

TAKINGS AND THE POLICE POWER

JOSEPH L. SAX*

If the government wants to convert a private house into a post office, or run a new highway through a farm, or build a dam which will flood nearby land,¹ it is going to have to compensate the losses sustained as a result of these activities. In such cases courts uniformly hold that property has been taken by the government, thus bringing into operation the constitutional mandate that private property may not be taken for public use without just compensation.² But if government prohibits the continuance of a business which has been established for a long time,³ or outlaws certain businesses altogether,⁴ or prohibits the use of land for any of the purposes which give it substantial economic value,⁵ it may not have to pay a penny. In cases of this type, where the government is engaged in zoning, nuisance abatement, conservation, business regulation, or a host of other functions, courts will usually decide that the economic loss suffered by the private citizen was a mere incident of the lawful exercise of the "police power,"⁶ and thus not compensable.

*Associate Professor of Law, University of Colorado.

1. See *Pumpelly v. Green Bay Company*, 80 U.S. (13 Wall.) 166 (1871) (compensation required).

2. This article deals only with problems of interpretation of the federal Constitution. Like provisions in the various state constitutions have sometimes been given quite different interpretations. See Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

The constitutional provision at issue here is that language of the fifth amendment which provides "nor shall private property be taken for public use without just compensation." This requirement has traditionally been viewed as incorporated into the fourteenth amendment. *Chicago, B. & Q.R.R. v. Chicago*, 166 U.S. 226, 235-41 (1897); see *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 279 (1943). It is this language of the fifth amendment which is referred to throughout the article as the "taking provision" or the "compensation provision."

3. *Hadacheck v. Sebastian*, 239 U.S. 394, 408-09 (1915).

4. *Mugler v. Kansas*, 123 U.S. 623 (1887).

5. *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962).

6. The term "police power" has no exact definition. *Berman v. Parker*, 348 U.S. 26, 32 (1954). It is used by the courts to identify those state and local governmental restrictions and prohibitions which are valid and which may be invoked without payment of compensation. In its best known and most traditional uses, the police power is employed to protect the health, safety, and morals of the community in the form of such things as fire regulations [*Munn v. Illinois*, 94 U.S. 113, 146 (1876) (Field, J., dissenting)], garbage disposal control [*Gardner v. Michigan*, 199 U.S. 325 (1905)], and restrictions upon prostitution [*L'Hote v. City of New Orleans*, 177 U.S. 587 (1900)] and liquor [*Boston Beer Co. v. Massachusetts*, 97 U.S. 25 (1878)]. But it has never been thought that government authority under the police power was limited to those narrow uses. *Munn v. Illinois*, 94 U.S. 113 (1876) (price control). See generally *Barbier v. Connolly*, 113 U.S. 27, 31 (1885); *Mugler v. Kansas*, 123 U.S. 623, 662 (1887); *Chicago & A.R.R. v. Tranbarger*, 238 U.S. 67, 76-77 (1915).

Most of the federal regulation which will be discussed here arises not under a police power but under the authority to regulate interstate commerce. But a parallel conflict exists

Though all agree that compensation is required only for a governmental "taking" of property and not for losses occasioned by mere "regulation," the generality of the theory thus formulated is of little help in deciding any given case. In some specific instances it has become clear that the compensation clause of the fifth amendment predictably will or will not be held applicable.⁷ Nevertheless, the predominant characteristic of this area of law is a welter of confusing and apparently incompatible results. The principle upon which the cases can be rationalized is yet to be discovered by the bench: what commentators have called the "crazy-quilt pattern of Supreme Court doctrine"⁸ has effectively been acknowledged by the Court itself, which has developed the habit of introducing its uniformly unsatisfactory opinions in this area with the understatement that "no rigid rules"⁹ or "set formula"¹⁰ are available to determine where regulation ends and taking begins.

Two basic approaches have been developed by the courts to distinguish takings from police power regulations. The earlier theory, articulated in the main by the first Justice Harlan, drew on traditional legal concepts for its rules. Notions such as appropriation of a proprietary interest, physical invasion giving rise to a prescriptive easement, and nuisance were its basic tools. The second approach originated with Justice Holmes in the first quarter of this century, when the expansion of governmental regulation yielded a proliferation of claims for compensation by aggrieved owners of private property. Holmes' approach denied the utility of artificial legalisms such as Harlan employed. Holmes proposed reliance on a pragmatic, case-by-case resolution of the policy-conflict which he perceived to lie at the heart of the problem — the conflict between public need and private loss. Neither of these two approaches has proved able to produce satisfactory results. Harlan's theory reduces the constitutional issue to a formalistic quibble; an airport noise case, for example, may turn on whether the planes have physically penetrated that segment of air directly above the claimant's land. The Holmesian approach has equal failings. Its central premise — that the right to compensation depends on the magnitude of loss suffered — is historically unsound, has never in fact been acceptable to the Court, and wasn't even followed by Holmes himself. It is the purpose of this article to elaborate this analysis of the traditional

between the asserted authority to regulate without paying compensation and the demands of the fifth amendment. See, *e.g.*, *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950). Where federal regulation of water is involved, the compensation question is complicated by the presence of the so-called navigation servitude. See generally Morreale, *Federal Powers in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1 (1963).

7. *Pumpelly v. Green Bay Company*, 80 U.S. (13 Wall.) 166 (1871) (compensation required); *Mugler v. Kansas*, 123 U.S. 623 (1887) (no compensation required).

8. Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUPREME COURT REVIEW 63.

9. *United States v. Caltex, Inc.*, 344 U.S. 149, 156 (1952).

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

approaches to the problem of taking, to isolate the shortcomings of these theories, and to propose a more fruitful approach.

BACKGROUND TO THE MODERN CASES

Because most of the taking cases have come to the Supreme Court by way of state regulation, the bulk of "early" authority in this field is found subsequent to the adoption of the fourteenth amendment. For this reason it was not Marshall or his contemporaries, but the first Mr. Justice Harlan, writing during the last decades of the 19th century, who was the principal judicial architect of compensation theory. It is therefore appropriate to begin with a discussion of his opinion in the landmark case of *Mugler v. Kansas*.¹¹

In that case the state had forbidden the sale and manufacture of intoxicating liquors. It was argued that since the claimant's breweries were erected when it was lawful to engage in the manufacture of beer and were of little value for other purposes, the regulation destroyed, or at least materially diminished, the value of that property, and thus could not constitutionally be enforced without the payment of compensation. Holding that no compensation was due, Mr. Justice Harlan stated that this case "must be governed by principles that do not involve the power of eminent domain, in the exercise of which property may not be taken for public use without compensation."¹²

To support this holding, he proposed two corollary theories. First, he said, this regulation was not in any sense a "taking" because it involved no appropriation of property for the public benefit but merely a limitation upon use by the owner for certain purposes declared to be injurious to the community. This theory Harlan apparently derived from the literal language of the fifth amendment, which deals only with the "taking" of property. While the government's acquisition of a fee simple in the property would obviously be a taking, one cannot, as Justice Harlan saw it, describe as a taking of property

legislation [which] does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests.¹³

Justice Brandeis later expanded upon this theory of the nature of the police power as compared with a constitutional "taking" when he noted that:

The property so restricted remains in the possession of its owner. The State does not appropriate it or make any use of it. The State merely prevents the owner from making a use which interferes with paramount rights of the public. Whenever the use prohibited ceases to be noxious, — as it may because of further changes in local or social conditions, —

11. 123 U.S. 623 (1887).

12. *Id.* at 668.

13. *Id.* at 669.

the restriction will have to be removed and the owner will again be free to enjoy his property as heretofore.¹⁴

Under this first theory, then, the constitutional issue turns upon whether the government has asserted a proprietary interest for itself in the affected property.¹⁵

The second Harlan theory looks not to the role of the government (whether proprietor or mere prohibitor) but to the quality of the property owner's activity which calls forth government action. Harlan distinguished innocent from noxious uses. Thus, the operation of a fertilizer factory in the midst of a city¹⁶ is a noxious use which the government can abate without having to make compensation, no matter how great the economic loss involved. The rationale is that no one can obtain a vested right to injure or endanger the public. Thus the abatement of a noxious use is not a taking of property, since uses in contravention of the public interest are not property.¹⁷ Conversely, if the government interferes with "unoffending property,"¹⁸ compensation is required.

Thus the Harlan theories distinguish takings from exercises of the police power by artful definition of the terms "taking" and "property." Under the Harlan theory the constitutional question never turns upon an examination of the economic consequences of the government's action; these theories postulate a qualitative difference between the police power and a taking, not a mere difference of degree.

Within a relatively narrow area Harlan's conceptual approach produces not only clear-cut distinctions, but also satisfactory results. And in Harlan's day the standard sort of government activity — regulation of liquor,¹⁹ prostitution,²⁰ fertilizer works²¹ or brickyards²² — can quite understandably be described as the mere regulation (rather than appropriation) of noxious (rather than innocent) uses; such activity is easily distinguished from the invasion which occurs when the government appropriates property for a highway or a post office. In addition, since the exercise of the police power was generally limited in Harlan's time to the sort of rudimentary functions just mentioned, it was quite possible to accept those functions, and the Harlan

14. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922) (Brandeis, J., dissenting).

15. Under this theory, the government apparently need not be the titleholder of record so long as it asserts a proprietary control over the property and affirmatively uses the property for its own purposes. *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1871).

16. *E.g.*, *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878).

17. *Gardner v. Michigan*, 199 U.S. 325, 330 (1905).

18. *Mugler v. Kansas*, 123 U.S. 623, 679 (1887).

19. *Ibid.*

20. *L'Hote v. New Orleans*, 177 U.S. 587 (1900).

21. *Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878).

22. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

theory, without seeing any substantial or fundamental threat to the institution of private property.²³

As the scope of governmental regulations grew, however, the economic impact of government regulation undermined the rationality of Harlan's conceptual distinctions. Particularly with the growth of zoning, conservation legislation, and pervasive business regulation, the impact of the police power, however defined as qualitatively distinct, upon the traditional perquisites of private ownership could hardly be ignored.

It was at this point in history that Harlan's service on the Court ended and Justice Holmes assumed leadership in the development of the compensation theory. He arrived just in time to face the full challenge of changing concepts of the governmental function. As Frankfurter pointed out in his classic study of Justice Holmes, "there were only two important measures of economic legislation on the federal statute books when Mr. Justice Holmes came to the Court, and these two . . . had only somnolent vitality."²⁴ But it was a time of dramatic changes. In the federal field "a vast field of hitherto free enterprise was brought under governmental supervision."²⁵ And from the states "local anti-trust laws, shorter hours acts, minimum wage laws, blue-sky laws, banking laws, conservation enactments, illustrate only some of the topics on which laws came . . . for eventual judgment by Mr. Justice Holmes' Court."²⁶

What was unique and truly original about Holmes' contribution was that he saw the issue not in conceptual or formal terms, but as a manifestation of social conflict. Established economic interests were engaged in a battle for survival against the forces of social change; to Holmes it was constitutionally irrelevant whether the battle was at any given time being waged in a desirable fashion.²⁷ For him it was sufficient that interests on both sides had some claims of legitimacy, and the struggle was in any event "inevitable, unless the fundamental axioms of society and even the fundamental conditions of life, are to be changed."²⁸ The job of the law was, as Holmes saw it, not

23. Of course, there were exceptions that foreshadowed future developments; *e.g.*, *Munn v. Illinois*, 94 U.S. 113 (1876) (price regulation).

24. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 50 (1951).

25. *Ibid.*

26. *Id.* at 51.

27. That events were in conflict with his personal beliefs is evidenced by his private description of the changes being effected as "the petty larceny of the police power," 1 HOLMES-LASKI LETTERS 457 (Howe ed. 1953). But in his judicial capacity he never manipulated the law to fit his own convictions. Typical is his comment in the New York theatre ticket broker case:

I am far from saying that I think this particular law a wise and rationale provision. That is not my affair. But if the people of the State of New York speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States to prevent their having their will.

Tyson & Bros. v. Banton, 273 U.S. 418, 447 (1927) (dissenting opinion).

28. *Vegelahn v. Guntner*, 167 Mass. 92, 108, 44 N.E. 1077 (1896).

to fashion otherworldly conceptualisms but to assure that the battle of conflicting interests is "carried on in a fair and equal way."²⁹

In seeking a test of fairness Holmes found the Harlan approach lacking: while he never seems to have discussed or specifically rejected the proprietary interest, invasion, or noxious use tests, his own decisions rest upon entirely different grounds. Holmes saw no qualitative difference between traditional takings and traditional exercises of the police power, but only a continuum in which established property interests were asked to yield more or less to the pressures of public demands.

Fairness, as Holmes finally formulated it, required some restraint on the part of all parties. The owner of private property must concede that the "constitutional requirements of compensation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work."³⁰ And on the other hand those who would promote change must recognize that the "play" in the machine "must have its limits or the contract and due process clauses are gone" and "private property disappears."³¹

The specific point on which Holmes seems to have chosen to focus the constitutional question was the extensiveness of the economic harm inflicted by the regulation. While he never flatly stated that degree of economic harm was *the* critical factor in his theory, a reading of his opinions leaves little doubt that this was indeed the theory he devised.³² "[T]he question narrows itself," he once said, "to the magnitude of the burden imposed"³³ And in the *Hudson Water* case, he said that while the government may properly diminish values somewhat under the police power, if the exercise of that power makes the affected property "wholly useless, the right of property would prevail over the other public interest, and the police power would fail."³⁴ When he upheld a regulation against a claim that compensation was required, it was usually upon the ground that it involved only a "comparatively insignificant taking"³⁵ or "the infliction of some fractional and relatively small losses."³⁶

In practice, Holmes was more permissive in his application of the fifth amendment than might be inferred from the terms of his diminution of value test. He participated in cases which held,³⁷ and he occasionally expressly stated,³⁸

29. *Ibid.*

30. *Tyson & Bros. v. Banton*, 273 U.S. 418, 446 (1927).

31. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 415 (1922).

32. *Id.* at 413.

33. *Interstate Consol. St. Ry. v. Massachusetts*, 207 U.S. 79, 87 (1907).

34. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

35. *Noble State Bank v. Haskell*, 219 U.S. 104, 110 (1911).

36. *Interstate Consol. St. Ry. v. Massachusetts*, 207 U.S. 79, 87 (1907).

37. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

38. *Erie R.R. v. Public Utilities Comm'rs*, 254 U.S. 394, 410 (1921).

that even total or near total destruction of property might sometimes be constitutionally permitted without compensation. The extent of private loss could be of less weight than the magnitude of public need embodied in the challenged governmental action. But for our purposes it is only important to note that his route to decision assumed that the function of the compensation clause was to minimize private losses, and that the paramount significance of this policy consideration made it rational to determine the constitutional validity of challenged governmental acts largely by reference to the extent of private loss thereby occasioned.

Harlan and Holmes and their divergent attitudes provide the heritage upon which the present Court has built. Precisely what the Court has synthesized from the heritage is a question more easily asked than answered. For even today it cites both Holmes and Harlan, both authoritatively.

The ambiguous position of the present Court is nicely demonstrated by its opinion in the recent case of *Goldblatt v. Town of Hempstead*.³⁹ Appellants owned a tract of land within the town of Hempstead upon which they had been mining sand and gravel for over twenty years. As a result of their excavations, a large, deep, water-filled crater was created. During the years since mining began the town had expanded around appellant's excavation, and a series of steps by the town to regulate mining culminated in the enactment of the challenged ordinance, which prohibited mining below the water table and imposed an affirmative duty to refill any excavation presently below that level. It was apparently conceded that the regulation completely destroyed the mining utility of the property,⁴⁰ although the record did not show what value the property would have for other uses.

Although the opinion is technically mere dicta on the taking issue,⁴¹ the extensive discussion of the problem indicates a good deal about the Court's current attitude. Moreover, the case is particularly interesting in that it presented an example of modern zoning practice in one of its least appealing forms — the bald suppression of a pre-existing lawful business, not a common-law nuisance,⁴² in favor of subsequent residential development. In addition, since it had been argued that the ordinance wholly destroyed the economic value of the land,⁴³ the case presents an opportunity to view the Court's hand-

39. 369 U.S. 590 (1962).

40. *Id.* at 596.

41. The Court found the record barren of any evidence of economic detriment as a result of the regulation. Thus, a meaningful decision on the taking issue was foreclosed; whatever theory one follows, it is hard to find a taking if the victim suffered no loss, as might have been the case here. Oddly enough, the Court also seemed to find either "a dearth of relevant evidence" or some reason why decision was unnecessary on each of the other significant issues presented. (369 U.S. at 595, 597 n.5). Yet instead of following the proper or conventional means of remanding for further proceedings or dismissing per curiam [see Frank, *The United States Supreme Court: 1947-1948*, 16 U. CHI. L. REV. 1, 35-36 (1948)], the Court chose to discuss the theory of the taking problem.

42. 369 U.S. at 593.

43. Brief for Appellant, p. 18, *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); see also 369 U.S. at 592.

ling of the Holmesian diminution of value theory under an extreme factual situation.

The treatment of the precedents in *Goldblatt* is most interesting. The Court more than once cites Justice Holmes' famous opinion in the *Pennsylvania Coal* case.⁴⁴ That was the opinion in which Holmes most clearly articulated the theory that the constitutional question turned primarily upon the degree of economic injury imposed by the government regulation. Yet the *Goldblatt* opinion leaves some doubt whether the Court is following, or repudiating, the Holmesian doctrine. After saying that a legislative restriction is not to be viewed as a taking merely because it "completely prohibits a beneficial use to which the property has previously been put"⁴⁵ the Court stated the law in the following way:

That is not to say, however, that government action in the form of a regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation, *Pennsylvania Coal Co. v. Mahon*. . . . Although a comparison of values before and after is relevant, see *Pennsylvania Coal Co. v. Mahon*, *supra*, it is by no means conclusive ⁴⁶

Unfortunately, the incomplete state of the record in *Goldblatt* relieved the Court from having to decide just when onerous became too onerous, or how seriously the Court was going to take its stated deference to Mr. Justice Holmes' theory.

Only five months after the *Goldblatt* opinion was issued, however, the Court had an opportunity to make clear the meaning of that opinion. In *Consolidated Rock Products Co. v. Los Angeles*⁴⁷ the Court had before it an appeal from a decision upholding a zoning ordinance which completely destroyed the economic value of the plaintiff's land.⁴⁸ The constitutional question was squarely

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

45. 369 U.S. at 592.

46. *Id.* at 594.

47. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 368, *appeal dismissed*, 371 U.S. 36 (1962). Noted in 50 CALIF. L. REV. 896 (1962).

48. The record as to total destruction of value was unequivocal. The trial court had found

that the subject property has great value if used for rock, sand and gravel excavation but "no appreciable economic value" for any other purpose and . . . any suggestion that the property has economic value for any other use, including those for which it was zoned, "is preposterous".

