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Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis

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TESTING THE CONSTITUTIONAL VALIDITY OF LAND USE REGULATIONS: SUBSTANTIVE DUE PROCESS AS A SUPERIOR ALTERNATIVE TO TAKINGS ANALYSIS

Two clauses of the United States Constitution figure most prominently in the debate over the constitutional limits on the governmental power to regulate land. They are the just compensation clause of the fifth amendment[1] and the due process clause of the fifth and fourteenth amendments.[2] Neither the courts nor the commentators agree, however, on which provision to apply. Courts frequently confuse and blend the distinct concepts of: (1) taking property without payment of just compensation, and (2) depriving a person of property without due process of law.[3] This confusion has resulted in disparate results as well as in conflicting analysis.[4] A particular regulation might be ruled a "regulatory taking" in one state, struck down as a denial of due process in another, and upheld as a valid police regulation in a third.[5]

1. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The fifth amendment takings clause applies to the states through incorporation into the due process clause of the fourteenth amendment. Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 160 (1980); Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897). Therefore, to speak, as many courts do, of a "taking without due process" is literally accurate because of this incorporation. But it cannot excuse the blending of due process and takings that has been endemic in land use cases. The specific constitutional guarantees maintain their separate contours when they are incorporated into the "life," "liberty," or "property" protected by the fourteenth amendment. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

2. "[N]or shall any state deprive any person of . . . property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1. The fifth amendment, which applies solely to the federal government, contains almost identical language. U.S. CONST. amend. V.

3. This blending was recognized by the court in Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369 (D. Md. 1975).

> At the outset, it is important to make a distinction which has been totally overlooked in the pleadings of this case. . . . The fifth amendment employs two independent clauses to address two independent issues. Contrary to the allegations of the amended complaint, a claim of *deprivation* of property without due process cannot be blended as one and the same with the claim that property has been *taken* for public use, without just compensation.

400 F. Supp. at 1381. *See also* D. GODSCHALK, D. BROWER, L. MCBENNETT & B. VESTAL, CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT 53–54 (1977).

4. B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 8 (1977). Professor Ackerman states that "in many conversations on the subject [of the takings clause] I have not encountered a single lawyer, judge, or scholar who views existing case-law as anything but a chaos of confused argument which ought to be set right if one only knew how." *See also* Oakes, *"Property Rights" in Constitutional Analysis Today*, 56 WASH. L. REV. 583, 607 (1981).

5. A good example of the disparate approaches that state courts use to judge the constitutionality of land use regulations is found in the area of wetland regulation. *Compare* State v. Johnson, 265 A.2d 711 (Me. 1970) (wetland regulation held "unreasonable" and therefore a due process violation) *and* Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963) (wetland regulation held a taking) *with* Potomac Sand & Gravel Co. v. Governor of

The blending of these clauses has largely occurred under the label of "regulatory takings."[6] Courts have enlarged the fifth amendment test for determining whether a regulation is a taking to include many concepts deriving from due process restrictions on the police power.[7] The use of the inclusive "regulatory takings" label discourages analysis of whether the just compensation clause actually applies to limit land use regulations.[8] Some writers argue persuasively that the takings clause applies to few, if any, land use regulations.[9] This Comment does not attempt to

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Maryland, 266 Md. 358, 293 A.2d 241, *cert. denied*, 409 U.S. 1040 (1972) (similar regulation upheld against taking and due process challenges) *and* Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (same).

6. The term "regulatory takings," strictly defined, refers to regulations that so significantly restrict the owner's property interest that a court will declare that there has been a de facto exercise of eminent domain without compensation. As will be demonstrated, however, courts and commentators have used this term very loosely to denote any claimed constitutional violation based on an excessively restrictive regulation.

7. *See* part IIIA *infra*.

8. *See, e.g.*, Seigan, *Editor's Introduction to* PLANNING WITHOUT PRICES at 1, (1977). Professor Seigan believes that the takings clause provides the only safeguard against governmental deprivation of private property rights through excessively restrictive land use regulations. He claims that the theory that police power regulations are never takings "would render largely ineffective the constitutional safeguard for property ownership. It would allow government to reduce through regulation the prerogatives of ownership until the owner's interest were reduced to the virtual scrap of a naked title." *Id.* at 4. This argument fails to allow a proper place for the operation of substantive due process as a valid alternative to the use of the takings clause in these cases. As Professor Cunningham notes, "[d]espite chronic confusion in judicial language in cases where zoning or other land use regulations are challenged . . . , it is clear that such regulations may be held invalid on substantive due process grounds without a finding that they amount to a *de facto* taking . . . ." Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings,"* 8 HASTINGS CONST. L.Q. 517, 518 (1981).

9. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting); F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE [hereinafter cited as THE TAKING ISSUE] 238–55 (1973); Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 63 (1964); Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1091–93 (1980). Professors Sax and Stoebuck have independently developed a thesis that is particularly convincing. Professor Sax argued that the test for taking must include a showing that some governmental entity will benefit directly from the regulation. He believed that the primary justification for the takings clause was the fear of government using the power of eminent domain as a tool to tyrannize. Therefore, Sax stated that there should be a taking only when the government is seen as enriching itself at private expense. This theory was incorporated into the opinion of the New York court in Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 384, 385 N.Y.S.2d 5, *cert. denied*, 429 U.S. 990 (1976). The *Fred F. French* court stated, "[w]here government acts in its enterprise capacity, as where it takes land to widen a road, there is a compensable taking. Where government acts in its arbitral capacity, as where it legislates zoning or provides the machinery to enjoin noxious use, there is simply noncompensable regulation." Professor Sax has since repudiated his theory. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). Nevertheless, the first article has remained very influential in the courts.

Professor Stoebuck proposes a test for regulatory takings which has a different theoretical foundation but the same practical consequences as Professor Sax's first test. Professor Stoebuck argues that courts should focus on the difference between a deprivation of property, where the owner loses some valuable right but no public entity acquires it, and a literal "taking," where the property right is

duplicate their scholarship. Instead, it attempts to show that the due process test provides a better, more encompassing approach for judging the constitutionality of land use regulations.

The blending of substantive due process and takings might be an academic concern if the sole remedy granted for either provision were the same: invalidation of the ordinance.[10] But there is a growing trend to remedy regulatory takings in the same way as other takings and to require that the government compensate the owner for lost value during the time that the regulation remained in effect.[11] This trend emphasizes the need for courts to label correctly the tests that they use and to avoid blending elements from different tests.[12]

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appropriated for governmental use. Both Sax's and Stoebuck's tests limit "regulatory takings" to situations where some public body stands to gain directly from the regulation. For example, if a port authority zones land around an airport for low intensity uses to avoid conflicts with residential neighbors, the development potential of the land is being directly appropriated by the government for its benefit. Both Sax and Stoebuck would find a taking in this situation. In the more typical situation, where the public benefits from regulation are diffusely shared by the citizens of the community, no taking claim would be available under either theory.

10. Due process violations in the context of land use regulations are ordinarily remedied by invalidating the regulation. *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *cert. denied*, 429 U.S. 990 (1976). *See generally* Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 508 (1981). The same remedy has been followed traditionally for land use takings. *See, e.g.*, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963).

11. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 636–661 (1981) (Brennan, J., dissenting); Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981). Justice Brennan's dissenting opinion in *San Diego Gas* is especially noteworthy. Although he spoke for a minority of four justices, the majority did not reach the merits and Justice Rehnquist, concurring separately, stated that he "would have little difficulty in agreeing with much of what is said in the dissenting opinion." *Id.* at 633–34. Therefore Justice Brennan's sentiments seem to have the agreement of a majority of the court as it was then composed (Justice Stewart, who joined Brennan's opinion, has since been replaced by Justice O'Connor).

Justice Brennan's opinion in *San Diego Gas* strongly supports the idea that regulatory takings should be remedied by compensation to the landowner. He stated:

> The constitutional rule I propose requires that, once a court finds that a police power regulation has effected 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.

Id. at 658.

The New Hampshire Supreme Court in *Burrows* discussed and followed Justice Brennan's opinion, although it claimed to reach its decision solely on the basis of the New Hampshire Constitution. 432 A.2d at 19–22.

12. *See* Comment, *Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation*, 54 WASH. L. REV. 315, 326 (1979). The author asked:

> Does it matter that the limitations are often merged? One might argue that, as long as all the relevant tests for both limitations are applied, the proper finding on the question of constitution-

This Comment has three aims. First, it traces the history of substantive due process and regulatory takings to show how the courts have unwittingly interwoven strands from the two doctrines. Second, this Comment demonstrates that the underlying theory of each test requires that each be kept separate and distinct from the other. Last, the Comment shows that because the substantive due process test offers greater flexibility than the takings test it is a superior tool for evaluating the constitutionality of land use regulations.

I. SUBSTANTIVE DUE PROCESS

A. *The Origins of Substantive Due Process*

The Supreme Court first used the due process clause to examine the substance of a regulation in *Mugler v. Kansas*.[13] In this 1887 case, the Court considered a brewery owner's challenge to a state law prohibiting the manufacture of alcohol. The first Justice Harlan, writing for the majority, examined the substance of the regulation to determine whether (1) it had a "real or substantial relation" to a public purpose, or (2) it was a "palpable invasion of rights secured by the fundamental laws."[14] The Court concluded that the law was within the state's inherent power to prohibit "noxious uses" and rejected the challenge.

