

SAN DIEGO GAS: PROBLEMS, PITFALLS AND A BETTER WAY

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In the practice of medicine there is a maxim that, even if no cure can be effected, the physician should not make the patient worse. Indeed, the same principle governs human action generally, including the process of judicial decision. On that principle, the Supreme Court case of *San Diego Gas & Electric Co. v. City of San Diego*¹ causes concern.

Stated broadly, the question in *San Diego Gas* is what constitutional limitations restrict a governmental entity's police power to regulate the use of privately-owned land. More specifically, at what point, if at all, does a regulation so severely inhibit the owner's use that a constitutional limitation is exceeded? Two amendments to the United States Constitution, the fifth and the fourteenth, are involved. The fifth, binding directly on the United States Government, prohibits a deprivation of "property, without due process of law" and requires "just compensation" if "private property be taken for public use." The fourteenth amendment, binding on the states, provides that persons shall not be deprived of "property, without due process of law." In addition, it has been understood since at least 1897 that the due process clause of the fourteenth incorporates the fifth's compensation requirement for a "taking" of property.² Thus, the United

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1. 450 U.S. 621 (1981).

2. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Chicago, B. & Q. R.R. v. Chicago*, 166 U.S. 226 (1897) (strong dictum).

States Constitution imposes both limitations on federal and state governments.

Of course, state constitutions generally also contain similar limitations that are subject to interpretation by the courts of their states. The Federal Constitution and subsequent interpretations by the United States Supreme Court impose a "bottom line" on actions by state governments and their creatures. States may, under their own constitutions, protect property owners more fully, but they cannot protect them less.

A third constitutional limitation, the "equal protection" clause of the fourteenth amendment, may be invoked in some cases. Equal protection claims involve an allegation that an offended person, landowner or other, has been treated discriminatorily compared with other persons. The present discussion excludes equal protection claims; this discussion concerns only severity of regulations.

The Court's constitutional analysis in *San Diego Gas* focused only on the "taking" clause. To simplify complex facts, the power company complained that a combination of zoning and open-space regulations deprived it of "all practical, beneficial or economic use" of some 214 acres it owned and wished to develop. The case followed a tortured course through the California courts, from the trial court up to the state supreme court, then back to the court of appeal, from which it came directly to the United States Supreme Court.

The court of appeal held that, no matter how severe the regulation, the company could not have eminent domain compensation, the so-called "inverse condemnation" remedy,³ on the authority of the California Supreme Court's opinion in *Agins v. City of Tiburon*.⁴ *Agins* had held that remedy was unavailable in California, but the court had said that a very severe regulation, one that deprived an owner of "substantially all use of his land," would be an eminent domain "taking." The court would then invalidate the regulations in a declaratory judgment or mandamus action.⁵ Therefore, the court of appeal

3. See *San Diego Gas & Elec. Co. v. City of San Diego*, 146 Cal. Rptr. 103 (Cal. App. 1978), *rev'd on remand without published opinion*, 4 Civ. No. 16277 (June 25, 1979).

4. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 477 U.S. 255 (1980).

5. Did the California Supreme Court's discussion of invalidity refer to the "taking" clause or the due process clause? In his dissent in *San Diego Gas*, Justice Brennan concludes it was the due process clause. See 101 S. Ct. 1287, 1298 n.4 (1981). This is wrong. In *Agins*, California said they referred to a "violation of the Fifth

added that if the company wished to retry the case and could prove that the regulations were so severe as to constitute a "taking," the company might yet have them declared invalid.

In Justice Blackmun's opinion, signed by Chief Justice Burger and Justices White and Stevens, the Court dismissed the appeal to the Supreme Court for want of a "final judgment or decree." Justice Rehnquist's concurring opinion completed the majority, though its reference to Justice Brennan's dissent must be considered in a moment. In effect, the majority seemed unwilling to consider the compensation, or so-called "inverse condemnation," remedy⁶ apart from the invalidation remedy. If that were all there were to it, *San Diego Gas* would be only a case of federal procedure, a dull subject indeed.

Justice Brennan's dissenting opinion and the prospect that a majority of the Court may agree with his views on the "taking question" places *San Diego Gas* at the eye of the storm. Justice Brennan, joined by Justices Stewart, Marshall, and Powell, was ready to review the California position that no land use regulation could call for compensation. The dissenters were willing to sever this question from the invalidation question because they concluded California had finally, and erroneously, precluded compensation.

Their constitutional doctrine, stated more completely than the Court has ever stated a police power taking doctrine, emerges as follows: 1) A land use regulation may so severely restrict a landowner

Amendment to the United States Constitution and article I, section 19, of the California Constitution" (California's eminent domain section). See 24 Cal. 3d at 273, 598 P.2d at 28, 157 Cal. Rptr. at 375. In the same connection they relied upon *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), a regulatory "taking" case if there is one, and upon a quotation from P. NICHOLS, *LAW OF EMINENT DOMAIN* (1972), also stating a "taking" theory. It is true that prior California decisions, such as *HFH, Ltd. v. Superior Ct.*, 15 Cal. 3d 508, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), and *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal.2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962), left a lot of question about whether California was working on a due process or "taking" theory. But not *Agins*; it is as clear as language can make it that the court had a "taking" doctrine in mind. If *Agins* is a due process case, then New York was right in *Fred F. French Inv. Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976); *Mahon* is also a due process case. If *Mahon* is a due process case, Justice Brennan's dissent is in serious trouble. We will return to this subject later.

6. In California and among some legal writers, the phrase "inverse condemnation" has come to describe the remedy of compensation for severe land-use regulations. This is not a discriminating use of language. Any action in which a landowner, as plaintiff, contends a governmental entity has a de facto exercised eminent domain powers is an "inverse" or "reverse" condemnation action.

as to effect a "taking" under the fifth amendment. 2) Regulations reach that point "where the effects completely deprive the owner of all or most of his interest in the property." *Pennsylvania Coal Co. v. Mahon*⁷ was cited as the "source" of this test. 3) If a regulation amounts to a "taking," "the government entity must 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."

In short, the dissenters would adopt the so-called "inverse condemnation" formula that some middle-level California decisions developed and that the California Supreme Court expressly rejected in *Agins*.⁸ Justice Brennan, viewing California's discussion of "invalidation" in *Agins* as based upon the guarantee of due process, was critical. He said *Agins* had in mind the same theory as *Fred F. French Investing Co. v. City of New York*,⁹ which clearly was a due process decision. The dissent's mischaracterization of *Agins*¹⁰ is one of the fascinating aspects of *San Diego Gas*. That aspect will be discussed later.

Justice Rehnquist's concurring opinion suggests a majority of the Court subscribed to the Brennan doctrine. Though concurring that the appeal should be dismissed for lack of an appealable judgment, Justice Rehnquist remarked that he agreed with "much of what is said in the dissenting opinion." One may infer that Justice Rehnquist was attracted to the general contours of the Brennan "inverse condemnation" doctrine, though perhaps he wanted to reflect upon the doctrine before committing himself.

A further complication is that Justice Stewart, who did sign the Brennan dissent, has now retired. Justice O'Connor has replaced him. During the time she was on the Arizona Court of Appeals, she did not write or sign an opinion that revealed her views on any subject covered by this article.¹¹ Similarly, Justice Blackmun's opinion

7. 260 U.S. 393 (1922).

8. *Agins v. City of Tiburon*, 145 Cal. Rptr. 476 (Cal. App. 1978); *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976), *vacating* *Eldridge v. City of Palo Alto*, 124 Cal. Rptr. 547 (Cal. App. 1975); *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 101 Cal. Rptr. 93 (1972) (dictum). *Accord Arastra Limited Partnership v. City of Palo Alto*, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated*, 417 F. Supp. 1125 (N.D. Cal. 1976); *Dahl v. City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974).

9. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

10. *See supra* note 5.

11. Justice O'Connor's name first appeared among the list of judges in the front of

for the Court did not disclose a position on the taking—"inverse condemnation" issue, except to remark that "the federal constitutional aspects of that issue are not to be cast aside lightly." It thus appears that three and probably four of the present justices agree basically with the Brennan doctrine, and the views of the other five justices are unknown.

Those students of the law laboring in the fields of police power, eminent domain, and land use regulation were quick to recognize *San Diego Gas's* importance.¹² It suggests the Court is, or was at the date of the decision, tantalizingly close to a breakthrough on the question of when or if a land use regulation is an eminent domain "taking" and, if so, what remedy the landowner may have. Or so many think.

The second section of this article will develop the theme that, had Justice Brennan's dissent been the Court's opinion, it would have compounded rather than resolved fundamental problems and inconsistencies in the Court's previous decisions. Legal writers for some years have generally agreed that the problems and inconsistencies do exist.¹³

The most serious problem consists of unresolved tensions between two Supreme Court decisions, *Mugler v. Kansas* in 1887,¹⁴ and *Pennsylvania Coal Co. v. Mahon* in 1922.¹⁵ Besides the *Mugler-Mahon* problem, others lurk within Justice Brennan's *San Diego Gas* dissent. All will be explored in the second section. Consequently, *San Diego*

600 P.2d. The index to each volume of the Pacific Reporter from 600 P.2d through 633 P.2d was searched, and any Ariz. App. decision that looked remotely relevant was examined. That search was cross-checked by a Lexis search. Except for opinions that were pending publication as of 24 November 1981, Justice O'Connor neither wrote nor signed an opinion relevant to this article.

12. See, e.g., Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings,"* 8 HASTINGS CONST. L.Q. 517 (1981); Johnson, *Compensation for Invalid Land-Use Regulations,* 15 GA. L. REV. 559 (1981); Mandelker, *Land Use Takings: The Compensation Issue,* 8 HASTINGS CONST. L.Q. 491 (1981).

13. See, e.g., F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* 236 (1973); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law,* 1962 SUP. CT. REV. 63; Van Alostyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria,* 44 S. CAL. L. REV. 1 (1970).

14. 123 U.S. 623 (1887).

15. 260 U.S. 393 (1922). Both *Mahon* and *Mugler* continue to be cited by the Supreme Court with apparent full reliance. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

Gas lies in an area in which guidance from the Supreme Court is eagerly awaited.

