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# The Takings Clause and Partial Interests in Land

## ON SHARP BOUNDARIES AND CONTINUOUS DISTRIBUTIONS

*Richard A. Epstein*<sup>†</sup>

### INTRODUCTION

The title of this conference—*Post-Zoning: Alternative Forms of Public Land Use Controls*—is fitting for the David Trager Symposium. David was a close friend of mine, and during the years that he was dean, he brought me to New York City and Brooklyn Law School to speak about the question of rent control, which I attacked in my usual blunt fashion.<sup>1</sup> The question of land use regulation is to some extent orthogonal to the rent control question—which deals with financial matters rather than with physical externalities between adjacent, and not so adjacent, landowners. I have no question that market solutions work far more smoothly for financial relations between landlord and tenant than they do for physical interactions among strangers. There is no need for a law of nuisance to regulate financial interactions among various rights holders. But there is, decidedly, that need when dealing with disputes between ordinary landowners. The law of nuisance is the relevant body of law, and its development long antedates the rise of Progressive legal theory.<sup>2</sup>

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<sup>1</sup> Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741 (1988); Richard A. Epstein, *Rent Control Revisited: One Reply to Seven Critics*, 54 BROOK. L. REV. 1281 (1989).

<sup>2</sup> See Joel Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974).

Put more generally, no one could possibly argue—and I have not argued<sup>3</sup>—that all forms of liability and regulation should have no role to play in land use disputes. But that necessary concession to state power does leave open the question of exactly which forms of regulation should be imposed, and how. In dealing with this question, I take the general approach that any system of weak property rights will necessarily lead to political mischief. The definition of a weak property right for these purposes is one whose validity depends on the complex interaction of multiple variables, each of uncertain weight. The adoption of this approach quickly drives courts toward a view that the determination of rights depends on the reasonableness of certain conduct under the circumstances. In the absence of any strong theory of property rights, courts tend to show extreme deference to the decisions of legislatures and administrative agencies. The actions of these groups, however, are vulnerable to political intrigue that can shift certain key property rights—such as the right to develop land—back and forth between individuals in an ad hoc fashion. Some measure of stability is found in the takings law—under the key decision in *Loretto v. Teleprompter Manhattan CATV Corp.*<sup>4</sup>—insofar as it adopts a rule of per se compensation for cases of direct government occupation. But the law of regulatory takings—those challenges dealing with government regulation that restricts the power of property owners to use, develop, or alienate their land—is governed by the decision in *Penn Central Transportation Co. v. New York City*,<sup>5</sup> which takes a self-conscious pride in insisting that only “ad hoc” rules are capable of resolving challenges to government regulation under the Takings Clause.<sup>6</sup>

The great vice in takings law lies in the abandonment of principled adjudication in regulatory takings cases. The argument here is that the correct set of bright-line rules will reduce the level of discretion afforded to land use regulators, such that the secure property rights created will lead to higher levels of investment and, as a result, higher overall levels of

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<sup>3</sup> RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Richard A. Epstein, *From Penn Central to Lingle: The Long Backwards Road*, 40 J. MARSHALL L. REV. 593 (2007).

<sup>4</sup> 458 U.S. 419, 441 (1982).

<sup>5</sup> 438 U.S. 104 (1978).

<sup>6</sup> *Id.* at 123-24.

social welfare.<sup>7</sup> The recognition that property rights have, in many instances, sharp boundaries imposes clear extrinsic limitations on what it is that legislatures and administrative agencies can do with respect to those rights. This argument is not intended to say that there are no difficult takings cases. The full system of takings requires the incorporation of two further elements. The first deals with implicit in-kind compensation and the second with the state's exertion of the police power. First, in ordinary takings cases, the compensation supplied to a landowner is in cash. But there is in principle no reason why that compensation could not be supplied in-kind. That in-kind compensation is critical in understanding any complex zoning scheme that simultaneously imposes both benefits and burdens on all its members. In some cases, the benefits from the scheme are compensation for the burdens that it imposes on all its members. That outcome usually holds when the gains and burdens are proportionate across all players. In other cases, the skew between benefits and burdens indicates that cash compensation may still be required to make up for shifts in wealth between the parties. Second, the traditional police power inquiry is whether the government taking of property is justified under the police power as a means to protect "the safety, health, morals, and general welfare of the public [at large]."<sup>8</sup> This formulation was applied, controversially, in *Lochner v. New York*.<sup>9</sup> In this article, I shall not dwell on those cases because the issues that I address involve categorical mistakes in analysis by the Supreme Court that implicate neither of these central concerns to the overall structure of the law.

What is relevant from the earlier work is the continued insistence that it is only possible to develop a consistent view of public law by following the sound articulation of *private law*

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<sup>7</sup> I have developed this theme in greater detail in Richard A. Epstein, *The Property Rights Decisions of Justice Sandra Day O'Connor: When Pragmatic Balancing Is Not Enough*, 1 BRIGHAM-KANNER PROP. RTS. CONF. J. 177 (2012).

<sup>8</sup> EPSTEIN, TAKINGS, *supra* note 3, at 107-45 (quoting *Lochner v. New York*, 198 U.S. 45, 53 (1905)) (internal quotation marks omitted).

<sup>9</sup> See 198 U.S. at 53 ("There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.").

principles. In this regard, a sound body of takings law should follow the appropriate formula for a sound body of private law, which, when properly formulated, relies on clear boundary lines to determine who is entitled to do what.<sup>10</sup> The decision to offer compensation in takings cases, like the decision to offer compensation in tort law, should be governed by bright-line rules. By the same token, the amount of compensation awarded for the taking should vary continuously with the amount of the loss inflicted on the owner. In this regard, the public law differs from the private law, insofar as governments are authorized to make takings for public use, and thus need only compensate for the owner's loss and do not have to make restitution for the public gain.

In short, to make takings law more principled and predictable, a continuity between torts and takings is central to the overall operation of the system. As will become evident, however, that principle is widely rejected, most notably in the Court's flooding cases, which are an example of the incongruent distinction between permanent and temporary takings.<sup>11</sup> A similar weakness infects the well-established constitutional distinction between partial and total takings, where the analysis often starts and ends with the question of whether the regulation in question has gone "too far" to be done under the police power.<sup>12</sup> The proper approach to compensability does not depend on these elusive notions of degree. Instead it should follow the lead of the private law of conveyances, especially as it is embodied in the law governing mineral support rights. Whenever government action shifts private rights from one party to another, a taking has occurred. All questions of degree are reserved for determining the proper level of compensation.

In dealing with the regulatory issues of this conference, these insights are lost in the push for ever more government regulation in the land use area, all without compensation to those property owners whose use rights are either restricted or eliminated. More specifically, I am deeply troubled by the use of the words "Post-Zoning" in the conference title. New York City is on any account a place where public administrators exercise huge discretion over what parties should be allowed to develop what property on what terms. Yet the use of this conference title moves us in exactly the wrong direction by

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<sup>10</sup> See *infra* Part I.B.

<sup>11</sup> See *infra* pp. 600-07.

<sup>12</sup> See *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

making it appear that the major defect in the current system of land use regulation is that zoning law has proved inadequate to grapple with all the complex issues of land use, so that additional systems are needed in order to pick up the slack. My worst fears are richly confirmed simply by looking at one slide from the presentation of New York City Council Member Brad Lander, from the 39th District, which neatly links a set of overambitious goals with an expanded set of zoning and nonzoning tools designed to implement them. Thus, the slide reads as follows:

## PURSUING EQUITABLE DEVELOPMENT

**Goals**

- Affordable housing
- Wage standards
- Union jobs
- Local hiring
- Job training
- Open space
- Community use
- Traffic mitigation
- Noise mitigation
- Local grants

**Zoning Tools**

- Inclusionary zoning
- TDRs
- Zoning for parks, plazas, community facilities
- Special permits

**Non-Zoning Tools**

- Community benefits agreements
- Restrictive declarations
- Development agmts
- Labor/labor peace agmts
- Living/prevaling wage laws
- Apprenticeship requirements
- First source hiring laws

New York City Council Member Brad Lander, 39<sup>th</sup> District

It is hard to imagine a more relentlessly self-destructive agenda for New York City. The first of its many ills is the effort to link massive forms of labor regulation to real estate development. These labor regulations all are intended to raise wages above competitive levels for the benefit of the union workers who are behind the program, resulting, for example, in upending the Kingsbridge Armory project in 2009.<sup>18</sup> The real estate regulations—pay particular notice to “special permits”—are a way to hold the developers hostage to the labor rules. The combined effect is lower efficiency in both sectors, and an