370 P.2d at 344. That finding was not disputed by the California Supreme Court nor by counsel for the city in opposing the appeal (Motion to Dismiss or Affirm, pp. 7-8). Indeed the rather pathetic attempts of both the city and the California Supreme Court to circumvent that finding merely accentuate its clarity. Counsel for the city took the extraordinary position that the trial court had merely found that "the land in question had no other 'economic' value than for rock and gravel quarrying but [not] that it had no other value at all." *Id.* at 8. The California Supreme Court said "It must be conceded that in relation to its value for the extraction of rock, sand and gravel the value of the property for any of the described uses is relatively small if not minimal, and that as to a considerable part of it seasonal flooding might prevent its continuous use for any purpose." 370 P.2d at 351. It would be difficult to find a case with a more solid record of total economic injury.

presented to the Court as "whether zoning ordinances which altogether destroy the worth of valuable land by prohibiting the only economic use of which it is capable effects a taking of real property without compensation."⁴⁹ Everything about the case indicates that it would have been an ideal vehicle for clarifying the ambiguity with which the Court had surrounded the constitutional significance of diminution of value in *Goldblatt*. The constitutional question was clearly presented and squarely decided below; the record was free of those ambiguities and uncertainties which frequently seem to induce a denial of review; and the appeal was competently presented by one of the country's leading law firms. Yet the Court dismissed the appeal for lack of a substantial federal question.

While the decision is technically on the merits, the real meaning of such per curiam dispositions must always be considered as in some doubt.⁵⁰ The most that can be said is that such a dismissal of a case in which an ordinance destroyed the entire value of the plaintiff's property casts some doubt on the vitality of the Holmesian test.

Scepticism about the vitality of the diminution of value test would appear thoroughly justified. Despite the deference accorded to Holmes' opinions, the Court has not in fact been impressed by proof of diminution of value.⁵¹ In several leading cases it has simply refused to consider the argument that the degree of economic loss ranged upward from 75 per cent of value.⁵² Indeed, as has been indicated, Holmes himself usually found that the regulation at issue, though it might go "to the verge of the law,"⁵³ rarely went beyond it.⁵⁴

49. Brief for Appellant, Jurisdictional Statement, p. 5.

50. The significance of a dismissal for want of a substantial federal question has been the subject of much critical comment. See Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938*, 53 HARV. L. REV. 579 (1940); Note, *The Insubstantial Federal Question*, 62 HARV. L. REV. 488 (1949); Note, *Supreme Court Per Curiam Practice: A Critique*, 69 HARV. L. REV. 707 (1956); Note, *Per Curiam Decisions of the Supreme Court: 1957 Term*, 26 U. CHI. L. REV. 279, 279-84 (1959). While the dismissal is always technically a decision on the merits, and frequently utilized as a precedent, 69 HARV. L. REV. at 712, 62 HARV. L. REV. at 494, HART & WECHSLER, *FEDERAL COURTS AND THE FEDERAL SYSTEM* 574 (1953), the use of such decisions as a source of important substantive rules must be approached with caution, for it is also true that the Court uses (actually misuses) the dismissal as it does the denial of certiorari — as a discretionary denial of jurisdiction. 62 HARV. L. REV. at 492-94; *Linehan v. Waterfront Commission*, 347 U.S. 439 (1954) (dissenting opinion). And it is always possible that the dismissal is a technical one, as for failure properly to present the federal question or lack of finality in the judgment below. See 69 HARV. L. REV. at 711.

51. *E.g.*, *Queenside Realty Co. v. Saxl*, 328 U.S. 80, 82-83 (1946); *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928).

52. *E.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (75% loss); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (87-1/2% loss).

53. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

54. *Erie R.R. v. Public Utilities Comm'rs*, 254 U.S. 394, 410 (1921); *Block v. Hirsch*, 256 U.S. 135 (1921); *Marcus Brown Co. v. Feldman*, 256 U.S. 170 (1921); *Levy Leasing Co. v. Siegel*, 258 U.S. 242 (1922); *Cedar Rapids Gas Light Co. v. City of Cedar Rapids*, 223 U.S. 655 (1912). See also *Interstate Consol. St. Ry. v. Massachusetts*, 207 U.S. 79

And in the *Erie Railroad* case,⁵⁵ where it was argued that a regulation requiring railroads to pay for grade separations might bankrupt the Erie, Holmes went so far as to say "that the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights."⁵⁶

On the other hand, the diminution of value test cannot safely be ignored. In *Armstrong v. United States*,⁵⁷ decided just a few years ago, the Holmesian approach may have been the critical factor in the decision. In that case the United States had contracted for the building of ships under a contract providing that, in the event of default by the ship-building company, title to all completed and uncompleted work would be transferred to the United States. The default occurred, and a number of unfinished hulls were conveyed to the United States. Since the shipbuilder had not paid for his materials, the petitioner materialman sought to enforce his state law materialman's lien against the United States. The United States thereupon asserted its sovereign immunity, making the liens unenforceable. Petitioner sued in the Court of Claims, arguing that the destruction of his liens by interposition of the immunity doctrine constituted a taking of property for which compensation must be paid. The case is of interest for the language which the Court employed in holding that there had been a taking:

The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment "taking" and is not a mere "consequential incidence" of a valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens ⁵⁸

The *Armstrong* opinion demonstrates the characteristic ambiguity of the taking cases. It may well rest upon a finding of "total destruction . . . of all value" and thus exemplify the Court's use of the diminution of value approach. Or it may rest upon a finding that the value was appropriated by the government "for its own advantage" in a proprietary capacity; this view would be a return to the old Harlan theory of "taking" based upon a finding that the government has appropriated something like a fee interest to itself, rather than merely regulating uses.⁵⁹ A further complication demonstrated by *Arm-*

(1907); *Hudson Water Co. v. McCarter*, 209 U.S. 349 (1908); *Noble State Bank v. Haskell*, 219 U.S. 104 (1911); *contra*, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922).

55. 254 U.S. 394 (1921).

56. *Id.* at 410.

57. 364 U.S. 40 (1960).

58. *Id.* at 48.

59. This seems to be the most prevalent theory used by the Court today. *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 165-66 (1958); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950); *Causby v. United States*, 328 U.S. 256, 266 (1946), where the court said, "it is the char-

strong is that three dissenting members of the Court would have decided against the claimant on yet another theory which sometimes finds its way into the cases. They would have held there had been no taking because the economic damage caused was a mere "consequential incidence" of the valid exercise of the power of sovereign immunity.⁶⁰ This theory the majority rejected simply by saying it was not so.

Thus the Court in *Armstrong* gives little guidance for future decisions. As the foregoing discussion indicates, ambiguity seems to be the rule rather than the exception in these cases. Nor is analysis aided by the fact that certain quite prominent decisions in this area, full of dicta about the general rationale of the taking-regulation dilemma, have in fact been decided upon some quite special ground such as the existence of a wartime emergency.⁶¹ A survey of the recent cases, of which those just discussed are typical, leaves the impression that the Court has settled upon no satisfactory rationale for the cases and operates somewhat haphazardly, using any or all of the available, often conflicting theories without developing any clear approach to the constitutional problem. It seems appropriate to inquire whether the currently available theories are capable of resolving the problem of the taking cases.

THE INVASION THEORY

Initially, it is obvious that whether the government takes title or possession of the subject property is merely a matter of the form in which it chooses to proceed. One of the oldest tricks of capitalizing on form is to try to depreciate the value or inhibit the development of property through zoning, so that it has a much reduced market value when the government gets around to buying it.⁶² Thus the government gets most of the value of the property without any acter of the invasion, not the amount of damage resulting from it, . . . that determines the question whether it is a taking."

60. The Court does not explain the "consequential incidence" theory, but previous cases show that it is usually used in one of two ways. Perhaps most often, it is little more than a synonym for the physical invasion theory. *United States v. Dickinson*, 331 U.S. 745, 750 (1947); *Gibson v. United States*, 166 U.S. 269, 274-75 (1897). Sometimes the theory apparently is invoked for the view that the harm imposed is justified by the fact that the government act is independently privileged, and thus the injury must be borne as an incidental consequence of a lawful act. The injury imposed by constitutionally protected libel would be an example [*e.g.*, for Representatives and Senators, U.S. Const., Art. I, Sec. 6(1)], as would the authority, based upon unbroken historical precedent, to impose fines in a criminal proceeding. It was this latter ground which was invoked in *Armstrong*, the doctrine of sovereign immunity being viewed as the privilege. See note 134 *infra*.

61. See, *e.g.*, *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958); *United States v. Caltex (Philippines)*, 344 U.S. 149 (1952).

62. A classic example is found in *Miller v. City of Beaver Falls*, 368 Pa. 189, 82 A.2d 34 (1951). There the city council included plaintiff's undeveloped land in a plat of future parks and passed an ordinance saying that no compensation would be paid for any improvements put upon platted land within three years following the adoption of the ordinance. In clear effect, the city "took" an interest in the land in the form of a three year option to purchase at current value. The court had no trouble in finding it unconstitutional.

formal "taking." New Jersey cities seem to have pioneered this technique. The city of Plainfield once zoned plaintiff's property exclusively for school, park, and playground use.⁶³ And Newark tried to solve the ubiquitous airport problem by height zoning all property in the vicinity of the airport so as to avoid any interference with take off or landing of aircraft.⁶⁴ Another New Jersey township zoned land for township sewage treatment, water supply facilities, and public recreational uses.⁶⁵ A Kentucky city zoned private land as a ponding area for water storage in accordance with a flood control plan.⁶⁶ The state courts have quite uniformly rejected these guises and required the payment of compensation.⁶⁷

But a similar device slipped by the U.S. Supreme Court, at least in part, because the Court applied the old invasion theory. In *United States v. Central Eureka Mining Company*,⁶⁸ the War Production Board shut down privately owned gold mines for the purpose of inducing experienced miners, who were in very short supply, to go into more essential war work. In essence what the government was doing was improving the labor situation by putting the competition out of business. In the private realm this is ordinarily done by buying the competitor. And in the ordinary situation this is what would have been done. But instead of buying the right to operate the business in question, and thus the economic power to induce a shift of labor to other industries, the government merely "regulated" the gold mines out of business without invoking the magic talisman of a physical invasion.⁶⁹ Form prevailed over substance; the Court's opinion turned in at least some degree on its finding that "the Government did not occupy, use or in any manner take physical possession

63. *Joint Meeting v. Borough of Middlesex*, 69 N.J. Super. 136, 173 A.2d 785 (1961).