Moreover, the Court has recently handed down several decisions in which it might have announced a definitive police power "taking" doctrine but did not. *Penn Central Transportation Co. v. City of New York*,¹⁶ in 1978, involving the historic site designation of Grand Central Station, presented the Court with an opportunity to make a definitive statement. Rather, the Court, through Justice Brennan, said it had been unable to develop "any 'set formula'" for a "taking." The Court described at length many of its own decisions involving land use regulations. Included were *Mugler*, *Mahon*, and numerous other decisions that have heightened the tension between those two. No suggestion was made that any of these were inconsistent; they were treated as alternative approaches for particular fact patterns. Then, instead of trying to match the right formula to *Penn Central's* facts, the Court simply concluded that under none of the approaches had *Penn Central* suffered a "taking." The parties' case was decided, but little else.

Between *Penn Central* and *San Diego Gas*, several Supreme Court "taking" decisions avoided clarifying the land use regulation "taking" issue and its relation to the law of eminent domain. The 1979 decision of *Andrus v. Allard*¹⁷ held that federal statutes prohibiting transactions in bald eagle feathers or parts were not a "taking" of the defendants' eagle feathers. Justice Brennan's opinion contains some passages discussing regulatory "takings," but repeats *Penn Central's* theme. A year later *Webb's Fabulous Pharmacies, Inc. v. Beckwith*¹⁸ held that a Florida statute that gave local courts interest earned on certain funds deposited in their registries amounted to a "taking" of the depositors' property. The Court said the statute was not regulatory but an outright appropriation. In 1979, *Kaiser Aetna v. United States*¹⁹ held that an owner of a private pond who dug a channel to navigable waters did not open the pond to public navigation. The case is not technically an eminent domain case, though the Court did say that it would have been a "taking" if the public had been allowed access.

16. 438 U.S. 104 (1978).

17. 444 U.S. 51 (1979).

18. 449 U.S. 155 (1980).

19. 444 U.S. 164 (1979).

Agins v. City of Tiburon,²⁰ the Supreme Court's review of the California decision previously cited,²¹ might have become the long-awaited definitive decision. A unanimous Court concluded that a zoning ordinance "effects a taking" if it "denies an owner economically viable use of his land." The Court cited *Penn Central* as authority. However, because the Court merely determined that the ordinance on its face was not a "taking," it avoided discussing the compensation ("inverse condemnation") remedy California rejected. Thus, *Agins* reiterates the holding of *Village of Euclid v. Ambler Realty Co.*²² Indeed, the Court relies upon the 1926 *Euclid* decision as "the seminal decision."

San Diego Gas sparked a great deal of interest because the Court might have made the "breakthrough." A Court that reached the merits in *Roe v. Wade*²³ could have done so in *San Diego Gas* if it had wished. Indications are that a majority of the Court had, or had nearly, settled their minds on Justice Brennan's formulation, which, if adopted, would meet the definition of a "breakthrough." Lawyers interested in land use regulation still are waiting for the shoe to drop, but they may have to wait a while longer.²⁴

The posture of the regulatory "taking" doctrine in the Supreme Court may now be summarized. Since *Pennsylvania Coal Co. v. Mahon*, and continuing to the present, the Court has repeatedly said that a land use regulation can at some point become so severe that it constitutes an eminent domain "taking." Doubt remains as to a viable judicial formula or test for determining a "taking." Indeed, because of the persistence of *Mugler v. Kansas* and other decisions, there is doubt about whether the "taking" doctrine has sufficient force to make it a significant limitation upon governmental action.

20. 447 U.S. 255 (1980).

21. See *supra* note 3.

22. 272 U.S. 365 (1926).

23. 410 U.S. 113 (1973). Justice Blackmun wrote for the Court in both *Roe* and *San Diego Gas*.

24. As of November 27, 1981, the Supreme Court had two applications on its docket for October Term 1981 that could produce the regulatory "taking" issue. The Court denied certiorari, however, for each. One, docket No. 81-404, was an appeal from *Court House Plaza Co. v. City of Palo Alto*, 117 Cal. App. 3d 871, 173 Cal. Rptr. 161, cert. denied, 454 U.S. 1074 (1981). The other was docket No. 81-621, a petition for certiorari in *Graham v. Estuary Prop., Inc.*, 399 So. 2d 1374 (Fla.), cert. denied, 454 U.S. 1083 (1981). The "taking" issue seemed to be clearly presented in *Graham* but not so clearly in *Court House Plaza*.

Recent decisions, going back at least to *Penn Central*, seem to presage a "breakthrough," in which the Court will issue a definitive statement on the doctrine. At the same time, *Penn Central* and later decisions give evidence that the justices are not ready to cast the die.

As previously observed, *San Diego Gas* has evoked scholarly commentaries,²⁵ as did *Agins v. City of Tiburon*.²⁶ Most, though not all, of this writing concentrated on the remedial aspects of the two cases, the so-called "inverse condemnation" remedy versus the "invalidation" remedy. No argument will be made that Justice Brennan's compensation formula is either incorrect or inappropriate. Indeed, if—*if*—a court reaches the point that it concludes a land use regulation has effected a "taking," then, if the fifth amendment's compensation clause is to have any meaning, "just compensation" follows. As Justice Brennan's dissent stated, this result "is supported by the express words and purpose of the Just Compensation Clause."²⁷ Such an "argument for logical symmetry of remedies in all kinds of taking cases" has been disputed.²⁸ Policy arguments have been marshalled against the remedy, most strongly that it would have a chilling effect on local land use planning to have the possibility of compensation hanging over zoning and environmental regulations.²⁹ On balance, Justice Brennan's point seems the final word; law, constitutional or other, is command, not just convenience. Choice of remedy is not, however, the focus of concern in the present article.

The questions to be aired here are given secondary attention but are critical at this time. They are anterior to questions about choice of remedy. They are problems that have festered and been plastered over. If the Supreme Court had, by only one more vote, adopted Justice Brennan's opinion, the Court would have compounded and

25. See *supra* note 12. See also 3 WHITTIER L. REV. 547 (1981).

26. Note, *Municipal Open Space Ordinance Not a "Taking" of Property: Agins v. City of Tiburon*, 13 CONN. L. REV. 167 (1980); Note, *Agins v. City of Tiburon: A Balancing Framework for "Taking" Challenges of Zoning Ordinances*, 1981 DET. C.L. REV. 179; Note, *Agins v. City of Tiburon: The Case of the Frustrated Landowner*, 13 LOY. L.A.L. REV. 157 (1979); Note, *Supreme Court Fails to Reach Inverse Condemnation Issues*, 21 NAT. RESOURCES J. 172 (1981); Note, *Agins v. City of Tiburon: Open Space Zoning Prevails—Failure to Submit Master Plan Prevents a Cognizable Decrease in Property Value*, 8 PEPPERDINE L. REV. 839 (1981); Note, *Agins v. City of Tiburon: An Aggrieved Party—Loss of Inverse Condemnation Actions in Zoning Disputes*, 7 PEPPERDINE L. REV. 457 (1980).

27. 101 S. Ct. 1287, 1304-05 (1981).

28. Cunningham, *supra* note 12, at 536.

29. *Id.*

even added to the real problems that make the "taking issue" quicksand.

That which follows will be divided into two principal sections: First an exploration of the "pitfalls and problems" that lie within Justice Brennan's opinion; and second, "a better answer" to the whole police power "taking" question.

II. PITFALLS AND PROBLEMS OF THE BRENNAN OPINION: PROBLEMS WITH THE TEST FOR A "TAKING"

A. *Split between Mahon and Mugler*

Justice Brennan's dissent concentrates upon the remedy for a police power "taking," whether it should be compensation or invalidation. Before one can consider the remedy to give a party, one must have determined that the party is entitled to relief of some kind. Before a court can grant compensation or declare invalidity, it must, if that is to be the basis for relief, first determine that a "taking" has occurred. It is well and good to fashion the proper remedy for a "taking," but if the doctrine or test for a "taking" is wrong, unworkable, or otherwise weak, the court has built a boat without a sail.

In a sharp departure from his recent opinion for the Court in *Penn Central*,³⁰ Justice Brennan moved deftly to a "set formula" for a regulatory "taking." A "taking" occurs, he said, "where the effects completely deprive the owner of all or most of his interest in the property."³¹ This test, he correctly acknowledged, has its "source" in Justice Holmes's "too far" test in *Pennsylvania Coal Co. v. Mahon*.³² Self-evidently, Justice Brennan's formulation is an attempt to put a little flesh on the bony "too far" test.

Justice Brennan's test of a "taking" built upon *Mahon* is not surprising. In fact, all American judicial formulas that allow for regulations upon land use to constitute potential "takings" are the *Mahon* test or some variant of it.³³ Setting aside doctrines urged by legal

30. There is no "set formula" for a "taking" but different approaches for different factual settings. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

31. 101 S. Ct. 1287, 1304 (1981).

32. *Id.* at 1302. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

33. Stoebe, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1062-70 (1980). There are, however, doctrines proposed by legal writers that might allow for regulatory "takings" on a non-*Mahon* basis. *Id.* at 1070-79.

writers, the only two judicially created formulas to govern the police power taking question are *Mahon's* or that of *Mugler v. Kansas*³⁴ or some variation of one of them.³⁵

Mugler announced that, the police power's being one thing and the eminent domain power's being another, no exercise of the police power is an eminent domain "taking." *Mahon's* doctrine, that a land use regulation that goes "too far" in diminishing an owner's rights of use and enjoyment is a "taking," is not the logical opposite, of course. It is, however, certainly inconsistent. Both decisions continue to be cited with apparent full reliance by the Supreme Court.³⁶

Between the two inconsistent positions, a number of important Supreme Court decisions align, like a suspension bridge stretched between two diverging towers. *Hadacheck v. Sebastian*,³⁷ decided between *Mugler* and *Mahon*, seems in the *Mugler* line, not surprisingly. But after *Mahon* come a number of decisions that uphold quite severe land use restrictions, whose results are easier to reconcile with *Mugler* than with *Mahon*. Leading examples are *Village of Euclid v. Ambler Realty Co.*,³⁸ *Miller v. Schoene*,³⁹ *United States v. Central Eureka Mining Co.*,⁴⁰ and *Goldblatt v. Town of Hempstead*.⁴¹ All these decisions were cited with approval in *Penn Central*,⁴² and, indeed, Justice Brennan similarly cited some of them in his *San Diego Gas* dissent. The fact is, *Mahon* itself is the only Supreme Court decision to apply the *Mahon* test and to conclude that a "taking" has occurred.