<sup>18</sup> For the most recent effort to jumpstart the project, see Eyewitness News, *City Reopens Proposals for Kingsbridge Armory Site*, WABC-TV/DT (Jan. 27, 2012), [http://abclocal.go.com/wabc/story?section=news/local/new\\_york&id=8521255](http://abclocal.go.com/wabc/story?section=news/local/new_york&id=8521255). The site was abandoned in 1996 and is still undeveloped.

enormous boon to the political influence of public officials like Mr. Lander, who are able to insert themselves as of right into the middle of every land use decision that takes place within the city. One can recognize from the huge complexity in the patterns of land use in New York City, where land uses can vary within a single block, that zoning is often not the appropriate way to sort things out. But it hardly follows that another set of regulations should be brought into play to deal with zoning's supposed shortfall. Zoning laws seek to deal with the conflicts that arise from the locational adjacencies that are commonplace in any dense urban environment, which they regulate only with indifferent success. In many cases the most difficult issues that a sound system of public regulation must deal with are such mundane issues as noise mitigation and traffic congestion, but these occupy at most a small fraction of attention on the Lander list.

The avidity with which land use regulators champion multiple alternative land use controls should be understood as part of the long-standing governance problem facing local communities. Contrary to the hopes of planners, an increased level of government regulation is not part of any sustainable solution to land use issues. New kinds of regulatory schemes are often merely layered on top of existing regulations.<sup>14</sup> The root of the difficulty here is that the current system of property rights in land is so weak that virtually all land use regulation issues are securely within the public domain. Rights to possession may remain secure, which is good as far as it goes. But it does not go far enough when state governments have veto rights over any plan for use or development of current land, which they can then tie to their collateral ambitions in "wage standards," or indeed a host of other issues. The predictable outcome from this process is overall delay and systematic favoritism that allows one lucky or well-placed developer—it is never clear which—to receive the benefits not only of approvals but also of the blocking position against rival projects within the city. Ad hoc schemes of regulation are thus treacherous because the very freedom that allows the rare high-minded government official to put new schemes into place offers the freedom for battalions of ambitious government

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<sup>14</sup> For a discussion of these possibilities, see Nicole Stelle Garnett, *Redeeming Transect Zoning*, 78 BROOK. L. REV. 571 (2013) (describing novel zoning techniques that overlap with traditional Euclidian zoning on matters of aesthetics and performance).

officials to put misguided government regulations into place, piece by piece.

In light of the manifest risks in the current constitutional and political order, the central question lies not in the details of any novel scheme. Rather, it lies in finding the types of systematic institutional constraint so desperately needed to channel the political discretion Council Member Lander and his cohorts have carved out for themselves into productive channels. On this point, the conventional wisdom plays into the hands of the status quo because it rests on the view that sound political judgment is needed to make the system go, and that such judgment is possible only in a legal regime that places sharp limitations on the reach of the Takings Clause to the federal and state constitutions.<sup>15</sup> More specifically, the received wisdom today insists that while just compensation may be required whenever the government permanently occupies land, it ought never—except perhaps in extreme cases of “no economic viability”<sup>16</sup>—be required to compensate when it “merely” regulates land use, whether or not as part of some comprehensive zoning scheme.

The argument in favor of the status quo—to the extent that anyone even bothers to address these questions today—is that the introduction of a compensation requirement will necessarily impede the implementation of systematic planning in the public good, which requires a high level of political control over the process. Any desirable protections that are afforded are thought to be procedural in nature, such that individual landowners have the right to present their views at

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<sup>15</sup> For an early statement of this position, see *Berman v. Parker*, 348 U.S. 26, 33 (1954) (citations omitted):

We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

<sup>16</sup> For a statement of this position, see *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992) (emphasis omitted) (internal quotation marks omitted): “As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation does not substantially advance legitimate state interests or denies an owner economically viable use of his land.”



public hearings and through other forms of political action.<sup>17</sup> Strong property entitlements thus give way to partial participation rights in the overall political process.

All this is sadly misplaced. In my view, the ultimate question in land use regulation does not deal with the particulars of any given scheme of land use control. It deals with the question of whether we should draw a line between those areas that are subject to per se rights of compensation and those in which no compensation is owing at all, which, as I noted above, should be determined by clear rules and not ad hoc balancing tests. The first of these domains of permanent physical occupation is outlined in *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>18</sup> which follows a per se compensation rule. The second of regulatory takings is most closely associated in modern times with *Penn Central Transportation Co. v. New York City*,<sup>19</sup> which relies on a mushy balancing test. The interim territory is addressed in the Court's key decision in *Lucas v. South Carolina Coastal Commission*,<sup>20</sup> in which only those forms of regulation that leave the landowner with no viable economic use of the property are thought to require compensation by a modest extension of *Loretto*. The rest remains in political solution.

To address these issues, I shall proceed as follows. In Part I, I shall stress the critical distinction between those issues that are relevant to the question of whether a taking has taken place and those issues that relate to the level of compensation owing once the taking is established. I argue that the only way to attack these issues is to track the private-law rules, as noted earlier, that govern the distinction between liability and damages. I then argue that hard-edged rules are needed for deciding liability in private law and for deciding the taking question in public law. In Part II, I show how this framework plays out with the dubious constitutional distinction between permanent and temporary takings. In Part III, I apply that same framework to the distinction between physical and regulatory takings. In Part IV, I show how this analysis helps discern the proper rule of transferable development rights in takings law. A brief conclusion follows.

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<sup>17</sup> See, e.g., *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

<sup>18</sup> 458 U.S. 419 (1982).

<sup>19</sup> 438 U.S. 104 (1978).

<sup>20</sup> 505 U.S. 1003, 1016 (1992).

## I. TAKINGS AND VALUATION: A FRESH START

### A. *Private Analogies for Public Situations*

The current state of the law of takings requires a thorough reexamination of the relationship between occupation, regulation, and compensation, which today give the state far too much running room in dealing with the wide range of condemnation and regulation cases in the land use area. This problem is likely to prove especially acute in major cities like New York. The root of the difficulty lies not in the particulars but in matters of basic structure. To see why this is the case, it is best to step back from the particular institutional arrangements and ask about how best to design any system of regulation.

In this regard, it is often a mistake to start with public systems, because it is all too easy to become entranced with the proposition that the state should be endowed with special rights that transcend those of its particular citizens. After all, if all property comes top down from the state, it is easy, even after the fact, to announce that a particular grant was subject to conditions—express or implied—that constrain its proper use. It is also too easy to fall into the comfortable complacency of Justice John Paul Stevens in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, when he wrote:

Long ago it was recognized that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community, and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.<sup>21</sup>

From this mistaken premise, it takes little imagination for local opposition to real estate development to conjure up harm that is "injurious to the community" so that the takings law is dramatically severed from the law of nuisance. The adoption of this broad definition of harm thus makes it inevitable that some harm will occur no matter what is done, so that it always lies within the political domain to decide which harms should be controlled and which disallowed. This inclusive account of the harm principle in turn creates a broad and capacious view of the police power that necessarily shunts off to one side any claims for private property rights. As that

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<sup>21</sup> 480 U.S. 470, 491-92 (1987) (citations omitted) (internal quotation marks omitted).

*deus ex machina* is not available in private disputes, all entitlements claims are more subject to scrutiny. A better approach is surely needed, and that, in turn, depends on the effective utilization of bright-line rules that already organize so many voluntary arrangements.

### B. *Bright-Line Rules*

In the private law, the major objective is to minimize the level of frictions between neighbors in order to allow productive activities to go forward with minimum fuss and bother. Clear boundary lines give individuals unique authority to decide how to use given resources. This reduces the level of transactional confusion and uncertainty that comes when government officials are given a huge reservoir of power to insist that certain activities are in violation of some implied, but utterly unspecified, account of the police power.

