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EMINENT DOMAIN REVISITED AND SOME LAND USE PROBLEMS

Robert Kratovil*

INTRODUCTION

Since the author and a colleague last addressed the broader problems of eminent domain some thirty years ago,¹ a gradual erosion of property rights has crept into judicial decisions. In particular, the concept of inverse condemnation for the overregulation of land use has become a ripe battleground between land regulators and real estate developers. Noted commentators have published a multitude of articles dealing with the problem of inverse condemnation.² Court decisions have multiplied. Nevertheless, satisfactory answers in this area remain elusive.

To begin, any destruction of a private property right by a public body creates a potential eminent domain problem.³ Under the due process clauses of the fifth and fourteenth amendments⁴ and state due process and eminent domain provisions,⁵ private property may not be taken for public use without just compensation. In addition, many state constitutions require that compensation be paid when property is merely taken or damaged by a public

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5. See, e.g., Ill. Const. art. I, § 2: “No person shall be deprived of life, liberty or property without due process of law . . . ” Article I, § 15 is the eminent domain clause.
Thus, in jurisdictions with "or damaged" provisions, landowners confronted with restrictive zoning rules, or land use regulations, that excessively "damage" their property may seek redress by attacking the constitutionality of the regulation as applied to their land.

In states without "or damaged" constitutional provisions, the landowner may claim that governmental action that severely impinges upon property rights results in a de facto taking that requires compensation. Rather than seeking relief that declares the action invalid, the landowner may seek compensation for the actual injury suffered. In fact, taking by the condemnor for its own use is characteristic of the old concept of eminent domain. The newer concept asserts that taking away from the landowner gives rise to an equal right to compensation. If a landowner is deprived of property rights it makes little difference whether the government acquired or destroyed those rights. In either case, the rights are lost.

Although a reading of the current literature might legitimately lead one to infer that inverse condemnation is a recently contrived remedy, this inference is erroneous. This article will attempt to put the "taking issue" in perspective by tracing the origins of inverse condemnation, examining the delicate balance between social gains and individual losses, and discussing the means employed to determine what governmental action constitutes a "taking" of property.

In so doing, this article will critically examine some newer doctrines that, in seeking to protect the public, ignore the fundamental rights of landowners. For example, by refusing to permit inverse condemnation actions, some courts have allowed governmental bodies to impose unreasonable land regulations on developers while circumventing the just compensation command.

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6. See, e.g., CAL. CONST. art. 1, § 19: "Private property may be taken or damaged for public use when just compensation . . . has first been paid . . . . " For a summary of the various state constitutions containing the "or damaged" provisions, see 2A P. NICHOLS, EMINENT DOMAIN § 6.26 (Rohan ed. 1984).

7. See Kanner, supra note 2, at 882 (property is a group of rights and, therefore, substantial interference with these rights is a taking although title and right to possession are not disturbed).

8. A whole range of remedies is presented. For example, a developer may seek a declaration that an infringing zoning ordinance be declared invalid as applied to the project so that construction on the project may proceed. A homeowner may seek an injunction against an airport proposal to increase flight patterns over his dwelling. Finally, the landowner may simply seek damages by way of inverse condemnation against a municipality for damages suffered from excessive regulation of his land.

9. For a discussion of the nature and definition of governmental taking, see F. BOsselMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL (1973) [hereinafter cited as F. BOsselMAN, THE TAKING ISSUE]. See infra notes 44-47 and accompanying text for a critique of this work. The TAKING ISSUE should be regarded as a good collection of authorities. Its conclusions, however, are questionable.

According to some recent theories, neither federal nor state constitutions allow compensation for land use regulations that effectively deprive landowners of the beneficial use of their land. It is one thing to favor beneficial land use controls and environmental protection. It is, however, another matter to categorically deny any compensation to landowners in the name of the public interest when their land is stripped of its value. This result is clearly inequitable and constitutionally impermissible. If the phrase "eminent domain" has any meaning, that meaning is that property is protected by the judicial branch against the other branches of state and federal government. Awarding monetary compensation is an integral part of the pattern of protection, as is invalidation of excessive regulation. At times, however, invalidation provides inadequate protection.

I. ORIGINS OF INVERSE CONDEMNATION—"OR DAMAGED" CONSTITUTIONS

Inverse condemnation is actually much older than commentators assert. In fact, an action at law for inverse condemnation against a local government was recognized at least as early as 1882. In Rigney v. City of Chicago,11 a landowner instituted an action for damages against the city of Chicago. The city had constructed a viaduct along the street on which plaintiff's land abutted, and thereby deprived the plaintiff of access to the street. Upon review, the Illinois Supreme Court noted the new provision in the Illinois Constitution of 1870, which declared that "private property shall not be taken or damaged for public use without just compensation."12 The court found that the just compensation requirement was triggered when there was direct physical obstruction or injury that caused damage to the landowner's right of enjoyment in excess of that sustained by the public generally.13 The court therefore held that an action for damages did lie against the city.14

Plainly, Rigney is an inverse condemnation case. Had the court so chosen, it could have dismissed the case and required the plaintiff to mandamus the city to condemn the property. Instead, the Rigney court chose to sanction a simple procedure that permitted the landowner to achieve the same result by bringing an action at law for damages. Thus, at its inception, inverse condemnation was simply a procedural convenience, an alternative remedy in states with "or damaged" constitutional provisions.

The Rigney case, of course, has great substantive importance. It was the first case in which the first "or damaged" constitutional provision was construed by the judiciary. The Rigney court squarely held that the phrase "or damaged" does not refer to mere physical damage, but also includes damage caused to intangible property rights. According to Rigney, a plaintiff

11. 102 III. 64 (1882).
12. Id. at 75.
13. Id. at 78.
14. Id. at 81.
need only prove special damages and a direct physical disturbance of a right which is enjoyed in connection with the property. 15

Twenty-four years after the Rigney case was decided, another decision appeared in which the issue was first expressed in modern jargon. In Newport v. Temscal Water Co., 16 a landowner sought to enjoin a water company from taking water from land in a manner prejudicial to plaintiff's legal rights. While the California Supreme Court sympathized with the landowner's plight, it held that an injunction should not be granted since the inhabitants of the town would be left without water. Instead, the court reasoned that when public interests are involved and damages are ascertainable, injunctive relief should be denied and monetary recovery should be allowed. Such an action, the court stated, "should be regarded in its nature as the reverse of an action in condemnation." 17

The "or damaged" approach to condemnation quickly became popular. West Virginia adopted an "or damaged" constitutional provision in 1872, and thereafter over half of the states took similar action. 18 By explicitly providing for property damage recovery, the "or damaged" constitutional provisions made a substantial addition to the bundle of rights we regard as "property." 19

II. MODERN INVERSE CONdemnation

Eminent domain litigation has shifted decisively to the issue of overregulation. 20 With the advent of post-World War II land development on an enormous scale, real estate values skyrocketed. 21 A concomitant increase in urbanization heightened concern over the environmental consequences of rapid growth. These parallel developments led to an ever-widening rift between those who desired stringent land use regulations and those who

15. Id. The Rigney court further noted that the English courts, in construing similar statutes that provided compensation for injuries occasioned by public improvements, laid down similar rules providing for damage recovery even when the governmental action was not a complete taking. See, e.g., McCarthy v. Metropolitan Board of Works, 7 L.R.-C.P. 508 (1872) (House of Lords approval of statutory compensation scheme to protect property "injuriously affected" by public actions).

16. 149 Cal. 415, 87 P. 372 (1906).
17. Id. at 418, 87 P. at 375.


21. While there were a few large-scale land developments in earlier times, nothing in world history equals the phenomenal growth of post-World War II land development that occurred, for instance, in California.
sought protection of their valuable property investments. Of course, these adversarial groups found their way to the courtroom to resolve disputes.

The California courts have been extremely active in adjudicating these regulatory disputes. In part, this may be the result of the phenomenal post-World War II growth of land development in California. But it is also no secret that California courts have been especially receptive to rigorous land use regulation at the expense of developers. The clash between developers and regulators, with California as the battleground, will figure prominently in this article.

A. Attitudes of Local Officials and Governments

Local officials have not maintained an exemplary record with respect to landowners' rights. For example, in San Diego Gas & Electric Co. v. San Diego, Justice Brennan noted in his dissenting opinion a particularly disturbing comment by a city official. Brennan quoted a city attorney who addressed the National Institute of Municipal Law Officers in California as saying that a city could "amend the regulation and start over again" if it lost a zoning suit. Time and time again, land use regulations have been found invalid as infringements upon the rights of landowners, but just compensation has eluded the landowners' grasp. Local governments simply add new twists to their previous regulations. The battle simply begins anew. Developers' lawyers have been saying this for years; namely, that local governments will resort to any tactics, no matter how despicable, to block unwanted developments.

Today, the flouting of federal and state constitutional requirements begins with the enactment of the zoning ordinance. Local governments often zone large areas for impossible uses, such as agriculture or industry. In this

22. The California courts have viewed large-scale development activity with undisguised aversion. California zoning decisions are noted for their anti-developer bias. See, e.g., 1 N. Williams, American Planning Law: Land Use and the Police Power § 6.03 at 115 (1974) ("The striking feature of California zoning law is that the courts in that state have quite consistently been far rougher on the property rights of developers than those in any other state.")