The primary problem is that the Supreme Court's own decisions are seemingly inconsistent. This should not be confused with a problem of vagueness. That problem exists also; *Mahon's* "too far" test is vague and would be so even if *Mahon* were the only Supreme Court regulatory "taking" case. That problem will be addressed in a moment. Often in the law, problems of vagueness must be tolerated to a certain extent, as with the many judicial tests that turn on "reasona-

34. 123 U.S. 623 (1887).

35. Stoebuck, *supra* note 33, at 1069-70.

36. *See, e.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

37. 239 U.S. 394 (1915).

38. 272 U.S. 365 (1926) (Holmes, J. concurring).

39. 276 U.S. 272 (1928) (Holmes, J. concurring).

40. 357 U.S. 155 (1958).

41. 369 U.S. 590 (1962).

42. 438 U.S. 104 (1978).

bleness." Inconsistency, however, is not a quality that is consciously sought, nor is it tolerable when it occurs inadvertently. It is not an answer to argue that the Supreme Court, of all courts, is a Court whose decisions implement policy rather than rules. Neither policy nor rule can be stretched to fit poles as far apart as *Mahon* and *Mugler*.

It is not clear how fully the Court sees the inconsistency in its decisions. *Penn Central* may have been an attempt to reconcile the former opinions, by treating them as alternative approaches for different factual situations. If so, between his majority opinion in *Penn Central* and his dissent in *San Diego Gas*, Justice Brennan seems to have abandoned the attempt, for the dissent's test for a "taking" is built squarely upon *Mahon*.

Consequently, had the dissent been the Court's opinion, it would perhaps have been "definitive" on some issues, but it would have perpetuated the *Mahon-Mugler* split with yet another layer. Although the Court maintains wide discretion, not even the Supreme Court should work within such an inconsistency. The attempt to do so has skewed sixty years of "taking" decisions.

A review of the decisions following *Mahon*, cited above, beginning with *Village of Euclid v. Ambler Realty Co.*, will show that the tension between *Mahon* and *Mugler* suffuses them all. The New York Court of Appeals tried to relieve the tension in *Fred F. French Investing Co. v. City of New York*,⁴³ by labeling *Mahon*'s "taking" doctrine a "metaphor" for a lack of due process. Justice Brennan's dissent rejects *French*'s attempt summarily,⁴⁴ but it deserves more respect, as the most promising formula so far advanced to resolve the inconsistency. Until resolution, there will be no such thing as a definitive Supreme Court decision on the police power "taking" issue.

Of course the Supreme Court may continue as it has for sixty years, reaching results in the "taking" cases on essentially a case-by-case basis. It has that power. However, such decisions are of constitutional dimensions, inescapably binding on every organ of state and local government, every court, every landowner in the country.

In the state courts, *Mahon* and *Mugler* have produced two distinct and contrary lines of authority. *Mahon*'s doctrine or some variant of it has been invoked in many cases to invalidate land use regula-

43. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

44. 101 S. Ct. 1287, 1302 n.14 (1981).

tions.⁴⁵ On the other hand is a sizable group of decisions that uphold regulations under the *Mugler* doctrine that no exercise of the police power is a "taking."⁴⁶ It is not uncommon to find inconsistent *Mahon*-type and *Mugler*-type expressions in the decisions of a given state,⁴⁷ just as there are among the Supreme Court's own decisions. Such inconsistency has resulted in state court decisions bouncing about in an unpredictable pattern, like a skiff caught in a tide rip.

Surely, then, the Supreme Court should bring to an end the inconsistency within its own decisions. Whatever "taking" formula the Court finally adopts, the formula must resolve the tension between *Mahon* and *Mugler*, harmonizing them if it can, overruling one if it must. Accordingly, to attempt to fashion a remedy for a "taking" when we do not know what a "taking" is, is to prescribe the cure without diagnosing the disease.

B. *Vagueness of the Mahon test*

Even if we assume that the *Mahon* doctrine, or some variant of it, is the clear test for a police power "taking"—setting aside the inconsistency problem—vagueness of application is readily apparent. *Mahon*, in its most definite passage, said that, "while property may be regulated to a certain extent, if regulation goes too far it will be

45. See, e.g., *State v. Johnson*, 265 A.2d 711 (Me. 1970); *Maryland-Nat'l Capital Park & Planning Comm'n v. Chadwick*, 286 Md. 1, 405 A.2d 241 (1979); *Aronson v. Town of Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964); *Morris County Land & Improvement Co. v. Parsippany-Troy Hills Township*, 40 N.J. 539, 193 A.2d 232 (1963); *Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587 (1938).

46. See, e.g., *City of St. Paul v. Chicago, St. P., M. & O. Ry.*, 413 F.2d 762 (8th Cir. 1969); *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962); *People v. Adco Advertising*, 35 Cal. App. 3d 507, 110 Cal. Rptr. 849 (1973); *Sherman-Reynolds, Inc. v. Mahin*, 47 Ill. 2d 323, 265 N.E.2d 640 (1970); *Jameson v. St. Tammany Parish Police Jury*, 225 So. 2d 720 (La. App. 1969) (dictum); *People v. Raub*, 9 Mich. App. 114, 155 N.W.2d 878 (1967); *Board of Supervisors v. Abide Bros., Inc.*, 231 So. 2d 483 (Miss. 1970) (dictum); *Markham Advertising Co. v. State*, 73 Wash. 2d 405, 439 P.2d 248 (1968); *Saveland Park Holding Corp. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955).

47. Compare, e.g., *Agins v. City of Tiburon*, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979) (accepting *Mahon*), with *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (1962) (rejecting *Mahon*). Compare *Maple Leaf Inv., Inc. v. State*, 88 Wash. 2d 726, 565 P.2d 1162 (1977), and *Department of Ecology v. Pacesetter Constr. Co.*, 89 Wash.2d 203, 571 P.2d 196 (1977) ("balancing" test), with *Markham Advertising Co. v. State*, 73 Wash. 2d 405, 439 P.2d 248 (1968).

recognized as a taking.”⁴⁸ Justice Holmes’s underlying concern was that one owner should not be compelled to bear more than a tolerable share of society’s costs of operation. Just share is the primary reason for imposing the compensation requirement, and for that matter the other limitations upon the exercise of eminent domain power; that has never been doubted.⁴⁹

As a pithy redaction of the just-share principle and a starting point for further embellishment, “too far” may be reasonable enough. If Justice Holmes intended to return to that task, he chose not to further clarify “too far” in *Village of Euclid v. Ambler Realty Co.*⁵⁰ Even as a workable, predictable test for the resolution of actual cases, “too far” has a lot of obvious slippage.

To be sure, there are many legal problems, often called mixed questions of fact and law, when courts apply a vague test of reasonableness. The reasonable person test in negligence cases comes to mind first. And, to pick an example from eminent domain law, most courts say a landowner whose right of access to an abutting street is diminished by the state suffers a “taking” when the diminution becomes unreasonable.⁵¹ In these and other cases governed by rules of reasonableness, results are less predictable than with inflexible rules, and the trier of fact plays a large role in the outcome. However, a great difference, if only of degree, exists between such examples and the police power cases. The range of factual variables is much less. Standards of comparison are more definable.

Similarly, the negligence cases usually deal with a single act, and the reasonable-person test refers to some external standard, though it is only the jury’s concept of how the community expected the defendant to act. Also, since the defendant did not plan the negligent act, predictability is less important than in business or property affairs. With the street access cases the court knows how much access the owner had before the government reduced it, the degree of reduction, the present and potential uses of his land, and the precise impact the reduction has on these uses.

48. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

49. See, e.g., Locke, *Essay Concerning Civil Government*, in LOCKE’S TWO TREATISES OF GOVERNMENT 378-80 (P. Laslett ed. 1960); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967).

50. 272 U.S. 365 (1926).

51. 276 U.S. 272 (1928).

In comparison, to ask whether a police power regulation has "too far" or "unreasonably" diminished former rights of use is to drift afloat in a foggy sea. A neutral community standard is hardly discoverable, for it all depends upon whether one views reasonableness from the landowner's or the government's point of view except perhaps in extreme cases. Unlike street access cases, land use regulations have a diffuse impact on an assortment of property rights that can only be called "use and enjoyment." How far is "too far?"

A comparison of two leading decisions illustrates the vagueness problem. In *Arverne Bay Construction Co. v. Thatcher*,⁵² New York concluded that certain zoning prevented all feasible development of land and in addition was a "taking." *Mahon* was explicitly followed. Wisconsin, in *Just v. Marinette County*,⁵³ also citing *Mahon*, upheld a swampland preservation ordinance that prevented all development. The ordinance did not go "too far," the court said, because, after all, it allowed the owners to keep the land in its natural state.

The vagueness problem is obviously connected with the inconsistency problem recently discussed. One might attempt to reconcile *Mahon* and the Supreme Court's subsequent regulatory "taking" decisions by saying that, considering the vagueness of the "too far" test, the regulations in the later cases simply did not go too far. That argument does not dispose of the formulaic differences between *Mahon* and *Mugler* and the many state decisions that adopt one or the other of their positions. Still the argument has been made and probably is partly what the Supreme Court had in mind when it recited "alternative" approaches in *Penn Central*. The problem is, even considering only the Court's own decisions (excluding *Mugler* itself), one must come pretty close to saying that no land use regulation can ever go "too far." At least one gets close enough to that position to raise a serious question whether such a test has probative value. If state-court decisions like *Arverne Bay* and *Just* are also considered, the question is hard indeed.

Many courts have tried to make the "too far" test more meaningful. *Arverne Bay* did so by holding that zoning that prevents all feasible uses goes too far. California did so in *Agins v. City of Tiburon*,⁵⁴ by defining "too far" as a deprivation of "substantially all use" of

52. Stoebeck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEX. L. REV. 733, 764-65 (1969).

53. 278 N.Y. 222, 15 N.E.2d 587 (1938).

54. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

land. In affirming *Agins*, the Supreme Court said in dictum that zoning effects a "taking" if it "denies an owner economically viable use of his land."⁵⁵ In his *San Diego Gas* dissent Justice Brennan spoke of government action "where the effects completely deprive the owner of all or most of his interest in the property."⁵⁶ This article will not undertake the Sisyphean task of analyzing and comparing these verbalizations, which are descriptive rather than dispositive and will undoubtedly change with the next opinion. They do perhaps tighten up "too far" a bit, mostly by tending to limit it to the more severe kinds of regulatory impacts.