The current jumble of takings law fails to articulate the bright-line rules that are needed to decide whether compensation is owing and if so, what level is required. In organizing the law of takings, it is critical to remember that every legal system must make a choice between two types of rules.<sup>22</sup> One option is a bright-line rule that is reminiscent of a foul line in baseball or a boundary line in football. Decisions are made by looking at outputs, not inputs. Balls that are hit foul are not in play. Those that are hit fair are within play. The entire system is dichotomous, so much so that detailed determinations must be made as to whether the entire foot or ball has to be in bounds, or whether it is sufficient that there is some overlap, however small, between the foot or ball and the line. These systems are pervasive in every sport. To be sure, there are modest tweaks to make the system work better: the player who is pushed out of bounds can be treated as if he landed in bounds, and so on. And there is usually a second tier of sanctions for bean balls and flagrant fouls that can impose something akin to criminal sanctions: fines, suspensions, rehab, and the like. But never let the exceptions divert attention from the main feature of the system, which involves

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<sup>22</sup> I pursue this theme in Richard A. Epstein, *The Irrelevance of the Hand Formula: How Institutional Arrangements Structure Tort Liability*, in LIBER AMICORUM BOUDEWIJN BOUCKAERT 65-76 (Jef De Mot ed., Brugge, Die Keure 2012) (Festschrift in honor of Boudewijn Bouckaert).

bright-line rules with clear outcomes that are measurable independent of the efforts of the participants.

The same utilization of bright-line rules should be dominant in organizing systems of legal liability. Under a negligence system, these disputes are all too often decided by a detailed examination of the defendant's conduct leading up to the occurrence of harm. That long inquiry need not be undertaken under a thoroughgoing system of strict liability. Boundary rules, such as those involved in any sound code of traffic rules, should determine in principle how the system applies. If neither party deviates from the rules, no accident occurs. If one party deviates, and the other does not, that party bears the full liability. If both deviate, they share the responsibility. This system, which is commonly used in practice, has much more clarity than the standard formulas of negligence that invite a generalized balancing regime commonly associated with the Hand formula.<sup>23</sup> Under this approach, many formal tests of liability unwisely stress that a party may be found liable for negligence only if care levels fall below some socially determined figure. In practice, the rules of negligence per se, tied closely to compliance with the traffic rules, often negate those kinds of inquiries.

On matters of public administration, the key point here concerns theory, not practice. And in practice, where huge numbers of claims must be processed with great rapidity, the detailed inquiry into negligence never takes place at all, because it is just too expensive.<sup>24</sup> Quite simply, a liability rule is an on-off switch. A bright-line rule is also an on-off switch. The two match well with each other. A clear set of factual determinants eases the burden on decision makers ex post. Care levels are not directly monitored, but the output-based rules exert powerful incentives on private parties to conform their conduct to law. Indeed, as a first approximation, the defendant who knows he will face liability will organize conduct so that he takes all cost-effective precautions, just as the Hand formula requires.<sup>25</sup> The result is appropriate levels of care, without having to incur the cost of monitoring. No one doubts that in some cases, matters of solvency and the like could dictate some

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<sup>23</sup> The Hand formula compares the expected costs of accidents against the burden of precaution. See *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

<sup>24</sup> See H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 98-99 (2d ed. 1980).

<sup>25</sup> See *Carroll Towing*, 159 F.2d at 173.

form of *ex ante* relief by way of injunction. But even so, whenever a liability system is needed, the output measures will work best so long as we can set the rules of the road.

Once liability is determined, the question of compensation for losses remains. There are endless variations on how proper compensation should be computed, but for these purposes, there is only one point that matters. Any sensible rule on compensation requires that the trier of fact use a continuous distribution on the valuation so that the compensation provided can be proportionate to the loss inflicted. That distribution is required whether we think in terms of fairness or efficiency—or some combination of the two. And this proposition remains true even if it is universally agreed that certain types of losses can only be translated into dollars and cents with great difficulty, if at all. The point here is that the only two choices we have are fixed damage amounts or variable compensation. Owing to the pervasive and inevitable variation in the extent of these wrongs, the variable measure dominates every time. It does so, moreover, regardless of the rule that is used to determine liability in the first place. In essence, the correct sequence is liability by rule, damages by degree. Simple to state, if hard to carry out.

The same set of insights carries over to decisions by government to condemn land or regulate land use. The boundary lines that play such a key role in dealing with sporting events and automobile accidents should have the same role in land use cases. The decision on whether compensation is owing is an on-off question, which in the first instance should be subject to a bright-line rule. The question of damages awarded for the property taken should vary, as a first approximation, with the value of the property taken. Even if other elements such as consequential damages are added back into the mix, they too should be determined continuously.

Unfortunately, the current set of constitutional norms only follows the second half of this dual strategy, as set out under the *Loretto* test. The cases of permanent physical occupation are said to require compensation on a *per se* rule, leaving the amount owing to the extent of the loss. But under the *Penn Central* rule, all other partial takings of land are treated as mere regulatory takings, which are manifestly subject to rather different rules. The uncertainty here comes on two dimensions, both of which require some discussion. The first is the line between a permanent and a temporary taking. The second is the line between occupation and regulation. Both distinctions quickly

become terms of art, and both require some comment before turning to specific land use systems of regulation.

## II. PERMANENT VERSUS TEMPORARY TAKINGS

The line between permanent and temporary takings has its origins in Justice Holmes's eloquent but misguided decision in *Block v. Hirsh*, which sustained a "temporary" two-year ordinance designed to keep rents under control in the aftermath of World War I.<sup>26</sup> Holmes stated the case succinctly:

[T]he [statutory] provisions . . . are made necessary by emergencies growing out of the war, resulting in rental conditions in the District dangerous to the public health and burdensome to public officers, employees and accessories, and thereby embarrassing the Federal Government in the transaction of the public business. As emergency legislation the Title is to end in two years unless sooner repealed.<sup>27</sup>

In dealing with the challenge, Justice Holmes did not make any reference to the distinction between physical and regulatory takings, which then lay far in the future. Nor did he deny that the holdover tenant had taken the property from the landlord.<sup>28</sup> Instead, he made two arguments. The first was an implicit police power justification, namely, that the chaotic conditions after the war required this regulatory intervention.<sup>29</sup> Justice Holmes never asked the question whether it would have been better to offer housing allowances to government employees instead of entrenching all tenants in their property for two years, regardless of their personal situations. Somewhat unconvinced by his own rationale, he then added this Holmesian flourish: "The regulation is put and justified only as a temporary measure. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."<sup>30</sup>

No explanation, and no sense. The question in this case was whether a decision to order a holdover tenant into the premises has to be regarded as a taking for a term. The entire law of property understands how critical it is to specify ownership rights in land not only by metes and bounds but also by time. The use of that second dimension makes possible

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<sup>26</sup> *Block v. Hirsch*, 256 U.S. 135, 157 (1921).

<sup>27</sup> *Id.* at 154.

<sup>28</sup> *Id.* at 153-54.

<sup>29</sup> *Id.* at 154-56.

<sup>30</sup> *Id.* at 157 (citation omitted).

extensive gains from trade through the division of property interests. The clear temporal division makes it clear who is entitled to possession of the premises at any given time. More complex arrangements, such as shared premises and leases, can be negotiated by contract. The correct public-law approach is to track the private-law distinctions.

The categorical distinction between permanent and temporary takings so prized by Holmes suffers from two fatal defects. The first is that it is not possible to identify which cases fall on which side the line. Property is always projected on the plane of time, so that interests can run from a short-term lease to the fee simple absolute, which has no definite termination date. All of these are property interests, defined by time as well as space. Under the private law, all are protected equally. When the system of state regulation seeks to upset that continuous understanding, it faces the very set of problems that the private law has been able to overcome. On questions of degree, the fundamental inquiry is this: why should some (undefined) class require full compensation for a loss, while another class, which lies a hair's breath away on the other side of the line, requires none. No one can explain why that permanent-temporary line should be drawn at a day, year, decade, or century. Yet, under Holmes's formulation, compensation, as measured by the difference between contract and market, must be furnished by the state in permanent but not temporary cases. Surely, permanent cannot cover only cases that last forever, but has to cover occupation for 100 years, or even for periods that equal or exceed the useful life of the structure. So, already, permanent means "not quite permanent."

The second flaw is that this supposed distinction lacks the hard-edged character needed for on-off determinations. In reality, that hard-edged line is supplied the moment the tenant overstays the lease. At that point, the longer the tenant stays in possession, the greater the compensation owing. Nowhere does Holmes offer any coherent rationale based on notions of fairness or efficiency to explain why a clear line should be abandoned in favor of a distinction that turns cases into matters of degree. The difference by length is, however, perfectly covered by continuous modification of the compensation levels to reflect precisely the duration of deprivation. It may well be that some consequential damages should be given to the landlord as well, but those too should depend on the nature of the dislocation, without any distinction between permanent and temporary. The

distinction violates the fundamental structural requirements of a good system of compensation for physical takings.