24. Id. at 655 (Brennan, J., dissenting).

25. See Kanner, Condemnation Blight: Just How Just is Compensation? 48 Notre Dame Law. 765, 799 (1973) (indicating that some condemnation cases encourage governmental officials to act irresponsibly and fraudulently so long as no physical invasion of ownership interests occurs); Comment, Just Compensation or Just Invalidity: The Availability of a Damages Remedy in Challenging Land Use Restrictions, 29 UCLA L. Rev. 711, 733-34 (1982) (landowners challenging "takings" are vulnerable to a "bewildering series of multiple agency restrictions, buck-passing and dilatory vacillations," and there is little courts can do to prevent this administrative treadmill effect); see also Fiore v. City of Highland Park, 76 Ill. App. 2d 62, 221 N.E.2d 323 (2d Dist. 1966) (when city continues to change zoning during pendency of appeal in effort to block apartment construction, court may invalidate zoning and frame decree to prevent flouting of judicial process), aff'd on rehearing, 93 Ill. App. 2d 24, 235 N.E.2d 23, cert. denied, 393 U.S. 1084 (1967).

manner, residential developers are forced to seek rezoning, thereby providing local officials with a chance to inspect the developer. The original zoning map is, at times, a constitutional monstrosity. While many still contend that regulatory takings occur rarely, or that the remedy of injunction is sufficient, these contentions are difficult to reconcile with the wide-spread disregard of property rights in modern land use control law.

B. Police Power vs. Eminent Domain—
"Taking Away" and Overregulation

At times, landowners and others are called upon to share in a general loss. Thus, under certain circumstances, property may be lawfully destroyed (taken away from the landowner) under a government's police power without compensation of any kind. If a person owns land improved with a building, and the authorities, dealing with a conflagration, deem it necessary to destroy the building to create a fire break, this is *damnnum absque injuria*, an injury without legal redress. This was precisely the procedure involved in the vain attempt to halt the great San Francisco fire, since an earthquake had destroyed the water mains. Under such circumstances, the public need is so great that all private rights must give way before it.

Public welfare concerns of a lesser magnitude also have resulted in huge non-compensable wipeouts of property values. For example, in *Hadacheck v. Los Angeles*, the City of Los Angeles had enacted an ordinance that prohibited the manufacture of bricks within specified city limits. The plaintiff, who owned brick clay deposits and a brick factory within the limited area, was convicted of a misdemeanor for violating the ordinance. Plaintiff's land value was about $800,000 if used for brick-making purposes, but only $60,000 if used for residential purposes. In effect, the ordinance compelled the plaintiff to abandon his business entirely. The plaintiff, therefore, charged that the ordinance amounted to a taking of property without compensation in violation of due process.

The Supreme Court in *Hadacheck* refused to compensate plaintiff for his huge loss, noting that the police power is "one of the most essential powers of government, one that is the least limitable." The Court declared that "there must be progress, and if in its march private interests are in the way they must yield to the good of the community." The Court found that the state's purpose in enacting the ordinance—to improve the health and comfort of the community by eliminating the fumes, smoke, and soot of the plaintiff's brickmaking operations—was sufficiently compelling to justify the deprivation without compensation.

27. See Bowditch v. City of Boston, 101 U.S. 16 (1879); Holtz v. Superior Court of City of San Francisco, 3 Cal. 3d 307, 475 P.2d 441, 90 Cal. Rptr. 345 (1970); see also J. Mills, EMINENT DOMAIN § 5 (1879).
28. 239 U.S. 394 (1915).
29. *Id.* at 398.
30. *Id.* at 410.
31. *Id.*
32. *Id.*
Similarly, in Miller v. Schoene, a Virginia statute required red cedar trees within two miles of any apple orchard to be cut down when the trees were found to have a communicable plant disease. The plaintiffs argued that their cedar trees could not be destroyed by the government simply to preserve the property values of the apple orchard owners. The Court, however, held that, under the state's police power, the state may destroy one class of property to save another which is of greater value to the public. When the public interest is involved, the Court reasoned, the state may exercise its police power even to the extent of destroying property interests without compensation.

It is well-established that in exercising the power of eminent domain and taking fee simple title, the condemnor, theoretically, pays the full market value. Yet, the same public body can, without compensation, lawfully destroy immense property values under its police power. Courts have struggled to relieve this inherent tension between police power and eminent domain.

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33. 276 U.S. 272 (1928).
34. Id. at 279.
35. Id. at 277-80.
37. To a layman there is nothing mysterious about condemnation without compensation. Thinking in the old, easily understood way about eminent domain as a taking by the public for a public use, why shouldn't full value be paid? And if a tract of land needs regulating for the public good, the layman will tell you that it is folly to consider paying compensation to landowners. The ordinary understandings of ordinary people, including their expectations about the risk of regulation, have been suggested as an approach to the taking issue. See Rose, Mahon Reconstructed: Why the Taking Issue is Still in a Muddle, 57 S. CAL. L. REV. 561, 598 (1984). Alas, the real world is a good deal too complex to lend itself to simple solutions.
38. The only thread of unanimity in the countless writings in this area is that the courts are adrift in a sea of confusion. See, e.g., Broeder, Torts and Just Compensation: Some Personal Reflections, 17 HASTINGS L.J. 217, 228 (1965) (characterizing the case law as highly ambiguous and irreconcilable); Dunham, supra note 2, at 63 (describing takings cases as forming a "crazy-quilt pattern"); Johnson, Compensation for Invalid Land-Use Regulation, 15 GA. L. REV. 559, 563-64 (1981) (noting that the courts' identification of takings has been notoriously confused); Mulligan, Loretto v. Teleprompter Manhattan CATV Corporation: Another Excursion into the Takings Dilemma, 17 URB. L. 109, 110 (1985) (noting the absence of absolute standards and ensuing uncertainty from Supreme Court guidance in "takings" area); Van Alstyne, supra note 2, at 2 (describing the cases as "characterized by confusing and incompatible results, often explained in conclusory terminology, circular reasoning, and empty rhetoric"); Comment, Finding a Taking: Standards for Fairness, 16 U.S.F.L. REV. 743, 746 (1982) (reluctance of Supreme Court to set down clean standards for "taking" results in great uncertainty in reviewing state action).

Other commentators have attempted to find the line drawn by courts between valid regulation and de facto taking. Unfortunately, the results of this inquiry are inconclusive. Compare R. Anderson, AMERICAN LAW OF ZONING § 3.27 (2d ed. 1976) (concluding that while no precise formula exists to determine where regulation crosses line to become confiscation, financial loss is a relevant, but not decisive, consideration), with Krasnowiecki & Strong, Compensable Regulations for Open Space, 29 AM. INST. PLANNERS 87, 89 (1963) (estimating the average breaking point between valid regulation and "taking" to be "a loss of two-thirds of the admitted value for some other use"). In any event, the search for a mathematical average breaking point may be of little value considering the diversity of judicial opinion with respect to compensable takings resulting from governmental overregulation. See Berger, A Policy Analysis of the Taking Problem, 43 N.Y.U. L. REV. 165, 175 n.35 (1974).
The leading case in this area is Pennsylvania Coal Co. v. Mahon. In Pennsylvania Coal, the Court examined a statute that forbade the mining of anthracite coal without leaving pillars for surface support. This right was explicitly reserved in the company's mineral deeds. The coal company claimed that the public body lacked authority to enact such a statute, and brought an action for damages. In a majority opinion written by Justice Holmes, the Court recognized that it faced the difficult question of whether the police power could be stretched so as to destroy the coal company's property rights. The Court noted that while not every government action that diminishes property values requires damages, when the diminution reaches a certain magnitude there must be an exercise of eminent domain and payment of compensation.

Holmes made his now-famous statement that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The Court concluded with this warning: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal was the first intimation that overregulation might subject a governmental body to the payment of compensation. It triggered a burning controversy. Those favoring strict regulation of land use remain opposed to Pennsylvania Coal even today.

Pennsylvania Coal prompted a belated and unprecedented response from the executive branch. In 1973 the Executive Office of the President's Council on Environmental Quality published a monograph entitled "The Taking Issue." Upon even a cursory examination it is clear that the monograph was intended not to illuminate, but to persuade. The foreword to the monograph expressed the hope that the study "will serve to clarify and inform public debate, in order that America's future can be better served by a more rational system of land use policies and controls." In short, as its able authors pointed out, the monograph was a brief that argued that Pennsylvania Coal should be overruled. The monograph assaulted Justice Holmes' reasoning in Pennsylvania Coal. Among the many charges levelled, the monograph asserted that Holmes rewrote the Constitution by liberally construing the concept of taking to include non-physical interference with property rights.

Scholars have vigorously attacked the monograph. In this author's view, "The Taking Issue" was doomed to failure from the very beginning. The

40. Id. at 413.
41. Id.
42. Id. at 415.
43. Id. at 416.
45. Id. at 122.
46. One must remember that The Taking Issue was written at the height of the concern over the destruction of marshes and coastal wetlands by the developers. The case for preservation
Supreme Court has shown no inclination to retreat from its opinion in *Pennsylvania Coal*. In fact, the Court often cites the case and approves its general balancing technique.\textsuperscript{47}

When *Pennsylvania Coal* was decided, on December 11, 1922, it initially attracted some attention, but not a great deal. A few student notes appeared, but none were critical.\textsuperscript{48} Zoning at that time was still in limbo. A widely held opinion viewed zoning as violative of the federal constitution. From 1923 to recent times the viability of *Pennsylvania Coal* was not under attack. Constitutional law was taught and articles by authorities on constitutional law appeared periodically. It was not until the post-World War II invasion of wetlands has been stated by others. See Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1 (1972). In fact, environmental concern for wetlands resulted in some remarkable decisions. For example, in *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), the court preserved wetlands by holding that a landowner has no constitutional right to develop his land—a rather unusual holding for a state that is considered a pioneer in the purchase and condemnation of development rights for the creation of scenic easements. See Kamrowski v. State, 31 Wis. 2d 256, 142 N.W.2d 793 (1966).


of old suburban areas by developers selling inexpensive homes that Pennsylvania Coal began to be criticized.\textsuperscript{49} It may be legitimately inferred that had Pennsylvania Coal initially turned American constitutional law in a new and unacceptable direction, it would have attracted adverse comment long before World War II ended.\textsuperscript{50}

There are complaints from time to time that Pennsylvania Coal "gives no yardstick for the degree of interference that constitutes a taking."\textsuperscript{51} In this author's view, this is analogous to complaining that the Bible provides no yardstick for telling us what the Lord will decide on Judgment Day. The line-drawing technique of Pennsylvania Coal requires a balancing of interests. When the purported reason for the governmental action is weak, and the resultant interference with the beneficial use of the land is substantial, a reviewing court may provide relief. Conversely, when a land use restriction represents a paramount governmental interest and the interference with the landowners' property rights is necessary, the court should deny recovery. Thus, in the fire-break cases the preservation of the city from destruction would outweigh all other interests. On the other hand, preservation of wetlands would have been assigned minimal weight a century ago. Thus, the factors weighed change with the times and the growth of human knowledge concerning the world in which we live.