Probably the only completely predictable formula, other than to say no regulation is a "taking" or all regulations are "takings," would be one that says a regulation that causes X percentage of diminution in value is a "taking." As far as is known, no court has attempted this, nor would the judicial process lend itself to it. However, it ought to be possible to introduce more predictability by isolating factors that go into the "too far" question and addressing these separately. As for Justice Brennan's dissent in *San Diego Gas*, it does little to make the "too far" test more intelligible. If anything, the dissent's formula strengthens the suspicion that the test may be applied so restrictively as to have little practical effect upon governmental actions. The dissent, then, suffers from and perpetuates the vagueness problem that haunts *Mahon's* test. The "definitive" Supreme Court decision will need to address that problem.

C. *The Brennan dissent fails to follow Mahon*

Justice Brennan's dissent in *San Diego Gas* bases its test for a regulatory "taking" upon the "source," *Mahon's* "too far" test. In *Mahon*, however, the remedy granted was invalidation, not the compensation ("inverse condemnation") remedy that Justice Brennan urges.

The reasoning behind the *Mahon* remedy, put succinctly, goes through these steps: the Constitution requires "just compensation" for a "taking"; the regulation in question has effected a "taking"; the governmental entity has not offered compensation; and, because no compensation is offered, the regulation offends the Constitution and

55. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

56. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

is void.⁵⁷ Justice Brennan's reasoning goes like this: the Constitution requires "just compensation" for a "taking"; the regulation in question has effected a "taking"; the constitutional provision is self-executing; therefore, compensation is triggered. Implied also is the notion that the Constitution does not forbid "takings"; it merely requires compensation. Justice Brennan offers policy arguments for the compensation remedy. He also notes that in numerous kinds of inverse condemnation cases (properly so called), such as loss-of-street-access cases, the remedy is always compensation.

Justice Brennan summarily explains the disparity between his remedy and *Mahon's*. In a footnote⁵⁸ he observes that in the "factual posture" of the case, the Court had no occasion to, and did not, consider an award of compensation. That appears to be true, but the Court did regard it as "our duty" to consider the validity of the Pennsylvania statute because the parties had put that in issue. And the Court did declare the statute void, as scores or hundreds of subsequent authorities have noted. The Court did not say compensation was *not* required, but it *did* hold the statute *was* invalid.

The question raised at this point is not whether invalidation or compensation is the correct or better remedy. If the writer were persuaded that any form of "taking" doctrine were correct for cases like *San Diego Gas* and *Mahon*, he would be attracted to Justice Brennan's compensation remedy. The question raised is what effect it would have on *Mahon's* already confused status if the Brennan opinion and remedy were to be adopted by the Court. The Court would have the *Mahon* test for a "taking" but would have impliedly overruled *Mahon* on the remedial aspect. It does appear feasible to separate test from remedy; so, the problem is not as serious as other problems with the Brennan dissent. Nevertheless, it is a problem because *Mahon's* status would be subjected to yet another question.

D. *The Mahon test replicates the due process test*

It is now time to bear down upon a matter previously mentioned only briefly. *Fred F. French Investing Co. v. City of New York*⁵⁹ involved the validity of a zoning ordinance that placed a parcel of

57. 101 S. Ct. at 1304.

58. See *Pamel Corp. v. Puerto Rico Highway Auth.*, 621 F.2d 33 (1st Cir. 1980); *Maryland-Nat'l Capital Park & Planning Comm'n v. Chadwick*, 286 Md. 1, 405 A.2d 241 (1979).

59. 101 S. Ct. 1287, 1303 n.17 (1981).

downtown Manhattan realty in a special park district, open-space zone. The landowner and would-be developer argued this was a "taking," upon the authority of *Arverne Bay Construction Co. v. Thatcher*, the leading New York decision just examined, and of *Pennsylvania Coal Co. v. Mahon*. No, held the New York Court of Appeals, it was not a "taking," but the ordinance was void because it denied substantive due process. As for *Mahon* and *Arverne Bay*, the court said the references in those decisions to a "taking" were a "metaphor" for a lack of substantive due process.⁶⁰ Justice Brennan's *San Diego Gas* dissent disposes of *French* in a couple of footnotes, saying that it is "tampering with the express language of the opinion" to label *Mahon* a due process case.⁶¹ The matter will not down that readily.

In the first place, it is very easy to confuse a regulatory "taking" case with a substantive due process case, if indeed they are different. Justice Brennan does so in his dissent, more demonstrably than New York did in *French*. In discussing the California Supreme Court's decision in *Agins v. City of Tiburon*,⁶² he said that court set out a due process test for validity of a land use regulation.⁶³ If that is so, then Justice Brennan must believe after all that "taking" is a "metaphor."

The California court concluded that zoning that has "deprived [an

60. 39 N.Y.2d 587, 385 N.Y.S.2d 5, 350 N.E.2d 381 (1976).

61. For those who are fond of *Fred F. French*, subsequent New York decisions are something of a disappointment. It is not that the *French* "takings"-due process analysis has been criticized but more that New York has "lost the thread." Decisions immediately after *French* grasped its import. See, in order cited, *Charles v. Diamond*, 41 N.Y.2d 318, 360 N.E.2d 1295 (1977); *New York Tel. Co. v. Town of North Hempstead*, 41 N.Y.2d 691, 363 N.E.2d 694 (1977); *Penn Cent. Transp. Co. v. City of New York*, 42 N.Y.2d 324, 366 N.E.2d 1271 (1977). Before long, however, several "thread losing" symptoms began to appear. Some of the leading "taking" cases were cited as authority, such as *Lutheran Church in Am. v. City of New York*, 35 N.Y.2d 121, 359 N.Y.S.2d 7, 316 N.E.2d 305 (1974); *Vernon Park Realty Co. v. City of Mt. Vernon*, 307 N.Y. 493, 121 N.E.2d 517 (1954); and *Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587 (1938). These "taking" cases were cited along with *French* and *Penn Central*, which is consistent only if they are understood to be due process cases. At first that could have been so, but the latest decisions seem inadvertently to have returned to them as authority for a "taking" analysis. The sharp distinction between the "taking" and due process theories has become dulled over a period of four or five years. See, in the order cited, *Modjeska Sign Studios, Inc. v. Berle*, 43 N.Y.2d 468, 373 N.E.2d 255 (1977); *Spears v. Berle*, 48 N.Y.2d 254, 397 N.E.2d 1304 (1979); *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922 (1980).

62. 101 S. Ct. 1287, 1298 n.4, 1302 n.14 (1981).

63. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

owner] of substantially all use of his land" may be invalidated in a mandamus or declaratory judgment action on the ground that it is a "taking." To support this conclusion, California, in some three pages of text, cited as authority: a passage from Nichols that speaks of "exercise of the power of eminent domain;" The fifth amendment to the United States Constitution; article I, section 19, of the California Constitution, which is solely an eminent domain clause; and the famous passage from *Pennsylvania Coal Co. v. Mahon* that contains the "too far" test.⁶⁴ The language clearly states an eminent domain ground. If *Agins* contains a due process test, then *Mahon* most certainly does. If *Mahon* is a due process case, then, not only was *Fred F. French* right, but Justice Brennan's dissent is in serious trouble.

The source of confusion is in *Mahon's* "too far" test itself. It is a replication of the test for when a regulation on property rights denies substantive due process. The dogged refusal of most courts and writers to face up to this phenomenon is a major roadblock to solving the "taking" dilemma. How did this occur?

According to the Supreme Court,⁶⁵ the "classic statement" of the due process rule is contained in the 1894 decision, *Lawton v. Steele*.⁶⁶ In upholding a New York statute that authorized illegal fishing nets to be seized, the Court applied this test: "it must appear, first that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and [third,] *not unduly oppressive* upon individuals."⁶⁷ (Emphasis added.) In other words, 1) there must be a public problem or "evil," 2) the regulation must tend to solve this problem, and 3) the regulation must not be "unduly oppressive" upon the person regulated.

Mahon replicates the third part of the test. No difference in application would have been made in *Lawton* if the Court had said that the regulation should not go "too far" in regulating the person. No difference would have been made in *Mahon* if Justice Holmes had said a land use regulation must not be "unduly oppressive" against the landowner.

Lawton v. Steele remains a vigorous decision, in good standing in

64. 101 S. Ct. 1287, 1298 n.4 (1981).

65. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 272-74, 598 P.2d 25, 157 Cal. Rptr. 372, 374-76 (1979). See *supra* note 5.

66. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962).

67. 152 U.S. 133 (1894).

the Supreme Court⁶⁸ and cited frequently by federal and state courts.⁶⁹ It was in effect when *Mahon* was handed down; so, it is a question of *Mahon*'s replicating *Lawton*, not vice versa. On the face of the language quoted above, the two tests occupy the same ground for all practical purposes. A rhetorician might distinguish "too far" regulations from "unduly oppressive" ones. But the practical effect of these two tests is so similar as to lead to confusion and a blending of eminent domain and due process. There is direct evidence that a confusion and blending actually exist.

Justice Brennan's characterization of the California discussion in *Agins v. City of Tiburon* as a due process analysis has already been noted. That is only the latest of many instances in which "takings" and due process have been confused. In its immediately preceding zoning—"taking" decision, *Agins v. City of Tiburon*, this passage appears: "The application of a general zoning law to particular property effects a taking if the ordinance *does not substantially advance legitimate state interests*, see *Nectow v. Cambridge*, . . . or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*. . . ."⁷⁰ (Emphasis added.) The italicized words are simply a rephrasing of the first part of *Lawton v. Steele*'s due process test, already quoted. *Nectow v. City of Cambridge* is a zoning-due process case, as it has always been understood to be.

In Justice Brennan's opinion for the Court in *Penn Central*, he also cited *Nectow v. City of Cambridge* and other due process decisions, intermixed with "taking" cases.⁷¹ *Goldblatt v. Town of Hempstead*,⁷² certainly one of the leading regulatory "taking" decisions and relied upon heavily in the Supreme Court's recent decisions, intermixes *Lawton v. Steele* with *Mahon* and several other "taking" cases. *Lawton* is there cited as containing the "classic statement" to test when a police power "encroachment on private interests" goes too far to be upheld. On the critical point, defining how far is "too far," the Court

68. *Id.* at 137.

69. *Id.*

70. *E.g.*, *Sisk v. Texas Parks & Wildlife Dep't*, 644 F.2d 1056, 1058 (5th Cir. 1981); *Maher v. City of New Orleans*, 516 F.2d 1051, 1059 (5th Cir. 1975); *Perry v. City of Chicago*, 480 F. Supp. 498, 501 (N.D. Ill. 1979).