The Court applied the substantive due process test again in *Lawton v. Steele*.[15] The Court considered a challenge to a law that allowed state agents to seize the equipment of people caught violating fishing regulations. It rejected the challenge, but it again stated that the due process clause requires substantive as well as procedural fairness. In a classic summation of substantive due process, the Court said:

> To justify the state in thus interposing its authority in behalf of the public, it must appear—First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.[16]

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ality will always be reached. This is true, but the possible remedies for the two constitutional violations are not the same. A taking without compensation can be corrected by payment, but a government action that is arbitrary or serves no valid public purpose must be voided.

Id.

13. 123 U.S. 623 (1887).

14. *Id.* at 661. Justice Harlan stated: "[t]he courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority." *Id.*

15. 152 U.S. 133 (1894).

16. *Id.* at 137. The United States Supreme Court quoted this passage as "still valid today" in

This two-part test[17] embodies the familiar due process ends-means analysis of legislation to determine its overall reasonableness. Legislation must both (1) be aimed at achieving some public purpose, and (2) use means that are reasonably suited to achieving that purpose.

B. Substantive Due Process in the Context of Land Use Controls

The Supreme Court has used the substantive due process standard to judge the validity of land use controls. For example, in *Hadacheck v. Sebastion,*[18] the Court upheld a Los Angeles ordinance prohibiting brick manufacture despite the plaintiff's claim that the ban uniquely and unconstitutionally deprived him of the profitable use of his brickyard. The Court stated that there was a public purpose, based on the city's desire to prevent a nuisance such as the brickyard from existing in growing residential areas, and held that the ordinance used reasonable means to achieve that purpose.[19]

The Court used the substantive due process test again in *Village of Euclid v. Ambler Realty Co.,*[20] where it established the constitutionality of zoning ordinances. Justice Sutherland rejected the argument that zoning fails to promote any valid public purpose. He said that the city had the power to prevent nuisances, and indicated that a nuisance was merely the "right thing in the wrong place."[21] He also held that zoning provides a reasonable means to promote the orderly development of communities.[22]

Justice Sutherland in *Euclid* did not reach the question whether a particular zoning ordinance, as applied, might fail the ends-means test.[23] He

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Goldblatt v. Hempstead, 369 U.S. 590, 594–95 (1962). For a modern use of this test by a state court, see Potomac Sand & Gravel Co. v. Governor of Maryland, 226 Md. 358, 293 A.2d 241, 249 (1972).

17. The test as stated in *Lawton* emphasized two elements. Several commentators have since separated out "undue oppression" as a distinct third element. D. GODSCHALK, D. BROWER, L. MCBENNETT & B. VESTAL, *supra* note 3, at 46; Stoebuck, *supra* note 9, at 1081–82; Oakes, *supra* note 4, at 592 n.46. Because the author believes that separating the "unduly oppressive" character of the regulation from the means analysis makes an important difference in the interpretation of the *Lawton* test, this Comment treats *Lawton* as creating a two-part test. *See* note 157 and accompanying text *infra*.

18. 239 U.S. 394 (1915).

19. *Id.* at 408–14.

20. 272 U.S. 365 (1926).

21. *Id.* at 388.

22. *Id.* at 395. *Euclid* was clearly a due process case. The Court focused on the ends-means test and concluded that the regulation was reasonable. It did not discuss whether the regulation constituted a fifth amendment taking. This omission is more significant in light of the fact that the lower court in *Euclid* relied on *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922), to declare the regulation a taking. *Ambler Realty Co. v. Village of Euclid,* 297 F. 307, 311–12 (N.D. Ohio 1924) *rev'd,* 272 U.S. 365 (1926). *See generally* THE TAKING ISSUE, *supra* note 9, at 137–38.

23. 272 U.S. at 395.

returned to this question in *Nectow v. City of Cambridge,*[24] and wrote for a unanimous Court that residential zoning of property in an industrial area near railroad tracks was unreasonable because it did not bear a "substantial relation to the public health, safety, morals or general welfare."[25]

C. *The Continued Relevance of Substantive Due Process to Land Use Cases*

The overthrow of *Lochner v. New York*[26] and its progeny[27] by the New Deal Court[28] convinced many that the substantive due process standard had been consigned to the "dustbin of history."[29] Nevertheless, there are several reasons to believe that a circumscribed substantive due process doctrine still limits land use controls. First, the Supreme Court has twice applied the substantive due process test in recent land use controversies. For example, in *Goldblatt v. Town of Hempstead,*[30] the Court considered a gravel pit owner's challenge to a regulation that prevented any continued mining. The Court applied the "still classic" *Lawton v. Steele* test[31] to the regulation,[32] and held that it was a reasonable use of the police power.[33] A more recent example, though less directly on point, is the Supreme Court's use of substantive due process in *Moore v. City of East Cleveland.*[34] This case involved a zoning ordinance limiting occupants of a house to members of a nuclear family. The plurality opinion, written by Justice Powell, invalidated the ordinance because it unreasonably infringed on "family rights" substantively protected by the fourteenth

24. 277 U.S. 183 (1928).

25. *Id.* at 188. The decision in *Nectow* was reached on due process grounds. Although the Court considered the fact that the plaintiff was seriously injured by the regulation, this was not determinative. Instead, the Court found that the regulation failed the ends-means test because it had "no foundation in reason" and was "a mere arbitrary or irrational exercise of power." *Id.* at 187–88 (quoting Nectow v. City of Cambridge, 260 Mass. 441, 157 N.E. 618, 620 (1928)). The Court therefore held that the invasion of the plaintiff's rights lacked a "necessary basis" and invalidated the ordinance.

26. 198 U.S. 45 (1905).

27. Cases generally linked with *Lochner* as exemplary of the era of economic due process include Allgeyer v. Louisiana, 165 U.S. 578 (1897), and Coppage v. Kansas, 236 U.S. 1 (1915). The reader will note that the word "progeny" is used loosely, as *Allgeyer* actually predates *Lochner.*

28. The cases generally taken to mark the end of the *Lochner* era are Nebbia v. New York, 291 U.S. 502 (1934), and West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). *See generally* Oakes, *supra* note 2, at 592–93.

29. B. ACKERMAN, *supra* note 4, at 114. *See also* McCloskey, *Economic Due Process and The Supreme Court: An Exhumation and Reburial,* 1962 SUP. CT. REV. 34.

30. 369 U.S. 590 (1962).

31. *See* note 16 and accompanying text *supra.*

32. 369 U.S. at 594.

33. *Id.* at 596.

34. 431 U.S. 494 (1977).

amendment.[35] Mr. Justice Stevens, concurring in the judgment, based his opinion on substantive due process protection of property ownership.[36] Both the plurality and concurring opinions in *Moore* cited *Euclid* and *Nectow* as controlling precedents for land use cases.[37] Numerous other recent Supreme Court decisions also demonstrate the continuing validity of *Euclid* and *Nectow* as precedent.[38] Both of these cases were decided on a substantive due process rationale.[39]

Furthermore, the Supreme Court has strongly reaffirmed substantive due process in many non-economic contexts.[40] The Burger Court has questioned the distinction between personal and economic rights. Speaking for a unanimous Court in *Lynch v. Household Finance Company*,[41] Justice Stewart stated, "the dichotomy between personal liberties and property rights is a false one. . . . 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 . . . ."[42] This sentiment is echoed in several recent cases in which the Supreme Court used substantive standards to measure the validity of state procedures for divesting persons of property.[43]

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35. *Id.* at 502–06. The Court noted:

> [s]ubstantive due process has at times been a treacherous field for this court. . . . As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court. That history counsels caution and restraint. But it does not counsel abandonment, nor does it require what the city urges here: cutting off any protection of family rights at the first convenient, if arbitrary boundary—the boundary of the nuclear family.

Id. at 502 (footnote omitted).

36. *Id.* at 514–15 (Stevens, J. concurring). Justice Stevens saw the "critical question presented by this case" as "whether East Cleveland's housing ordinance is a permissible restriction on appellant's right to use her own property as she sees fit." *Id.* at 513. He answered this question in the negative. *Id.* at 520–21.

37. *Id.* at 498 n.6, 512–15.

38. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 260–61 (1980); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 133 n.29 (1978); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 262 (1977). *Arlington Heights* emphasized the right of the landowner "to be free from arbitrary or irrational zoning actions. *See Euclid v. Ambler Realty Co.*, . . . *Nectow v. City of Cambridge*, ..." *Id.*

39. *See* notes 22 & 25 and accompanying text *supra*.

40. Moore v. City of East Cleveland, 431 U.S. 494 (1977) (protected family interests); Roe v. Wade, 410 U.S. 113 (1973) (right of privacy); Griswold v. Connecticut, 381 U.S. 479 (1965) (same); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (right to travel). This reaffirmation of substantive due process has received considerable critical support. *See* Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) the Recent Cases*, 71 NW. U.L. REV. 417, 468–69 (1976); Tushnet, *The Newer Property: Suggestions for a Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 279. *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 564 (1978).

41. 405 U.S. 538 (1972).

42. *Id.* at 552. *See generally* Oakes, *supra* note 4, at 594–95.

43. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 593 (1972). *See* Oakes, *supra* note 4, at 597–98; Tushnet, *supra* note 40, at 273–77.

Finally, state courts often examine legislation affecting property rights more closely than does the Supreme Court.[44] The state courts base their review on due process or "law of the land" clauses in state constitutions, or simply on notions of natural law.[45] Thus, even if the Supreme Court were to hold that the federal constitution has no application to local land use regulations, substantive due process would continue to define the range of permissible regulations in many state courts.