The differences in approach matter. One simple illustration is the current system of rent stabilization in New York City, which in its current form has been in place now continuously since 1969.<sup>31</sup> But that notational three-year term is a victory of appearance over reality. The defenders of rent control were well familiar with Holmes's decision, so that they have studiously avoided any permanent rent control that could run afoul of his dictum. Instead, from the outset, the current practice in New York City has called for a succession of three-year temporary programs—each tied in ritual fashion to the Holmesian emergency.<sup>32</sup> The system requires the City Council and the Mayor to certify in a pro forma fashion that the shortage, defined as a vacancy rate below 5 percent, still continues.<sup>33</sup> “In order to extend the Rent Stabilization Law, the City must determine that a housing emergency exists to merit the need for rent stabilization,” said Mayor Bloomberg.<sup>34</sup> The vacancy rate is now 3.12 percent.<sup>35</sup> Done. It matters not that the low-cost rentals (plus countless other restrictions) are the cause of the shortage.

The object lesson of the ritual reenactment is to show that it is easy beyond words to game the short-versus-long timeline that Holmes proposed in *Block v. Hirsh*. In contrast, it is not possible to game any system in which the duration of the taking moves in lockstep with the amount of the compensation owing. Yet none of these considerations work themselves into a system known for the below-market rates it gives to some tenants, thereby forcing others in nonstabilized units to bear the full brunt of new arrivals to the New York rental market. The wrong constitutional frame has generated the wrong political response, with the wrong social outcomes. The key

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<sup>31</sup> N.Y.C. Rent Stabilization Law of 1969, N.Y.C., N.Y., ADMIN. CODE §§ 26-501 to -520 (1969), available at [http://tenant.net/Rent\\_Laws/RSL/rsltoc.html](http://tenant.net/Rent_Laws/RSL/rsltoc.html) (last visited Dec. 26, 2012).

<sup>32</sup> See N.Y.C. Rent Guidelines Bd., *Rent Act of 2011*, HOUSINGNYC, <http://www.housingnyc.com/html/resources/rent2011.html> (last updated Sept. 14, 2012).

<sup>33</sup> *Bloomberg Extends Rent Control for Three More Years*, REAL DEAL (Mar. 27, 2012, 6:30 PM), <http://therealdeal.com/blog/2012/03/27/bloomberg-extends-rent-control-for-three-more-years/>.

<sup>34</sup> Kim Velsey, *Rental Relief! Mayor Bloomberg Renews NYC Rent Regulation Law*, N.Y. OBSERVER (Mar. 27, 2012, 3:18 PM), <http://observer.com/2012/03/rental-relief-mayor-bloomberg-renews-nyc-rent-regulation-law/>.

<sup>35</sup> Press Release, NYC.gov, Mayor Bloomberg Releases Findings of 2011 New York City Housing and Vacancy Survey (Feb. 10, 2012), available at <http://www.nyc.gov/html/om/html/2012a/pr050-12.html>.



point in all these cases is that, as a matter of first principle, the duration of the regulation only determines the amount of compensation for the government regulation, but not the fact of a taking itself. The use of the correct definition eliminates New York City's ability to evade the just compensation requirement through its system of successive regulations that are the functional equivalent of a system of long-term regulation.

The shaky line between continuous and permanent occupation also arises in flooding cases. On this score, the received wisdom deviates from sound principles by insisting on a strong line between a tort and a taking. The distinction has been articulated in unmistakable terms in the Supreme Court case law. In *Keokuk & Hamilton Bridge Co. v. United States*,<sup>36</sup> a unanimous Supreme Court, speaking through Justice Holmes, held that damage to plaintiff's bridge by the government's blasting operations counted as a noncompensable tort and not as taking of the private property. Then, in *Sanguinetti v. United States*, Justice Sutherland wrote: "[I]n order to create an enforceable liability against the Government, it is, at least, necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property."<sup>37</sup> Justice Frankfurter pursued the same theme in *United States v. Dickinson*, when he wrote: "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time."<sup>38</sup> These pronouncements are misguided for two separate reasons.<sup>39</sup>

First, they make the level of compensation turn on the length of the causal chain. Harms that are "direct" are covered, while those which are indirect are not. That distinction is at variance with the normal private-law treatment of the same subject, where the only question for liability is not whether the harm was directly or indirectly caused, but whether the harm in question was too remote to be attributable to the defendant's act. Under the rule in *Rylands v. Fletcher*, which cemented the role of strict liability in nineteenth-century England, it is immaterial whether the defendants poured or sent water down

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<sup>36</sup> 260 U.S. 125, 127 (1922).

<sup>37</sup> *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924).

<sup>38</sup> *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

<sup>39</sup> For my earlier critique, see EPSTEIN, *supra* note 3, at 44-46.

the mine of the plaintiff,<sup>40</sup> or whether it came to rest in the reservoir before it broke through its foundation. Under the famous formulation of Judge Blackburn, it was enough that “the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his own peril . . . .”<sup>41</sup> Similarly, in *Spano v. Perini Corp.*, yet another blasting case, the Court held that it was immaterial whether “there was ‘a physical invasion’ of, or trespass on, the plaintiff’s property . . . [or whether] the damage was caused by ‘setting the air in motion, or in some other unexplained way.’”<sup>42</sup> The question is whether the defendant could be said to have caused the harm. The length of the causal chain did not influence any finding of liability, even though in earlier times it may have influenced the choice of remedy between trespass and trespass on the case.<sup>43</sup> The question thus remains why a distinction that is regarded as immaterial to liability under the tort law should assume decisive importance when the question turns to compensation under the Takings Clause.

Second, as a matter of tort theory, it is utterly immaterial to the plaintiff’s case for compensation that the defendant did not acquire some sort of servitude over his property. The question under tort is always what level of harm was caused, not what return benefit the plaintiff received. To be sure, in some cases, where a trespass caused trivial harm to the plaintiff but supplied great benefit to the defendant, the plaintiff could elect to waive the tort remedy and sue instead for restitution.<sup>44</sup> That restitution is clearly blocked by the Takings Clause, whose major function is to make sure that the landowner cannot hold out against a government project. The compromise solution is that the government program can go forward but only if the landowner receives compensation for his losses.

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<sup>40</sup> *Fletcher v. Rylands*, [1865] 159 Eng. Rep. 737 (L.R. Exch.). Per Bramwell, B., “The defendants had no right to pour or send water onto the plaintiff’s works.” *Id.* at 743.

<sup>41</sup> *Fletcher*, [1866] 1 L.R. Exch. 265, 279, *aff’d sub nom.*, [1868] *Rylands v. Fletcher* 3 L.R.E. & I. App. (H.L.) 330.

<sup>42</sup> *Spano v. Perini Corp.*, 250 N.E.2d 31, 34 (N.Y. 1969) (quoting *Booth v. Rome*, 35 N.E. 592, 596 (N.Y. 1893)).

<sup>43</sup> For discussion of the importance of the forms of action, see OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 77-84 (1881).

<sup>44</sup> See *Phillips v. Homfray*, [1883] 24 Ch. D. 439 (1883). For discussion, see Richard A. Epstein, *The Ubiquity of the Benefit Principle*, 67 S. CAL. L. REV. 1369, 1400 n.73 (1994).

The rickety structure of the current law is illustrated by *Arkansas Game & Fish Commission v. United States*<sup>46</sup>—another flooding case that has just been decided by the Supreme Court.<sup>46</sup> At issue in that case was whether the United States owed compensation for the sporadic release of water from behind a dam that the Army Corps of Engineers constructed in southeast Missouri. The deliberate release of water from behind the dam flooded 23,000 acres of timberland that the Arkansas Game & Fish Commission owned some 115 miles south of the dam. Between 1993 and 2000, water from behind the dam was, from time to time, released in order to control the rate of flow from the Black River. It was agreed on all hands that a permanent occupation of the lands by flood water would be a compensable event. Not so, for temporary releases. The question then was how to treat these periodic and unscheduled releases, which, without question, destroyed trees owned by the Arkansas Commission when the water from the flood undermined the root systems of the trees before it receded. It was clear that the Corps' operation of the dam necessarily had to cause some releases, but there was a disagreement as to the foreseeability of the type and extent of damages.