71. 447 U.S. 255, 260 (1980).

72. 438 U.S. 104, 125, 126, 127, 130 (1978). Other due process decisions included *Gorieb v. Fox*, 274 U.S. 603 (1927), and *Walls v. Midland Carbon Co.*, 254 U.S. 300 (1920). These decisions show some blending of "taking" and due process language but seem to be essentially due process cases.

has many times interchanged the due process and "taking" cases and continues to do so.

Cases are legion in which state courts strike down a land use regulation on the ground that it is "arbitrary, unreasonable, confiscatory, and void" or some such phrase.⁷³ "Arbitrary" and "unreasonable" are words associated with a lack of substantive due process. "Confiscatory" is a synonym for "taking." "Void" is the result—and one never knows in such decisions whether that result was based on eminent domain or due process grounds, as if that did not matter.

The operation of the fourteenth amendment to the United States Constitution causes the intermixing of eminent domain and due process in part. As previously seen,⁷⁴ the fifth amendment's "taking" clause is binding on the states through the due process clause of the fourteenth. In discussing fourteenth amendment due process, it is therefore correct to say due process *includes* the guarantee of compensation for a "taking." It is correct to speak of an uncompensated "taking" as *denying* due process. However—and this is where the confusion must enter—that is not the same as saying that due process is *only* the guarantee of compensation or that they are the *same*.

The fourteenth amendment also incorporates others of the first ten, such as the first amendment. That does not cause the guarantee of free speech, for instance, to lose its separate content, nor does it prevent finding content in addition to free speech in the fourteenth. There would be a full body of federal eminent domain law if the fourteenth amendment did not exist; it simply would not apply to the states. And if there were no fifth amendment, the fourteenth would still extend the rest of its protections. One fears, though, that phrases such as "a 'taking' without due process" often obscure these principles.

The courts, federal and state, confuse a regulatory "taking" with a denial of due process. *Mahon's* "too far" test for a "taking" replicates the "unduly oppressive" part of *Lawton's* test for denial of due process. The Supreme Court and other courts have interchanged "taking" and due process cases in defining "too far." A blending of "taking" and due process tests recurs in state courts. The "definitive"

73. 369 U.S. 590, 594-95 (1962).

74. See, e.g., *Corthouts v. Town of Newington*, 140 Conn. 284, 99 A.2d 112 (1953); *LaSalle Nat'l Bank v. Town of Cook*, 12 Ill. 2d 40, 145 N.E.2d 65 (1957); *Kozesnik v. Montgomery Township*, 24 N.J. 154, 131 A.2d 1 (1957); *Stevens v. Town of Huntington*, 20 N.Y.2d 352, 229 N.E.2d 591, 283 N.Y.S.2d 16 (1967).

Supreme Court regulatory "taking" case will address those problems. Justice Brennan's dissent in *San Diego Gas* does not do so, but continues and further compounds the confusion.

III. WHAT OF "ECONOMIC" DUE PROCESS?

The previous analysis implicitly suggests that substantive due process protects real property rights. For some years now, many have professed to doubt that so-called "economic" due process survived in Roosevelt's New Deal Court or, at most, that it retained sufficient vigor to mean anything.⁷⁵ As to the first parts of *Lawton v. Steele's* test, whether there is a public problem of legitimate concern to the governmental entity and whether the regulation adopted tends to solve it, there is at least a minimal due process limitation extant. Suppose a city council should adopt a land use restriction for the sole purpose of punishing a political foe. Or suppose there is indeed a serious public problem with rats and, purportedly to alleviate it, the city forbids the keeping of cats. In the first case there is no legitimate problem to which the council may address any ordinance; their action might be said to be *ultra vires*. In the second example, there is a problem, but, unless there are some highly unusual circumstances that do not appear, the particular anti-cat ordinance hardly tends to solve it. Justice Douglas's remarks in *Berman v. Parker*⁷⁶ indicate that, though "the role of the judiciary . . . is an extremely narrow one," such regulations would be invalidated on due process grounds. A footnote in Justice Brennan's *San Diego Gas* dissent suggests he, too, believed a due process limitation on land use regulations existed to that extent.⁷⁷

For present purposes the most acute question is whether the third part of *Lawton's* test, turning on the phrase "unduly oppressive," has vitality in the Supreme Court. Suppose, to relieve the rat problem, the city council's ordinance required that all buildings where rats were known to propagate be burned down. There is a serious public problem, and the ordinance tends to solve it, but is it "unduly oppres-

75. See *supra* note 2.

76. *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores*, 414 U.S. 156 (1973); *Rogin v. Bensalem Township*, 616 F.2d 680 (3d Cir. 1980); McCloskey, *Economic Due Process and the Supreme Court: Exhumation and Reburial*, 1962 SUP. CT. REV. 34. Oakes, "Property Rights" in *Constitutional Analysis Today*, 56 WASH. L. REV. 583, 590-94 (1981).

77. 348 U.S. 26, 32-33 (1954).

sive" on the building owners? Discussions of due process, certainly those by the Supreme Court, have not overtly discussed whether this aspect of due process is to be treated differently than the other two. Therefore, discussion of the question, perhaps even its existence, is somewhat speculative. Indirect evidence suggests that some members of the Court in recent years have felt that any question of "unduly oppressive" or "too far" is solely a "taking" question and no longer a part of due process. As just mentioned, Justice Douglas in *Berman* and Justice Brennan in *San Diego Gas* omitted mention of this aspect in discussions of due process, though they believed a regulation that went "too far" was a "taking." On the other hand, *Lawton v. Steele* remains. Some recent Supreme Court decisions, such as Justice White's in *Schad v. Borough of Mt. Ephraim*⁷⁸ and Justice Powell's in *Moore v. City of East Cleveland*,⁷⁹ suggest *Lawton's* "unduly oppressive" aspect of due process has not disappeared.

Currently, "economic" substantive due process may enjoy a renaissance in the Supreme Court. After a brief account of the flowering and deflowering of "economic" due process, this article will then review some of the recent evidences of quickening.

If *Lawton v. Steele* contains the classic statement, *Lochner v. New York* in 1905⁸⁰ is regarded as the fullest bloom. There, the Supreme Court struck down a statute limiting bakers' working hours, on the ground that it denied bakery owners' due process. The result was not justified on *Lawton's*, or any, formula basis but was simply the Court's substitution of its policy judgment for the New York legislature's. That has been the ground of near-universal criticism in recent times and was the basis for Justice Holmes's famous dissent.⁸¹

The "*Lochner* era," when economic legislation might be overturned on some broad policy basis, lasted until the New Deal days. *Coppage v. Kansas*,⁸² in 1915, struck down a statute that outlawed "yellow dog" contracts, whereby employees would agree not to join labor unions. In 1923, *Adkins v. Children's Hospital*⁸³ invalidated a law prescribing minimum wages for women. Yet, even during *Loch-*

78. 101 S. Ct. 1287, 1306 n.23 (1981).

79. 452 U.S. 61 (1981) (dictum).

80. 431 U.S. 494 (1977).

81. 198 U.S. 45 (1905).

82. "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Id.* at 75.

83. 236 U.S. 1 (1915).

ner's heyday, there was a cross-current in the Court. As early as 1908, *Muller v. Oregon*⁸⁴ upheld a statute that set maximum working hours for females in factories and laundries, "without questioning in any respect" *Lochner*. *Bunting v. Oregon*,⁸⁵ a 1917 decision, approved a statute fixing maximum male and female working hours, without citing *Lochner*. By 1934, *Lochner*'s eclipse came into view, when the Court upheld the New York milk price control act in *Nebbia v. New York*.⁸⁶ The view became plainer in 1937, when *West Coast Hotel Co. v. Parrish*⁸⁷ overruled *Adkins v. Children's Hospital*. This event may be said to mark the end of the "*Lochner* era."

Lochner has never been formally overruled, but remains in an "eclipsed" status. *Olsen v. Nebraska*, a unanimous opinion written by Justice Douglas in 1941, said that "notions of public policy imbedded in earlier decisions of this Court" no longer had "continuing vitality."⁸⁸ Not only *Olsen* but numerous later decisions, such as *Williamson v. Lee Optical Co.*⁸⁹ in 1955 and *North Dakota State Board of Pharmacy v. Snyder's Drug Stores*⁹⁰ in 1973, illustrate the accuracy of that statement. When economic regulations have been involved, the post-*Lochner* approach has indulged in an almost unshakable presumption that they are addressed to a public problem and are valid. Rhetorically, the Court has said that an economic regulation will be struck down if it has no "rational basis." Even this strict standard has been applied so that no law is likely to violate it.⁹¹ While economic due process has not died since the days of the Roosevelt Court, it has been fairly dormant most of the time.

Theoretical justification for the narrow view of economic due process is found in Justice Stone's famous footnote four in *United States v. Carolene Products Co.* in 1938.⁹² In explaining why economic interests should receive a lesser degree of due process protection than should certain "personal" liberties, Justice Stone distinguished between those rights that are expressly mentioned in the first ten

84. 262 U.S. 525 (1923).

85. 208 U.S. 412 (1908).

86. 243 U.S. 426 (1917).

87. 291 U.S. 502 (1934).

88. 300 U.S. 379 (1937).

89. 313 U.S. 236, 246-47 (1941).

90. 348 U.S. 483 (1955).

91. 414 U.S. 156 (1973).

92. McCloskey, *supra* note 76, at 39.

amendments and others that are only implied. So, for instance, since freedom of speech and press are read into the fourteenth amendment from the express words of the first, and rights in economic relationships are only implied, there is a much stronger presumption of validity of regulations of the latter than of the former. On this basis, the "double standard," whereby first-amendment rights are given strong, and property or economic rights weak, due process protection has been justified.

But Phoenix rose from the ashes. In the last decade or so, Supreme Court evidence of several kinds has appeared, suggesting that economic due process too may be having a rebirth. None should think that any emerging economic due process will be in the image of *Lochner v. New York*; expecting that would construct a shibboleth. There is, however, reason to say that *Lawton v. Steele*'s concept of "unduly oppressive" may again be filled with meaningful content. Of this there is evidence.

Reference was just made to the "double standard" and to its justification in the *Carolene Products* case. If the justification is genuine and not merely a rationalization for a pre-determined result, then all "implied" rights—all rights not specifically enumerated in the first ten amendments—should receive the same slight due process protection that economic rights have received since the end of the *Lochner* era.