64. *Yara Engineering Corp. v. City of Newark*, 132 N.J.L. 370, 40 A.2d 559 (Sup. Ct. 1945). See note 147 *infra*.

65. *Morris County Land Improvement Co. v. Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963).

66. *Hager v. Louisville Zoning Comm'n*, 261 S.W.2d 619 (Ky. Ct. App. 1953).

67. See notes 62-66 *supra*. Some idea of the variety of problems and of potential devices for dealing with them in the area of metropolitan development is given in the following articles: Note, *Techniques for Preserving Open Spaces*, 75 HARV. L. REV. 1622 (1962); Krasnowiecki & Paul, *The Preservation of Open Spaces in Metropolitan Areas*, 110 U. PA. L. REV. 179 (1961); Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 666-67 (1958).

68. 357 U.S. 155 (1958).

69. Of course it is not suggested that the government by the closing order obtained the value of the land itself or of the remaining minerals, which they would have got by a fee simple purchase. All that properly was in the case was an alleged taking of the value of operating the business for the duration of the order. The appropriation of this value could have been as easily achieved by "regulation" as by a traditional taking. Of course such partial takings are well known. See, e.g., *United States v. General Motors*, 323 U.S. 373 (1945), where the government ousted a lessee and installed itself as a tenant, thus taking not the fee simple or the entire leasehold but merely the rental value of part of the unexpired leasehold interest in the subject property. In that case the government did not circumvent the constitutional question by passing a regulation forbidding the use of the property for rental purposes as to all parties except the United States.

of the gold mines or of the equipment connected with them."⁷⁰ Compensation was denied.

For constitutional questions to depend on such formalities is, as these cases demonstrate, preposterous. The formal appropriation or physical invasion theory should be rejected once and for all.

THE NOXIOUS USE THEORY

Analysis will show the noxious use test to be no more adequate than the invasion test, although it has a beguiling simplicity and a perpetual appeal. Since the taking provision is undoubtedly an attempt to find some fair balance between the forces of change and the security of established interests, it has seemed particularly appropriate to believe that the compensation problem could be solved by saying that the uses which could be destroyed without compensation were those that were noxious, or wrongful, or harmful in some sense.

Of course it has long been obvious that all non-compensable uses could not be described in terms of moral obloquy such as might be appropriate for the regulation of prostitution or liquor. But a more modern version of the noxious use test has had considerable popularity, and it is this version which must be discussed. This is the "creation of the harm" test, based on the argument that while in general established economic interests cannot be diminished merely because of a resulting public benefit, that rule does not apply where the individual whose interest is to be diminished himself created the need for public regulation by his conduct. The test has been most explicitly articulated in the series of grade-separation cases which have come before the Court.⁷¹ In those situations a railroad track crosses a highway at street level. As highway traffic increases, the legislature determines that in the interests of safety, a grade separation is necessary. The cost of providing the improvement is usually assessed in large part against the railroad. It has been almost universally the rule that the railroad must pay, and the justification has been that:

Having brought about the problem, the railroads are in no position to complain because their share of the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements.⁷²

This test has received some recent scholarly support.⁷³ Certainly it has some appeal. The imposition of safety regulations without compensation can be justified on the ground that the property owners "created" the safety hazard; similarly, social legislation such as workmen's compensation can be justified as a need created by the employers' greed and heedlessness.

70. 357 U.S. at 165-66.

71. *E.g.*, *Atchison, T. & S.F. Ry. v. Public Utilities Comm'rs*, 346 U.S. 346, 352 (1953); *Louisville Cent. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935).

72. *Atchison, T. & S.F. Ry. v. Public Utilities Comm'rs*, 346 U.S. 346, 353 (1953).

73. Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUPREME COURT REVIEW 63, 75, 80.

This test is, however, insufficient to explain a great number of other very important cases. Perhaps nuisance abatement is the best example. Zoning out of nuisances is perhaps the classic example of the non-compensable exercise of the police power. The typical nuisance situation is one in which a perfectly lawful industrial enterprise located on the outskirts of the city suddenly finds itself in the midst of a new and unforeseen residential development.⁷⁴ It can hardly be said that the industrial user created this evil which is now sought to be remedied; the patent fact is that the evil was created by the unfortunate juxtaposition of two lawful activities.⁷⁵ Indeed that is precisely the situation in the grade crossing cases. If all we mean by "creation of the evil" is that one has located himself in a place which subsequently turns out to be inconsistent with the public interest — and that is all that can be said of the nuisance and grade crossing cases — then we must also say that the farmer who buys land in a place which is subsequently needed for a state highway has "created" the harm to be remedied and need not be given compensation.

Actually the problem is not one of noxiousness or harm-creating activity at all; rather it is a problem of inconsistency between perfectly innocent and independently desirable uses. And what is true of the nuisance and grade crossing cases is equally true of a great many cases in which the Court denies compensation.

For example, incompatibility is the essence of the famous decision in *Miller v. Schoene*.⁷⁶ There the complainant was required to destroy his red cedar trees because they produced cedar rust which was fatal to apple trees which happened to be cultivated nearby. To say that the cedar tree owner caused the harm is no more accurate than to say that the apple growers caused the

74. *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

75. Nor can it be said that a nuisance is a somehow morally culpable use. As Mr. Justice Sutherland succinctly put it, a nuisance is simply "a right thing in the wrong place, — like a pig in the parlor instead of the barnyard." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). And of course the place of location was in these cases a perfectly proper place when the now-odious activity began.

Moreover, it is highly dangerous to try to give any qualitative evaluation of what are called nuisances. The category is an open and ever changing one. It is notable that the Court in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 593 (1962), equivocated about whether to call sand and gravel mining a nuisance. Surely it would be shocking if the constitutional issue were to turn upon the "niceties" of a verbal or historical exercise. *Miller v. Schoene*, 276 U.S. 272, 280 (1928). Finally, it should be noted how the definitions of nuisance change with the fashions. In 1843 the New York court held a bowling alley to be a common-law nuisance for the reason that it was

A useless establishment, wasting the time of the owner, tending to fasten his own idle habits on his family, and to draw the men and boys of the neighborhood into a bad moral atmosphere — a place which, despite every care, will be attended by profligates, with evil communication, and at best with a waste of time and money, followed by the multiplication of paupers and rogues

Tanner v. Trustees of the Village, 5 Hill (N.Y.) 121, 128 (1843).

76. 276 U.S. 272 (1928).

harm by locating near cedar groves. If we are talking about blameworthiness, some moral wrongdoing or conscious act of dangerous risk-taking which induces us to shift the cost to a particular individual, it simply does not exist in these cases.

Of course the same is true of cases like *Consolidated Rock Products*⁷⁷ and *Goldblatt*.⁷⁸ The users there created the harm only in the sense that they decided to mine sand and gravel in a place which subsequently became desirable for residential homesites. The list could be extended indefinitely. When a truck is ordered to use mud-guards to prevent splashing other road users, is this non-compensable because the trucker has caused the evil — that is, mud-splashing? Or have other drivers caused the evil by glutting the highways? It is just as rational to attribute the harm to increased congestion, and thus spread the cost among all road users, as it is to attribute it to the trucker. The same could be said of fire regulations imposed upon all old wooden buildings in a city: has the house owner caused the harm by operating a fire trap; or is the building a fire trap now because others have made the neighborhood a congested one? The noxious use, cause-of-the-harm test is simply insufficient for the task.

THE DIMINUTION OF VALUE THEORY

Since emphasis on the diminution of value is probably the most popular current approach to the taking problem, it is important to understand precisely what it comprehends. Essentially the theory appears to express two interrelated ideas: (1) that all legally acquired existing economic values are property,⁷⁹ and (2) that while such values may be diminished somewhat without compensation, they may not be excessively diminished; the meaning of "excessive" is necessarily imprecise, but it is fairly clear under the theory that it would be unconstitutional to deprive a property of all or substantially all its economic value.

This approach, too, has tremendous appeal. It seems to bear out the oft-repeated observation that "the political ethics reflected in the fifth amendment reject confiscation as a measure of justice."⁸⁰ This is a strong and attractive sentiment, but it has unfortunately been used to obscure the real problems of the compensation clause. The problem is much more complicated than merely identifying existing economic values, denominating them property, and providing a rule that those values may not be wholly or substantially destroyed.

77. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962).

78. 369 U.S. 590 (1962).

79. If the theory does not so hold, the exceptions and limitations are well hidden. The cases all seem to proceed on the assumption that all established economic values are necessarily entitled to constitutional protection against diminution.

80. *United States v. Cors*, 337 U.S. 325, 332 (1949).

a. The Test Presupposes a False Definition of Property

The first complication is presented by the fact that we very often permit total destruction of established values; in so doing we circumvent the diminution of value approach by an alternative analysis, which simply says that the interest affected was not property and thus not entitled to constitutional protection. This is a very common approach, used by Holmes himself on several occasions.⁸¹ The classic formulation of the "no-compensation because no-property" approach was provided by Justice Jackson in the *Willow River Power* case:

Only those economic advantages are "rights" which have the law back of them . . . whether it is a property right is really the question to be answered.⁸²

The significance of this is that it shows the erroneous and delusive simplicity of the diminution of value approach. For every time we deny compensation on the ground that the interest affected was not really a property right, we repudiate in some measure the essence of the diminution of value test — the proposition that established economic values as such are entitled to constitutional protection.