D. The Test for Substantive Due Process in Modern Land Use Cases

To summarize, the substantive due process test used in the cases above can be divided into four basic elements. First, the regulation must serve some public end. Second, the means employed by the regulation must bear a reasonable relation to the purpose that the regulation seeks to achieve. Third, the means employed must not unduly injure the individuals affected by the regulation. Finally, the court applying the due process test must balance the public interest in the regulation against the harm to the individual. The test essentially provides some structure for an ad hoc determination of the regulation's overall reasonableness. Ordinarily, a court will not invalidate a regulation unless it decides that it has "no foundation in reason and is a mere arbitrary or irrational exercise of [the police] power."[46]

II. "REGULATORY TAKINGS"

A. The Origins of the Concept of Regulatory Takings

The second important limit on the power of government to regulate land uses stems from the just compensation clause of the fifth amendment. The idea that a police power regulation could constitute a fifth amendment "taking" of property sprang virtually *ex nihilo* from the pen of Justice Holmes in *Pennsylvania Coal Company v. Mahon*.[47] *Pennsylvania Coal* involved a Pennsylvania law prohibiting all mining that endangered the surface support of dwellings.[48] Mahon, a homeowner, sued

44. Comment, *State Economic Substantive Due Process: A Proposed Approach*, 88 YALE L.J. 1487, 1487–88 & n.5 (1979).

45. *Id.*

46. Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928) (quoting Village of Euclid v. Ambler Realty Co., 272 U.S. 366, 395 (1926)).

47. 260 U.S. 393 (1922). Justice Holmes experimented with this theory in a number of earlier cases, but his statements were limited to dicta. *See* Block v. Hirsch, 256 U.S. 135, 156 (1921); Rideout v. Knox, 148 Mass. 368, 374, 19 N.E. 390, 392–93 (1890). *See generally* THE TAKING ISSUE, *supra* note 9, at 124–26.

48. 260 U.S. 393, 412–13 (1922).

under the law to enjoin Pennsylvania Coal Company from mining under his property, despite a clause in his deed that specifically deprived him of the right to sue for any loss of surface support.[49] The Court held that the Pennsylvania statute was invalid, and said "that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking."[50] Justice Holmes held that because the law deprived Pennsylvania Coal of the only profitable use of its property it constituted a taking.[51]

Pennsylvania Coal was the first decision to contradict the statement in *Mugler v. Kansas*[52] that a police power regulation could only be challenged for lack of due process, and never as a taking.[53] Justice Holmes apparently recognized the conflict between these cases,[54] but did not explicitly overrule or even cite *Mugler*. The modern Court continues to rely on both cases and the conflict has never been resolved.[55]

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49. *Id.* at 412.

50. *Id.* at 415.

51. *Id.* at 416. In one revealing passage, Justice Holmes acknowledged that government may permissibly reduce the value of private property "to some extent." He continued:

> As long recognized some values are enjoyed under an implied limitation, and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act.

Id. at 413.

52. 123 U.S. 623 (1887). *See* text accompanying notes 13–15 *supra*.

53. 123 U.S. at 668. The *Mugler* Court stated:

> [t]he power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain. . . .

Id. at 669.

For cases that follow the *Mugler* analysis, see, e.g., Hadacheck v. Sebastian, 239 U.S. 394 (1915); Consolidated Rock Prod. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962). Additional cases are cited in Stoebuck, *supra* note 9, at 1060 nn.19–20.

Professor Cunningham states that, "[p]rior to [*Mahon*], the Court seemingly would not invalidate a land use regulation as a taking, no matter how much financial loss it caused the landowner, provided that the regulation had a proper purpose and employed means that were rationally related to the achievement of that purpose." Cunningham, *Inverse Condemnation as a Remedy for "Regulatory Takings,"* 8 HASTINGS CONST. L.Q. 517, 519 (1981).

54. Holmes did not cite *Mugler* in *Pennsylvania Coal*, seemingly unaware that there was any conflict between the cases. Contemporaneous letters, however, show that this ignorance was more feigned than real. Holmes wrote Laski in 1922 that he had "always thought old Harlan's decision in *Mugler v. Kansas* was pretty fishy." 1 HOLMES-LASKY LETTERS 473 (M. Howe ed. 1953).

55. Oakes, *supra* note 4, at 607. Judge Oakes states that "[t]he law of takings, at least as expressed by the Supreme Court, has essentially been without doctrinal advance for fifty years, and . . . two opposing and inconsistent lines of authority have not been explained or resolved; they are simply there." *Id.* *See also* Stoebuck, *supra* note 9, at 1069.

B. The Doctrine of Regulatory Takings in Modern Land Use Cases

The Supreme Court has not found any land use regulation to be a taking since *Pennsylvania Coal*.[56] Nevertheless, the case is repeatedly cited by the Supreme Court[57] and many state courts have relied on it to hold that particular regulations work takings.[58] These cases, however, also show that Justice Holmes' simple but enigmatic "too far" test has been greatly altered and elaborated over the years. The original focus on the deprivation to the landowner has given way, in most cases, to a more complex analysis. Three modern Supreme Court cases, all rejecting taking challenges to land use regulations, illustrate the additions that courts have made to Holmes' "too far" test.

In the first of these cases, *Goldblatt v. Town of Hempstead*,[59] the Court rejected a taking challenge brought by a gravel pit owner to an ordinance forbidding any mining below the water table. The Court held that the landowner's diminution in value, standing by itself, did not constitute a taking. The Court did not identify the additional factors that bear on this determination, however, and concluded that there was "no set formula" to identify when a regulation crossed the line to become a fifth amendment taking.[60]

In *Penn Central Transportation Company v. New York City*,[61] the Court considered the validity of historic preservation zoning. It held that no taking occurred when the owner of Grand Central Station was denied permission to construct an office building over the historic structure. In a lengthy discussion of the test for takings, the Court again denied that any single formula exists, and stated that the question involves "essentially ad hoc, factual inquiries."[62] The facts that the court considered important included the public purpose asserted for the regulation,[63] the extent of the

56. Only four cases involving land use regulations that present the taking question have reached the Supreme Court since *Pennsylvania Coal*. The Court has upheld each of these regulations. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (open space zoning); Agins v. City of Tiburon, 447 U.S. 255 (1980) (large lot residential zoning); Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (historic preservation zoning); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (prohibition of gravel mining).

57. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Andrus v. Allard, 444 U.S. 51, 66 (1980); Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978).

58. *See, e.g.*, Burrows v. City of Keene, 121 N.H. 590, 432 A.2d 15 (1981); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 231, 15 N.E.2d 587, 591 (1938) *See generally* THE TAKING ISSUE, *supra* note 9.

59. 369 U.S. 590 (1962).

60. *Id.* at 594.

61. 438 U.S. 104 (1978).

62. *Id.* at 124.

63. *Id.* at 125, 129.

burden on the landowner,[64] the treatment of similar parcels,[65] and whether the regulation deprived the owner of a well-defined property interest.[66] The Court's analysis implicitly endorsed a balancing of all these factors to determine the constitutionality of the regulation.

The most recent Supreme Court formulation of the test for land use takings occurred in *Agins v. City of Tiburon*.[67] This case involved a challenge to open space zoning in a wealthy suburb of San Francisco. Justice Powell, speaking for a unanimous Court, formulated a three part test for regulatory takings. He stated:

> The application of a general zoning law to particular property effects a taking [1] if the ordinance does not substantially advance legitimate state interests . . . [2] or denies an owner economically valuable use of his land. . . . [3] [T]he question necessarily requires a weighing of private and public interests.[68]

The Court held that the challenged zoning passed all three elements of the test, and rejected the takings claim.

The three-part test formulated by Justice Powell in *Agins* typifies the modern test for regulatory takings. Many courts state that a regulation becomes a compensable taking if it does not advance a valid public purpose.[69] Justice Powell's second element, that a regulation is a taking if it "denies the owner economically valuable use of his land," essentially restates the central theme of Holmes' "too far" test. This element remains the most important element in the regulatory takings test used in most courts.[70] Finally, most courts balance the public gain from the regulation with the private loss to determine whether it amounts to a taking.[71]

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64. *Id.* at 124.

65. *Id.* at 133 n.29.

66. *Id.* at 124–25.

67. 447 U.S. 255 (1980).

68. *Id.* at 260.

69. *E.g., id.; see* National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597, 608 (1965). *See generally* Stoebuck, *supra* note 9, at 1066 n.47.

70. *E.g.*, Agins v. Tiburon, 447 U.S. 255, 260 (1980); Steel Hill Dev., Inc. v. Sanbornton, 469 F.2d 956, 963 (1st Cir. 1972); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938). In *Arverne Bay* the court said:

> [a]n ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property. The only substantial difference, in such case, between restriction and actual taking is that the restriction leaves the owner subject to the burden of payments of taxation, while outright confiscation would relieve him of that burden.

Id. at 232.

71. *E.g.*, Agins v. Tiburon, 447 U.S. 255, 260 (1980); Maple Leaf Investors, Inc. v. Dept. of Ecology, 88 Wn. 2d 726, 565 P.2d 1162 (1977) (court used balancing test to uphold floodplain zoning). *See generally* THE TAKING ISSUE, *supra* note 9, at 139; Comment, *supra* note 12, at 327 n.54 and cases cited therein.