When balancing competing interests, courts must make value judgments. No hard and fast rule is foreseeable.\textsuperscript{52} Indeed, the Constitution is a structure of law implicit with values: moral values, civic values, and social values.\textsuperscript{53} Assigning value to the interests involved in taking cases remains a major task of the courts.\textsuperscript{54}

Nevertheless, the battle lines have been drawn. On one side are regulators, who would like to regulate land use for legitimate reasons, but without compensating the landowner for any loss.\textsuperscript{55} Regulators are joined by local officials who wish to stop all growth in their "tight little islands."\textsuperscript{56} On the other side are the land developers, who complain bitterly of the unprincipled use of regulations to block developments on which the land developers have spent fortunes. The developers are joined by those landowners who merely

\textsuperscript{49} See Sax, supra note 2, at 151 n.7.

\textsuperscript{50} For an early, supportive discussion of "taking" concepts in light of Pennsylvania Coal, see Lenhoff, Development of the Concept of Eminent Domain, 42 COLUM. L. REV. 596, 615 (1942).

\textsuperscript{51} Rose, supra note 37, at 566.

\textsuperscript{52} See L. Tribe, American Constitutional Law 459, 463 (1978).


\textsuperscript{54} For a discussion of the general balancing between social gains and private losses, see infra text accompanying notes 88-106.

\textsuperscript{55} Many courts simply limit the plaintiff's remedy to invalidation of the governmental regulation. Limiting the aggrieved landowner to invalidation ignores the real costs and damages suffered while the regulation was in effect. See Morgan & Shonkwiler, Regulatory Takings in Oregon: A Walk Down Fifth Avenue Without Due Process, 16 WILLAMETTE L. REV. 591, 605 (1980); Comment, supra note 25, at 717.

wish to preserve their property values and prevent unjust interference with their property rights. A solution to this dilemma is needed.

C. The Brennan Taking Formula

The issue of inverse condemnation as a form of taking was raised in San Diego Gas & Electric Co. v. San Diego. In San Diego Gas, a land developer challenged the validity of a land use regulation that effectively deprived the developer of the beneficial use of his land. The plaintiff owned land that, when purchased as a possible site for a nuclear power plant, was zoned for industrial and agricultural use. The city rezoned parts of the property and reduced the acreage for industrial use. The city also established an open-space plan which encompassed the plaintiff’s property and proposed that the city acquire the land to preserve it as a parkland. The city never purchased the land, but the zone remained intact. The plaintiff argued that the governmental action constituted a taking that required just compensation. By a narrow five to four majority, the United States Supreme Court dismissed the plaintiff's appeal from the California Supreme Court since it determined that the state court judgment was not final. Nevertheless, the case is significant because a majority of the justices agreed on a valuation formula that will hereafter be referred to as "the Brennan formula."

Justice Brennan's dissent clearly indicated that a government’s exercise of its regulatory police power may give rise to a taking that requires compensation. Relying on Pennsylvania Coal, Justice Brennan reasoned that if a regulation has denied a property owner all or most of his interest in the property, a taking has occurred. He therefore determined that it would only be fair for the public to bear the cost of the landowner’s losses from the time the regulation was applied until its ultimate recission by the government.

Justice Brennan then attacked the notion that even if a taking is found, the landowner is limited to mere invalidation of the regulation. Justice Brennan stated that once a court finds that a police power regulation has effected a taking, “the government entity must pay just compensation for the period commencing on the date the regulation first effected the ‘taking’ and ending on the date the governmental entity chooses to rescind or otherwise amend the regulation.”

Justices Stewart, Marshall and Powell agreed with Brennan's view and joined in his dissent. Justice Rehnquist filed a concurring opinion in which he agreed with Brennan’s views, but doubted, along with other justices, that the judgment on appeal was final.

58. Id. at 633.
59. Id. at 656 (Brennan, J., dissenting).
60. Id. at 655 (Brennan, J., dissenting).
61. Id. at 658 (Brennan, J., dissenting).
62. Id. at 636 (Brennan, J., dissenting).
63. Id.
64. Id. at 633.
If the five justices correctly stated the applicable constitutional doctrine, all states are bound by the Brennan formula. To be sure, the Brennan formula is of limited scope. The formula deals with loss of use value during a limited time period. But the formula does establish an important principle, namely, that an action for money compensation is a constitutional remedy for overregulation.

Some courts have adopted the Brennan formula in dealing with inverse condemnation actions. For example, in *Martino v. Santa Clara Valley Water District*, landowners brought an action against a water district and the city for inverse condemnation. The plaintiff landowners claimed that the defendants' enforcement of a flood-control program deprived them of all beneficial economic uses of their property, and therefore resulted in a taking that necessitated just compensation. The court of appeals rejected defendants' argument that the only proper remedy was mandamus or declaratory relief. Instead, the *Martino* court pointed to the Brennan formula in *San Diego Gas* for the proposition that compensation could be recovered in inverse condemnation. The *Martino* court, therefore, reversed the lower court's summary judgment and remanded the case.

Similarly, the Sixth Circuit endorsed the Brennan formula in *Hamilton Bank v. Williamson County Regional Planning Commission*. While the Supreme Court subsequently disposed of the case on procedural grounds, the appellate court's analysis continues to be of value. In *Hamilton Bank*, the successor in interest of land developers sued the planning commission to recover damages for a taking. The plaintiff alleged that the commission's rezoning substantially diminished the value of the land. Although the land had been zoned to permit cluster residential development, after the developer expended three to five million dollars, the commission rezoned the land and refused to approve any more plats. The jury found that the commission had denied the plaintiff an economically viable use of its property in violation of the just compensation command. The district court granted the defendant judgment notwithstanding the verdict, but the Sixth Circuit reversed.

65. Indeed, the Brennan formula is gaining acceptance as the controlling view. See *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141 (9th Cir. 1983), cert. denied, 104 S. Ct. 151 (1984); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981); Devines v. Maier, 655 F.2d 138 (7th Cir. 1981); Burrows v. City of Keenee, 121 N.H. 590, 432 A.2d 15 (1981); Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983); Zinn v. State, 112 Wis. 2d 417, 334 N.W.2d 67 (1983); see also 2 P. Nichols, supra note 6, at § 6.21 (6) at 6-154.

66. 703 F.2d 1141 (9th Cir. 1983), cert. denied, 104 S. Ct. 151 (1984).
67. *Id.* at 1144.
70. See infra notes 77-86 and accompanying text.
71. 729 F.2d at 403-404.
72. *Id.* at 409.
The appellate court turned to *Pennsylvania Coal* for guidance and noted that a taking need not be an actual physical occupation; governmental regulation can constitute a taking. The court, however, stressed that a taking does not occur when the government simply deprives an owner of the best or most profitable use of the property. Also, mere diminution in property value does not create a taking. Nonetheless, the court agreed with expert opinion that the property had no remaining economically viable use and, thus, was taken by the government.

Turning to the compensation question, the *Hamilton Bank* court relied on the Brennan formula articulated in *San Diego Gas.* The court quoted from Justice Brennan’s dissent, which noted the shortcomings of limiting recovery to declaratory relief because mere invalidation does not compensate the landowner for the economic loss he suffered during the time of the taking. The court also agreed with Justice Brennan’s view that invalidation would not fulfill the just compensation clause’s purpose of shifting the burden of loss from the individual to the public. The court therefore agreed with the Brennan formula and awarded damages for a temporary regulatory taking.

While the Supreme Court recently reviewed the Sixth Circuit’s holding in *Hamilton Bank,* its decision was not dispositive of the principal issues upon which the parties sought review. Rather, the Court devoted most of its discussion to procedural aspects of the claim. The question of what remedies are available in inverse condemnation proceedings therefore remains unanswered.

The Supreme Court reversed the Sixth Circuit’s decision in *Hamilton* on the ground that the plaintiff’s failure to seek a variance for his property prevented the state from making a final decision on what development was permitted. The Court conceded that, while the plaintiff was not required to exhaust all administrative remedies prior to bringing a section 1983 claim, the administrative action must be final before it can be reviewed. The majority found the taking claim to be premature because the plaintiff had not utilized Tennessee’s inverse condemnation procedure prior to bringing the action. Interestingly, the Court also noted that the regulations could possibly be viewed as an impermissible exercise of the state’s police power rather than a fifth amendment taking; the impossibility of determining the

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73. *Id.* at 405.

74. *Id.* at 406.

75. *Id.* at 408 (citing *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981)).

76. *Id.* at 409 (citing *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 655-57 (1981) (Brennan, J., dissenting)).


78. *Id.* at 3117.