The trouble is, some newly discovered implied rights have received strong protection. A right to travel outside the country was given broad protection in *Aptheker v. Secretary of State*.⁹³ "Certain rights associated with the family," whose contours are undefined, were the basis for striking down a zoning ordinance on due process grounds in *Moore v. East Cleveland*.⁹⁴ Most strikingly, the "penumbra" right of "privacy" has emerged. In *Griswold v. Connecticut*,⁹⁵ a statute prohibiting birth control devices and instruction was invalidated as denying this right. A primary example is *Roe v. Wade*,⁹⁶ striking down the Texas anti-abortion statute on the ground that it denied the fourteenth amendment right of privacy. No one can read this decision without concluding that it gives broad meaning and strong protection to the right of privacy. Indeed, Professor John Hart Ely has

93. 304 U.S. 144, 152 n.4 (1938).

94. 378 U.S. 500 (1964).

95. 431 U.S. 494 (1977).

96. 381 U.S. 479 (1965).

said *Roe* was as arbitrary as *Lochner v. New York*; he even finds *Roe* less defensible than *Lochner*.⁹⁷ Has the Court come round rull circle? Was the theoretical justification for the "double standard" only a sand castle? If a double standard exists for economic rights, does it exist only by arbitrary fiat? These are troublesome questions in a system in which principles are supposed to control results.

The Court itself has been troubled by the "double standard." Justice Stewart's majority opinion in 1972 in *Lynch v. Household Finance Corp.*,⁹⁸ which Justice Douglas, Brennan, and Marshall signed, contains a remarkable passage. The occasion was a holding that federal district courts had jurisdiction to entertain suits challenging a state pre-judgment garnishment in a section 1983 action.⁹⁹ Under the section, district courts might hear suits challenging state action that deprived persons of "rights, privileges, or immunities" guaranteed by the United States Constitution or statutes. A district court had dismissed the action on the ground that the quoted phrase referred only to "personal" and not "property" rights. Reversing, the Supreme Court said: "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right. . . ." This language, which reads like something out of John Locke, was attributed to John Adams, William Blackstone, and Locke. Here is a statement of principle to counterbalance *Carolene Products'* footnote four.

In several areas, in fact, the Supreme Court has strengthened constitutional protections of property rights in recent years. *Lynch v. Household Finance* is one example, of course. Three years previously, the Court had struck down a Wisconsin pre-judgment garnishment statute in *Sniadach v. Family Finance Corp.*¹⁰⁰ The same year as *Lynch*, *Fuentes v. Shevin*¹⁰¹ voided a state pre-judgment replevin procedure. These due process decisions involved procedural rather than substantive due process. That does not detract from the present point, which is that new law was made enlarging property rights. To

97. 410 U.S. 113 (1973).

98. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

99. 405 U.S. 538, 552 (1972).

100. 42 U.S.C. § 1983 (1976).

101. 395 U.S. 337 (1969).

be sure, "personal" property, not "commercial" property, was involved. But this is not significant unless they are to be distinguished by a second "double standard," piled on top of the "personal" rights—property rights "double standard."

A second and quite recent augmenting of property rights has come under the contract clause, article I, section 10, of the Constitution. Between *Home Building & Loan Association v. Blaisdell*¹⁰² in 1934 and *City of El Paso v. Simmons*¹⁰³ in 1965, the scope of the clause was severely circumscribed. Its vitality was problematic, especially as applied to private obligations. But in 1977 it sprang to renewed life in *United States Trust Co. v. New Jersey*.¹⁰⁴ For the first time in nearly forty years, a state statute, repealing an earlier law giving certain protections to holders of some public bonds, was held to violate the contract clause. The next year, in *Allied Structural Steel Co. v. Spannaus*,¹⁰⁵ the Court took a further step. It struck down a Minnesota statute that added to the obligations of employers to employees under their pension plans, which is a matter of private contract. Justices Brennan, White, and Marshall, dissenting, complained that the majority's broad reading of the contract clause threatened "to undermine the jurisprudence of property rights developed over the last 40 years."¹⁰⁶

The Supreme Court's newly enlarged first-amendment-due-process protection of commercial speech is another enhancement of property rights. Since *Valentine v. Chrestensen*¹⁰⁷ in 1942, it had been assumed that at least certain kinds of commercial speech, most of all advertising, were beyond the first amendment's scope. Some uneasy distinctions had been made, for instance, in the "pornography" cases involving publication of books and movies for profit¹⁰⁸ and for newspapers.¹⁰⁹ Then, in the mid-1970's, the advertising citadel crumbled under sudden attack. *Bigelow v. Virginia*,¹¹⁰ in 1975, extended the

102. 407 U.S. 67 (1972).

103. 290 U.S. 398 (1934).

104. 379 U.S. 497 (1965).

105. 431 U.S. 1 (1977).

106. 438 U.S. 234 (1978).

107. *Id.* at 259.

108. 316 U.S. 52 (1942).

109. *See* *Schad v. Village of Mt. Ephraim*, 452 U.S. 61 (1981) (nude dancing), and cases cited therein.

110. *See* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

first and fourteenth amendments' protection to a newspaper advertisement for abortions. The next year *Virginia Pharmacy Board v. Virginia Consumer Council*¹¹¹ did the same for prescription drug advertisements, in an opinion that went further than *Bigelow*. And, the next year, *Bates v. State Bar of Arizona*¹¹² struck down a state rule against lawyers' advertising. That commercial, for-profit advertising is protected is clear, though the extent of protection is not. The Supreme Court's most recent advertising-free-speech decision, *Metromedia, Inc. v. City of San Diego*,¹¹³ shows that non-commercial communication has a preferred status to commercial and that the area of law is in a state of flux. Strong cross currents are at work within the Court, as witnessed by remarks in Justice White's plurality opinion in *Metromedia*, in which he suggests that Chief Justice Burger's dissent would have required the Court to overrule certain free-speech decisions.¹¹⁴ Overall, the past five or six years have seen commercial or economic rights strengthened in the free-speech area.

To recapitulate, economic rights have ascended in the Supreme Court in several areas within the past few years. The "double standard" between economic rights and "personal" liberties, while not disappearing, has lost much of its vigor and legitimacy. Due process protection has been extended to economic interests in pre-judgment garnishment and replevin cases as well as commercial speech cases. The contract clause has been resuscitated. However, such tangible items of evidence are not the whole story; they are symptoms of changes in the Court's composition and thinking that will in the long run determine its directions.

Historical evidence confirms what common knowledge tells us—that members of the Court who would be classified as political and social conservatives tend to defend economic and property rights, and socio-political liberals tend to restrict such rights. Liberals tend to enlarge "personal" liberties, while conservatives tend to give less weight to these liberties when they collide with other societal interests, such as stability, order, and also economic rights. The Court that handed down *Lochner v. New York* was dominated by conservatives. When President Roosevelt's liberal appointees made their weight felt, the *Lochner* era ended, and economic rights weighed

111. 421 U.S. 809 (1975).

112. 425 U.S. 748 (1976).

113. 433 U.S. 350 (1977).

114. 453 U.S. 490 (1981).

lighter in the balance. Through the years of the Warren Court, that continued to be the story. It is not just coincidence that a renaissance of property rights has occurred, because there has been a historic shift from the composition of the Warren Court to that of the Burger Court. The situation, however, is more complex than that; as suggested above, there are some interesting cross currents.

In *Virginia Pharmacy Board*, for instance, Justice Rehnquist, who might be supposed to favor economic interests, dissented to the extension of free-speech protection to the advertising of prescription drugs.¹¹⁵ His dissent suggests that his objections to extending first-amendment protection and to interfering with a state's legislative choices were stronger than whatever concern he felt for the pharmacy business. Chief Justice Burger and Justices Rehnquist and Stevens, dissenting in the *Metromedia* case, indicate that similar objections overcame any concern they had for protecting the billboard advertising business.¹¹⁶ *Fuentes v. Shevin* is an unusual case from a proprietary viewpoint, in that the conditional seller of goods had a property interest in replevying them speedily, and the buyer had an interest in delaying replevin. Justice White's dissent, in which Chief Justice Burger and Justice Blackmun joined, saw the seller's interest as weighing heavier than the buyer's.¹¹⁷ Justices White, Stewart and Rehnquist, dissenting in *Moore v. City of East Cleveland*, were concerned with giving due process protection to the "extended family" and with interference with local legislative powers.¹¹⁸ The above examples illustrate that justices who might in general tend to favor protection of property rights may, in a given case, find that tendency overcome by stronger countervailing value judgments. On the other hand, in *United States Trust Co. v. New Jersey*¹¹⁹ and *Allied Structural Steel Co. v. Spannaus*,¹²⁰ the decisions that revived the contract clause, there are strong dissents by Justices Brennan, White, and Marshall that clearly show an ideological objection to an expansion of property rights. One suspects that a decision that invalidated a

115. *Id.* at 517-20.

116. *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 781-90 (1976).

117. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

118. *Fuentes v. Shevin*, 407 U.S. 67, 97-103 (1972).

119. 431 U.S. 494, 531-52 (1977).

120. 431 U.S. 1 (1977).

land use regulation on property-rights-due-process grounds would evoke a similar dissent.

Justice Brennan's dissent in *San Diego Gas*¹²¹ contains an interesting byplay that may be relevant at this point. As already seen, he mischaracterized California's decision in *Agins v. City of Tiburon*¹²² as a due process decision, when the California Supreme Court explicitly stated a "taking" theory.¹²³ Why? The answer may be connected with the fact that he was also quite critical of *Agins*, as well as of *Fred F. French Investing Co. v. City of New York*,¹²⁴ which clearly was a due process decision. Is it not plausible that Justice Brennan, who decried the enhancement of property rights in the *United States Trust* and *Spannaus* contract-clause cases, was moving to forestall a revival of economic substantive due process? One might ask why, if he were supposedly concerned about a growing strength of property rights, he would be willing to protect them under the "taking" clause, but not under the due process clause. A possible answer is that the due process clause has a much broader sweep than the "taking" clause. For practical purposes the regulatory "taking" cases are limited to land use regulations, while the due process clause applies, to the extent it applies at all, to economic and property rights generally. If the speculations in this paragraph—and they are no more than that—are not too wide of the mark, large forces may be gathering in the Supreme Court upon the battleground of economic due process.