In fact there are so many of these non-property situations that one must be irrevocably led to the conclusion that whatever it is that the compensation clause is preventing, it is something other than the destruction of established economic values. Changes in the common law are frequently made, and they are changes which may have very substantial economic import; yet we invariably deny compensation on the ground that there was no property interest in maintenance of the status quo. In the field of tort law, for example, such changes as abolition of the privity rule, imposition of the doctrine of products liability, or the extinguishment of charitable immunity are well known instances. The constitutionality of such laws is assumed on the ground that the economic advantage affected — like the common law right to embezzle — is not property. Similarly in the law of real property, it seems never to have been suggested that a compensable taking was involved when the courts first "took away" an easement by necessity from an unwilling grantor,⁸³ although

81. Delusive exactness is a source of fallacy throughout the law. By calling a business "property" you make it seem like land, and lead up to the conclusion that a statute cannot substantially cut down the advantages of ownership existing before the statute was passed But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct . . . subject to substantial modification according to time and circumstances

Truax v. Corrigan, 257 U.S. 312, 342-43 (1921) (dissenting opinion). And of course it was Holmes who pointed out that "there are many things which a man might do at common law that the states may forbid" and which have never been thought to be property entitled to constitutional protection. "He might embezzle until a statute cut down his liberty." *Noble State Bank v. Haskell*, 219 U.S. 104, 113 (1911).

82. *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

83. See Powell, *The Relationship between Property Rights and Civil Rights*, 15 *HASTINGS L.J.* 135, 142 n.35 (1963).

we today clearly treat an easement as a kind of interest which can give rise to a taking problem.⁸⁴

Similarly the legislatures are permitted to prohibit the continuance of businesses, lawful when established, with ensuing total or near total destruction of values. As that practice formerly affected lotteries,⁸⁵ or the manufacture of liquor,⁸⁶ it proceeds apace today against debt adjustment,⁸⁷ and whatever other businesses which once "were thought useful adjuncts of the state"⁸⁸ but have since fallen into popular disfavor. Of these crushing economic dislocations for the affected persons we merely say that there was no property interest involved.

When the legislature destroys 90% of value by prohibiting continuance of a brickyard,⁸⁹ it contents itself with saying the activity was a nuisance, and everyone knows that there is no property in a nuisance; when it imposes heavy regulation on the oil industry,⁹⁰ it says it is preventing waste, and so too, there is plainly no property interest in waste. Zoning, with losses of 75% or more of value, is similarly treated.⁹¹

The no-property principle has been even more boldly utilized in the development of a familiar area of federal law, the so-called navigation servitude. This judicially devised rule says that, as against subsequent governmental needs, all previously established private interests or uses in the navigable waters of the United States must give way. The Court has reached this well established principle of law by the *ipse dixit* that it is "inconceivable" that anyone should obtain a proprietary interest in the navigable waters of the nation.⁹² Why it is more inconceivable than that one should obtain a proprietary interest

84. *United States v. Virginia Electric & Power Co.*, 365 U.S. 624 (1961). There seems to be some tradition of disregarding losses incurred by restrictions on businesses upon the theory that "frustration" of economic expectations, as opposed to a destruction of tangible property, cannot ever be compensable. *United States v. Grand River Dam Authority*, 363 U.S. 229, 236 (1960). Insofar as this view is utilized as a means of excluding remote or speculative damages, it is justifiable. But if, as sometimes seems to be the case, intangible losses are simply excluded as such, the theory must be rejected as unsound and inconsistent with fundamental and quite relevant facts of economic life. See *United States v. General Motors Corp.*, 323 U.S. 373, 379 (1945). *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), is a case in which the inadequacy of the theory is most apparent.

85. See *Tyson & Brother v. Banton*, 273 U.S. 418, 446 (1927) (dissenting opinion).

86. *Mugler v. Kansas*, 123 U.S. 623 (1887).

87. *Ferguson v. Skrupa*, 372 U.S. 726 (1963). While never made express, it seems clear that there was to be no compensation made. See the complaint at Transcript, pp. 3-4.

88. *Tyson & Brother v. Banton*, 273 U.S. 418, 446 (1927) (dissenting opinion).

89. *Hadacheck v. Sebastian*, 239 U.S. 394, 408-09 (1915).

90. *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210 (1932).

91. *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926).

92. *E.g.*, *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 62 (1913). For an extensive discussion of the navigation servitude see Morreale, *Federal Powers in Western Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1 (1963).

in land, good as against a subsequent state or federal road building plan, or more inconceivable than that one should obtain a proprietary interest in petroleum, or any other precious resource, has not been explained to the satisfaction of this observer.⁹³ Nor, incidentally, is this approach a mere isolated anomaly perpetuated from early federal law. In recent years both California and Texas have by statute redefined the property acquirable in water so as to subordinate all appropriations to the subsequently arising needs of municipalities in the state.⁹⁴ And, as an historical footnote, it is interesting to observe that in the early days of the nation both North and South Carolina permitted the state, without compensation, to appropriate land for the construction of roads and highways.⁹⁵

The conclusion to be drawn from these examples, just a few among many, is clear. The diminution of value test gives a highly unreal view of the actual working of the compensation rule in American law. Destruction of recognized economic interests, on the ground that there is no property interest, is so widespread and pervasive that the policy of preventing individual economic loss as such, can hardly be said to have been given significant recognition by the courts. Nor can it be seriously argued that the foregoing examples are part of a special limited class of noxious or harmful uses; they are, like the typical taking cases, merely uses which have become inconsistent with the legislatively declared public interest. Thus, the question naturally arises as to whether or not we have been misled in thinking that the function of the compensation clause is essentially to protect and maintain established values. Certainly if we look to what the Court has done, the answer must be that in fact and in result (the Court has not treated protection of values as its primary goal.

The next inquiry, then, is whether the maintenance of established values ought to be accepted as the principal function of the compensation clause. And to answer this question we turn first to history. One will be surprised if he assumes that the compensation clause was designed to protect property interests, to maintain at least in substance the economic status quo. A close analysis of the early history of the compensation provision will not support the notion, so commonly held, that the taking clause was to be a bulwark for the maintenance of the established distribution of wealth. The history

93. Though there is perhaps some special historical authority for the navigation rule. See Grotius, *De Jure Belli et Pacis* (1625) Bk. II, ch. II, § XII; but see *id.* at § XIII.

94. Tex. Civ. Stat. Art. 7472 (1954); Calif. Water Code 1460 (1956). The constitutionality of these sections has not, incidentally, been tested.

95. See Grant, *The "Higher Law" Background of the Law of Eminent Domain*, in 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW 912, 925 (1938). This position was, of course, the exception and not the rule.

Perhaps the most questionable use of non-property conceptions to avoid confrontation of the compensation issue has begun in the area of "government largess" — licensing, public employment, etc. The dimensions of this problem are just beginning to be exposed. See Reich, *The New Property*, 73 YALE L.J. 733 (1964).

of the development of the compensation clause is such an interesting one that it is presented here in some detail.

b. The Test Is Inconsistent with the Early History of the Compensation Principle

The direct antecedents of the just compensation provision of the fifth amendment are the jurisprudential writings of such 17th and early 18th century scholars as Grotius,⁹⁶ Pufendorf,⁹⁷ Bynkershoek,⁹⁸ Burlamaqui,⁹⁹ and Vattel.¹⁰⁰

Grotius, the earliest and most important of the writers, stated the "rule" in language which seems plainly to have influenced the drafters of the fifth amendment:

A king may two ways deprive his subjects of their right, either by way of punishment or by virtue of the eminent power. But if he does it the last way, it must be for some public advantage, and then the subject ought to receive, if possible, a just satisfaction for the loss he suffers, out of the common stock.¹⁰¹

The others expressed the same principle.¹⁰²

Standing alone this formulation reveals nothing about the interests which these early writers sought to protect, and unfortunately they were not sufficiently accommodating to leave a careful analysis of the proper scope of the police power and its relation to the requirement of compensation. It has been traditional to treat as obvious that the purpose of the compensation rule was to mandate the substantial maintenance of existing economic values against government diminution. This is one of the abiding myths of American constitutional law.

One of the little known facts of our legal history is that Grotius, the father of the compensation clause, was a firm advocate of government regulation of prices. He stated the rule that "all men have a right to purchase the necessities of life at a reasonable price, except the owners want them for their own use."¹⁰³ Nor was this a quirk in the personality of Grotius. All the early writers espoused this principle, which was delineated in considerable detail by Vattel, in 1758:

Men are obliged naturally to assist each other as much as possible, and to contribute to the perfection and happiness of their fellow creatures; whence it follows that after the introduction of private property, it became a duty to sell to each other at a fair price what the possessor has

96. *DE JURE BELLI ET PACIS* (1625), Bk. II, ch. XIV, §§ VII, VIII.

97. *DE JURE NATURAE ET GENTIUM* (1672), Bk. VIII, ch. 5, § 7.

98. *QUAESTIONEM JURIS PUBLICI LIBRI DUO* (1737), [2 Tenney Frank trans. 221 (1930)].

99. *PRINCIPLES OF NATURAL AND POLITIC LAW* (1747), pt. III, ch. 5, §§ XXV-XXIX.

100. *THE LAW OF NATIONS* (1758), Bk. I, ch. XX, § 244. James Madison was "acquainted with the works of Grotius, Pufendorf, Burlamaqui and Vattel," Brant, *The Madison Heritage*, in *THE GREAT RIGHTS* 19 (Cahn ed. 1963).

101. See note 96, at § VII.

102. See notes 97-99.

103. Grotius, *op. cit. supra* note 96, at Bk. II, ch. II, § XIX.

no occasion for, and what is necessary to others; because, since that introduction of private property, no one can by any other means procure the different things that may be necessary or useful to him and calculated to render life pleasant and agreeable. Now, since right springs from obligation, the obligation which we have just established, gives every man the right of procuring the things he wants, by purchasing them at a reasonable price from those who have themselves no occasion for them.¹⁰⁴

It is thus extremely interesting to note that price control, which Holmes apologetically upheld with the observation that it "went to the verge of the law," was a central element in the philosophy of Grotius and his contemporaries. Of course this information seems surprising only if we begin with the assumption that maintenance of values is itself the value upon which the compensation rule is based. But while we have seen that Grotius obviously felt that under some conditions values could not be destroyed without compensation, his attitude toward price control suggests that something other than value maintenance itself is the central idea.