The case received an exhaustive treatment in the Federal Circuit, where Judge Dyk reviewed the relevant precedents, which he summarized as follows:

As with structural cases, in determining whether a governmental decision to release water from a dam can result in a taking, we must distinguish between action which is by its nature temporary and that which is permanent. But in distinguishing between temporary and permanent action, we do not focus on a structure and its consequence. Rather we must focus on whether the government flood control policy was a permanent or temporary policy. Releases that are ad hoc or temporary cannot, by their very nature, be inevitably recurring.<sup>47</sup>

Stated otherwise, we are told that the relevant line is that a government action “must ‘constitute an actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property.’”<sup>48</sup> The dissent of

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<sup>46</sup> *Ark. Game & Fish Comm'n v. United States*, 637 F.3d 1366 (Fed. Cir. 2011), *rev'd*, 133 S. Ct. 511 (2012).

<sup>46</sup> See *Ark. Game & Fish Comm'n*, 133 S. Ct. 511.

<sup>47</sup> 637 F.3d at 1377. The relevant precedents, accurately summarized, include *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 328 (1987), *Sanguinetti v. United States*, 264 U.S. 146, 150 (1924), and *United States v. Cress*, 243 U.S. 316, 328 (1917).

<sup>48</sup> *Sanguinetti*, 246 U.S. at 149.

Judge Newman did not disagree on the overall approach, but drew the line between a permanent and temporary taking in a different place. Precedent, according to Judge Newman, well establishes that when property "is actually invaded by superinduced additions of water . . . so as to effectively destroy or impair its usefulness, it is a taking[] within the meaning of the Constitution . . . ." <sup>49</sup> "Precedent does not require constant or permanent flooding, and eventual abatement of the flooding does not defeat entitlement to just compensation; the specific facts must be considered, as for any invasion of property." <sup>50</sup>

Neither of these ad hoc views held when the case reached the Supreme Court. The Arkansas Game & Fish Commission had a victory of sorts in the U.S. Supreme Court, which unanimously ordered the case remanded for further consideration. Ironically, the issue of sovereign immunity, which loomed so large in the decisions below was nowhere addressed by the Court, where Justice Ruth Bader Ginsburg framed the question to ask "whether a taking may occur, within the meaning of the Takings Clause, when government-induced flood invasions, although repetitive, are temporary." <sup>51</sup> Yet once again the question illustrates the ragged nature of the permanent-temporary distinction, and necessarily raises the question of how repetitive and severe these flood invasions must be to cross over the line between noncompensable and compensable events. No matter where that line is drawn, the risk remains that the differences in outcome will depend not only on the total amount of flood damage that takes place, but on small differences in the frequency and intensity of the individual events that compose the whole. Yet at no point did the fine points of the distribution of floods alter the bottom line that before the floods began the forest lands were "healthy and flourishing," while afterwards they were not. <sup>52</sup>

At this point, the opinion becomes murky at best. Justice Ginsburg begins by quoting the most familiar line from *Armstrong v. United States*, to the effect that "The Takings Clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" <sup>53</sup> In that case

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<sup>49</sup> *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 181 (1872).

<sup>50</sup> *Ark. Game & Fish Comm'n*, 637 F.3d at 1381.

<sup>51</sup> *Ark. Game & Fish Comm'n*, 133 S. Ct. at 515.

<sup>52</sup> *Id.* at 517.

<sup>53</sup> 364 U.S. 40, 49 (1960): The full passage reads:

the Supreme Court held that a materialman's lien on a naval vessel could not be dissolved by the unilateral action of the United States unless it paid just compensation.

But in the next breadth she notes that notwithstanding this general proposition, "most takings claims turn on situation-specific factual inquiries."<sup>54</sup> At this point, the question of compensability becomes hopelessly ad hoc, as all the subtle differences in degree that should be relevant to the question of compensation owed are now thrown into the hopper to determine whether any compensation is owed at all. The Supreme Court again plunges into conceptual darkness by failing to understand that bright-line rules are needed to determine whether any compensation is owing. Only then are continuous rules needed to determine the amount of compensation required. So after an inconclusive examination of its past decisions, the Court refuses to accept the government's slippery slope argument to relieve it of all liability regardless of the severity of the flooding in question. So it is back to the laundry list of factors, at which point a remand is now required:

When regulation or temporary physical invasion by government interferes with private property, our decisions recognize, time is indeed a factor in determining the existence *vel non* of a compensable taking. . . .

Also relevant to the takings inquiry is the degree to which the invasion is intended or is the foreseeable result of authorized government action. . . . So, too, are the character of the land at issue and the owner's "reasonable investment-backed expectations" regarding the land's use. . . . Severity of the interference figures in the calculus as well.<sup>55</sup>

Treated, therefore, as a matter of private law, the precedents cited earlier demonstrate that compensation applies in both permanent and temporary takings, so that on the question of liability, the variations in question are of no consequence. *Ex post*, it is possible to both identify the harms

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The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here.

<sup>54</sup> *Ark. Game & Fish Comm'n*, 133 S. Ct. at 518 (citing *Penn Central Transp. Co.*, v. *New York City*, 438 U.S. 104, 124 (1978), discussed *infra* at Part IV).

<sup>55</sup> *Id.* at 522 (citations omitted).

caused by the flooding and the measure of damages involved. Armed with that information, there is no need to ask about the frequency and distribution of the harms in question to decide *whether* compensation is owing. All physical harms are compensable. The battle is solely over amount.

Once this unified approach is taken, it is no longer necessary to distinguish between cases where the government is protected from mere tort claims and those where it must pay full compensation for the permanent occupation of land. It is therefore no longer necessary to ask when government action crosses some indefinite line that morphs a noncompensable tort into a full-blooded, compensable taking. Both cases involve physical invasions. Everything else on timing and detail is only relevant to the valuation question. In addition, the added intellectual clarity from a clean rule helps organize judicial behavior and send the correct incentives to administrative bodies. Returning to the flooding precedents, the conceptual problem is this: it is always possible to imagine distinct release schedules that over any defined period of time cause exactly the same amount of downstream damage as a single release. Do we want to say that a few large releases should be subject to a compensation requirement when the periodic smaller releases that cause identical harm are not? What do we do with releases in three equal installments? This is no different from saying that the government must compensate the individual from whom it seizes \$1000 in a lump sum, but need not pay any compensation when it takes an irregular set of future payments whose present value equals \$1000.

The issue here is not whether we can guess about which cases to put on which side of the line, but why it is that we need to draw the line at all. This is not a case where there is some "average reciprocity of advantage" to both sides, which tucks nicely into Holmes's famous aphorism.<sup>66</sup> Unfortunately, in *Arkansas Game & Fish Commission*, the downstream releases all go necessarily in one direction, which means that the United States always wins and Arkansas always loses.<sup>67</sup> There

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<sup>66</sup> For the initial use of the phrase, see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), speaking of what "secured an average reciprocity of advantage that has been recognized as a justification of various laws." For extensive discussion of the case, see WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* 13-61 (1995); Richard A. Epstein, *Pennsylvania Coal v. Mahon: The Erratic Takings Jurisprudence of Justice Holmes*, 86 GEO. L.J. 875 (1998).

<sup>67</sup> For discussion of this asymmetry, see Richard A. Epstein, *Property Rights, State of Nature Theory, and Environmental Protection*, 4 N.Y.U. L. & LIBERTY 1 (2008).

is no question that these releases would be actionable at common law,<sup>58</sup> and there is no reason why any court should attempt to divide them into different classes to resolve a dispute that need not arise. The bifurcation of the analysis into takings and damages eliminates, in the ex post world, a set of arbitrary distinctions that no jurisprudence can make clear. Eliminating this distinction puts on the government the full costs of its actions, so that it no longer has any incentive to game the system by using a set of temporary releases that artfully stay on the noncompensation side of the line. It is only a small irony that the coercion for environmental protection that drives government programs into overdrive against private defendants, often at the cost of serious due process violations,<sup>59</sup> is blithely ignored by unprincipled efforts to artificially narrow the class of compensable events. This double standard makes hash out of the law of partial takings.