81. *Id.* at 3121.
final effect of the regulations on the plaintiff's investment-backed profit expectations would, therefore, also render the action premature.82

The majority opinion, written by Justice Blackmun, did not address the issue of whether the Brennan formula would have been applicable had a taking in fact occurred. Justices Brennan and Marshall concurred in the majority opinion but asserted that the Brennan formula articulated in San Diego Gas was still viable.83 Justice Stevens, however, while concurring in the majority opinion, noted his dissatisfaction with the Brennan formula.84 Justice Stevens reasoned that if the local government employed fair procedures, it should not be held liable for the lost use of the land while the legitimacy of the regulation was being litigated.85 Stevens' presumption that governments act in good faith in establishing such regulations, however, is unrealistic in light of Justice Brennan's depiction of what actually takes place in the real world of land use regulation.86 Nothing in the Constitution requires the Court to be guided by a myth that experience has exploded.

The Supreme Court's decision in Hamilton Bank evidences its desire to avoid addressing the taking issue squarely. Unfortunately, the Court's erection of procedural road-blocks hinders the determination of substantive legal issues.87 Whether the Brennan formula is the proper means for determining damages in instances of governmental takings is a matter of enormous import and should be addressed by the Court.

III. BALANCING SOCIAL GAINS AGAINST PRIVATE LOSSES

The test for the legitimacy of a police power action is to compare the societal need for the measure, or the contemplated societal gain from it, with the harm it will cause to the individual or class of individuals complaining. If the social gains outweigh the individual losses, the measure is deemed legitimate.88 This balancing test was advocated by Pennsylvania Coal,89 adopted by the Model Land Development Code,90 and explicitly approved by the Supreme Court.91

82. Id. at 3124. See also id. at 3123 (citing Martin v. District of Columbia, 205 U.S. 135 (1907)) and contrast with infra text accompanying note 178.
83. Id. at 3124-25 (Brennan, J., concurring).
84. Id. at 3125 (Stevens, J., concurring) Justice Rehnquist obviously disagrees. See supra text accompanying note 64.
85. Id. at 3126-27 (Stevens, J., concurring). See also infra text accompanying note 25.
86. See supra notes 23-26 and accompanying text.
87. See Hamilton Bank, 105 S.Ct. at 3124 (White, J., dissenting).
88. See Kratovil & Harrison, supra note 1, at 609; Michelman, supra note 2, at 1193; Ragsdale & Sher, The Court's Role in The Evolution of Power Over Land, 7 Urb. Law. 60, 79 (1975); Wright, Exclusionary Land Use Controls and the Taking Issue, 8 Hastings Const. L.Q. 545, 567 (1981).
89. See supra notes 39-56 and accompanying text.
90. For a discussion of the general balancing technique required by the Code, see Haley, Balancing Private Loss Against Public Gain to Test for a Violation of Due Process of a Taking Without Just Compensation, 54 Wash. L. Rev. 315 (1979). Haley noted that it was the Kratovil & Harrison article, supra note 1, that introduced the balancing concept into the periodical literature on eminent domain. Id. at 316 n.7.
For example, in *Pruneyard Shopping Center v. Robins*, the Supreme Court analyzed petitioner's argument that compelling a shopping center to permit the exercise of free expression on its grounds amounted to a taking of petitioner's property rights under the fifth amendment. The Court determined that the appropriate inquiry was whether the restriction on private property forced some people "to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." This public versus private balancing included, according to the Court, an inquiry into the character of the governmental action, its economic effect, and the degree of interference with reasonable investment-backed expectations. Balancing these equities, while taking into consideration *Pennsylvania Coal's* admonition about regulations "going too far," the *Robins* Court found that the minimal degree of interference with plaintiff's property rights did not amount to a taking.

State courts have also resorted to a balancing test when only state law is involved. In *State Department of Ecology v. Pacesetter*, the Washington Supreme Court confronted a wetlands preservation statute that allegedly impinged on plaintiff's property rights. The court reaffirmed its approval of the balancing of private loss against public gain in determining whether application of the statute had taken or damaged plaintiff's property. The court stated that "the question essentially is one of social policy which requires the balancing of the public interest in regulating the use of private property against the interest of private landowners not to be encumbered by restrictions on the use of their property."

A. Balancing Process—"Or Damaged" States

In the balancing process, especially at the state level, there is a factor that is not present in Supreme Court decisions, namely, the "or damaged" constitutions. The "or damaged" clauses were designed to expand compensability beyond the apparent limits of the traditional, physical invasion

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93. Id. at 83 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
94. 447 U.S. at 84-85. See infra note 115.
96. 89 Wash. 2d 203, 571 P.2d 196 (1977).
97. Id. at 207, 571 P.2d at 199 (quoting Maple Leaf Investors, Inc. v. Department of Ecology, 88 Wash. 2d 726, 565 P.2d 1162 (1977)).
98. See supra note 6.
test for taking. The landowner’s bundle of rights is greater in an “or damaged” state than it is in a “taking” state. Hence, a state court in an “or damaged” state, when confronted with an overregulation balancing problem, must often tip the balance in favor of compensation due to the “or damaged” provision.

B. Balancing and Environmental Control

Environmental groups, although well-intentioned, consistently refuse to recognize the often devastating effects that land use regulations have on property rights involved in socially desirable projects. At times, environmental groups struggle to block needed housing projects if they sense a possible harm to the environment. For example, a handbook for environmental activities provides this advice: “The mere threat of a suit can be an impressive political tactic . . . . Suits can be an effective delaying tactic to force compromises . . . . Extensive delay may even force the developer to abandon his plans due to financing difficulties.” Even though the developer may have very laudable ends in mind, environmental groups often blindly proceed with their opposition.

A wetlands case is illustrative of this problem. In Just v. Marinette County, developers brought suit to declare a shoreland zoning ordinance unconstitutional. While the public purpose of the ordinance was admirable—protection of wetlands and prevention of degradation and deterioration resulting from shoreland development—the destruction of property rights was devastating. The plaintiffs purchased over thirty-six acres of land along a lake in Wisconsin. More than six years later, the county enacted an ordinance to preserve wetlands by placing numerous burdensome conditions upon the use of the land. In effect, the ordinance destroyed the plaintiffs’ property value by denying them the opportunity to make any practical use of their land. In response to plaintiffs’ eminent domain arguments, the court simply denied recovery because the property was not physically taken but had merely been diminished in value. So viewed, the court found the ordinance a valid exercise of the state’s police power.

Courts should not be so myopic in the balancing process. When regulatory losses fall heavily on particular individuals, the police power must give way to eminent domain where the net result of the loss is the subjection of private property to public use. Moreover, the environmentalists are not always right. “Making the world safe for the environment is not the same thing as making the environment safe for our world.”

99. See Van Alstyne, supra note 19, at 15-16.
102. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
103. Id. at 11-12, 201 N.W.2d at 763.
104. Id. at 26, 201 N.W.2d at 773.
housing project is planned, for example, a balancing of benefits may counsel development. Thus, in order to rectify problems such as a shortage of housing and limited access to credit, the need for a low-income housing development may supercede the need for environmental preservation. In the balancing process, courts must weigh the homeless' need for shelter against regulation that blocks housing for the poor. Thus, the balancing process becomes an effective tool to master the complex web of public policy concerns. Once again, value judgments must be made.

IV. Property

In an eminent domain situation, courts must determine whether the interest claimed by the landowner is indeed a “property right” that must be protected or compensated. For example, in United States v. Willow River Power Co., the Court held that a riparian owner of a dam that produced a valuable head of water was not entitled to compensation under the fifth amendment when a federal navigation improvement substantially reduced the volume of water controlled by the dam. While the Court recognized that the head of water had value, and that the plaintiff had an economic interest in the water, it reasoned that not all economic interests are “property rights”; only those economic advantages that the courts recognize as rights can be protected from interference or require compensation for their invasion. The Court noted that it could not “start the process of decision by calling such a claim as we have here a ‘property right’; whether it is a property right is really the question to be answered. Such economic uses are rights only when they are legally protected interests.”

After an extensive discussion concerning the unique nature of riparian rights, the Court found that no taking of “property” had occurred. Thus, under the Willow River holding, the labelling of asserted rights as property rights is not a constructive approach to solving condemnation problems. All relevant facts must be carefully weighed. Only then can one balance the public welfare against the private claim and decide whether the case involves the taking of “property” and is therefore an appropriate one for testing constitutional issues.

A further complicating factor in determining whether “property” is involved is that state law is often employed to determine “property” for the purposes of federal condemnation. Thus, in Robins, the Court refused to adopt a more liberal view of property because the United States is not

106. Whitman, Federal Housing Assistance for the Poor: Old Problems and New Directions, 9 Urb. Law 1, 3 n.14 (1977) (citing H. Aaron, Shelter and the Subsidies 31 (1972)).
108. Id. at 511.
109. Id. at 502.
110. Id. at 511. A like issue arises where a state agency seeks to violate a general plan of building restrictions. The issue is whether, against the state, equitable servitudes are property.
“possessed of residual authority that enables it to define ‘property’ in the first instance.” While federal law may determine the definition of property in some instances, federal courts sometimes believe that they should adopt local state law unless a statutory federal interest is at stake.

The Supreme Court, however, tends to determine on an ad hoc basis whether a property right exists. In so doing, the Court at times defines property more broadly than a state supreme court would. Yet federal and state definitions manage a peaceful coexistence. Thus, in Robins, the Supreme Court held that a shopping center owner’s property rights included the right to exclude distributors of pamphlets. Nevertheless, the Court respected the state’s regulation and free speech interpretation, permitting the distribution of pamphlets in shopping centers. This apparent paradox of allowing states to define some substantive rights, such as free speech, more broadly than the federal courts, while refusing to sanction narrow state interpretations of other rights, such as property, contributes to the diversity of property rights and complicates the taking issue. As a probable result, states can and will expand their constitutional definition of protected speech and federal courts will recognize a shrinkage in the bundle of rights we call property.