III. ANALYSIS

A. *Courts Have Blended and Confused the Tests for Substantive Due Process and Takings*

The theories of substantive due process and eminent domain developed separately from distinct constitutional provisions. Substantive due process requires that governments enact regulations that are reasonable.[72] Eminent domain, on the other hand, prohibits government from acquiring private property without payment.[73]

Nevertheless, the tests that modern courts use to determine whether a land use regulation is a violation of substantive due process or a taking have become so intertwined that it is difficult to distinguish between them. Essentially the same elements are considered using each of the tests. For example, the first and second elements of the due process test, namely that the regulation has a public purpose and uses means reasonably necessary to accomplish the purpose,[74] are integrated into the first element of the modern taking test: that the regulation "substantially advance" a valid public purpose.[75] In addition, both tests include a balancing element.[76] And, although there is a theoretical distinction between *Pennsylvania Coal's* "too far" language and *Lawton's* "unduly oppressive" formulation, the difference is not one that could easily be applied

72. Lack of substantive due process is often equated with the regulation's "unreasonableness." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (zoning regulation not "unreasonable"); Richardson v. Beattie, 98 N.H. 71, 95 A.2d 122, 126 (1953) (regulation "unreasonable" and therefore violative of due process). *See* D. GODSCHALK, D. BROWER, L. MCBENNETT & B. VESTAL, *supra* note 3, at 43:

> Substantive due process is concerned with the rights and duties of people and governments in their ordinary relations with each other. It includes a concern for what the government can do, the limits of its regulatory powers, and the essential fairness of governmental actions. A law may violate the substantive due process guarantee if it seeks to control something that is beyond its power to control, or controls it in a way that is unfair.

73. The emphasis in eminent domain is on fairness to the affected individual, not on the overall reasonableness of the regulation. These concerns overlap, certainly, yet they remain distinct in focus. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). Professor Michelman equates the determination of a regulation's reasonableness with the use of a balancing test. He then shows that this test is inapplicable to the issue of compensation for takings.

> [J]udgements about efficiency exhaust the significance of any comparison of gains flowing from a measure with the losses occasioned by it. In particular, although a weighing of *A*'s losses against the gains of *B*, *C*, and *D* may tell us whether a measure is efficient, that weighing cannot tell us whether the measure may be justly enforced against *A* without compensating him.

Id. at 1196.

74. *See* part I*D supra*.

75. *See* notes 82–84 and accompanying text *supra*.

76. *See* parts I*D* & I*B supra*.

by the courts.[77] Both tests, as they are applied today, converge on a single requirement of reasonableness.

This blending of substantive due process and takings into a single limitation on land use regulations might appear unimportant, but there is an important reason to resist this development. The characterization of the test can affect the remedy applied. Ordinarily, courts remedy due process violations by invalidating the ordinance.[78] Takings, on the other hand, are almost invariably remedied by the payment of monetary damages.[79] But land use takings are one area where this distinction has broken down. Courts have traditionally invalidated land use regulations that they declare are takings.[80] Recently, however, some courts have indicated that regulatory takings also trigger payment of compensation for the value lost by the landowner.[81] This trend is highlighted by Justice Brennan's dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego,*[82] a case involving open space zoning. The majority did not reach the merits,[83] but Justice Brennan, speaking for three other justices and with the apparent support of a fourth,[84] stated that the zoning constituted a taking

77. *See* Stoebuck, *supra* note 9, at 1082.

78. *See* note 10 and accompanying text *supra*. There has been some recent interest in the possibility of a damage remedy for due process violations under 42 U.S.C. § 1983. *See generally* Mandelker, *supra* note 10, at 506–512; Bosselman & Bonder, *Potential Immunity of Land Use Control Systems from Civil Rights and Antitrust Liability,* 8 HASTINGS CONST. L.Q. 453, 456–59 (1981). This remedy remains highly speculative and appears to have little applicability to typical land use situations. Mandelker, *supra* note 10, at 507–512.

79. *See* note 78 *supra*.

80. *See* note 10 and accompanying text *supra*. *See generally* Cunningham, *supra* note 8, at 517; Wright, *Exclusionary Land Use Controls and the Taking Issue,* 8 HASTINGS CONST. L.Q. 545, 578 (1981).

81. San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 658–59 (1981) (Brennan, J., dissenting); Burrows v. City of Keene, 121 N.H. 581, 432 A.2d 15 (1981) (relying on Brennan's dissent in *San Diego Gas* to require compensation for land use taking); Eldridge v. City of Palo Alto, 51 Cal. App. 3d 726, 124 Cal. Rptr. 547 (1975), *vacated on rehearing,* 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976); Beyer v. City of Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976) (decided with *Eldridge* on remand). The *Eldridge* decision, which endorsed a damage remedy for regulatory takings, was overruled by the California Supreme Court in Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds,* 447 U.S. 255 (1980). This damage remedy is often referred to as the "inverse condemnation" remedy, invoking the analogy to those eminent domain cases where the landowner sues the government for compensation for a taking instead of the more normal pattern in eminent domain where the government initiates the proceeding to condemn the land.

82. 450 U.S. 621 (1981).

83. The majority did not reach the takings issue because of the absence of a final judgment. *Id.* at 633.

84. Justice Rehnquist, concurring in the dismissal for lack of a final judgment, stated that, on the merits, he "would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan." *Id.* at 633–34. (Rehnquist, J., concurring).

and that the fifth amendment required the city to correct it by paying damages.[85]

The argument for monetary damages for land use takings rests primarily on a simple syllogism: (1) excessively restrictive land use regulations are fifth amendment takings; (2) takings are remedied by the payment of just compensation; (3) therefore, excessively restrictive land use regulations are remedied by the payment of just compensation.[86] This syllogism has logical force only if its major premise is correct.[87] One must ask whether the modern "regulatory takings" test actually identifies fifth amendment takings, or whether it is a mislabeled test for substantive due process.[88]

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85. *Id.* at 658–59, 661. (Brennan, J., dissenting). Justice Brennan stated:

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

Id. at 653. Justice Brennan bases this conclusion on the notion of fairness to the individual landowner.

> If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a "taking," it is only fair that the public bear the cost of benefits received during the interim period between application of the regulation and the government entity's recission of it.

Id. at 656–57.

86. *See* Mandelker, *supra* note 10, at 498.

87. The force of this syllogism can be questioned even if all its terms are granted. Professor Mandelker argues that the normal remedial hierarchy for private law suits is responsive to policy considerations, and that these considerations require a court to reject the "inverse condemnation" remedy for regulatory takings. *Id.* at 495–99. Most writers agree that the "inverse condemnation" remedy would have unfortunate consequences on the ability of government to plan land uses because of the fear of crushing liability and the uncertainty of the taking standards. Hall, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 HASTINGS L.J. 1569, 1597 (1977) (a monetary inverse condemnation remedy "will intimidate legislative bodies and will discourage the implementation of strict or innovative planning measures in favor of measures which are less stringent, more traditional, and fiscally safe."); Wright, *supra* note 80, at 583–84; Note, *Takings Law—Is Inverse Condemnation an Appropriate Remedy for Due Process Violations?*, 57 WASH. L. REV. 551, 566–67 (1982). Justice Brennan, however, claimed to be totally unmoved by these policy arguments, stating: "the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive or judicial branches." San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 661 (1981) (Brennan, J., dissenting).

88. *See* Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d5 (1976). The *Fred F. French* court argued persuasively that many courts that have used takings language have used it as a "metaphor" for lack of substantive due process. 350 N.E.2d at 385. The court said:

> [t]he metaphor should not be confused with the reality. Close examination of the [regulatory takings] cases reveals that in none of them, anymore than in the *Pennsylvania Coal* case . . . was there an actual "taking" under the eminent domain power, despite the use of the terms "taking" or "confiscatory." Instead in each, the gravamen of the constitutional challenge was that it was an invalid exercise of the police power under the due process clause, and the cases were decided under that rubric.

Id. (citations omitted). Despite the *Fred F. French* court's clear repudiation of the takings analysis, at

1. Substantive Due Process Concepts Have Entered Eminent Domain

In land use cases, the due process and takings limitations have been confused and blended to the point that it is difficult to identify the reasoning used in many decisions. The intertwining of due process and eminent domain has resulted, in part, from confusion of precedents. Although the two clauses have spawned two lines of precedent that relate to the constitutionality of land use regulations, courts tend to use due process and takings precedents interchangeably, without clearly recognizing the doctrinal differences between the concepts.

An early example of this blending is *Goldblatt v. Town of Hempstead*.[89] The *Goldblatt* court cited both *Pennsylvania Coal* and *Lawton* as controlling precedents.[90] Justice Clark, in *Goldblatt,* recognized the difference between the tests espoused in these cases but the juxtaposition initiated further doctrinal confusion. This intertwining was exacerbated in *Penn Central Transportation Co. v. City of New York*.[91] Justice Brennan, speaking for the majority, cited *Euclid, Nectow, Mugler,* and other due process cases alongside *Pennsylvania Coal* and other cases explicitly relying on a takings analysis.[92] To make matters worse, he presented the *Mugler* approach and the *Pennsylvania Coal* approach as alternative ways to approach the takings problem, despite the irreconcilability of these cases.[93] Finally, in *Agins v. City of Tiburon,*[94] the Court developed its three-part test for regulatory takings, while relying indiscriminately on cases from each line of precedent. Specifically, the Court cited *Nectow* to support the proposition that a regulation becomes a taking if it does not

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least one commentator has asserted that it held the challenged regulation "to be a taking." Wright, *supra* note 80, at 577 n.138 (1981). This exemplifies the common tendency to confuse the due process and takings issues.

Professor Stoebuck has identified three major problems that have hindered clear analysis in this area: (1) failure to work within the constitutional language and history of the takings clause; (2) failure to make the theory of regulatory takings consistent with the theory developed for other "nontrespassory takings"; and, (3) failure to recognize the proper place of substantive due process. Stoebuck, *supra* note 9, at 1080–82. This Comment uses a similar analysis to distinguish between the valid and the invalid in this confusing area of law.