There is no coherent reason to have the on-off switch of compensation turn on the frequency, severity, and distribution of the harm. These are questions of degree that should, under no circumstances, be raised to ostensible differences in kind. The purpose of strict liability in tort is to control the externalities created when activity on one land causes harm on another. Armed with the information in the ex post state of the world, there is no reason to figure out the knowledge possessed by government agents at the outset when they devised their flood control plan. Instead, government officials are held responsible for what they do, like other actors. Rather than face up to the implications of the broad scope of the constitutional protection that is offered under the Takings Clause, the Justices of the Supreme Court to date have preferred to announce and defend untenable distinctions with perfect confidence. The result is predictable chaos. But here as elsewhere, there is no way to get the right result by tweaking the wrong premises.

### III. TAKINGS VERSUS REGULATION

The permanent-temporary line is a dead loser in takings law. So too is the ostensibly related constitutional distinction between takings and regulation. The origin of this distinction lies in Holmes's decision in *Pennsylvania Coal Co. v.*

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<sup>58</sup> See *Rylands v. Fletcher*, [1868] 3 L.R.E. & I. App. 330 (H.L.).

<sup>59</sup> *Sackett v. EPA*, 132 S. Ct. 1367, 1371-73 (2012).

*Mahon*,<sup>60</sup> which is an infuriating mix between great intellectual insight and unpardonable legal gibberish. The case involved the question of whether the local government could condemn out a support easement that Pennsylvania Coal had explicitly reserved for itself when it conveyed the surface interest to Mahon (and to others similarly situated) in 1878. The retention of the support easement meant, in effect, that the coal company had the right to dig out coal from under the surface without worrying whether the land or any buildings on it would cave in. The legislative decision at issue essentially transferred the easement in question back to the owner. The clear conveyancing rule that governs this particular case is that once the two parties have agreed to one division of common property, any decision by the state to alter that division of rights constitutes a taking of an interest vested in one and transferring it to the other. The key point here is that to answer the takings question there is no need to ask whether the state transfer of the support easement was a total transfer of a partial interest or a partial transfer of a larger interest. Either way it is a taking. All the fine points go only to valuation on the extent of the loss to the coal company, not to the government's liability.

Justice Holmes got this case half right. His most apt comparison is found in this proposition:

If in any case its representatives have been so short sighted as to acquire only surface rights without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place and refusing to pay for it because the public wanted it very much.<sup>61</sup>

But in other places he strays off the mark by misstating how the police power interacts with the Takings Clause. *Mahon* is not like the ordinary situation where the government enjoins a private nuisance, at which point it owes no more compensation to the landowner than would be required of private plaintiffs who succeeded on the same theory. But in this setting the protection of safety for the surface owner involves the destruction of private interest previously conveyed. Compensation is thus owed here just as it would be owed if the state took timber from the land of a third party to shore up the mining operations of Pennsylvania Coal.

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<sup>60</sup> 260 U.S. at 412-16.

<sup>61</sup> *Id.* at 415.



Justice Holmes, however, had long had a strong tendency to argue that matters of degree often should be treated as though they create differences in kind—in violation of our fundamental structural constraint. Thus, in *Leroy Fibre Co. v. Chicago, Milwaukee, & St. Paul Railway*<sup>62</sup> the question was whether there was contributory negligence in a plaintiff that stored its flax too close to the railroad tracks. The majority decision of Justice McKenna treated this as a question of property rights and held the distance irrelevant. There was no duty to remove the flax from the tracks. Holmes, however, thought that the owners should have done so, tested by the question of “whether the plaintiff’s flax was so near to the track as to be in danger from even a prudently managed engine.”<sup>63</sup> Thereafter, Holmes waxes eloquent:

I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized. Negligence is all degree[]—that of the defendant here degree of the nicest sort; and between the variations according to distance that I suppose to exist and the simple universality of the rules in the Twelve Tables or the *Leges Barbarorum*, there lies the culture of two thousand years.<sup>64</sup>

In modern terms, Holmes may well have been right to think that in these cases some “joint care” solution might make sense. It could well be that some fire suppression steps by the railroad should be coupled with some loss protection by the landowner. But if so, the nature of that dual accommodation remains unclear. Distance is a very weak proxy, and a more elaborate set of accommodations by legislation might prove sensible.

Just that statutory solution was adopted in the simpler situation involving the tension between rights of privacy and the construction of spite fences in Holmes’s 1889 decision in *Rideout v. Knox*.<sup>65</sup> There, Holmes resorted to a similar distinction of degree to uphold against challenge a statute that allowed for a finding of a spite fence, but only for fences over six feet high.<sup>66</sup> He noted, first, that at common law, normally owners can build their fences as high as they choose, so that

<sup>62</sup> *LeRoy Fibre Co. v. Chi., Milwaukee, & St. Paul Ry.*, 232 U.S. 340, 340-41 (1914).

<sup>63</sup> *Id.* at 353 (Holmes, J., partially concurring).

<sup>64</sup> *Id.* at 354 (internal citations omitted).

<sup>65</sup> *Rideout v. Knox*, 19 N.E. 391 (Mass. 1889).

<sup>66</sup> *Id.* at 392.

the laws here impose a clear limitation on that established property right. He then continued:

But it does not follow that the rule is the same for a boundary fence, unnecessarily built more than six feet high. It may be said that the difference is only one of degree. Most differences are, when nicely analyzed. At any rate, difference of degree is one of the distinctions by which the right of the legislature to exercise the police power is determined. Some small limitations of previously existing rights incident to property may be imposed for the sake of preventing a manifest evil; larger ones could not be, except by the exercise of the right of eminent domain.<sup>67</sup>

The reason this solution works for this case is not because of the fuzzy way in which Holmes tries to articulate the distinction between the police power and the eminent domain power. Rather, it is because the statute preserves a safe harbor for fences up to eye-level, where the risk to privacy from nearby pedestrians is greatest. The extra requirement of malice works well here because the average reciprocity of advantage does suggest that both sides are better off from this restriction of the normal right to increase the height of fences. The issue, therefore, is not just a simple question of degree, as Holmes thinks. Viewed as a whole, the statute could easily work a Pareto improvement between neighbors: this well-constructed legal regime makes it highly likely that the average reciprocity of advantage satisfies the just compensation requirement. Yet that reciprocity condition is manifestly violated in *Pennsylvania Coal*, where Holmes sticks with his (now misplaced) distinction of degree. He jumps headlong into the fire when he writes the one sentence that, above all others, has set modern takings law off on the wrong track: "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."<sup>68</sup> At this point, the trap door springs shut, as the line between

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<sup>67</sup> *Id.*

<sup>68</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Holmes then talks about the public necessity cases without analyzing them. In fact, they require some kind of a split verdict. In those cases where the property of A, which would not be harmed by the fire, is used to prevent its spread, compensation should be owing. But in those cases where the state destroys property that would otherwise be destroyed by the conflagration, then no compensation is required, except for the trivial loss of the use value for the time between the earlier destruction and its final destruction, which can be ignored. See *Mayor of New York v. Lord*, 18 Wend. 126, 129-30 (N.Y. 1837). For further discussion, see RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, *CASES & MATERIALS ON TORTS* 51-52 (10th ed. 2012). Once again Holmes's uncertain grasp of private law leads to an unnecessary level of indecision in dealing with the constitutional issues.

takings and valuation disappears. The question of compensability now morphs into one of degree, and in *Pennsylvania Coal*, Holmes argues that the regulation has crossed the line because, “[t]o make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it.”<sup>69</sup>

Once again, the equivocation, “very nearly the same effect,” gives rise to the question of whether it does or it doesn’t. The correct answer in this case does not turn on the futile distinction between physical and regulatory takings. Correctly understood, the loss of the support easement ends the takings inquiry, and the proper measure of damage depends on the effects of the regulation on the operation of the mine. It makes no difference on this ground whether the taking in question is “physical”—insofar as it is not possible to take out columns of coal needed to support the surface—or “regulatory” because the coal can be removed so long as the mining company complies with requirements to put in place substitute measures to support the surface. Holmes’s intellectual shipwreck repeats an oft-made error in takings law by having questions of degree masquerade as distinctions in kind.

#### IV. TRANSFERABLE DEVELOPMENT RIGHTS AS “JUST COMPENSATION”

This self-conscious muddle between the takings issue and the compensation issue is well-illustrated by taking a look at one of the “post-zoning devices” discussed at this conference—transferable development rights (TDRs). The idea behind TDRs is to use the development rights that are granted in one location (“the receiving site”) as compensation for the development rights that are lost in another (“the sending site”).<sup>70</sup> The reason for making that shift is to preserve a sense of open spaces in some sensitive areas, while directing development to those areas where it will cause, on balance, the fewest environmental dislocations. TDRs are discussed at length in my colleague Professor Vicki Been’s instructive paper on modern efforts to increase their utilization by matching new

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<sup>69</sup> *Pa. Coal Co.*, 260 U.S. at 414-15.