Economic and proprietary substantive due process remains a simmering issue in the Supreme Court. That the Court might revive such due process in some meaningful form, unthinkable ten or fifteen years ago, is quite possible now. Property and economic rights have been enlarged within that time, sometimes dramatically. The "double standard" that purportedly distinguished due process protection of "personal" and economic rights is largely undercut. Because individual justices weigh and balance different values and concerns that may conflict, the degree to which economic due process may be extended within a given case will somewhat depend upon the other issues, such as free speech, it presents. It happens, however, that land use regulation cases tend to present property rights questions in isolation. Therefore, in such a due process case the justices will tend to

121. 438 U.S. 234 (1978).

122. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981).

123. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979).

124. See *supra* notes 5 & 63-65 and accompanying text.

line up according to their convictions on the role of property rights, similarly to the recent contract-clause cases. A conservative shift in the Court's membership suggests that, for the near future, a revival of economic due process is increasingly likely.

What form would due process protection against land use regulations take? Few persons would, or would wish to, contend for a return to *Lochner v. New York* or anything like it. One of the "cross currents" in recent decisions, described above, suggests that the more conservative justices would not countenance that degree of interference with legislative prerogatives.

The most promising formula is to agree with New York in *Fred F. French*, that *Pennsylvania Coal Co. v. Mahon*'s¹²⁵ use of the word "taking" was a "metaphor" for denial of substantive due process. It has been shown that *Mahon*'s "too far" test was a replication of the final part of *Lawton v. Steele*'s¹²⁶ due process test.¹²⁷ This step would salvage the essence of *Mahon* without overruling it, would give due weight to *Lawton*, and would resolve any confusion that exists between the two. Whether the Court chose the "too far" language of *Mahon* or *Lawton*'s "unduly oppressive" formulation would not much matter. The same step would also largely resolve the "tension" that exists between *Mahon* and *Mugler v. Kansas*¹²⁸ and a number of other Supreme Court decisions on the "taking" issue.¹²⁹ *Mahon* would now deal with the due process clause, and *Mugler*, the "taking" clause. Some further work should be done on the "taking" issue, as will be discussed in a moment. If this single step were now taken, the serious theoretical problems and conflicts that have plagued the regulatory "taking"-due process area for sixty years would be mostly resolved. The pieces would fit.

If the Supreme Court will choose the suggested course, it should see to one further matter. The "too far" or "unduly oppressive" test, whether viewed as a "taking" or due process test, is inherently vague. It is arguably broad enough to include cases as divergent as *Lochner v. New York* and *Hadacheck v. Sebastian*.¹³⁰ To be sure, the Court

125. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

126. 260 U.S. 393 (1922).

127. 152 U.S. 133 (1894).

128. See *supra* notes 60-75 and accompanying text.

129. 123 U.S. 623 (1887).

130. For discussion of this "tension," see *supra* notes 30-47 and accompanying text.

has historically preferred to maintain great breadth in its doctrinal formulas, to retain flexibility to give play to policy considerations in future cases. Even so, the phrase "too far," standing alone, has proved unmanageable, as the Court's own decisions show. Moreover, since the test, being of constitutional dimensions, is binding on the state courts that do not have the Supreme Court's flexibility, the test should be further refined for their sake.

"Too far" or "unduly oppressive" implies a balancing of the public's interests against those of the regulated landowner and is another reason the question is more properly a due process than an eminent domain one. Eminent domain should not, and generally does not, involve balancing the condemnee's rights against the public's. For instance, if the government occupies private land, it does not matter whether the purpose is to build essential fortifications or only a nonessential park; we do not weigh the public's need against the owner's activities or loss. For either purpose, a "taking" has equally occurred, and the owner gets equal compensation.

The Supreme Court must identify factors on both sides of the equation that are relevant to whether a land use regulation poses a question of due process. On the public's side, the seriousness of a public problem, the extent to which the owner's land contributes to it, the degree to which the proposed regulation solves it, and the feasibility of less oppressive solutions seem relevant. Any suggestion that public officials had ulterior motives should make the regulation suspect. On the owner's side, the amount and percentage of value loss are of course relevant; as are questions of extent of remaining uses; past, present, and potential uses; temporary or permanent nature of the regulation; the extent to which the owner should have anticipated such a regulation; and how feasible it is for him to alter present or currently planned uses. The factors listed are not intended to be exclusive; no doubt others may be identified. No list of factors can reduce the matter to a mathematical formula. In its usual way, the Supreme Court would likely identify and give content to factors over time in a number of decisions.

The Court should make land use regulations subject to the due process limitation. The first step is to establish a basic test, built upon *Mahon's* "too far," or *Lawton's* "unduly oppressive," formula. Then the test can be given usable content. Hopefully, if this task is pursued diligently, a concept of due process will evolve that is meaningful but will not in any sense be a return to *Lochner*. A presumption of legislative validity should be present; one need not borrow from the "sus-

pect classification" cases. A middle ground is possible. Recent developments in the Supreme Court indicate that this is an attainable goal and a propitious time.

IV. FATE OF THE "TAKING QUESTION"

If *Pennsylvania Coal Co. v. Mahon* is recast as a due process decision, as urged above, then the Supreme Court will have no police power "taking" doctrine left. In fact, all decisions, state or federal, that allow for land use regulations to be "takings" employ *Mahon's* "too far" test or some variant of it.¹³¹ Would there then be no such thing as a "taking" by land use regulation?

Since 1962, when Professor Allison Dunham published an article on the issue,¹³² the subject of police power, or regulatory, "takings" has increasingly excited legal scholars.¹³³ The subject has become the most urgent part of eminent domain law. Land use regulations are environmental regulations, whether cast in the traditional form of zoning or in some newer form such as wetlands preservation acts. Enormous forces and high emotions surround the clash of those who would intensify land development and those who would preserve land in its natural state. Developers seek constitutional limitations on environmental controls, which are generally expressed in either a "taking" or a due process argument. Having discussed the due process question, this article now turns to the "taking" issue.

The "taking" argument begins with the eminent domain clause of the United States Constitution or of a state constitution.¹³⁴ In lan-

131. 239 U.S. 394 (1915).

132. Stoebuck, *supra* note 33, at 1062-70.

133. Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63.

134. Leading writings on the subject, in chronological order, include: Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1970); Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971); F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE* (1973); Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975); Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 798 (1976); and Hagman, *Compensable Regulation: A Way of Dealing with Wipeouts from Land Use Controls?*, 54 U. DET. J. URB. L. 45 (1976). The writer's own views on the subject are spelled out at length in Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH.

guage that is typical, the United States fifth amendment says, "nor shall private property be taken for public use without just compensation." Analysis in eminent domain cases breaks down into four categories, suggested by the language of that clause: "property," "taking," "public use," and "just compensation."

The present concern is not with the so-called "public use" question, which has to do with whether a governmental entity may employ its eminent domain power for a given purpose.¹³⁵ Nor is the concern here with "just compensation," which has to do with the amount of compensation or damages the governmental entity must pay, assuming it is agreed that a "taking" has occurred. Rather, the concern is with whether any "taking" has occurred: when, if ever, does a land use regulation come to a "taking"? "Property" and "taking" are intertwined and indeed are lumped together in many judicial decisions and even in scholarly discussions. Precise analysis requires that the elements be separated as far as can be.

When the "property" element is considered separately from the "taking" element, it appears that something the law calls "property" is "affected" by the activities of an entity that has eminent domain power (for short, a "governmental entity"). Once, until perhaps the latter part of the nineteenth century, it might have been said that no "taking" could occur without some physical invasion or touching of the condemnee's land. "Property" was equated with physical possession.¹³⁶ Despite an occasional judicial relapse,¹³⁷ that is no longer

& LEE L. REV. 1057 (1980), and, more briefly, in W. STOEBUCK, *NONTRESPASSORY TAKINGS IN EMINENT DOMAIN*, ch. 6, at 167-202 (1977). Theoretical underpinnings of the writer's views are in Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972).

135. Every state constitution except North Carolina's contains an eminent domain clause that, for present purposes, may be said to read similarly to the fifth amendment to the United States Constitution. Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 554 (1972). North Carolina's constitution contains the so-called "Magna Carta," or due process formulation, which states that "No person ought to be . . . deprived of his life, liberty or property but by the law of the land." This has been interpreted to guarantee compensation for an eminent domain "taking." See Note, *Eminent Domain in North Carolina—A Case Study*, 35 N.C.L. REV. 296, 299-300 (1957).

136. See Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 588-99 (1972); Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L.J. 599 (1949).

137. See, e.g., *Callender v. Marsh*, 18 Mass. (1 Pick.) 417 (1823); *Monongahela Navigation Co. v. Coons*, 6 Watts & Serg. 101 (Pa. 1843). See generally Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 599-605 (1972).

true. In eminent domain, as in property law generally, "property" is now recognized to refer to abstract legal rights in land. Thus, it is quite possible to have a "taking" of "property" without any physical invasion. Frequent examples are found in the many decisions that hold that governmental activity that unreasonably diminishes the right of an abutting landowner to reach a public street is a compensable "taking." The property right affected is the owner's judicially recognized easement of egress and ingress.¹³⁸ Or suppose that the owner of parcel *A* is benefited by a restrictive covenant that nearby parcel *B* will be used for no purpose other than a single-family dwelling. If a governmental entity acquires parcel *B* and uses it for some other purpose, most courts that have faced the question have held this to extinguish, and so to "take," owner *A*'s "property" in the restrictive covenant.¹³⁹ As a final example, suppose a governmental entity conducts some disturbing activity that, if conducted by a private party, would amount to a nuisance against a landowner. The cases have often involved sewage disposal plants or, in recent years, jet aircraft approaching a public airport that fly alongside (but not necessarily over) the plaintiff's land. In these cases most, but not all, courts have held the plaintiff has suffered a loss, and so a "taking," of the property right to be free from nuisance.¹⁴⁰

When the principles implied by the above examples, and others that could be described are applied to the land use regulation cases, it is apparent that "property" is "affected." Certainly the landowner's use and enjoyment of land is a property right, actually a collection of a more or less indefinite group of sticks in the bundle that comprise "property." Any regulation that regulates at all will to some degree diminish some of these rights. Thus, any such regulation "affects" "property."

The "taking" question is much more difficult and crucial in the present inquiry than is the "property" question. It is at this juncture that the theory being propounded here differs fundamentally and radically from most thinking on the police power "taking" problem. As seen previously, all judicial theories, and much of the scholarly

138. *E.g.*, *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

139. *See* Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEX. L. REV. 733 (1969).