Indeed, as the quotation from Vattel indicates, those philosophers held to a principle that is essentially non-property oriented. To them the highest value for government seems to have been the duty so to regulate and adjust economic power as to "make life pleasant and agreeable" for all the "fellow creatures" in the society.¹⁰⁵ What is important to note about these statements is that they state an affirmative principle, rather than a mere grudging acquiescence in a result which is viewed as essentially at odds with the central values of the society. There is all the difference in the world between the language of Vattel and the language of Justice Holmes in speaking once of "the petty larceny of the police power."¹⁰⁶

We have become so indoctrinated with the idea that quantitative value maintenance is a constitutional principle and a dictate of "natural equity"¹⁰⁷ that we have conveniently forgotten the extensive non-property background in our law. While it is true that the Roman tradition exalted the free market-private property concept,¹⁰⁸ that tradition is just one of the roots of our legal system. Another and equally important part of the background, from which Grotius drew, must be recognized. That is the Christian tradition, which devised the legal concept of "just price."

Just price, a fundamental premise of medieval economic life, was founded upon the notion that property and economic position must be subordinated to the attainment of social justice.¹⁰⁹ In making illegal the selling of an item

104. VATTEL, *op. cit. supra* note 100, at Bk. I, ch. VIII, § 88.

105. *Ibid.*

106. 1 HOLMES-LASKI LETTERS 457 (Howe ed. 1953).

107. See Grant, *supra* note 95.

108. O'BRIEN, AN ESSAY ON MEDIEVAL ECONOMIC TEACHING 104 (1920).

109. *Ibid.*; 8 ENCYC. SOC. SCI. 504 (1932). The maintenance of a just price was "the whole economic teaching of the Church and the whole economic policy of the State. . . . What that teaching and policy aimed at was a fair price, which it was believed could only be found in a stable, regulated price." 1 ASHLEY, AN INTRODUCTION TO ENGLISH ECONOMIC HISTORY AND THEORY 178, 181, 191 (1923).

for more than its worth, or the buying of an item for less than its worth, the proper price was found by repudiating the test of the economic market and seeking instead "to find a medium between a price so low as to render labourers, artisans and merchants unable to maintain themselves suitably, and one so high as to disable the poor from obtaining the necessities of life."¹¹⁰

Of course, non-property concepts are not solely the invention of continental legal systems. The old laws against forestalling, regrating, and engrossing are well-known fixtures of English legal history.¹¹¹ And those prohibitions against selling at unreasonably high prices were not, it should be noted, merely restraints upon monopoly.¹¹² Nor were the rules approved in ignorance of the usual arguments about the sanctity of private property and the virtues of the free economic market. In fact, in one famous case Lord Kenyon made it a point to remark that:

So far as the policy of this system of laws [prohibiting selling at unreasonable prices] has been lately called in question, I have endeavoured to inform myself as much as lay in my power, and for this purpose I have read Dr. Adam Smith's work . . .¹¹³

Dr. Smith took a predictably dim view of these offenses. "The popular fear of engrossing or forestalling may be compared to the popular terrors and suspicions of witchcraft. The unfortunate wretches accused of this latter crime were not more innocent of the misfortunes imputed to them, than those who have been accused of the former."¹¹⁴

The existence and acceptance of these elements of the Christian legal tradition by those who formulated the compensation notion should cast the gravest doubt upon the facile modern assumption that maintenance of established economic values as such was their central purpose. The evidence certainly seems to indicate that the mere fact that government activity destroyed existing economic advantages and power did not disturb them at all.

And the specific evidence which we do have about their views on the scope of the compensation rule supports these general observations. Interestingly, they did not give blanket disapproval to all government acts which inflicted serious or total loss. Quite the contrary, they all talked about a quite specific and limited situation in describing the need for a compensation rule.

Uniformly the example which the early writers had in mind was that typified by the wartime situation in which the army, urgently in need of supplies or funds, seizes them from a citizen near at hand; or the case where the state seizes a house to prevent its use as a shelter for the enemy, or to make room

110. O'BRIEN, *op. cit. supra* note 108, at 107.

111. ASHLEY, *op. cit. supra* note 109, at 182-87; see Jones, *Historical Development of the Law of Business Competition*, 35 YALE L.J. 905 (1926); HANDLER, *TRADE REGULATION, CASES AND OTHER MATERIALS* 16 (1960). See also THEOBALD, *FREE MEN AND FREE MARKETS* 13-14 (1963).

112. *King v. Waddington*, 1 East 143, 102 Eng. Rep. 56 (K.B. 1800).

113. 1 East at 157, 102 Eng. Rep. at 62.

114. 2 THE WEALTH OF NATIONS 125 (Bk. IV, c. 5) (LIX World's Classics, 1904).

for fortifications.¹¹⁵ It was only for the losses sustained in such circumstances that compensation was thought to be required. Significantly, no mention was made of the losses inflicted by sanitary or safety laws, though they were, of course, of very ancient origin;¹¹⁶ nor by the loss inflicted when it was first decided that easements by necessity must be given;¹¹⁷ nor when the rules of nuisance law were imposed;¹¹⁸ nor by the variety of rules which put substantial limitations on the power to dispose of real property.¹¹⁹ And, as we have seen, the early writers expressly approved the losses sustained by price regulation laws.

In trying to understand the distinction they must have intended, it seems clear enough that the forbidden uses were not necessarily the most destructive. The rule they proposed would seem to require compensation when the army seizes a single goat of limited value, but not when an extremely valuable easement of necessity is judicially taken, or an extremely valuable use of property cut off as a nuisance.

What seemed to concern the early writers was not the fact of loss but the imposition of loss by unjust means. It was the exercise of arbitrary or tyrannical powers that were sought to be controlled. As Pufendorf put it, the fear was that "ill Princes," unless constrained, "may sometimes abuse [their powers] to the damage and ruin of their subjects."¹²⁰ The examples they give suggest a principal fear of ill-considered, hasty, or even discriminatory impositions created by the pressing necessity of the state to get a job done, and of a possible animus against those citizens who were not, as Pufendorf put it, "kind or public spirited enough to offer their money [or property] voluntarily."¹²¹

Certainly the foregoing evidence is at least sufficient to suggest that we must look to some principle other than value maintenance *per se* if we are to find an historically accurate as well as currently workable theory for the taking cases. Scanty though it is, there is at least some basis in the early writers for finding that their real concern was a protection of values only as against government conduct which raised the dangers of arbitrary or tyrannical treatment.

In support of that position it can be demonstrated that the English and American authorities writing at about the time of the adoption of the fifth amendment also viewed the provision as a bulwark against unfairness, rather than against mere value diminution.

115. PUFENDORF, *op. cit. supra* note 97; BURLAMAQUI, *op. cit. supra* note 99; and BYNKERSHOEK, *op. cit. supra* note 98, at 222.

116. POWELL, *op. cit. supra* note 83, at 145.

117. *Id.* at 142.

118. *Id.* at 142-43.

119. *Id.* at 140.

120. PUFENDORF, *op. cit. supra* note 97.

121. *Ibid.*

c. *The Test Is Not Supported by the Contemporaneous History of the Amendment*

At the outset it must be noted that contemporaneous commentary upon the meaning of the compensation clause is in very short supply. No really satisfactory discussion or analysis has been found. But the few authorities which are available seem to be consistent with the proposition advanced here, that the clause was designed to prevent arbitrary government action, rather than to preserve the economic status quo.

In what is perhaps the most revealing commentary extant, St. George Tucker wrote about the purpose of the taking clause in 1803:

That [provision] which declares that private property shall not be taken for public use without just compensation, was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever.¹²²

While there is a great dearth of commentary upon the express problem at hand, there are, of course, those who will remind us that the framers were drawn from the property-owning class,¹²³ who will urge that Madison himself was a "conservative guarantor of the status quo,"¹²⁴ and who will seek to draw from those assertions the contrary of the view drawn here about the proper and intended interpretation of the taking provision. Perhaps the best answer to such arguments is the analysis advanced by Madison's definitive biographer, Irving Brant:

It is easy and erroneous to simplify that into a mere statement that governments are set up to protect property rights. . . . But Madison was well aware that in a competitive society, with public order and private rights maintained, property would flow ceaselessly into the hands of those most able to gain and hold it. He was practically saying, therefore, that one of the first objects of government was to protect the poor and near-poor by laws restraining concentration of wealth and the power of its holders.

* * *

. . . Madison was not assailing private property. He was seeking to protect men against property, and to protect property against the destructive effect of too great concentration . . .¹²⁵

Certainly there is nothing here to require adoption of a test that requires a quantitative interpretation of the taking clause.

Nor is our theory inconsistent with the writing of Blackstone himself. Perhaps the best remembered champion of the language of private property, he spoke of property as the third "absolute right" of every Englishman.¹²⁶ But the authorities he cites for his famous statement that the law will not authorize the least violation of property, not even for the general good of the whole

122. TUCKER'S BLACKSTONE, COMMENTARIES 305-06 (appendix) (1803).

123. BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 60 (1950).

124. *Id.* at 175.

125. *Id.* at 174, 176.