<sup>70</sup> See NOELLE HIGGINS, WHAT ARE TDRS?, available at [http://depts.washington.edu/open2100/pdf/3\\_OpenSpaceImplement/Implementation\\_Mechanisms/transfer\\_development\\_rights.pdf](http://depts.washington.edu/open2100/pdf/3_OpenSpaceImplement/Implementation_Mechanisms/transfer_development_rights.pdf) (last visited Nov. 30, 2012).

projects with empty spaces.<sup>71</sup> Her inquiry asks how best to fashion market devices to secure the transfer of these rights between parties. She notes, correctly, that two obstacles stand in the path of their rapid transfer. The first of these is unavoidable. These rights are hard to value, so that the costs involved in their transfer are high relative to the potential gains, even in a voluntary market, including the heavy cost of securing support rights from the surface owner in *Pennsylvania Coal*. Second, matters are made more complex by the wide range of government restrictions that limit the sale of TDRs, which include the need for the transferee of the TDR to secure a distinct zoning clearance for new construction, a long and tortuous process. As Professor Been notes, it is hard to make this a robust market.

The antecedent question is why in a system with strong property rights there ever arises the need to transfer the TDRs in the first place, given that the owner of the “receiving site” would already hold the rights to development on his own land. In this regard, it is important to see how the *Penn Central* case uses TDRs to grease the way to an intolerable account of the regulatory takings test, which is its enduring legacy. Recall that in *Penn Central*, the question that faced the Supreme Court was whether the designation of Grand Central Terminal as a landmark site meant that the city could stop the construction of the Breuer Tower without compensation, so long as the surface owner could cover its costs, and then some, by the revenue obtained from its use of the existing structures on the land. Even though Grand Central station was not a public utility, the issue of rates came up in the New York Court of Appeals because it was unclear whether Penn Central could keep its operations at Grand Central Station out of the red if it were forced to abandon the use of its air rights. Thus, if the building had been valued at market, the revenues were insufficient to allow Penn Central to make a decent rate of return.<sup>72</sup> But if the size of the protected interest could be lowered, then the suitable return could be found off that smaller base.

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<sup>71</sup> Vicki Been & John Infranca, *Transferable Development Rights Programs: “Post-Zoning”?*, 78 BROOK. L. REV. 435 (2013).

<sup>72</sup> *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1274-75 (N.Y. 1977), *aff’d*, 438 U.S. 104 (1978).

In the New York Court of Appeals,<sup>73</sup> the entire case was treated as a rate regulation matter.<sup>74</sup> Judge Charles Breitel advanced the novel theory that the rates in question did not have to compensate the property owner for those additional values added solely by virtue of the benefits that the property owner received from its large locational advantages. He wrote that "a property owner is not absolutely entitled to receive a return on so much of the property value as was created by social investment."<sup>75</sup> He never bothered to note that the property owner contributed to that social investment by the payment of real estate taxes and by the positive contribution that its private investment in real estate improvements made to the overall neighborhood. Breitel's logic plainly has bizarre implications, for if the city need not compensate for neighborhood advantages in a regulation setting, it need not compensate for them in an outright condemnation case, so that all landowners can recover at most a fraction of their value out of the property on condemnation. That suspect valuation standard leads, of course, to massive overcondemnation of property, which could then be sold off for a nifty profit, again at market rates. Any sensible approach recognizes that the particular landowner both receives and contributes to local values so that market valuation, at the very least, is necessary to prevent overcondemnation of properties.

This goofy approach to rate regulation disappeared from view in the U.S. Supreme Court. What took place, however, was arguably worse. When the case was in the Supreme Court, Penn Central argued that the case had to do with the confiscation of a discrete property interest—namely, that in its air rights over Grand Central Station—for which it received nothing in return. In principle, a coherent theory of property rights should yield the same result regardless of which approach is taken. But in our politically charged world, Justice Brennan was keen to make sure that landmark preservation laws, which he noted were the norm throughout the United States, should not be struck down by judicial intervention.<sup>76</sup> All

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<sup>73</sup> See generally *id.*

<sup>74</sup> For a contemporary discussion of the New York Court of Appeals decision, see Richard Wollach, *Penn Central v. City of New York: A Landmark Landmark Case*, 6 *FORDHAM URB. L.J.* 667, 679-83 (1977).

<sup>75</sup> *Penn Cent.*, 366 N.E.2d at 1278.

<sup>76</sup> *Penn Cent.*, 438 U.S. at 107 ("Over the past 50 years, all 50 States and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance." The rest of the passage

that remained was to determine how best to achieve that result. In this particular situation, he made many views, among the most egregious being that the improper equation of loss of property rights through direct regulation could not be attacked because it has “significantly diminished” the value of the property site.<sup>77</sup> In order to sustain that equivalence, he made conscious reference to Justice Holmes’s decision in *Pennsylvania Coal*—to the effect that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law[]”<sup>78</sup>—and to an equally memorable quotation from Justice Robert Jackson’s famous decision in *United States v. Willow River*—to the effect that “this Court has dismissed ‘taking’ challenges on the ground that, while the challenged government action caused economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute ‘property’ for Fifth Amendment purposes.”<sup>79</sup> In effect, the consequences of government regulation are treated similarly to those of diminution of property values attributable to competition, when, in reality, the two are polar opposites. Competition increases overall social wealth, while direct forms of regulation often diminish it.

Nonetheless, Justice Brennan’s extensive dose of legal realism is intended to set up the punch line, which contains the very error that has infected takings law from the outset. It is, alas, necessary to repeat his critical passage:

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continues in laudatory fashion about the laws, with no reference to any of the possible disadvantages of historical preservation.)

<sup>77</sup> *Id.* at 131.

<sup>78</sup> *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

<sup>79</sup> *Penn Cent.*, 438 U.S. at 124-25. The exact passage in *Willow River* reads:

It is clear, of course, that a head of water has value, and that the Company has an economic interest in keeping the St. Croix at the lower level. But not all economic interests are “property rights”; only those economic advantages are “rights” which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.

*United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945). Justice Jackson does not explain which expectations are rights, and which ones are not. More concretely, he attaches no weight to the point that in a reasonable user regime, the protection of these mill interests is routine in private-law disputes. For further critique, see Richard A. Epstein, *Playing by Different Rules? Property Rights in Land and Water*, in DANIEL H. COLE & ELINOR OSTROM, *PROPERTY IN LAND AND OTHER RESOURCES* 349-52 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1719254](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719254).

The question of what constitutes a "taking" for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty. While this Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," . . . this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.<sup>80</sup>

For these purposes, it is critical to note that Justice Brennan makes the same (mistaken) use of *Armstrong v. United States* that was made 34 years later by Justice Ginsburg in *Arkansas Game & Fish Commission*. Instead of applying the on-off switch for the air rights, he denied that the needed clarity found in *Armstrong* was not achievable, so that "ad hoc" rules with balancing tests had to be invoked to deal with this situation. It is for that reason that the passage quoted from *Armstrong*<sup>81</sup> was chopped up and surrounded with qualifiers insisting that it could not develop "a set formula" that would eliminate the need to make "ad hoc, factual inquires" under its well-known balancing test.<sup>82</sup> And yet, little is said as to why this should be the case.

The standard rule in these matters is that property rights are creatures of state law, not federal law. Thus, in New York, and virtually everywhere else, air rights are subject to full protection under state law. It is a trespass to build in the air space reserved to another. The owner has the right not only

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<sup>80</sup> *Penn Cent.*, 438 U.S. at 123-24 (first and fourth alterations in original) (citations omitted).

<sup>81</sup> See *supra* notes 17 and 51 and accompanying text.

<sup>82</sup> *Penn Cent.*, 438 U.S. at 123-24.

to use the air rights, but to sell them, subdivide them, give them away, and mortgage them. The overall efficiency of any property system depends on the ability to decompose larger interests into smaller ones, which will be done so long as the cost of that division is less than the gains generated by it. The correct response in all cases, therefore, is to insist that whatever interests created are protected against takings, lest the gains from that subdivision are threatened by government action that confiscates the air rights in whole or in part.