89. 369 U.S. 590 (1962).

90. *Id.* at 594–95.

91. 438 U.S. 104 (1978).

92. *Id.* at 124–25, 127.

93. *Id.* at 124–27. The *Mugler* and *Pennsylvania Coal* cases are irreconcilable because the first stated that a valid police power regulation could never be a taking, while the second held that the difference was merely a matter of degree. *See* Stoebuck, *supra* note 9, at 1068. Professor Stoebuck claims that "[t]he Supreme Court's lengthy majority and dissenting opionions in *Penn Central* compound rather than disentangle the doctrinal imbroglio over when a taking occurs. To say, as the majority appears to, that a number of alternative theories exist is, if taken on its face, to create situations of near anarchy." *Id.* at 1069.

94. 447 U.S. 255 (1980).

"substantially advance legitimate state interests."[95] *Pennsylvania Coal* was cited to support the second element: that a regulation becomes a taking if it "denies an owner economically viable use of his land."[96] And for the third element, the need to balance public benefit against private loss, the Court cited *Euclid* as the "seminal decision."[97] *Euclid* and *Nectow,* of course, were decided on a substantive due process rationale and did not explore the possibility that the challenged regulation was a taking.[98]

In addition to this confusion of precedent, there are doctrinal reasons to reject the public purpose and balancing elements as part of the test for fifth amendment takings. Analysis shows that the second element of the *Agins* test, the extent that the regulation burdens the landowner, is the only doctrinally sound element in a test for regulatory takings.

a. Public Purpose Requirement

The modern test for regulatory takings states that a regulation is a taking if it is not substantially related to a valid public purpose. This requirement, however, is not grounded in eminent domain.

It is a basic tenet of eminent domain doctrine that any exercise of that power must further some public purpose.[99] This rule is designed, in part, to prevent governments from spending public funds for private purposes or in ways that clearly provide no benefit to the public. For this reason, an attempted exercise of the power of eminent domain will be invalid if it serves no public purpose.

This reasoning is inverted when courts hold that a regulation is a taking because it serves no public purpose.[100] This necessarily means that there has been an exercise of eminent domain that does not further any public purpose. It follows that the public must pay for a regulation if it provides them with no real benefit. This contradicts the rationale behind the public use doctrine in eminent domain: that public funds be expended only to further public interests.[101]

95. *Id.* at 260.

96. *Id.*

97. *Id.* at 261.

98. *See* notes 22 & 25 and accompanying text *supra.*

99. *E.g.,* Berman v. Parker, 348 U.S. 26, 32 (1954).

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

101. Justice Brennan recognized this inconsistency in his *San Diego Gas* dissent. He stated that the taking question arises only when an otherwise valid use of the police power is too restrictive on the landowner;

> A different case may arise where a police power regulation is not enacted in furtherance of the public health, safety, morals, or general welfare so that there may be no "public use." Although the government entity may not be forced to pay just compensation under the Fifth Amendment,

The public purpose requirement is the first part of the substantive due process test.[102] It is logical to hold a regulation unreasonable and void if it does not advance any public interest. But this requirement bears little relationship to eminent domain, and provides no reason to require a government to compensate the landowner.

b. Balancing Public Need Against Private Loss

A balancing test is also an element of both the modern test for regulatory takings and the substantive due process test. Balancing is clearly appropriate under the substantive due process test for the reasonableness of a regulation.[103] It is, however, an inappropriate addition to the *Pennsylvania Coal* test for regulatory takings.

Several writers have tried to find support for a balancing test in *Pennsylvania Coal*.[104] However, the thrust of Justice Holmes' opinion opposes the utilitarian calculus implicit in this test.[105] He emphasized that excessive diminutions of private property rights are absolutely prohibited, no matter how great the public need. "We are in danger of forgetting," Justice Holmes wrote, "that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[106]

Further, balancing is abhorrent to the theory of eminent domain. A strong public need for acquiring a small piece of property is never balanced against the possibility that the cost to the owner will be slight.[107] Whether private property has been taken for public use is determined without reference to the strength of the public need or the value of the

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the landowner may nevertheless have a damages cause of action under 42 U.S.C. § 1983 . . . for a Fourteenth Amendment due process violation.

San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 656 n.23 (1981).

102. *See* notes 16–17 and accompanying text *supra*.

103. *See* Stoebuck, *supra* note 9, at 1065; Comment, *supra* note 12, at 331–33.

104. THE TAKING ISSUE, *supra* note 9, at 139, 207, 238, 256; Comment, *supra* note 12, at 327–28.

105. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414–16 (1922); *See* Comment, *supra* note 12, at 328–30.

106. 260 U.S. at 416.

107. *See* Loretto v. Teleprompter Manhattan CATV Corp., 102 S.Ct. 3164 (1982). *Loretto* affirmed the "traditional rule" that a permanent physical occupation of property is a taking *per se*, and held that courts may not balance public against private interests in making this judgment. *Id.* at 3174, 3179. *See also* Stoebuck, *supra* note 9, at 1065–66. Professor Stoebuck urges that "[i]t is contrary to our entire concept of eminent domain to say that urgent necessity will justify an uncompensated taking when a less pressing public purpose will not. . . . Physical appropriation without compensation would result whenever an imperative public need exists." *Id.*

property taken.[108] Once a taking is identified, the only remaining question concerns the amount of compensation.

Balancing deprives the *Pennsylvania Coal* "too far" test of any independent force and effect. It turns a prohibition couched in absolute terms into a relative and conditional impediment. In other words, the balancing test protects private property only when the court finds that the regulation is unreasonable. Emphasis on the reasonableness of the regulation is consistent with due process, but antithetical to eminent domain.[109]

c. *A "True" Test for Regulatory Takings*

Because most elements used by courts to identify regulatory takings derive from substantive due process, the question arises: What is left of the test for regulatory takings? This question requires a return to the roots of the doctrine in *Pennsylvania Coal Company v. Mahon*.[110] The "too far" test does provide an independent test for regulatory takings that is related to eminent domain.

The "too far" test arose from Holmes' fascination with the concept of property as a bundle of rights.[111] He saw that the right to use property is an important right of ownership, or, more correctly, the result of having other rights.[112] The owner claiming that the regulation has gone "too far" is alleging that the public has taken one of the most valuable sticks in his bundle, the right of profitable use. The Supreme Court has long recognized that the property protected by the fifth amendment is not limited to the layman's conception of "property" as a physical "thing."[113]

108. Loretto v. Teleprompter Manhattan CATV Corp., 102 S.Ct. 3164, 3171 (1982). *Loretto* distinguishes permanent physical occupations of property, which it subjects to the per se rule, from temporary invasions and regulations that only limit the owner's use of the property. Temporary invasions and regulatory burdens, according to *Loretto*, remain subject to a balancing test.

Loretto represents a positive step in Supreme Court takings jurisprudence. By definitively removing permanent physical occupations of property from the balancing process, it obviates the fear that balancing will spread from the regulatory context to other areas of eminent domain. Nevertheless, *Loretto* fails to show persuasively why balancing should be retained even for regulations and temporary physical invasions. It decided only that balancing was not appropriate in the context of permanent physical occupations. Therefore, its statements about the continued validity of balancing in other contexts is dicta.

109. *See id. See also* Stoebuck, *supra* note 9, at 1065. Professor Stoebuck states: "Balancing is also too 'dangerous' to function as a test for a police power taking. Balancing allows the government to destroy real property rights completely, even to appropriate land physically, provided the public necessity is urgent enough." *Id.*

110. 260 U.S. 393 (1922).

111. *See* THE TAKING ISSUE, *supra* note 9, at 240–46.

112. *Id.*

113. *See, e.g.*, United States v. General Motors Corp., 323 U.S. 373, 378–79 (1944). The Court stated that "property" is not construed in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by the law. . . . [Instead it]

Holmes' opinion left unanswered at least one crucial question: What quantum of deprivation will trigger a taking claim? This point cannot readily be identified from *Pennsylvania Coal,*[114] subsequent cases,[115] or from the commentators,[116] and is beyond the scope of this Comment.

Courts generally have refused to limit their scrutiny to the one factor singled out by Holmes' "too far" test. Instead, courts apply a more flexible test. But this flexibility can only be accomplished under the takings rubric through considerable manipulation of the legal test involved. These courts have ignored the fact that the substantive due process test provides the flexibility necessary to analyze land use regulations. It has the added advantage of avoiding the doctrinal inconsistencies that have plagued attempts to enlarge the takings test beyond its original contours.

IV. THE NEED FOR A FLEXIBLE TEST

Land use regulations in this country are characterized by their diversity. Every level of government, from the smallest village to the national legislature, has imposed some form of land use control. The problems these controls address range from parochial concerns of suburban communities to economic and environmental issues of national significance. Governments use a variety of methods to regulate lands. Even within the

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denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *Id.* at 377–78.

114. 260 U.S. 393 (1922). Justice Holmes' statements on this point are equivocal. He stated that "the question depends upon the particular facts." *Id.* at 413. Holmes also warned that "this is a question of degree—and therefore cannot be disposed of by general propositions. But we regard this as going beyond any of the cases decided by this Court." *Id.* at 416. As a whole, Holmes' opinion is remarkably devoid of guidelines for future courts seeking to determine the degree of diminution that would trigger a taking.