When a state court is called upon to define “property” for compensation purposes under a state constitution, it has the same freedom of choice that the Supreme Court enjoys under the federal Constitution. As a result, “property” is virtually undefinable. Since there are fifty state constitutions, which are construed by fifty state courts in addition to the federal perspective, there are, in this country, fifty-one distinct notions of the definition of “property”. But, if we recall that “property” has one meaning in a contest between individuals and another meaning when the issue is between a public body and the landowner, as demonstrated in Willow River, then the number of existing solutions must be doubled.

V. Beyond “Property”—Protection of “Expectations”

An important philosophical underpinning in contract law is the protection of the parties’ expectations. This concept of expectation has also crept into the Court’s condemnation decisions.

112. Id. at 84.
116. Id. at 81.
In *Kaiser Aetna v. United States*, the owners of a private pond invested substantial amounts of money to dredge the pond and develop it into an exclusive marina with a surrounding marina community. The marina was open only to fee paying members; the fees were used in part to "maintain the privacy and security of the pond." After acquiescing to the petitioners' arrangement, the federal government reversed itself and attempted to assert a public right of access to the improved pond. The government based its assertion on the theory that the marina was subject to the federal navigational servitude since the owners had dredged a channel connecting it to navigable water.

The petitioners argued that the right to exclude others had become essential to the use and economic value of the property. They contended that to infringe upon this exclusivity amounted to a taking. The Court agreed with the petitioners, noting that the government could not interfere with reasonable investment-backed expectations:

> While the consent of individual officials representing the United States cannot "estop" the United States it can lead to the fruition of a number of expectancies embodied in the concept of "property."—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property. In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.

This language in *Kaiser Aetna* exemplifies a time-honored principle behind legal concepts—respect of expectations. Indeed, as other commentators have noted, respect for individuals' "basis of expectations" goes back to Bentham's teachings. Professor Michelman has argued that "investment-backed expectations" and "property expectancies" are to be protected "if sufficiently important."

It is interesting and probably significant that the *Kaiser Aetna* Court employed a vocabulary devoid of any mention of "vested rights." Perhaps

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120. 444 U.S. 164 (1979).
121. *Id.* at 168.
122. *Id.* at 167-68.
123. *Id.* at 168.
124. *Id.* at 179.
125. See Michelman, *supra* note 2, at 1211. Bentham's utilitarian property theory troubled Michelman because the theory does not mandate compensation in every case of society action "which is disappointing to justified, investment-based expectations." *Id.* at 1211. Michelman found no difficulty in denying compensation, provided that utilitarian theorists agreed that "human interdependence" requires that sound allocation of resources be based on collective control over property rights. This collective control and resulting allocation of resources, according to Michelman, will inevitably upset "justifiable expectations" of individuals in situations where it would be almost impossible "to arrive at a comprehensive set of apparently 'correct' compensation settlements." *Id.* at 1213.
126. Michelman, *supra* note 2, at 1213. In Professor Michelman's classic exposition of the just compensation clause, he asserted that *Pennsylvania Coal* essentially employed a test that gauged "whether or not the measure in question can be seen to have practically deprived the claimant of some distinctly-perceived, sharply crystallized, investment-backed expectation." *Id.* at 1233.
the court sought to avoid the barnacles that have attached to that hoary concept by substituting instead a quest for fairness, a new quest for the ethical foundations of just compensation. The Court may have provided a signal that the consent of individual governmental officials may indeed lead to the fruition of expectancies embodied in the concept of property—expectancies of sufficient importance to require compensation upon infringement. Such fruition would require investments by the landowner of a character and magnitude not yet fully defined. But this fruition would qualify these investment-backed expectations for protection against taking without compensation.

The Court, then, has offered some direction as to the location of the line marking the point where eminent domain territory begins. But the exact point where police power ends and eminent domain begins remains a mystery.

### VI. Natural Law and Natural Rights

Since under the American value system the doctrines of natural law and natural rights extend protection to private property, it is essential to consider natural rights in the balancing process to determine the right to compensation. The earliest mention of natural rights in federal jurisprudence occurred in the case of *Corfield v. Coryell* in 1823. According to *Corfield*, certain unstated "natural rights" exist that all governments must respect. Even


In fact, in a celebrated case, a court refused to apply vested rights or estoppel after huge expenditures were made. See *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386, cert. denied, 429 U.S. 1083 (1976).

It was probably this case that brought forth the Urban Land Institute paper. See *Siemon, Larson, and Porter, Vested Rights* (Urban Land Institute and Urban Land Research Fund, 1982). The authors argued that investment-backed expectations created vested rights. They argued that it is constitutionally impermissible to alter regulations affecting a land development if: (1) the development expectation was reasonable and final when it was formulated; (2) the expectation is investment-backed; (3) impairment of the investment-backed expectation is substantial; and (4) the new or changed regulation cannot bear strict or active judicial scrutiny by which the court determines whether the law in question is necessary to promote a compelling government interest.

In any event, the results under estoppel and vested rights theories have been uneven. See Bosselman, *Survey of Recent Court Decisions*, 1984 ALI-ABA COURSE OF STUDY, LAND USE AND LITIGATION; Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63 (discussing zoning estoppel and vested rights cases).

128. For an interesting and insightful discussion of individual rights as pre-existing legislative rights in society, see R. Dworkin, *Taking Rights Seriously* x-xi (1977).


130. See L. Tribe *supra* note 52, at 405.
the Magna Carta was but a fragmentary statement of such rights.\textsuperscript{131} The Supreme Court, it is claimed, never acceded to the doctrine of natural rights, at least in its majority opinions.\textsuperscript{132} However, the Court seems to have adopted through construction of the Constitution a doctrine of fundamental rights in equal protection that is closely analogous to the natural rights doctrine.\textsuperscript{133}

Notions of natural rights continue to play a role in constitutional adjudication.\textsuperscript{134} For example, in 1934, when, during the Great Depression, the very survival of our form of government was in grave doubt, the Supreme Court was called upon to determine the validity of a Minnesota law which granted a moratorium on mortgage foreclosures.\textsuperscript{135} To sustain this law, the Court was compelled to recognize the obvious fact that impairment of contracts, expressly forbidden by the Constitution, must nevertheless be permitted when the survival of government is at stake. The Court sustained the moratorium, stating:

But into all contracts, . . . there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong . . . .\textsuperscript{136}

Later, in a substantive due process decision, \textit{Griswold v. Connecticut},\textsuperscript{137} the Court struck down a Connecticut statute forbidding any person from "aiding or abetting" the distribution of birth control devices.\textsuperscript{138} The majority found that a penumbra of constitutional rights supported recognition of a right of privacy in the fourteenth amendment. Three concurring justices, in an opinion written by Justice Goldberg, preferred to rely instead on the ninth amendment.\textsuperscript{139} Citing this and later Supreme Court decisions, one commentator has concluded that a type of quasi-natural law will continue to be incorporated as an important element in the American political system.\textsuperscript{140}

Other commentators have found support in the ninth amendment for the notion that recently conceived constitutional rights can be traced to the natural rights tradition that is deeply embedded in our constitutional origins.\textsuperscript{141}

\textsuperscript{131} \textit{Id.} at 428.
\textsuperscript{132} \textit{Id.} at 406.
\textsuperscript{133} \textit{Id.} at 407.
\textsuperscript{134} \textit{Id.}
\textsuperscript{136} \textit{Id.} at 435-36 (emphasis added).
\textsuperscript{137} 381 U.S. 479 (1965).
\textsuperscript{138} \textit{Id.} at 481.
\textsuperscript{139} \textit{Id.} at 488 (Goldberg, J., concurring). The ninth amendment provides that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. \textit{Const. amend. IX.}
\textsuperscript{140} See P. Sigmund, \textit{Natural Law in Political Thought} 109 (1971) (discussing the views of the philosophers, the Hart-Fuller debate, papal encyclicals, the judgment at Nuremburg and a vast diversity of commentaries on natural law).
One decision often cited is Serrano v. Priest,\textsuperscript{142} in which the California court quoted Horace Mann's exposition of the "great, immortal principles of natural law."\textsuperscript{143} Natural law, it seems, simply refuses to die.

The early history of natural rights in American eminent domain law has been interestingly recounted.\textsuperscript{144} Early American cases and treatises utilized a natural law approach to eminent domain.\textsuperscript{145} Mills, in an old treatise, reasoned that in the absence of a constitutional provision for compensation, any law for the taking of property without compensation would be void.\textsuperscript{146} In Chicago, Burlington & Quincy Railroad v. Chicago,\textsuperscript{147} the Court, relying on natural law authorities, held that the due process clause of the fourteenth amendment required the states to pay just compensation when taking private property for public use. The Burlington case and its natural law predecessors most clearly establish the true nature of the power of eminent domain.