126. 1 BLACKSTONE, COMMENTARIES* 138.

community,¹²⁷ are the Magna Charta and a series of statutes of the reign of Edward III. None of those authorities contradicts the thesis put forward here. Indeed, the Magna Charta itself merely holds that no freeman shall be dis-seized of his freehold "but by lawful judgment of his peers or by the law of the land."¹²⁸ And the interpretation put upon that mandate made it no more than a guarantee of rational treatment in procedure and substance.¹²⁹ Indeed, the example of the requirement of compensation selected by Blackstone is quite in accord with the views of Grotius, Pufendorf, and Bynkershoek; he merely argues that compensation would be due when a highway is put across private land. The property owner in that case is subjected to an economic burden under circumstances presenting the same dangers as those singled out by the early writers — appropriation of property by the state for its own account to finance its own enterprise (a critical factor under the compensation test to be proposed later in this article).¹³⁰ The abandonment of the test of quantitative diminution of value can thus be seen as quite consistent with Blackstone.

The same conclusion may be drawn from the famous language of Chief Justice Marshall in *Fletcher v. Peck*:¹³¹

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?

On its face that language may be viewed as a paeon to the policy of prevention of private economic loss, but the facts of the case put the statement in quite a different light. In its simplest terms, the state legislature by statute had conveyed state-owned land to A; A had subsequently conveyed to B, who was wholly ignorant of the transaction between the State and A. Apparently A had bribed some legislators in order to induce passage of the act conveying the land to him. A subsequent session of the legislature, made aware of A's chicanery, passed a law rescinding and repealing the act of conveyance to A. The only problem with this remedial legislation was that at the time of its passage, the land was owned by B, a perfectly innocent and bona fide purchaser.

In holding that such a statute could not divest B of his property in the land, Chief Justice Marshall was merely saying, with eminent good sense, that it was arbitrary and oppressive to make B pay for the dishonesty of A and the Georgia legislature. And it is in that context that Marshall's statement on the security of property fairly acquired must be read. The facts in *Fletcher v. Peck* illustrate the threat of the state's becoming the direct economic bene-

127. *Id.* at 139.

128. Magna Charta (1225) 9 Hen. 3, c. 29.

129. 25 Edw. III, st. 5, ch. 4 ordains that none shall "be out of his franchises nor of his freeholds unless he be duly brought into answer, and forejudged of the same by the course of the law." See also 28 Edw. III, ch. 3.

130. See discussion following note 137 *infra*.

131. 10 U.S. (6 Cranch) 87, 135-36 (1810).

fiary of its own legislative acts; that threat, not the danger or extent of private loss, is the lesson of the case.

The more one examines these early explanations of the constitutional purpose of the taking provision, the clearer it becomes that the protection afforded is most properly viewed as a guarantee against unfair or arbitrary government. Story, for example, stated that the compensation provision, "is laid down by jurists as a principle of universal law [because] in a free government, almost all other rights would become worthless, if the government possessed an *uncontrollable* power over the private fortune of every citizen."¹³² Even the first Justice Harlan, paraphrasing Justice Miller, explained the constitutional purpose of the provision by arguing that: "A government, by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depositary of power, was, after all, but a depotism."¹³³

d. The Test Imports an Unworkable Problem of Definition

Because the diminution test turns on the degree of quantitative diminution of value, it is necessary that the property at issue be precisely defined, so that we can determine how great the impairment of value is. But this is no easy task. If the government floods 80 acres of a 640 acre farm, is that a total destruction of 80 acres, or a mere 12½ percent loss? In a case of compulsory dedication of real property by a land subdivider, the acreage given up can be treated as a total loss, or merely as a loss of a small portion of the entire tract, in which case the end result might even be seen as an increase in the value of the property because of the prospect of municipal services. In the famous *Pennsylvania Coal* case is the loss to be treated as a total taking of that quantum of coal left in the ground, or as a small fraction of the total productivity of the mine? These definitional problems are difficult; they have never been seriously treated in opinions which invariably solve them by flat and unsupported assertions as to the identity of "the" property at issue. Since degree of loss is the very essence of the test, this is a central problem. The failure to deal with the issue, and the terrible complexities of trying to do so are further evidence of the unsatisfactory nature of the diminution of value test.

The series of observations above hopefully suggests that, for purposes of distinguishing between compensable takings and valid exercises of the police power, liberating the inquiry from traditional property notions embodied in the diminution of value approach would be both desirable and consistent with our constitutional history. It remains for us to use this historical evidence to construct an affirmative theory which is both administratively workable and substantively satisfactory.

132. 2 STORY, CONSTITUTION 547-48 (4th ed. 1873) (emphasis added). And Blackstone says that compensability is required to prevent government from "stripping the subject of his property in an *arbitrary* manner;" COMMENTARIES 139 (emphasis added).

133. *Chicago, B. & Q.R.R. v. Chicago*, 166 U.S. 226, 237 (1896), citing *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 663 (1874); see TUCKER'S BLACKSTONE, COMMENTARIES 305-06 (appendix) (1803).

FORMULATING A THEORY FOR THE TAKING CASES

Since the question being asked is what sort of protection is to be given to property, the initial task must be to develop a workable concept of what we mean when we talk about property. Aside from its failure to interpret correctly the policy considerations imbedded in the compensation clause, the diminution of value approach also suffers critically here: it fails to provide an adequate definition of the term property itself. A first step in formulating a better theory must involve finding a substitute for the rigid conception of property as a fixed status definable only in reference to existing economic values.

The essence of property, as we actually use the term, is not fixity at all, but fluidity. Property is the end result of a process of competition among inconsistent and contending economic values. Instead of some static and definable quantity, property really is a multitude of existing interests¹³⁴ which are constantly interrelating with each other, sometimes in ways that are mutually exclusive. We can talk about a landowner having a property interest in "full enjoyment" of his land,¹³⁵ but in reality many of the potential uses (full enjoyment) of one tract are incompatible with full enjoyment of the adjacent tract. It is more accurate to describe property as the value which each owner has left after the inconsistencies between the two competing owners have been resolved. And, of course, even then the situation is not static, because new conflicts are always arising as a result of a change in the neighborhood's character, or in technology, or in public values. These changes will revise once again the permitted and permissible uses which we call property. Property is thus the result of the process of competition.

Once reoriented to this more fluid concept of property as economic value defined by a process of competition, the question of when to compensate a diminution in the value of property resulting from government activity becomes a much less difficult one to formulate. The question now is: to what kind of competition ought existing values be exposed; and, from what kind of competition ought existing values be protected.

There are a number of answers which might be given to this question. Values might be protected against all competition which presents a serious

134. It should be clear that the threshold requirement of an interest which is "eligible" even to participate in the competition and thus to have the opportunity of becoming protectible property is that the economic interest has come into being as an interest recognizable at law. It could hardly raise a taking question if the government were, from the beginning of the nation, simply to refrain from opening certain of the public domain to appropriation. It is this qualification which prevents a taking issue from being raised by the doctrine of sovereign immunity in many circumstances. For this reason, it seems proper to read the decision in the *Armstrong* case (see note 57 *supra* and accompanying text) as turning on a rather narrow dispute over whether the lien had come into being as an interest without reference to the immunity doctrine; that is, the issue was the significance to be attached to the "prospect" of subsequent ownership of the property secured by the lien at the time the lien attached.

135. A phrase used by Mr. Justice Douglas in his *Causby* opinion, 328 U.S. at 264-65.

quantitative challenge; we have seen that this view would inhibit social change in a way that never has been found acceptable.¹³⁶ Values might be exposed to all competition which presents a claim of higher public interest; this, too, has been universally rejected, as government would never have to pay for any legitimate project, such as a road or a school, since those projects are almost by definition¹³⁷ treated as of more public importance than the superseded private use.

Another answer suggested here requires an attempt to isolate and define the two different kinds of private economic loss resulting from government activity and the two different respective roles played by government in the process of competition from which these losses arise. This analysis rests upon the distinction between the role of government as participant and the government as mediator in the process of competition among economic claims. The losses to individual property owners arising from government activity of the first type result in a benefit to a government enterprise; losses arising from the second type of activity are the result of government mediating conflicts between competing private economic claims and produces no benefit to any government enterprise.

Government as enterpriser operates in a host of areas, requiring money, equipment and real estate. It maintains an army which must be fed and clothed and supplied; it builds and maintains bridges and roads and buildings, and for these it must have land and other economic resources; it operates schools and offices and must have money to staff and equip them. Unrelated to ancient and disreputable notions about governmental and proprietary functions, the concept of government in its enterprise capacity as used here describes the economic function of providing for and maintaining the material plant, whether that be the state capitol or a retail liquor store. In this capacity, government must acquire economic resources, which, by one means or another, it must get from the citizenry. It is to be noted that in the performance of this enterprise capacity, government is very much like those who function in the private sector of the economy, and indeed is in its resource-acquiring job a competitor with private enterprisers; it is a consumer of land, machines, clothing, and the like.

In addition to its enterprise capacity, in which government acquires resources for its own account, government also plays another and quite different role. It "governs." That is, it mediates the disputes of various citizens and groups within the society, and it resolves the conflict among competing and conflicting alternatives. Typically in this function it says, as between neighbors,

136. See discussion in text accompanying notes 79-95 *supra*.

137. That governmental projects embrace a public interest sufficient to displace all private uses (without regard to the compensation question, but referring now only to the question of the hierarchy of public interest) is a principle which has been stated in the broadest possible terms. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 426 (1940); see *Berman v. Parker*, 348 U.S. 26 (1954).

that one fellow must cease keeping pigs in his backyard or must cease making bricks at a certain location; as between management and labor it imposes a duty of collective bargaining; as between tenant and landlord it may adjust prices or impose certain standards for health and safety. The essence of this function is that government serves only as an arbiter, defining standards to reconcile differences among the private interests in the community.

While quite different in design and function, the impact and ultimate purpose of government acting in its roles are quite similar. The impact on individual property-owners, whether the government is acting in its enterprise capacity or in its role as mediator, is the same kind of impairment of legally acquired, established economic values. And in performing both functions the government imposes upon private property for the ultimate purpose of furthering the public interest. Certainly, then, it is not urged that these functions are so sharply distinct as to present a perfect theoretical dichotomy. But it is urged that as a practical matter the distinction is real and clear enough to provide the basis for a workable rule of law.