115. *E.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) ("no set formula to determine where regulation ends and taking begins"); Andrus v. Allard, 444 U.S. 51, 65 (1979) (the question "calls as much for the exercise of judgment as for the application of logic"). Analysis of "regulatory takings" cases in state courts reveals no pattern regarding the amount of diminution in the owner's value that will result in a taking. *Compare, e.g.*, National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597, 608 (1965) (regulation ruled taking when it diminished land value from $260,000 to $175,000) *with* Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (not a taking although property rendered valueless), *appeal dismissed,* 371 U.S. 36 (1962). *Compare* Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761,771 (1972) (wetland regulation does not go "too far" when it merely prohibits owner from making uses of the land that are impossible in its natural state) *with* State v. Johnson, 265 A.2d 711, 716 (Me. 1970) (wetland regulation which prohibited owner from filling land ruled taking because it left landowner with no valuable use).

116. *See, e.g.*, Wright, *supra* note 80: "Legal scholars still are in search of rules or a formula which will lend precision to a process which is doomed to imprecision by the state of the law." *Id.* Attempts to find the precise point at which the diminution in value becomes a taking have all ended in failure. *See* THE TAKING ISSUE, *supra* note 9, at 208–211; Stoebuck, *supra* note 9, at 1064.

confines of traditional "euclidean" zoning,[117] the regulations vary greatly as to the intensity of the use permitted and the size of the area zoned for each use. Recently developed regulatory techniques make this diversity even more apparent. The advent of timed growth controls,[118] planned unit zones,[119] transferrable development rights,[120] and other new techniques make sweeping generalizations about the legal implications of land use controls ever more difficult to sustain.

A logical byproduct of this diversity is the need for flexibility in any test for the constitutionality of land use regulations. Many factors influence the reasonableness of land use regulations. A judgment that a regulation is or is not constitutional requires a court to make an essentially political choice. This choice is aided by a test that allows the court to consider all the factors that are relevant to the regulation in its social context. It is hindered by a test requiring a mechanical judgment based on consideration of only one factor.

The cases support this need for a flexible test. Courts employing both the substantive due process and the takings tests have done so in ways that allow them maximum latitude. The substantive due process test requires that a court consider and balance a large number of factors. Although the takings test began with a single inquiry, courts have expanded it to the point where it replicates the elements of the substantive due process test. Justice Brennan's endorsement of "ad hoc, factual inquiries" in *Penn*

117. "Euclidean zoning" is a planning technique that divides the community into areas defined by the zoning authority, each subject to different use restrictions. The technique was first approved in Village of Euclid v. Ambler Realty Co., 272 U.S. 366 (1926). It takes its name from that case and from the geometric rigidity that often characterizes the technique.

118. *See* notes 158–71 and accompanying text *infra*.

119. Planned unit development (P.U.D.) concepts have been introduced to counteract the rigidity of Euclidean zoning. As defined in one case:

> P.U.D.is the antithesis of the exclusive districting principle which is the mainstay of "Euclidean" zoning. The latter approach divided a community into districts, and explicitly mandated segregated uses. P.U.D., on the other hand, is an instrument of land use control which augments and supplements existing master plans and zoning ordinances, and permits a mixture of land uses on the same tract . . . . It also enables municipalities to negotiate with developers concerning proposed uses . . . which may be contrary to existing ordinances if the planned project is determined to be in the public and individual homeowner's interest. It also recognizes the importance of encouraging and making it financially worthwhile for developers and investors to undertake P.U.D. projects by permitting a more intensified utilization of vacant land . . . .

Rudderow v. Township Comm. of Mount Laurel, 121 N.J. Super. 409, 297 A.2d 583, 585 (1972), *quoted in* 1 A. RATHKOPF, THE LAW OF PLANNING AND ZONING 1–16 (4th ed. 1975).

120. Transferrable development rights are a technique to provide partial compensation for zoning by allowing the restricted owner to sell rights to others to allow them to develop their property more intensely than would otherwise be permitted. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); 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).

Central[121] and Justice Powell's three-part test in *Agins*[122] are examples of "takings" tests that contain all the breadth and flexibility of substantive due process. As discussed above, however, the balancing and public purpose elements are incompatible with the theory and purpose of the fifth amendment's just compensation clause.[123] Nevertheless, that most courts include these elements shows an understandable judicial reluctance to apply the *Pennsylvania Coal* test in a rigid, mechanical fashion.

A. *An Example of the Need for Flexibility: Zoning for Minimum Lot Sizes*

Zoning for minimum lot sizes illustrates the need for a flexible constitutional test. Although lot size restrictions are among the most simple and traditional of planning tools, they have been the subject of frequent litigation.[124] Lot size restrictions are enacted for many reasons, from protection of critical environmental areas to economic exclusion.[125] The burden that the zoning places on the landowner tends to increase with the size of the lot required, subject to facts intrinsic to the zoned property.[126] All things being equal, the landowner's loss of use and enjoyment is greater when a lot is zoned for a forty acre minimum lot than when it is zoned for a one acre minimum lot. The proportional nature of this impact, and the frequency with which these controls are challenged in court, make them an ideal laboratory in which to examine the factors that courts use to decide land use cases.

Under one rubric or another, courts have essentially employed a balancing test to determine the constitutionality of minimum lot size regulations.[127] Courts generally balance the public's need for the regulation against the harm to the owner. The public's need is itself separable into a number of different elements. Courts have looked at the size and sophistication of the government entity, the amount and quality of the planning

121. Penn Central Transp.Co. v. City of New York, 438 U.S. 104, 124 (1978).

122. Agins v. City of Tiburon, 447 U.S. 255, 260–61 (1980).

123. *See* notes 99–109 and accompanying text *supra*.

124. *See, e.g.*, Wright, *supra* note 80, at 551–53 and cases cited therein.

125. *Compare, e.g.*, Wilson v. County of McHenry, 92 Ill. App.3d 997, 416 N.E.2d 426 (1981) (160-acre agricultural zoning to preserve prime farm land), *with* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (court found that large lot residential zoning was enacted for purpose of excluding low income groups and racial minorities from community), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975).

126. *See* THE TAKING ISSUE, *supra* note 9, at 205–07; Wright, *supra* note 80, at 571–75.

127. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 260–61 (1980) (one- to five-acre minimum upheld under takings analysis); Steel Hill Dev. Inc. v. Town of Sanbornton, 469 F.2d 956 (5th Cir. 1972) (six-acre minimum upheld under due process analysis); Duggan v. County of Cook, 60 Ill.2d 107, 324 N.E.2d 406, (1975) (20,000 square foot minimum invalidated under due process analysis). *See also* Wright, *supra* note 80, at 551 nn.31–32 and cases cited therein.

preceding the enactment, and the urgency of the problem addressed, as measures of the public's need for the regulation.

1. The Public's Need

a. The Source of the Regulation

The size and sophistication of the regulating body is an important factor that courts look to in determining the reasonableness of a minimum lot size regulation.[128] For two reasons, courts do not, and should not, afford the same presumption of validity to land use decisions of local governments that they do to those of larger units.

First, many local government decisions reflect a purely parochial outlook.[129] A minimum lot size regulation that is perfectly rational for a suburban town might have harmful affects on the metropolitan area as a whole. For example, a suburban community may attempt to avoid low income housing or new development by zoning all or most of the community for large residential lot sizes. The effect of this regulation would be to divert growth to nearby communities and to decrease the opportunites for low cost housing in the area.[130] Courts often give less deference to local governmental regulations that disregard these state or regional concerns.[131] This consideration is especially important when the local gov-

128. Few cases state baldly that local governmental restrictions are subject to stricter scrutiny. *But see* note 131 *infra* and cases cited therein. Traditionally courts have purported to apply the same presumption of validity to regulations from local governments that they apply to acts of Congress or of state legislatures. Wright, *supra* note 80, at 568. Professor Wright adds, however, that "no one involved in this field can believe very seriously that courts do this in fact, and there is considerable doubt that they should." *Id. See also* THE TAKING ISSUE, *supra* note 9, at 229: "Traditionally, local land use regulations have not been treated by the courts with the same deference shown by the courts to state regulations. Although the courts have established a 'presumption of validity' for local regulations, in many states the presumption is easily rebutted." *Id.*

129. *See generally* Kolis, *Citadels of Privilege: Exclusionary Land Use Regulations and the Presumption of Constitutional Validity*, 8 HASTINGS CONST. L.Q. 585, 586 (1981).

130. *See id.* at 585–87; Wright, *supra* note 80, at 551, 613 n.40. Professor Wright states:

> Clearly, the object of much of this large lot zoning . . . is exclusion—exclusion from certain areas or suburban communities of low, moderate and even middle income people, exclusion of minorities . . . exclusion of young people who cannot afford to buy into that type of market, and (probably incidentally) exclusion of older people who either want to or have to live in apartments or condominiums.

Id. at 551.

131. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, 727–28 (local government may not disregard the impact of the regulation on region as a whole) *appeal dismissed and cert. denied*, 423 U.S. 808 (1975); Appeal of Kit-Mar Builders, Inc. 439 Pa. 466, 268 A.2d 765, 768–69 (1970); Save A Valuable Environment v. City of Bothell, 89 Wn. 2d 862, 576 P.2d 401, 405–06 (1978). *Cf.* Beck v. Town of Raymond, 118 N.H. 793, 394 A.2d 847 (1978) (court upheld "parochial growth restriction" as a temporary measure but criticized local planning efforts that disregard regional concerns).

ernment seeks to exclude racial minorities or low income groups from the community.[132] A court might be unable to find the explicit discriminatory intent required under modern Supreme Court equal protection analysis,[133] but still may decide that the public purpose supporting the regulation is too weak to survive a balancing test.[134]

The second reason justifying stricter scrutiny of local governments is their status as quasi-administrative entities.[135] Local governments zone under authority delegated by the state legislature.[136] Local land use decisions are subject to the procedural constraints written into the enabling statute or implied from procedural due process.[137] Substantive review of

The foundation for stricter scrutiny of local zoning decisions that are made in disregard of regional concerns was laid in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Justice Sutherland upheld the right of local governments to make their own planning decisions, but noted "the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." *Id.* at 390.

132. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (equal protection and due process grounds), *appeal dismissed and cert. denied,* 423 U.S. 808 (1975); Appeal of Kit-Mar Builders, Inc. 439 Pa. 466, 268 A.2d 765 (1970) (zoning having "an exclusionary purpose or result" is not allowed in Pennsylvania).

133. The United States Supreme Court has essentially foreclosed equal protection challenges to land use regulations where there is discriminatory effect but no independent evidence of discriminatory intent. Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977). *See generally* Kolis, *supra* note 129, at 602–04.

134. Suspicion of exclusionary motives has led several courts to subject minimum lot size regulations to more exacting scrutiny. *See, e.g.,* United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974) (zoning measure with discriminatory consequences subject to strict scrutiny); Robert E. Kurzius, Inc. v. Village of Upper Brookville, 67 A.D.2d 70, 414 N.Y.S.2d 573 (1979) (five-acre minimum was "improper exercise of police power" when enacted for primary purpose of maintaining village as "citadel of privilege"); National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) (town had duty to accommodate growth). *Cf.* Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972) (six-acre minimum zoning with likely exclusionary effect valid as "legitimate stop-gap measure" but not as permanent restriction).

135. The traditional attitude is to treat all local zoning actions as legislative acts entitled to a full presumption of validity. *See, e.g.,* Construction Industry Ass'n v. City of Petaluma, 522 F.2d 897, 906 (9th Cir. 1975) (if "a legitimate state interest is furthered by the zoning regulation, we must defer to the legislative act."), *cert. denied,* 424 U.S. 934 (1976). There has been a growing trend to recognize that some acts of local zoning authorities are quasi-judicial, administrative decisions. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713, 726, *appeal dismissed and cert. denied,* 423 U.S. 808 (1975): "[I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as the state." *See also* Fasano v. Board of County Comm'rs of Washington County, 264 Or. 574, 507 P.2d 23 (1973) (rezone is quasi-judicial action), *modified on other grounds,* Newberger v. City of Portland, 288 Or. 585, 607 P.2d 723, 725 (1980); Chrobuck v. Snohomish County, 78 Wn. 2d 884, 480 P.2d 489, 495–96 (1971) (planning commission's function "partakes of the nature of an administrative, quasi-judicial proceeding"). *See generally* O. BROWDER, R. CUNNINGHAM, J. JULIN & A. SMITH, BASIC PROPERTY LAW 1287–99 (3d ed. 1979).

136. Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 369–70, 285 N.E.2d 291, 296, 334 N.Y.S.2d 138, 145, *appeal dismissed,* 409 U.S. 1003 (1972). *See generally* 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 2.02 (4th ed. 1975).

137. 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 2.02 (4th ed. 1975).

zoning decisions may be justified as a "hard look" at the administrative choice.[138] Courts often demand that administrative decisions be adequately explained, rationally based, and responsive to the demands of the entire community.[139]

b. The Planning Preceding the Regulation

Courts tend to scrutinize minimum lot size regulations more closely if they appear to have been enacted without careful consideration of the consequences to the individual landowners and to the community.[140] The traditional requirement that local zoning conform to a comprehensive plan springs from this perception.[141] Some commentators note an "increasing concern on the part of the courts over the failure of some local governments to base their land use regulations on anything but popular prejudice."[142] Most courts try to discern the overall reasonableness of the regulation, and the planning that preceded it is a relevant consideration.

c. The Urgency of the Public Need

Another important factor that courts consider is the urgency of the public need for the regulation. Most courts recognize that some public purposes are more pressing than others and assign them different weights in a balancing process. For instance, maintenance of the aesthetic qualities in a wealthy suburb and preservation of prime farm soils critical to the economy of a state are both public purposes that will support regulation.[143]

138. *See* W. RODGERS, ENVIRONMENTAL LAW 196 (1977).

139. *Id.* at 16–21.

140. *See, e.g.*, Steel Hill Dev., Inc. v. Sanbornton, 469 F.2d 956, 962 (1st Cir. 1972). Chief Judge Coffin stated that he was "disturbed by the admission here that there was never any professional or scientific study made as to why six, rather than four or eight, acres was reasonable to protect the values cherished by the people of Sanbornton." The court upheld the challenged restriction as a "legitimate stop-gap measure," but stated that "this requirement may well not indefinitely stand without more homework by the concerned parties." *Id.*

141. Most state enabling acts require that all zoning be enacted "in accordance with a comprehensive plan." *See* 1 A. RATHKOPF, THE LAW OF ZONING AND PLANNING § 12.01 (4th ed. 1975). Professor Rathkopf emphasizes the connection between the need for planning and the regulation's ability to survive due process and equal protection challenges.

142. THE TAKING ISSUE, *supra* note 9, at 235.

143. *See, e.g.*, Home Builders League v. Township of Berlin, 81 N.J. 127, 405 A.2d 381, 390–91 (1979) (conservation of property values is a legitimate zoning purpose). *See also* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Justice Douglas stated that:

> [a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

But most courts recognize that the second objective is more important than the first.[144] Accordingly, a greater burden on the landowner can be supported when the more important purpose is invoked.

Courts perceive differences in the urgency of the public need for various lot size restrictions. There are at least two common types of situations where lot size regulations provoke constitutional challenges. In the first, a government imposes one-half to five-acre minimum lot sizes on a developing residential area to avoid congestion and maintain property values.[145] In the second, much larger minimums are imposed to preserve farmlands, wetlands, floodplains, or other environmentally significant areas.[146] The second type of control generally imposes greater burdens on the landowner.[147] Nevertheless, it has been generally more successful in surviving constitutional challenges, due to a perception that the public need for this type of regulations is also much greater. Two cases from Illinois illustrate this disparity.

In *Duggan v. County of Cook,*[148] the Illinois court invalidated 20,000 square foot single family residential zoning because it failed a balancing test. The court said:

> Ultimately if it clearly appears that the relative gain to the public is small when compared with the hardship imposed upon the property owner by the zoning restriction, there is then no valid basis for the exercise of the police power to so limit the owner's right to the use of his property.[149]

On the other hand, when the Illinois intermediate court considered 160-acre exclusive farm use zoning in *Wilson v. County of McHenry,*[150] it found that the public need outweighed the burden on the landowner and upheld the regulation.[151] This was so even though the burden imposed on

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Id. at 9.

144. The greater weight placed on the preservation of critical farmlands must be inferred from the results of cases involving either types of restrictions. *See* notes 148–53 and accompanying text *infra.*

145. *E.g.,* Agins v. City of Tiburon, 447 U.S. 255 (1980) (one- to five-acre minimum); Hamer v. Town of Ross, 59 Cal. 2d 776, 382 P.2d 375, 379, 31 Cal. Rptr. 335 (1963) (one acre limitation); Duggan v. County of Cook, 60 Ill. 2d 107, 324 N.E.2d 406, 408–9 (1975) (single family residential zoning); Appeals of Kit-Mar Builders, Inc. 439 Pa. 466, 268 A.2d 765–66 (1970) (two- and three-acre minimums).

146. *E.g.,* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 624–26 (1981) (open space zoning for wetlands); Wilson v. County of McHenry, 92 Ill. App.3d 997, 416 N.E.2d 426, 427 (1981) (160-acre exclusive farm use zoning); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 716, 764–66 (1972) (wetland regulation).

147. *See* note 126 and accompanying text *supra.*

148. 60 Ill. 2d 107, 324 N.E.2d 406 (1975).

149. 324 N.E.2d at 409.

150. 92 Ill. App. 3d 997, 416 N.E.2d 426 (1981).

151. 416 N.E.2d at 430. The court said: "The unique consideration in agricultural zoning, which

the *Wilson* landowner was much greater than that imposed in *Duggan*.[152] These results are not unusual.[153] Courts typically uphold regulations that advance strong public needs unless the result is manifestly unjust to the landowner.

2. *The Extent of the Owner's Loss*

The second component of the balancing test that courts consider in determining the constitutionality of minimum lot size restrictions is the burden that the regulation places upon the landowner.[154] Under the *Pennsylvania Coal* taking test, a court asks whether the regulation goes "too far" in depriving the owner of the reasonable use and enjoyment of his land.[155] Under the substantive due process test, a court asks whether the regulation is "unduly oppressive."[156] The difference between these concepts is not merely semantic. The substantive due process test explicitly envisions a balancing element, while the "too far" test is intended to operate as an absolute check on regulatory power.[157] The concept of "undue oppression," therefore, is more flexible than the "too far" test. One common

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includes the obvious public interest in preserving good farm land, must be balanced against this consideration of loss in value and profit."

152. The alleged loss in *McHenry* was $14,000–$16,000 per acre, or 75–80% of the value. 416 N.E.2d at 429. The loss in *Duggan* was not ascertained, but appears to be considerably less. *See* 324 N.E.2d at 409–10.