In the purest sense, there is no such thing as the power of eminent domain. For the states, eminent domain is merely a limitation on its police power which is basically the power of a sovereign to govern.\textsuperscript{148} Indeed, it has been said that the phrase "police power" is a misnomer and should not be used as a substitute for the power to govern.\textsuperscript{149} The term "police power" is not found in the federal or state constitutions, but is generally considered to be a grant from the people to their governmental agents.\textsuperscript{150} As the Burlington Court noted, under early state constitutions that had no eminent domain provisions, the states encountered no difficulty in requiring payment of compensation for taking private property for public use.\textsuperscript{151}

The fifth amendment assumes that the power to take private property for public use inheres in the federal government as an attribute of sovereignty, but provides that exercise of this power is subject to the limitation that compensation be paid. Thus, in Richmond Elks Hall Association v. Richmond Redevelopment,\textsuperscript{152} the court of appeals concluded that Supreme Court precedent clearly required that a governmental agency acting pursuant to the state's police power must pay just compensation for any taking it effects.\textsuperscript{153}

\textsuperscript{142} 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
\textsuperscript{143} Id. at 619, 487 P.2d at 1266, 96 Cal. Rptr. at 626.
\textsuperscript{144} See Grant, The Natural Law Background of Due Process, 31 COLUM. L. REV. 56 (1931); Grant, The "Higher Law" Background of the Law of Eminent Domain, 6 WIS. L. REV. 67 (1931).
\textsuperscript{145} See Young v. McKenzie, 3 Ga. 31 (1847); Gardner v. Village of Newburg, 2 Johns Ch. 162 (N.Y. Ch. 1816).
\textsuperscript{146} J. Mills, supra note 27, §§ 1, 2.
\textsuperscript{147} 166 U.S. 226 (1897).
\textsuperscript{148} See Noble State Bank v. Haskell, 219 U.S. 104 (1911); see also Berger, supra note 38, at 272.
\textsuperscript{149} See Linde, Without Due Process, 49 OR. L. REV. 125, 147 (1970) (concluding that "police power" terminology is a "source of genuine confusion" and should be abandoned by both courts and lawyers).
\textsuperscript{150} See generally, Bauman, The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls, 15 RUTGERS L.J. 15, 51-53 (1983) (discussing interplay between police power and eminent domain).
\textsuperscript{151} 166 U.S. at 248.
\textsuperscript{152} 541 F.2d 1227 (9th Cir. 1977).
\textsuperscript{153} Id. at 1332.
As the Supreme Court, in *Boom Co. v. Patterson*, stated:

The right of eminent domain, that is the right to take private property for public uses, appertains to every independent government. It requires no constitutional recognition; it is an attribute to sovereignty. The clause found in the Constitutions of the several States providing for just compensation for property taken is a mere limitation upon the exercise of the right.  

Many commentators have also noted the unitary nature of police power and eminent domain.

In sum, the American value system employs diverse sources in creating a barrier of protection around private property. The doctrines of natural law and natural rights form part of that barrier. In addition, there are the fifth amendment, the fourteenth amendment, and constitutional provisions in each of the fifty states. In a majority of the states the “or damaged” clause furnishes added proof that the people wanted protection greater than that offered by the federal Constitution. Incorporation of property protection in the Bill of Rights is significant. Thus, in America, private property rights are fundamental civil rights.

VII. STATE AND FEDERAL LAW COMPARED

Every state has provisions parallel to the due process and equal protection clauses of the United States Constitution. Constitutional challenges to economic regulations can therefore be made on state or federal grounds. Surprisingly, however, parties in state-based cases often rely on federal grounds even though the Supreme Court has abdicated the field of substantive due process.

Unfortunately, zoning decisions often fail to pinpoint the particular constitutional provision involved and dismiss the litigated issue with the meaningless observation that the zoning was “confiscatory.” This approach leaves to the reader’s imagination the problem of determining whether state or federal constitutional law was involved. The federal/state distinction, however, can be crucial to the case.

154. 98 U.S. 403, 406 (1878).
Professor Williams has suggested a useful formula to determine whether state or federal law defines the scope of the police power. In *Williams*, *supra* note 22, at §2.04. According to Williams, when a federal question is involved the federal courts will define the permissible scope of the police power, as *Pennsylvania Coal* holds. When no federal question is involved, each state court should define the scope of the police power for its jurisdiction.

159. Id.
160. Id. at 246.
It would be helpful at this point to discuss two decisions, one state and one federal, that deal with identical problems. In *Village of Belle Terre v. Boraas*, the Supreme Court considered a zoning ordinance which permitted only single-family dwellings within the municipality and which restricted the occupancy of such buildings to groups related by blood or marriage, or to no more than two unrelated persons. The Supreme Court held that this did not violate the federal Constitution. Under an equal protection analysis, the Court reasoned that no fundamental constitutional rights were involved.

Notwithstanding *Belle Terre*, courts in a number of states have sustained challenges to ordinances which exclude group homes from single-family districts. For example, in *State v. Baker*, Dennis Baker was the owner and co-resident of a single-family dwelling located in Plainfield, New Jersey. Residing with Baker were his wife, three daughters, and a Mrs. Conata and her three children. The residents contended that they constituted an "extended family" because they held common religious beliefs. The "family" ate together, shared common areas and held communal prayer sessions. The defendants were found by the trial court to have violated an ordinance comparable to that in *Belle Terre*. On appeal, the New Jersey Supreme Court found the ordinance violative of the New Jersey Constitution. The city relied on *Belle Terre*, but the court observed:

*Belle Terre* has been widely criticized by the commentators . . . . In any event *Belle Terre* is at most dispositive of any federal constitutional question here involved. We, of course, remain free to interpret our constitution and statutes more stringently . . . . We find the reasoning of *Belle Terre* to be . . . . unpersuasive.

The relevant language of the various state constitutions varies somewhat, though many are patterned after the federal constitution. In any event, state courts have continued to interfere freely with legislative policies when interpreting a due process clause or its equivalent in a state constitution. Substantive due process is very much alive in the state courts. There remains for each state court the problem of defining the content of state due process in its jurisdiction. Thus, in any situation when courts are called upon to apply substantive due process in a land use situation, there are fifty varieties of state due process, as well as due process as construed by lower federal court and ultimately defined by the Supreme Court.

The *Pennsylvania Coal* taking clause approach to limiting regulation allows a compromise in which legislatures remain free to regulate social problems,
eminent domain. The courts may then infuse their values and policy into particular cases involving particular tracts of land and protect specific individuals and their property from extreme instances of regulation.\(^{170}\)

In struggling to absorb the meaning of this great diversity of constitutional interpretation in land use situations, the NO TRESPASSING signs must be kept in mind. The federal courts must not intrude into the process of constitutional law interpretation where a state court, duly respecting the requirements of federal constitutional law and federal statutes, gives its own interpretation of its state law.\(^{171}\)

VIII. The Question of Remedies

Grotius, a sixteenth century Dutch lawyer-philosopher, is credited with coining the expression "eminent domain." Grotius stated that all subjects (persons) hold their property subject to the eminent domain of the state.\(^{172}\) In so stating, Grotius could not have meant that we are all doomed to have our property taken by the government. A more appropriate characterization might be that we all hold our property subject to the preeminent dominion or the police power of the state. But when that police power is indeed exercised to take property for public use, Grotius stated that compensation must be paid.\(^{173}\) Grotius, an authority on natural law, merely arrived at the same conclusion later drawn by early American authorities—that taking requires compensation.

Grotius is also credited with the first serious development of the doctrine that government was instituted by a social contract.\(^{174}\) Recognizing that "social contract" is a figure of speech, it is nevertheless reasonable to infer that, like other contracts, the contract that forms a government is to be given a reasonable construction. Governments so formed must act reasonably. They may regulate property but they must respect the natural rights of every person, including the property owner.

A. Compensation

When the legislature breaches the social compact by regulating unreasonably, to the financial detriment of a landowner, the judicial branch must take action. The judicial branch exercises a vast amount of discretion when it initiates such action since decisions that balance the private and public factors involved are ad hoc.\(^{175}\) Nevertheless, some argue that the court cannot or must not award compensation.\(^{176}\) Even though there is a violation of the just compensation clause, it is argued that the relief must be non-monetary.\(^{177}\)

\(^{170}\) See Ragsdale & Sher, supra note 88, at 86.


\(^{172}\) See I P. Nichols, Eminent Domain § 1.12(1) at 1-14 (Rohan ed. 1981).

\(^{173}\) Id.

\(^{174}\) See B. Russell, A History of Western Philosophy 630 (1945).


\(^{176}\) Id. at 26-27.

\(^{177}\) Id. at 27.
The Supreme Court, in a number of statements, has expressly embraced the requirement of compensation. There is nothing ambiguous about the Court's statements. In the Brennan formula, a majority of the Supreme Court agreed that damages may be awarded for overregulation. In fact, a panoply of remedies presents itself.

The Model Land Development Code contains a provision for retention of jurisdiction:

If the complainant is a landowner challenging the validity of an order, rule or ordinance applicable to his land and if the court is satisfied that as applied to his land the order, rule or ordinance constitutes a taking of his property without just compensation, the court shall retain jurisdiction if it further determines that the limitation or development could be lawfully imposed if compensation were paid, and request the local government to determine whether it wishes to institute proceedings under Article 5 to pay compensation. If the governmental agency making the order, rule or ordinance fails to respond within 90 days, the court shall enter an order of invalidity. If a proceeding to determine compensation is commenced, the court shall continue the initial proceeding until compensation has been determined.

It is evident that this provision introduces the notion that an otherwise invalid regulation might be validated by payment of compensation. The

178. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425 (1982) ("It is a separate question . . . whether an otherwise valid regulation so frustrates property rights that compensation must be paid"); Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) (government action in the form of regulation may be so onerous as to constitute a taking which requires compensation). The Court further explained in Martin v. District of Columbia, 205 U.S. 135 (1907), that "[c]onstitutional rights, like others, are matters of degree. To illustrate: Under the police power, in its strict sense, a certain limit might be set to the height of buildings without compensation; but to make that limit five feet would require compensation and a taking by eminent domain." Id. at 139.