Yet that was just what was done in *Penn Central*. Justice Brennan begins by noting—falsely—that the law of property looks at “the parcel as a whole—here, the city tax block designated as the ‘landmark site.’”<sup>83</sup> From that one sentence it follows that so long as there is some residual value to the parcel as a whole, the destruction of any fractional interest is of no concern. As a result, these air rights are no longer protected even after they are purchased by a third party, which thereby injects a gratuitous uncertainty that systematically disrupts private transactions.

At this point, Justice Brennan examined the role that TDRs played over other properties played in the overall analysis. No longer was it that they supply full and complete compensation for the air rights lost. Instead they were reduced to just one of the elements that went into the mix to decide whether a compensable taking took place:

Although appellants and others have argued that New York City’s transferable development-rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well not have constituted “just compensation” if a “taking” had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.<sup>84</sup>

One sign of intellectual sloppiness is to put quotation marks around terms that prove inconvenient, so as to be sure that they are not afforded their ordinary meaning. Justice Brennan denatures both the just compensation and the takings requirement by using just that tactic. In so doing, he abandons any notion that you first decide whether property rights have been taken and then ask whether compensation has been supplied. Under that approach, the loss of the use of the air

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<sup>83</sup> *Id.* at 130-31.

<sup>84</sup> *Id.* at 137.



rights constitutes the taking. In *Penn Central*, however, New York City offered no cash compensation, so that compensation in-kind is supplied, if at all, through the TDRs. A correct measure demands that “the compensation must be a full and perfect equivalent for the property taken,”<sup>85</sup> at which point the question is whether getting some air rights that might be exploited over some other property are equal in value to the air rights that, because of the taking, cannot be exploited over one’s own property. Justice Brennan does not even pretend that there is any equivalence in value. Rather, in the parallel universe of mere regulations, the sole purpose of the regulations is to “mitigate” the loss from a “taking,” which really hasn’t occurred anyhow.

He makes no effort to calculate the size of this mitigation, which has to be small. There are no external negotiations needed to build over a site that one already owns, but there are extensive such negotiations that are required to build on other sites, along with a host of other regulatory requirements to be satisfied. The correct view constitutionally on this issue is to *never* allow the government to compensate in kind, except in those cases where the restrictions on one parcel are part of the same comprehensive scheme that supplies benefits to others. Thus, with a general set of height restrictions, the correct approach is to ask whether the overall value of the sites increases or not. If it does, no extra compensation is required because the integrated plan supplies the answer. Otherwise, cash is needed to make up the difference. But in this case, there is no necessary connection between the restrictions on the Penn Central site and the use of the TDRs anywhere else. The correct procedure, and the only one that leads to honest evaluations, requires New York to pay in cash for the loss of the development rights—which it would never do. It can then in a separate transaction auction off the TDRs to get some accurate sense of their market value, which is likely to be far less than the first sum.

By way of analogy, let us assume that the state wants to condemn the development rights and pay for it with borrowed sums of money. One possibility is to give the financial paper to the condemnee. Its face value will of course equal that of the lost development rights. But a note is a complex instrument, and its interest coupons, maturity, collateral, and the like could

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<sup>85</sup> *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

easily influence its value. By forcing the state to sell off the notes to third parties, the amount the state can receive is limited to the fair market value of the paper, as evaluated by an independent party. That number will reflect both the interest rate and the riskiness of the note. Conversely, by forcing the condemnee to take that paper for the value the state assigns, it becomes impossible to gain evidence of its fair market value, as the state will low-ball valuation every time. The in-kind development rights discussed above permit that same kind of evasion. The point becomes clear when one looks at the rather paltry revenues that are generated from the sales of TDRs, as reported by Professor Been.<sup>86</sup> It is surely better that these rights be sold in complex and cumbersome transfers than left idle. But the central point is that the convoluted scheme for regulatory takings has already sucked most of the value out of the system by making the false parallel between the air rights lost and those offered in exchange. The efficiency of this market can only be restored by reversing *Penn Central's* bundling methodology, whose melding of the takings and compensation issues necessarily obscures all questions of valuation. The use of the correct procedure thus has this advantage. The taking of the air rights creates a per se obligation to compensate. The obligation to pay in cash, and not in TDRs, secures an honest valuation of the property taken. If both the takings and compensation elements are rightly done, the use of TDRs will no longer allow the state to engage in overcondemnation by the systematic practice of undercompensation.

## CONCLUSION

In this paper, I have sought to apply a unified theory of takings law to explain why all partial interests in real estate are entitled to the same level of constitutional protection as the outright ownership of land. The development of that unified approach eliminates the need to draw ad hoc lines to separate cases that by any rational economic analysis should receive the same treatment. The failure to grasp this one point thus leads the courts to turn somersaults in the vain effort to explain why compensation is awarded in some cases but denied in others. Further massaging of the new battle lines, such as that between permanent and temporary takings, will do nothing to

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<sup>86</sup> See Been & Infranca, *supra* note 71.

fix the fundamental weaknesses of the situation. Only a fresh conceptual start can save the current situation.

That fresh start is a tall order. The question that necessarily arises is whether all the mistakes in doctrine really matter. And they do. In essence, the various methods of dealing with takings cases misprice all relevant assets. That is true in the flooding and the rent control cases, where the untenable line between temporary invasions or restrictions and permanent takings systematically reduces the scope of government regulation. It also happens in the general areas of land use regulation with the highly dubious use of TDRs as a means of compensation for property taken. In all these cases the losses to the owners are systematically understated or entirely ignored, which leads the government to take too much and to pay too little for what it takes. Nor are any of these government actions saved by pointing to some positive external effects of the rules now in place. With the various zoning ordinances, the obvious negative externalities—the broad class of common law nuisances—are off the table. So the social gains must arise, if at all, from various intangibles, dealing with such issues as aesthetics and views. It is not the case that these issues do not matter. But it is very difficult indeed to figure out which way they do matter. The construction of the Breuer Tower over Penn Central Station, for example, could have added another masterpiece to the New York City landscape. That unit would clearly have some positive externalities, along with possible negative externalities. It is not as though the construction of any building affects all persons in the neighborhood the same way. So it is with views. Some views may be blocked, but others are now created, and still others are enhanced.

The common law judgment on all these variations was to ignore all these externalities because they point in no particular direction. That position is defensible on these grounds. First, the cost of intervention is very high, not only in terms of direct regulation but also in lost business opportunities. That is evident by looking at the extensive laundry list on Brad Lander's agenda. Second, the external effects of these regulations are both positive and negative. There is little reason to think that new construction is systematically negative in its effects, and even less to think that some large negative exceeds the other gains from the construction in question. Other issues always remain, dealing with traffic flow and the like, but in the case of landmark preservation laws, these structures do not present any distinct

issue. The upshot, therefore, is that landmark designation, like other forms of innovative regulation, tends to contribute to local stagnation, not to local prosperity. The just compensation requirement of the Takings Clause, when not frittered away, puts some brake on that process. Its own rationing system helps bring the system back into alignment.

There are, of course, other devices for land planning that remain even with a robust compensation requirement. First, the local government can condemn the air rights if it wishes to have them. It is virtually a moral certainty that no one in New York City would have made the needed appropriations from public funds to acquire—and retire—the air rights over the Penn Central terminal. The same is surely true with most other places in which regulations are put in place by government fiat. Second, private organizations can enter the market and buy up façades of structures that they wish to preserve, or acquire land that they could then put in trust for the desired purposes. None of these devices requires that condemnation be undertaken at bargain rates, and all of them in varying degrees may well operate to produce net social benefits.

There is only one conclusion that can be drawn from the maintenance of the unhappy status quo. It involves these propositions. First, politicians will prosper as they grant favors to this group and that. Second, the successful interest groups will support the operation of the system. Third, no court will intervene to stop its operation. In the end, the very people who laud the system will wonder how it is that if their grasp of land use law and practice is so profound, the system can continue to slide into reverse. The post-zoning alternatives are too often proposed without taking into account the traditional pitfalls that follow whenever these takings questions are regarded as matters of degree rather than matters of kind. Unless the system is altered to reflect this one sound governance principle—the more the government takes by regulation or occupation, the more it should pay—the likely result is that the adoption of new techniques of land use regulation will follow the downward path of the earlier land use initiatives.