153. *Compare, e.g.*, National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597, 608 (1965) (court invalidated four-acre minimums that reduced value of land from $260,000 to $175,000) *and* Aronson v. Town of Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964) (court invalidated 100,000 square foot minimum without proof of diminution in value) *with* American Sav. & Loan Ass'n v. County of Marin, 653 F.2d 364 (1981) (five-acre zoning to preserve coastal spit upheld, despite allegation that the zoning made that portion of the property useless) *and* Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972) (court upheld wetland regulation that allowed owner no profitable use of land). Injustice to the landowner often occurs when the property is unsuited to the purposes for which it is zoned. This aspect controlled two cases that considered very large lot agricultural zoning in Illinois before such zoning was upheld in Wilson v. County of McHenry, 92 Ill. App. 3d 997, 416 N.E.2d 426 (1981). In these cases the court invalidated the zoning because it concluded that the lands in question were not suitable for intensive farming. Pettee v. County of DeKalb, 60 Ill. App. 3d 304, 376 N.E.2d 720, 725 (1978); Smeja v. County of Boone, 34 Ill. App. 3d 628, 339 N.E.2d 452, 455 (1975).

154. *See* note 127 and accompanying text *supra*.

155. *See* notes 50, 110–16 and accompanying text *supra*.

156. *See* note 16 and accompanying text *supra*.

157. Professor Stoebuck claims that while "a metaphysician might try to distinguish among 'unduly oppressive,' 'too far,' and 'unreasonable,' . . . it is fatuous to suppose a court could formulate distinctions that would work in resolving actual cases." Stoebuck, *supra* note 9, at 1082. But there is an important difference. The "too far" test provides an independent measure of when a regulation becomes a taking. The "unduly oppressive" phrase in the substantive due process test, on the other hand, is an important part of the means analysis. The regulation is only "unduly oppressive" if it uses means that are more restrictive than necessary to accomplish the purpose.

variety of lot size restrictions, timed-growth controls, illustrates the need for this flexibility.

Timed-growth controls have become popular as planners seek ways to channel development into areas of the community that can best handle it.[158] Typically, these controls use very large minimum lot sizes to severely restrict development until a specific period of time has lapsed, or until the requisite public services have been installed.[159] Timed-growth controls have generally survived both due process and takings challenges.[160] This result seems consistent with substantive due process, but more problematic under a strict application of the *Pennsylvania Coal* test.

Professor Wright has canvassed the cases involving timed-growth controls and has concluded that five basic factors determine whether a court will approve a plan.[161] First, the controls must follow a careful study detailing the expected population growth, the demand on public services, and the community's ability to cope with these demands. Second, the plan must meet the concerns of the study by providing a timetable for development of public services. Third, a plan must reflect attainable goals and a real public commitment to achieve these goals. Fourth, there must be procedures for special treatment of individuals who are uniquely burdened or who wish to provide the necessary public services at their own expense. Finally, the plan must not be a sham. It must reflect a desire to accommodate growth in a sensible and orderly fashion, rather than simply an intent to freeze growth or to divert it to areas beyond the borders of the community.[162]

Taken together, these factors address the reasonableness of the regulation, not whether it constitutes a taking. Under the takings clause, a court should not consider any of these factors except the fourth.[163] A court applying the takings test should consider only whether the regulation, at its time of enactment, has gone "too far" in depriving the owner of the rea-

158. *See, e.g.*, Construction Industry Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1975); Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

159. *See* Wright, *supra* note 80, at 557.

160. *Id.*

161. *Id.* at 558.

162. *Id.*

163. This assertion goes against the traditional analysis of regulatory takings cases. It is black letter law to say that a regulation is only a taking if its effect is permanent. *E.g.*, Golden v. Planning Bd. of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972) (timed growth controls upheld against takings attack); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938) ("An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose" is a taking). In Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385, 385 N.Y.S.2d 5 (1976), however, the court claimed that both *Golden* and *Arverne Bay* used takings language as a "metaphor" for lack of substantive due process.

sonable use and enjoyment of her land.[164] The limited duration of the regulation, inherent in timed-growth controls, should not affect the takings determination.[165] Temporary takings are a common phenomenon in other areas of eminent domain.[166] For instance, in *United States v. Causby*,[167] the Court held that low level airplane flights over the plaintiff's farm constituted a fifth amendment taking.[168] The temporary nature of the use did not stop the Court from requiring payment for the time that government had interfered with the owner's property rights. Once it is conceded that overly restrictive land use regulations are actual takings, the analogy with the temporary takings cases seems compelling. If the immediate impact of the regulation sufficiently interferes with the owner's use and enjoyment, the owner must be compensated. The duration of the regulation only helps to determine the amount of the ultimate award.

Unlike the takings test, the substantive due process test allows a court to consider all the important issues surrounding timed-growth controls.[169] As Professor Wright shows, most courts do in fact look at the total impact of controls in determining their constitutionality.[170] Because development is merely delayed and not prohibited by these controls, courts often conclude that the timed controls are necessary to an important public purpose, and therefore are not unduly harsh.[171]

Application of the substantive due process test seems preferable as a matter of public policy. The potential range of circumstances surrounding timed-growth regulations requires that courts use a test that allows them to balance the urgency of the public's need and the unavailability of less restrictive alternatives against the landowner's inability to make profitable use of the land. Only under the substantive due process test does a court have the necessary flexibility. It can uphold those timed-growth regulations that protect the public from the problems attendant upon uncontrolled growth while restricting the owner no more than is necessary. Yet

164. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981) (Brennan, J., dissenting and expressing views of five justices on the merits).

165. *Id.* at 657: "The fact that a regulatory 'taking' may be temporary . . . does not make it any less of a constitutional 'taking.' Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable."

166. *See* Kimball Laundry Co. v. United States, 338 U.S. 1, 6 (1949); United States v. Petty Motor Co., 327 U.S. 372, 374–75 (1946); United States v. General Motors Corp., 323 U.S. 373, 374–75 (1945).

167. 328 U.S. 256 (1946).

168. *Id.* at 266. Because flights could be discontinued at any time, the case was remanded for consideration of the damages. *Id.* at 268.

169. *See* part I*D supra*.

170. Wright, *supra* note 80, at 557–58.

171. *Id.* at 558–59.

it can strike those regulations that burden the landowner or surrounding communities without corresponding benefit to the public.

V. CONCLUSION

The above examples demonstrate the need for a test that takes into account the variety of circumstances that characterize land use regulations in this country. A test with but one dimension, such as the one proposed by Justice Holmes in *Pennsylvania Coal,* is inadequate. It fails to take into account the size of the government entity enacting the regulation, the adequacy of the planning, or the strength of the policy justification. It validates many regulations that are manifestly unreasonable, simply because the impact of the regulation on the landowner is not so severe that the court will find a taking. It discourages government from regulation, even when there is a grave public need, whenever regulation imposes a considerable burden on the landowner.

Substantive due process, on the other hand, is superior to the takings test for most situations in which land use regulations are subjected to constitutional challenges. As demonstrated, substantive due process better describes the test that the courts already use in these situations. In addition, its adoption would lead courts to clearer analysis and more sure identification of appropriate precedents.

This proposal is essentially conservative. If substantive due process is accepted as the major check on government's power to regulate land, courts will continue their case-by-case review. Most land use regulations will be upheld, as they are today. Some regulations, because they appear to lack a public purpose, rational means or substantive fairness to the landowner, will be invalidated. The courts will continue to consider and balance several factors to determine whether a given regulation is constitutional. The status quo will reign.

Then why change from the takings label for the balancing test that most courts use? First and foremost is the need to avoid the notion that land use regulations necessarily require compensation. The possibility of damage payments for regulatory takings threatens to chill the ability of public entities to plan land uses. With dwindling budgets and burgeoning demands on the public treasury, even the inchoate threat of compensation for land use takings could doom efforts to bring innovative techniques and sound environmental planning to our communities. The second reason is more subtle. As demonstrated, both tests have been used in ways that allow the courts the greatest amount of latitude to consider the regulation in its social context. Nevertheless, only substantive due process can achieve this flexibility without sacrificing doctrinal consistency. The takings test sim-

ply was designed for another task. Pressed into service in the area of land use controls, the carefully developed concepts of eminent domain become excess theoretical baggage. A court using the takings test in this area is forced into a dilemma between selectively ignoring the doctrinal foundations of the test, or accepting these foundations and being led to unfortunate results.

Substantive due process, properly understood, eliminates the need for an expansive takings test. It meets the concerns that caused courts to enlarge the takings test beyond its original contours without the doctrinal inconsistencies that bedevil that effort. Substantive due process allows case-by-case flexibility with a doctrinal structure that is largely missing from the modern regulatory takings cases.

If this approach were accepted, courts might treat the takings test in either of two ways. First, the *Pennsylvania Coal* test could survive as a secondary approach, reserved solely for those situations where the regulation completely deprives the owner of any profitable use.[172] In these cases, the test could function as a "safety net" to prevent the owner's interests from being entirely balanced away under the substantive due process test. This preserves the rationale of the *Pennsylvania Coal* decision while providing an objective measure for when a regulation goes "too far." Second, courts could reject the concept of regulatory takings entirely, leaving scrutiny of land use regulations to substantive due process. Either result would improve our understanding of the test and remedies for unconstitutional land use regulations.

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172. Many courts that use the *Pennsylvania Coal* test state that a regulation will not become a taking unless "the property has been rendered worthless or useless." Smoke Rise Inc. v. Washington Suburban Sanitary Comm., 400 F. Supp. 1369, 1382 (D. Md. 1975). *See also* Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956, 963 (1st Cir. 1972); Sibson v. State, 111 N.H. 305, 282 A.2d 664 (1971).