179. See supra notes 57-87 and accompanying text.


The choices of relief, according to the Zaagman opinion, include (1) enjoining enforcement of the unconstitutional relief, thus leaving the property unzoned, (2) enjoining enforcement of any zoning classification other than that sought by the plaintiff, (3) enjoining enforcement of the invalid classification while ordering the city to allow plaintiff's specific use, (4) enjoining enforcement and remanding to the city, but retaining supervision of the choice of an alternative use, to be determined by equitable considerations as well as constitutional standards, and (5) enjoining enforcement and remanding for a local administrative hearing to decide the appropriate use. The Zaagman court adopted the fourth choice, while the dissent supported the last.

Id. at 117.

181. MODEL LAND DEV. CODE § 9-112(3) (1976). The comment to this section is as follows:

In subsection (3) the court is given a third choice. If it finds that the development restriction as applied to complainant's land would result in a taking of his property without compensation, the court may stay entry of an order of invalidity to give the local government time to determine whether it wishes to continue the restriction by paying compensation through the acquisition of some interest in the land pursuant to § 5-106.
amount of the compensation would correspond to the quantum of harm inflicted by the regulation and the overall circumstances. The concept of compensatory regulation is not new.\textsuperscript{182} This, indeed, was tried in the early days of zoning, when zoning without compensation for loss of value was thought to be unconstitutional.\textsuperscript{183} Compensatory regulation has even been revived in one state by statute.\textsuperscript{184}

Nevertheless, the dispute over compensatory regulations remains.\textsuperscript{185} The differences are deep and real. The problems of fixing appropriate compensation are difficult, but constitutional law does not present the obstacle. The analogy of the glass of water seems relevant. The filled glass of water represents unregulated ownership. Overregulation empties too much water, leaving too little for the ownership. Then, by means of compensation provisions, enough water is added to reach the line that marks the division between police power and eminent domain territory.\textsuperscript{186}

It is clear that a landowner who suffers physical invasion is entitled to compensation. But if he suffers serious damage without physical invasion, there are those who argue that money damages cannot be recovered. Yet, it is clear that overregulation requires some form of constitutional relief. The only question that remains is what kind of relief is permitted. No constitutional provision forbids monetary relief. Indeed, where the constitutions speak, they speak of compensation. A court that chooses to award damages for overregulation is constitutionally free to do so.

The principal argument against awarding damages in a zoning case is the fiscal argument. But this argument has been pretty well demolished by the Supreme Court's new interpretation of Section 1983.\textsuperscript{187} Under Section 1983, a local government may be liable in damages for an unconstitutional deprivation of a person's civil rights. Similarly, when the government damages the property rights of a landowner, the government should pay for the damage it caused.\textsuperscript{188}

\subsection*{B. Judicial Rezoning}

Judicial rezoning has periodically taken place.\textsuperscript{189} Commentators have also approved site-specific relief.\textsuperscript{190} The doctrine of separation of powers at first

\begin{footnotes}
\footnote{182. See D. HAGMAN \& D. MISZCZYNSKI, WINDFALLS AND WIPEOUTS 256 (1978).}
\footnote{183. See Mandelker, Land Use Takings, The Compensation Issue, 9 HASTINGS CONST. L.Q. 491, 505 n.41 (1981).}
\footnote{184. See PA. STAT. ANN. tit. 53, § 11011 (2) (Purdon's Supp. 1980).}
\footnote{185. See D. HAGMAN \& D. MISZCZYNSKI, supra note 182, at 261.}
\footnote{186. The illustration is adapted from City of Kansas City v. Kindle, 446 S.W.2d 807, 813 (Mo. 1969).}
\footnote{187. See infra notes 210-213 and accompanying text.}
\footnote{188. See Kanner, The Consequence of Taking Property by Regulation, 24 PRAC. LAW. 65, 74-75 (1978). Professor Kanner believes that the issue of the validity of condemnation with compensation has been decided by the Supreme Court. The author agrees with Professor Kanner's views.}
\footnote{190. See Mandelker, supra note 183, at 505; Note, The Inadequacy of Judicial Remedies in Cases of Exclusionary Zoning, 74 MICH. L. REV. 760, 770 (1977) (viewing judicial zoning as a method for dealing with municipal zoning officials' reluctance to obey court ordered rezoning).}
\end{footnotes}
blush seems to indicate that zoning and rezoning can be exercised only by the legislative branch.

In *LaSalle National Bank v. City of Chicago*, the Illinois court attempted to define its role:

> While the courts possess the authority to pass upon the validity of a zoning ordinance, this authority does not include the power to determine the ultimate classification . . . Since the practical effect of declaring an existing zoning ordinance void in regard to a particular piece of property is to leave that piece of property in an unzoned condition, the court may frame its order in reference to a specific proposal before it and find that the contemplated use would be a reasonable one . . . However, the court must exercise this authority with extreme care to avoid any encroachment into the legislative function of zoning.

A simpler, more direct remedy would be for the court to order the city to issue a permit to proceed with the use that the court finds reasonable. Of course, this solution is facially simplistic. For example, the local code usually contains mandatory housing and building code provisions. Judicial decrees, however, are usually confined to the issues at bar. Thus, any court judgment that issues a permit must make it plain that the parties must comply with appropriate provisions of the existing code. The court should then reserve jurisdiction to enforce the judgment, as has been done in desegregation cases. For example, visits by the building inspector twice each day could frustrate construction. Local officials are perfectly capable of this sort of misconduct. By reserving jurisdiction, the court could end such harrassment.

When the legislative branch obstinately refuses to exercise a function mandated by the constitution, the judiciary must intervene since the people have no place else to go. The Supreme Court in *Baker v. Carr* ordered

192. *Id.* at 460, 264 N.E.2d at 801 (emphasis added).
193. See Note, *supra* note 190, at 775.
194. *Id.* at 768.
196. Viewing the doctrine of separation of powers in its historical context is helpful. As Pound has pointed out, the real roots of the separation of powers doctrine in America can be traced back to the despotic character of the royal proprietors in the colonies:

> In the proprietary colonies the proprietors and their agents wielded all the powers of governors, lawmakers and judges as well as of owners. In one case when a judgment had been rendered in the Town Court at Savannah, the defeated litigant wrote a letter to the Trustees in London complaining of the court’s action. The letter having been read by the secretary, the Trustees without more, voted that the secretary write a letter to the governor on the spot directing him to order the court to reverse the judgment. Under the provincial regime, all the ultimate power was concentrated in the Privy Council at Westminster. All legislation had to be submitted to it for approval or disallowance . . .


The British proprietors have long since vanished from the scene. A mature system of justice can afford a relaxed attitude toward the arbitrary division of governmental power between the legislative and judicial branches.

197. 368 U.S. 186 (1962).
congressional redistricting although it had previously denied the Court's authority to do so; the legislature had refused to correct an intolerable situation. As Justice Clark observed in a concurring opinion, the voters were "caught up in a legislative strait jacket." Similarly, in Reynolds v. Sims, the Court dealt with state legislative apportionment. Thereafter, the Supreme Court proceeded to regulate much of the American voting process. These cases serve to emphasize the point already made that when the legislature fails to do its constitutionally-imposed duty, courts must step in to correct the constitutional infirmity.

Occasionally, under special circumstances, the compartmentalization of governmental functions into legislative and judicial branches must yield to the needs of the times. When this happens, mountains do not topple and oceans do not engulf the civilized world. In fact, life continues much as usual, and the new rule is accepted, not defied.

In land use situations, New Jersey has taken a novel and independent course. Various municipalities ignored the New Jersey Supreme Court when it ordered them to make provision for low and moderate income housing. The court, however, had the last word. In South Burlington County NAACP v. Township of Mount Laurel, the New Jersey Supreme Court assigned three judges to manage zoning cases on a statewide basis to ensure that local government did not block construction of housing for a low income group. Thus, for courts that are truly dedicated to the task of providing homes for the homeless, a precedent has been established.

That rezoning is not merely an academic exercise is evident from the Mount Laurel decision, where the court pointed out that a housing study made in 1972 indicated that the selling price of a new single family home could be reduced from $57,618 to $33,843 if the lot size and frontage requirements were reduced from 43,500 square feet and 200 feet to 12,000 square feet and 80 feet respectively. Under Mount Laurel, courts may require the use of available state or federal housing subsidies by local governments. Inclusionary and incentive zoning must be used. Mobile homes must be permitted. "Least cost" housing must be provided. Above all, to make certain that the municipalities do not again resort to evasive tactics, the court determined that masters in chancery would "assist" the local governments in the drafting of proper ordinances. In short, Mount

198. Id. at 195 (Clark, J., concurring).
202. Id. at 259 n.25, 456 A.2d at 441-42 n.25.
203. Id. at 262-64, 456 A.2d at 443.
204. Id. at 265-67, 456 A.2d at 445-50.
205. Id. at 274-77, 456 A.2d at 450-51.
206. Id. at 277-78, 456 A.2d at 451.
207. Id. at 281, 456 A.2d at 453.
Laurel supports the view that in reaching a desired land use result the courts may resort to the judicial activism common in cases involving school desegregation, prison overcrowding, and reapportionment.\textsuperscript{208}

To be sure, there will be criticism of Mount Laurel that expresses the traditional view that the judiciary should avoid intruding into the legislative sphere. This criticism is unwarranted. Pinning labels on a process does not move the analysis forward. When legislative bodies act improperly and persist in so doing, there will be instances of extreme injustice, as in Mount Laurel, that must be rectified. When the judiciary is the only remaining bastion of redress, courts should not hesitate to fulfill their counter-majoritarian purpose and prevent the abuse.\textsuperscript{209}

Finally, what occurs at trial when a zoning action is attacked as invalid "as applied" must be considered. During the trial, the zoning ordinance and the local master plan, as well as maps and photographs of the area, are in evidence. The judge is informed of all the surrounding properties' uses, zoning, and value. Expert witnesses testify. In short, before making a ruling, the judge must have all the information a zoning body would have in order to zone the land properly.

