Id.*

65. *Id.* The Court stated that "this Court has never required the State to compensate the owner for the consequences of his own neglect." *Id.*

66. 728 F.2d 876 (7th Cir.), *cert. denied*, 105 S. Ct. 130 (1984).

67. 454 U.S. 516 (1982). See *supra* notes 53-66 and accompanying text for a discussion of *Texaco*.

68. 665 F.2d 138 (7th Cir. 1981).

69. 728 F.2d at 886.

70. 665 F.2d at 141. The court, citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), stated that its resolution of the taking claim depends on the extent that the state's regulation interferes with the private property right. *Id.* See *supra* notes 25-39 and accompanying text for a discussion of *Mahon* and the continuum theory.

71. 665 F.2d at 142, 144. The court found that the city's enforcement of its housing code completely destroyed claimant's leasehold rights by extinguishing his right to occupy the premises. See *supra* note 36 and accompanying text for a discussion of the diminution in value test.

72. *Id.* at 146.

73. 728 F.2d at 886.

74. See Brief for Appellant at 19-24, *Devines v. Maier*, 728 F.2d 876. See *supra*

The Mayor of Milwaukee argued that the city's enforcement of its housing code was indistinguishable, in principle, from the operation of the state mineral rights statute in *Texaco*.⁷⁵ The court compared the facts of the two cases and concluded that in each case the state's regulation consisted of three steps. First, in both cases the state created a property right.⁷⁶ The state created mineral rights in *Texaco*⁷⁷ and leasehold rights in *Devines*.⁷⁸ Second, the state, exercising its police power, placed a reasonable condition on the property right.⁷⁹ In *Texaco*, the state required the property owner to either use his mineral rights or file a statement of claim.⁸⁰ In *Devines*, the state required the property owner to maintain his premises in a habitable condition.⁸¹ Finally, in both cases the state extinguished the property right when the property owner failed to satisfy the requisite condition.⁸²

The *Devines* court, after acknowledging the similarity between the facts of the two cases, considered the *Texaco* Court's reasoning.⁸³ The court noted that in *Texaco* the lapse of the property owner's mineral rights occurred through "no fault of the State."⁸⁴ The court next evaluated, in terms of fault, the sequence of events leading to the city's order to vacate.⁸⁵ The court observed that the city, by enacting and enforcing its housing code, protected both the tenant and the public from a potentially hazardous condition.⁸⁶ Under the housing code both landlords and tenants are obligated to make repairs that are nec-

notes 55-59 and accompanying text for a discussion of the mineral rights statute in *Texaco*.

75. See 728 F.2d at 882.

76. See *supra* note 61 and accompanying text.

77. The State of Wisconsin creates a property right by providing tenants with the right to the exclusive possession of their leased premises. WIS. STAT. ANN. § 704.05(2) (West 1981).

78. See 728 F.2d at 882.

79. 454 U.S. at 518.

80. WIS. STAT. § 66.05(1) (a) (1981). See *supra* note 7.

81. See 728 F.2d at 882.

82. See *id.*

83. *Id.* at 884.

84. See *id.*

85. See *id.* at 886.

86. See *id.* at 884 n.8. Tenants must maintain the plumbing, electrical wiring, machinery, and furnished equipment unless the cost of repair approaches the amount of rent that the tenant pays. Tenants must also repair damage caused by their negligence. Landlords are responsible for all other necessary repairs. WIS. STAT. ANN. § 704.07 (West 1981). A municipal ordinance imposes an additional obligation on tenants. Ten-

essary to keep the premises in a condition fit for human habitation.⁸⁷ Thus, the court reasoned, it is either the landlord's neglect or the tenant's neglect that makes the dwelling uninhabitable.⁸⁸

The *Devines* court concluded that its denial of the tenant's taking claim was completely supported by the *Texaco* decision.⁸⁹ In each case the state created a property right, but limited the scope of the right by placing a reasonable condition on retention of the right.⁹⁰ The property owner lost his right in each case when he failed to meet the statutory requirements that the state placed on the right.⁹¹ In both cases the property owner's uncompensated loss occurred as a direct result of his own neglect.⁹²

The tenant attempted to distinguish *Devines* from *Texaco* by arguing that the statutes operate differently to divest property owners of their rights.⁹³ The tenant observed that the mineral rights statute in *Texaco* is self-executing; if the mineral rights holder does not use his interest, or file a statement of claim, his rights automatically lapse.⁹⁴ In contrast, Milwaukee's housing code is not self-executing⁹⁵ because a building inspector must declare a dwelling "uninhabitable."⁹⁶ The tenant contended that because housing code enforcement requires a discretionary administrative decision, the city provides property owners with less notice of when and under what conditions they will lose their rights than did the state in *Texaco*.⁹⁷

The court, noting that the building inspector's decision is not final,⁹⁸

ants must maintain their premises in a "clean and sanitary condition." MILWAUKEE, WIS., MILWAUKEE CODE OF ORDINANCES § 51-81 (1981).