140. *See* Stoebuck, *Condemnation of Rights the Condemnee Holds in Lands of Another*, 56 IOWA L. REV. 293, 301-10 (1970).

writing, that allow for regulations to become takings follow or are variations upon *Pennsylvania Coal Co. v. Mahon*.¹⁴¹ *Mahon's* thesis is that it is only a matter of degree whether a regulation comes to a "taking." There is no qualitative difference between a regulation that "affects" and a regulation that "takes" "property," only a matter of severity or degree. The central thesis in the present article is that there is a principled, qualitative difference between the operation of regulations that are and those that are not "takings."

About *Mahon*, about the decisions influenced by it, and about the literature on police power "takings," there is a phenomenon that seems strangely to have escaped notice. The subject is not treated as if it were a part of the general subject of eminent domain. On the "taking" question, no one seems to look to other kinds of "taking" cases, enormous in number and variety, to discover what are the quintessential qualities or elements that mark governmental action as a "taking." It should be self-evident, unless *Mahon* and its progeny mean something else when they speak of the fifth amendment's eminent domain clause, that common "taking" elements will be found, as common chemical elements are found in the planets of the solar system. On this premise, the "taking" mechanism as it operates in several representative situations that are clear eminent domain examples will now be analyzed.

Consider first the simple example of a physical, or appropriative, "taking" for some governmental project such as a building or a street. In the one case government acquires an estate, probably in fee, and in the other, likely an easement. The particular nature of the interests is not important for present purposes; what is important is to inquire into how the "taking" occurs. The key is "acquires": the owner loses and government "takes" by acquiring. In the language of property law, there is a transfer, by force of the judicial condemnation decree. A deed given and received in voluntary settlement would have been, and commonly is, a perfect equivalent.

Does the transfer principle operate in other less "physical" exercises of eminent domain? It does, but as examples become less "physical," transfers occur more subtly. Reconsider the three examples that were used a moment ago to examine the "property" question. In the first case, loss of a street access easement, the owner's land loses an easement, and the servient tenement, the government's

141. See Stoebeuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207 (1967).

street, is unburdened. A transfer, in substance the release of an easement, has occurred; a release deed would have been a perfect substitute. The second case, extinction of an owner's restrictive covenant that formerly burdened the government's land, is no different. A release of the restriction has been compelled, for which a deed of release would have accomplished the same end. The third example, in which a governmental entity, such as an airport or sewage disposal plant, causes nuisance-type interference involves a transfer at the most abstract level of all. The landowner's property right to be free from nuisance has been partially destroyed, and the government's property rights in its airport or sewage disposal plant land have been correspondingly augmented.

Another analysis also supports the thesis that no act of eminent domain may occur unless there is a transfer. Interpretation of a statute or constitution begins with an analysis of the meaning of the words used—call it linguistic analysis. In question here is the meaning of the word "taken." The dictionary discusses the verb "take" for over a page of small print. Especially when it is used in the transitive form, the word always suggests a quality of reciprocity, in which one party relinquishes and the other gains something.¹⁴² Again, in the language of property law, "taking" suggests a transfer.

To recapitulate the preceding few pages, these conclusions emerge: First, for a "taking" of "property" to occur, action by a governmental entity must "affect" a private owner's "property" rights. Second, not only must the action "affect" the owner's rights, but a transfer must occur, whereby the owner loses property rights and the governmental entity must gain corresponding property rights. Since the regulations being discussed are on the use of land, the property rights affected, lost, and gained must be real property rights. These principles are derived both from the manner in which eminent domain actually works in all cases other than the regulatory cases and from an analysis of the words of the typical constitutional eminent domain clause.

How do these principles apply when one asks if a land use regulation is a "taking"? "Private property" is "affected"; this has already been established. More, the regulated owner loses property rights; his quantum of "property" is not merely affected but diminished. At this point one encounters a fundamental postulate of property law. The Anglo-American legal system does not admit that property rights

142. 260 U.S. 393 (1922).

in land can be destroyed; unlike chattels, land cannot become unowned. Rights in land may be divided up or transferred or both, but they cannot simply disappear. This means that when a land use regulation diminishes one owner's rights, as it will if it inhibits his uses or potential uses in any degree, those lost rights must be accounted for elsewhere. Something must move to another landowner, either the very thing lost or the equivalent reciprocal gain in rights to the other. All land use regulations produce transfers.

Land use regulations operate similarly to private restrictive covenants. There is a restricted, burdened, or regulated parcel, and, if the restriction has the effect of benefiting it, also a benefited parcel. The restricted owner's rights are diminished, while the benefited owner's rights are augmented. At a fairly high level of abstraction, a transfer occurs. In actual practice most land use regulations cover all parcels in a certain area or zone, so that they are more analogous to the reciprocal private restrictions in a subdivision than to a restriction between only two neighbors. This complicates the burden-benefit transfer, because all owners in the district gain and lose in varying degrees, but it does not change the core proposition that regulations cause transfers from burdened to benefited parcels.

Not all such transfers, however, are to the regulating governmental entity. A "taking" occurs only when governmental activity, in this case the enforcement of land use regulations, causes a transfer to a governmental entity. When does a regulation cause such a transfer? Only when the governmental entity holds interests, usually ownership, in land that is benefited by the burden on the regulated land. As a practical matter, the government's land must be more than just remotely or incidentally benefited; there must be some threshold level, such as "specially and directly benefited." An example, of which several cases have occurred, is found when airport-approach zoning is imposed on land lying under the flight path of aircraft landing and taking off from a public airport.¹⁴³ Because the burden on the zoned land specially benefits the government's property in the airport, a "taking" occurs. One might imagine other cases in which a governmental entity regulates private land with the effect, if not necessarily the intent, of conferring a special benefit on some governmentally owned land. It should not be said that there must be an intent, though often there will be; a "taking" occurs if there is in fact a special benefit, and so a transfer, to the governmental land.

143. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2329-31 (1971).

The fundamental problem with *Mahon's* "too far" test is that it takes into account only one side of the transfer that must occur for a "taking." It fails to recognize the transfer element. It considers only the owner's loss and makes a "taking" turn on the degree of loss. The theory propounded here turns upon a principled, qualitative difference in the operation of regulations that cause or do not cause "takings." Such variation is inherent in the nature of eminent domain as it is referred to in constitutional limitations and manifested in all other classes of cases. Police power "takings" are thus made a part of the general law of eminent domain.

Now the circle closes. The "taking" theory proposed would most surely reduce to very few the number of regulations that would effect "takings." A vital due process doctrine would be necessary to impose a meaningful constitutional limitation upon those land use regulations. The due process test previously urged provides that limitation. With the due process test, the Supreme Court could afford to adopt the "taking" test. A good starting point is *Fred F. French Investing Co. v. City of New York*.¹⁴⁴

V. CONCLUSIONS

Students of the subject have long and eagerly awaited a definitive Supreme Court decision on police power, or regulatory, "takings." The Court's recent decision in *San Diego Gas & Electric Co. v. City of San Diego*, especially Justice Brennan's dissent, and Justice Rehnquist's separate opinion, suggest that a majority was close to agreement on what they would have regarded as a definitive position. A "breakthrough" may be imminent. Before the justices subscribe to Justice Brennan's formula, however, they should consider carefully whether it would perpetuate and compound problems that, until they are resolved, will frustrate any definitive solution.

The Brennan formula focuses upon the remedy for a regulatory "taking." In so doing, it assumes that the test for when a "taking" occurs is *Pennsylvania Coal Co. v. Mahon's* "too far" test. The real problems that for sixty years have bedeviled federal and state courts alike swirl around this test. *Mahon* is seriously inconsistent with *Mugler v. Kansas* and a number of other leading Supreme Court decisions. The "too far" test is a replication of that part of *Lawton v.*

144. *E.g.*, *Hageman v. Board of Trustees*, 20 Ohio App. 2d 12, 251 N.E.2d 507 (1970).

Steele's due process test that turns upon the phrase "unduly oppressive." Because the phrase "too far" is vague and has not been given detailed content, it has produced inconsistent results in the Supreme Court and in state courts that are bound by it as constitutional law. Justice Brennan's dissenting opinion adds another source of confusion to these long standing problems; it calls for the remedy of compensation, while *Mahon*'s remedy is to invalidate an offending regulation.

Before a court can choose a remedy, it must have arrived at a solid basis for determining the right. *Mahon*'s "too far" test appears to be the basis for the right in Justice Brennan's dissent. It is not solid. It is judicial quicksand in which scores or hundreds of opinions have wallowed for years. Until the Court moves to secure the basis of the right, there will never be a definitive decision on police power "takings."

There is a better way. By interpreting "too far" as a "metaphor" for lack of substantive due process, the Court will avoid many problems associated with just compensation. *Mahon* will be brought together with *Lawton*, where it belongs. While the Court could hardly have taken that step a few years ago, recent events have made it appear plausible, perhaps likely. In several areas, recent Supreme Court decisions have given renewed force to private property rights. Those members of the Court who, with Justice Stewart in *Lynch v. Household Finance Corp.*,¹⁴⁵ believe that "the dichotomy between personal liberties and property rights is a false one" have the opportunity to act on their belief.

If "too far" becomes a due process question, then a new regulatory "taking" doctrine must emerge. There is a better way here, too. In line with the general law of eminent domain and with the normal meaning of "taken," a regulation should be a "taking" only when it benefits specially and directly augment governmentally owned rights in land. This is a narrow doctrine, allowing compensation in only a few situations. But, with an enlarged role for due process, the narrow "taking" doctrine will suffice. The two doctrines complement and supplement each other, pieces that interlock into a rational, workable mosaic.

This article has been written in that spirit of "quiet desperation" of which Thoreau speaks. *San Diego Gas*¹⁴⁶ gives much evidence that

145. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

146. 405 U.S. 538, 552 (1972).

the Supreme Court will imminently announce a doctrine such as Justice Brennan spells out. The Court has set its face against any meaningful discussion of the "problems and pitfalls" that *do* exist and *have* skewed the "taking question" for many years. Justice Brennan passes over them in silence. The Court has never, recently at any rate, discussed the theories of due process and "taking" offered here. Justice Brennan passes over them by a brief dismissal of *Fred F. French*. If a major decision is near, let it be for the better. If the problems of the past are cast in stone, who knows how long they may last?