Under these circumstances, the separation of powers doctrine, in its broad sense, is not involved. Virtually all zoning cases involve one tract of land and the issue usually involves the simple question of whether a piece of property deserves a specific classification. Most likely, a judge can make this decision with at least as great wisdom as large groups of aldermen. All great powers must be applied reasonably, and judicial zoning is certainly a reasonable solution to a difficult problem. Moreover, the background of the problem reveals a bad track record on the part of legislative bodies. Had legislatures dealt honestly, fairly, and competently with the problem, the question would never have arisen.

C. Section 1983

No important land use cases have been decided by the Supreme Court under Section 1983.\textsuperscript{210} It would be premature to draw any hard conclusions

\textsuperscript{208} Id. at 289 n.43, 456 A.2d at 457 n.43.

\textsuperscript{209} For a general discussion of judicial rezoning, see Hartman, Beyond Invalidation: The Judicial Power to Zone, 9 URB. L. ANN. 159 (1975). Where a separation of powers is ordained and conflict occurs, the power to resolve the conflict must reside somewhere if use of force is to be avoided. This was succinctly put by Bertrand Russell:

The country where Locke's principle of the division of powers has found its fullest application is the United States, where the President and Congress are wholly independent of each other, and the Supreme Court is independent of both. Inadvertently, the Constitution made the Supreme Court a branch of the legislature, since nothing is a law if the Supreme Court says it is not. The fact that its powers are nominally only interpretative in reality increases those powers, since it makes it difficult to criticize what are supposed to be purely legal decisions. It says a very great deal for the political sagacity of Americans that this Constitution has only once led to armed conflict.

B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 640 (1945).

based on the decisional law to date. Hernandez v. City of Lafayette\(^{211}\) is one lower court decision of considerable interest. In Hernandez, the landowner alleged that the city improperly refused to rezone his land from single-family to office complex purposes. The court held that plaintiff had stated a cause of action under section 1983, stating:

> It is well established that the application of a general zoning law to a particular property will effect a taking of that property under the just compensation clause of the Fifth Amendment (made applicable to the States by the Fourteenth Amendment) if the ordinance denies the owner any economically viable use of his land.\(^{212}\)

Thus, when invalidation of harsh land use regulations leaves the landowner with uncompensated losses caused by the invalid regulation, federal courts seem disposed to award damages under section 1983.\(^{213}\) An action to invalidate the regulation and to recover damages should be maintainable whether brought under the due process clause or section 1983.

\(\text{D. Inverse Condemnation}\)

The arguments against any use of inverse condemnation as a remedy for compensating a regulated landowner who has been deprived of constitutional rights have been discussed frequently. It is argued that the threat of inverse condemnation has a chilling effect on the exercise of the police power at a local level. Second, it is argued that it is unfair to treat what the local government enacted as a purely regulatory measure as a compensable taking. Third, many argue that inverse condemnation puts an unanticipated burden on the local budget. Fourth, it is argued that inverse condemnation amounts to a judicial usurpation of the legislative prerogative. Finally, it is asserted that the amount of compensation necessary to compensate injured landowners will be difficult to ascertain.\(^{214}\)

None of these arguments carries conviction. A court of general jurisdiction that regularly hears judicial attacks on zoning decisions is competent to control the practice in inverse condemnation cases. It is entirely within judicial competence to insist that the relief granted in such actions depend on the facts and may run the gamut of all remedies available where a zoning decision is attacked.

When the legislature has performed its sworn duties honestly and without bias, but has nevertheless passed an unconstitutional zoning regulation, the

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\(^{211}\) 643 F.2d 1188 (5th Cir. 1981), cert. denied, 455 U.S. 907 (1982).

\(^{212}\) Id. at 1197.


\(^{214}\) See Cunningham, supra note 213, at 536 (summarizing arguments for inverse condemnation).
court can simply invalidate the regulation and leave the matter of reaching a correct decision to the legislative body. The legislative body would then function under the guidance of the court decision.

If, on the other hand, the legislative body chooses wilfully to disobey a constitutional mandate, it is obvious that the court must choose a remedy that will command respect. It is unrealistic to speak of unfairness to a wilfully disobedient legislative body. It is unrealistic to suggest that the legislature was unaware of the burdens its conduct might place on the shoulders of the taxpayers. It is unrealistic to talk of usurpation of legislative power, for if the legislature had done its sworn duty the action would never have been brought in the first instance.

The issue is simple: either courts will pronounce vacuous judgments that the legislature is free to evade, or courts must seize whatever weapons are at hand to compel obedience to their orders. In appropriate cases, the remedy of awarding full compensation should be employed. But damages of full land value are a remedy of last resort, as in cases of obvious harassment.215

Critics of inverse condemnation lament the burden this remedy would impose on the public fisc. This argument loses credence when one considers recent Supreme Court interpretations of section 1983. While the resultant financial burden in these cases is great, it is necessary in order to deter unlawful conduct by governmental officials.216 It may be legitimately inferred that the Court was shocked and angered by the despotic and irresponsible conduct of local officials in their management of local affairs, as revealed, for example, in the San Diego Gas case, and decided that imposition of liability was the only language such officials could understand. Moreover, exposing the government to financial liability spreads the individual loss to those receiving the benefit—the public. To impose the burden of wrongful governmental action on the innocent landowner is unduly harsh and oppressive.

E. Choice of Remedy

When a number of remedies are available, the power to choose among the several remedies must be located somewhere. The airport cases strongly suggest that this power must not be left to the landowner. The landowners in airport cases have not been permitted to invoke the injunction remedy even though airport noise makes their homes unlivable.217 Leaving the choice entirely in the municipality's hands also seems unwise. At times a municipality that has honestly exceeded its regulatory powers simply pays for the loss of use the landowner has already suffered. But to allow the municipality to accept invalidation of one ordinance while its lawyers prepare another invalid

ordinance is folly. Plainly, the choice must ultimately rest with the court. At times, of course, the court's decision will leave much to be desired. But in such an event the parties have a right of appeal and the reviewing court ultimately must face the legal community.

CONCLUSION

Despite many years of bitter attack by commentators, Pennsylvania Coal remains a landmark decision. Approved by subsequent decisions, Pennsylvania Coal is the firmly established law of the land. When the court states that overregulation may require payment of compensation, (and it has said so time after time) it means exactly that. According to the Brennan formula, when a regulation is invalidated the landowner is entitled to compensation for the period of time he or she has been unable to make use of the land because of the regulation.

A restatement of the present situation as it exists under Pennsylvania Coal and the Brennan formula now follows. A state can condemn the fee simple title to land for a public purpose, such as the creation of a park, and must pay just compensation for the land thus acquired. Here the government's intention to acquire is crystal clear. Alternatively, the state may choose to attempt to regulate the land by zoning the land exclusively for public park purposes. Here the state has not selected the traditional remedy of condemnation, but its intention to "take" is still clear. A state court may decide that under its state constitution the only available remedy is invalidation of the regulation. But since a federal constitutional issue is also present, the remedy that the Supreme Court will choose is one within the exclusive control of the Supreme Court. The Supreme Court has determined that an award of damages is an appropriate remedy for the period that the landowner was deprived of the use of his land. Thus, if a state court stops with an adjudication of invalidity, it has stopped short of a full federal remedy under the Brennan formula for the period the land was unusable. If the state legislative body reveals an unconstitutional intent by persistently attempting to impose an invalid regulation, the court may elect to view the state action as tantamount to a permanent taking and may award full market value compensation.

Determining whether a public action creates a taking is a task that involves an ad hoc inquiry in which several factors are particularly significant: the economic impact of the regulation (notably the extent to which the regulation seems to strip the land of its economic value), the extent to which the regulation interferes with investment-backed expectations, and the character of the governmental action. Physical invasions, for example, are almost certain to constitute a "taking."

It would be helpful if some procedural changes were instituted. A special action should be available to attack a land use regulation on constitutional grounds. Optional remedies should be spelled out. Provision should be made for a final and appealable judgment that nevertheless allows the court to retain jurisdiction to protect the landowner against harassment and adjudicate the validity of an amendatory ordinance. In this fashion, the case will not
lose its place in the trial call and a judge familiar with the facts can try the
new issue.

When the court has plainly delineated its views on the appropriate zoning,
and the municipality thereafter adopts an amendment that disregards the
court's decision, difficult questions arise. The Supreme Court has stated that
when a constitutional violation occurs, all reasonable methods must be made
available to formulate an effective remedy, as shown in the school segregation
cases. This may mean judicial rezoning, the granting of a permit without
rezoning, or a judgment for full market value in inverse condemnation. The
court may also retain jurisdiction to oversee compliance by local officials.

Thus, land use cases will join racial discrimination cases and school
discrimination cases, with the trial courts retaining jurisdiction to make
certain the judicial decisions are not merely exercises in futility and that the
legislative body in fact obeys the mandate of the court. Under these condi-
tions, the rigid line between judicial and legislative power will tend to give
way to a more fluid and workable concept that recognizes the elementary
fact that if all branches of the government are equally "supreme," govern-
ment is impossible. The judicial branch will do whatever is necessary to see
that justice is done.

Finally, mention must be made of the new dedication of state courts to
significant re-interpretation of their state constitutions. As state courts re-
interpret, new state constitutional rights are certain to emerge and some of
them will cause a federally recognized shrinkage of property rights. This is
forward movement. To be sure, it will make the problem of defining property
more complex, but the world we live in shows no sign of diminishing
complexity.