87. See 728 F.2d at 884.

88. *Id.* at 885. In further support of its rejection of the tenant's taking claim, the court cited language from *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). See *supra* note 51 for the relevant language in *Loretto*.

89. See 728 F.2d at 884.

90. See *id.*

91. See *id.*

92. See Brief for Appellees at 7-9, *Devines v. Maier*, 728 F.2d 876.

93. See *id.* at 7.

94. *Id.* at 8.

95. 728 F.2d at 885.

96. See Brief for Appellees at 9, *Devines v. Maier*, 728 F.2d 876.

97. See 728 F.2d at 885.

98. *Id.*

dismissed the tenant's distinctions as insignificant.⁹⁹ A municipal ordinance provides tenants with the right to a hearing and the right to appeal the results of the hearing.¹⁰⁰ Additionally, tenants can appeal to the state courts for a restraining order, and a judicial determination of the reasonableness of the city's order.¹⁰¹ Because in both *Texaco* and *Devines* the property owner had a right to judicial review before he lost his property right,¹⁰² the court concluded that the two cases were sufficiently similar to warrant the same outcome.

Devines v. Maier is important for its application of the Supreme Court's taking claim analysis in *Texaco* to a tenant's taking argument.¹⁰³ Following the *Texaco* decision, the *Devines* court rejected the tenant's taking claim by focusing on how the state narrowly defines leasehold rights.¹⁰⁴ Recognizing that the state conditioned the tenant's leasehold rights on his ability to maintain the premises in a habitable state, the court avoided facing the taking claim.¹⁰⁵ Because the tenant neglected to satisfy the state-imposed condition, he lost his property right, and therefore possessed no property right that the state could take by its order to vacate the premises.¹⁰⁶

The Seventh Circuit's application of *Texaco* to the regulation of a tenant's leasehold rights warrants criticism. In *Texaco*, the property owner clearly failed to satisfy the statutory requirements, thereby causing the lapse of his rights.¹⁰⁷ In the *Devines* case, however, the housing code imposes duties on both landlords and tenants.¹⁰⁸ A landlord's neglect may cause a faultless tenant to lose his leasehold rights.¹⁰⁹

Devines v. Maier also deserves criticism for its failure to reject the tenant's taking claim by applying a conventional approach to the tak-

99. *Id.* See MILWAUKEE, WIS., MILWAUKEE CODE OF ORDINANCES § 12-11(3), (5) (1981).

100. 728 F.2d at 885. See WIS. STAT. § 66.05(3) (1981).

101. 728 F.2d at 885.

102. In *Texaco*, the Supreme Court did not indicate whether its taking analysis should be extended by courts to other areas of state regulation. See 454 U.S. at 530.

103. See *supra* notes 67-102 and accompanying text.

104. See 728 F.2d at 884.

105. See *id.*

106. See *supra* note 65 and accompanying text.

107. See *supra* note 64 and accompanying text.

108. See *supra* note 86.

109. The *Devines* court recognized that it might be the landlord's neglect that caused the dwelling to become uninhabitable. 728 F.2d at 886. The court, however, seemed to find the landlord-tenant distinction irrelevant. See *id.*

ing argument. Courts using either a continuum or separate powers approach have never held state enforcement of its housing code to be a taking.¹¹⁰ By ordering the tenant to vacate her uninhabitable dwelling, the city simply exercised its police power to protect the public from an unhealthy and potentially dangerous situation.¹¹¹ The city did not physically invade, acquire an interest in, or use the property in any way that would lead a court applying a traditional approach to consider the city's regulation a taking.¹¹²

Devines v. Maier is significant because it applies *Texaco's* atypical approach to the different and important subject of state regulation of substandard housing. In the future, courts dealing with taking claims in the context of substandard housing may follow the *Devines* lead and employ the *Texaco* analysis. Additionally, courts may attempt to expand *Texaco*, as the *Devines* court did, to decide taking claims in areas other than the regulation of substandard housing or mineral rights.

Steven R. Selsberg

110. 494 F. Supp. at 995. *See supra* note 47 (cases where court denied claimants compensation for state regulation of sub-code housing).

111. 728 F.2d at 886. *See also supra* note 7.

112. *See supra* notes 39-42 and accompanying text.