The rule proposed here is that when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking. But losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power. The detailed application of this theory to the prominent and difficult cases and the precise meaning to be given to the notion of enterprise capacity are the subject of the last section of this article. For the present it is sufficient to understand the proposal in the rather general terms already indicated and to note two preliminary facts.

First, examples of takings given by the early writers all fit quite clearly into the enterprise capacity, as do such classic takings as the appropriation of land for a highway or a public building; also such traditional police power regulation as safety laws and price control involve the government only in its capacity as a mediator.

Second, it is important to be clear at the outset that this proposal is quite different from the traditional distinction between takings and regulations attributed to Harlan, though it bears some resemblance to that approach. As we shall see, this test differs fundamentally from the old test in that a finding of enhancement of the resource position of a government enterprise does not necessarily require a physical invasion, or an acquisition of a formal proprietary interest. Moreover, non-compensability will never turn on a finding that the government action is a "mere restriction upon use," but will depend upon an examination of the identities of the parties involved in the competition and of the role of the government in that conflict.

We have seen that in devising a model of competition for analysis we have shifted emphasis from the old question of "how much" may values be dimin-

ished to the question "against what qualitative kinds of value-diminishing acts should existing values be insulated." Having established the view of "competition" as the essence of property, we now move to an analysis of the distinction between fair and unfair competition as the key to answering the compensation question. As already suggested, notions of fair and unfair competition are equated here with the distinction between government imposing economic loss as a mediator among private competing interests and government imposing economic detriment in support of resource-acquisition by itself in its enterprise capacity.

Why that distinction is equated with fairness and unfairness is suggested by our previous conclusion that the real function of the compensation rule is to provide a bulwark against arbitrary, unfair, or tyrannical government. It is submitted here that resource-acquisition by government in its enterprise capacity presents a three-fold source of such dangers, and that the compensation provision can satisfactorily serve its function to the extent that it immunizes existing values against these risks by requiring the payment of compensation whenever loss is occasioned by exercise of the enterprise capacity. Let us examine these three dangers.

a. The Risk of Discrimination

In typical competition among private interests, both the participants and the issue in conflict come into being independently of any governmental activity. The problem goes to government for mediation fully defined; government serves only the function of resolving it one way or the other. An alleged nuisance would be an example of such a private debate. But when the government is engaged in resource acquisition for its own account, it typically plays a much larger and more central role; it frequently both creates and defines the need. It has the power to say what commodity is needed, at what location it is needed, in what amounts and at what times. Moreover, in a good many cases the resources sought are more or less fungible.

For these reasons the official procurement process often provides a particularly apt opportunity for rewarding the faithful or punishing the opposition. In obtaining an item such as an automobile, for example, the range of choices could produce a discomfiting prospect for discrimination among the citizenry; whether the choice is made for a particular reason, as a political choice, or for no reason at all, the situation could be an undesirable one. Of course just how much choice there will be varies greatly depending on the nature of the acquisition: there will probably be less choice in planning a highway right-of-way than in obtaining an automobile; and perhaps even less choice in selecting a dam or power site.

While there was no evidence of a discriminatory motive in such a case as *Central Eureka Mining*,¹³⁸ for example, the very fact of imposition of burden on a single industry out of many similarly situated seems to illustrate

138. 357 U.S. 155 (1958); see discussion following note 68 *supra*.

the danger. As Justice Harlan suggested in his dissent in that case, the question naturally arises, why was the gold mining industry selected for special treatment. The existence of such a risk should be reason enough to desire protection from the opportunity for injustice.

b. The Risk of Excessive Zeal

A second characteristic of the enterprise capacity is the fact that in performing this function the government acts as a judge in its own case. The restraint and detached reflection which one expects from a legislature presiding over a contest between two private interests, and the consideration required before established interests are put aside, may well be feared to be wanting when government is called upon to implement its own projects.

Just as a fear of lack of restraint in the heat of military necessity first led to expressions of the need for a compensation rule when procurement was involved, such recent cases as *Central Eureka Mining* support a current concern that government involved in pursuing an important national goal, in which it is an active participant with an economic stake in the outcome, may be prone to display a questionable zeal in acquiring the tools needed to get on with the job.

Obviously the potential lack of restraint will not always be realized, especially in a government where the executive department must always get support for its plans either in the legislature or the courts, but that danger may be greater when a self-interest is involved can hardly be denied. It is the difference between legislators debating a typical controversial issue on which there are conflicting views and their deciding to enact a law that will double their own salaries.

c. The Scope of Exposure to Risk

Finally, and perhaps most important, there is an issue of scope of risk similar to the question of duty in the law of torts — and it ought to be solved in the same way. In torts the usual rule is that once the duty is established, the monetary damages to which one may be subject are unlimited.¹³⁹ But the *scope* of risks to which one can be made liable is clearly circumscribed.¹⁴⁰ Precisely the same distinction is proposed here. As we have seen, a limitation rule based merely on diminution of value has never been acceptable;¹⁴¹ but it is possible to protect established interests by limiting the scope of competition to which they are subject. A good argument can be made that the proper way to draw the line limiting exposure to losses is with the distinction between the demands of private competition and those of resource-seeking government enterprises.

139. *E.g.*, *In re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560.

140. *E.g.*, *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

141. Of course there have been some efforts to deal with the limitation of risk problems quantitatively in torts both within and without the negligence framework. Statutory damage limitations in some wrongful death acts is an example of the former, and scheduled benefit plans in workmen's compensation laws an instance of the latter.

The private competition among property owners is generally characterized by two factors: the competition to which one must submit is both localized and reciprocal. Thus, for example, in the typical nuisance case the users with whom an industrialist must compete are usually that limited group of property owners who can see, hear, or smell his operations. That class of persons who have standing to challenge his use as a nuisance owe him a parallel duty to use their property in a way that is not offensive to his reasonable uses. In the same sense, the typical zoning case is one in which there is a circumscribed physical community to which every owner must submit (or, in which he must compete), and everyone in that community is subject to the same sort of limitation in his favor. A like limitedness and reciprocity exists in such typical police power regulations as fire safety laws; there is a specific area or community to which a man is subject, and the other members of that community have similar obligations to him.

This characteristic is not to be confused with the traditional notion of reciprocal benefits. It is perfectly clear that restrictions may be wholly at odds with benefits received; indeed, it is understood that a restriction may put one out of business and thus impose total detriment with no benefit. That is not the point here. The only characteristic sought to be identified is that of limited risk, and a balance only in the sense of reciprocity of opportunity or reciprocity of competition.

Conversely, the subordination of existing private uses to governmental resource-acquisition provides no such limitations. Property owners in competition with one another are each subject to similar duties and to the demands of each other individually or in concert; the physical community more or less defines the scope of the risk, and each member of the community is similarly situated. But if the federal government decides to put a dam or a military base in that community, the scope of risk to which the property owner is subject is vastly increased. He is no longer subjected merely to the typical and ordinary risks of the community of which he is a part, but to a risk which in its type and size may be extraordinary and unprecedented. Certainly it was the imposition of this sort of unforeseeable and sudden risk, extraordinary in local affairs, which concerned the early writers.

Moreover the reciprocal element which seems to invest the competition among private users with an element of fairness, or at least of sportsmanship, is absent when one of the parties is the government. In its capacity as a seeker of resources it often has no presence in the community which is reciprocally subject to limitation. When the government seeks a site for a dam or a highway all the obligation flows in one direction; the private citizen's use is subjected to the proposed public use, but the government has no corresponding physical existence which is subject to the claims of its neighbors. It is not a part of the competing community. And even when the government has a preexisting physical presence in the community, as in the airport noise cases, traditional doctrines of sovereign immunity have largely insulated it from any

role in the interplay of duties and rights which characterize the private community.

These differences suggest a rule which allows for subjection of existing uses to a competition with other private uses, but denies — except upon compensation — subordination of private uses to the public interest in the form of government resource-acquisition in its enterprise capacity.

To be sure, the three dangers just discussed are by no means always present in government enterprise procurement, nor are they always absent in the resolution of private sector disputes. But, then, the proper goal of a compensation rule can be viewed as similar to that produced by a conflict of interest law: its purpose is to shield citizens from the burden of proving discrimination or lack of restraint in every case. It thus gives security against the possibility of such conduct by removing the opportunity. Likewise, in setting a scope of exposure to risk, the principal purpose of a compensation rule would be to make a general policy decision about the nature of economic security the society desires to provide, rather than to guarantee a particular degree of economic security for each piece of property for each individual.

APPLYING THE TAKING TEST

It remains now only to observe how the proposed theory works when applied to the cases. The precise rule to be applied is this: when an individual or limited group in society sustains a detriment to legally acquired existing economic values as a consequence of government activity which enhances the economic value of some governmental enterprise, then the act is a taking, and compensation is constitutionally required; but when the challenged act is an improvement of the public condition through resolution of conflict within the private sector of the society, compensation is not constitutionally required.

To be sure, the acquisition of title or the taking of physical possession will be present in the great majority of taking cases under this theory. But — and this is the important point — the presence or absence of a formal title-acquisition and/or invasion will never be conclusive. These formalities are not necessarily present when the government, as an enterpriser, is acquiring resources for its own account. With that in mind, we may now turn to the specific cases.

Because the airport noise cases have been so prominent in recent litigation involving the meaning of the taking provision,¹⁴² an analysis of those cases presents an appropriate starting point to test the proposed approach. These cases are particularly useful for another reason; they present the identical factual problem in a variety of formal settings. When a landowner adjacent to an airport is disturbed by direct overflights, as in *Causby*,¹⁴³ it is possible

142. *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946). Among the interesting more recent federal cases are *Batten v. United States*, 306 F.2d 580 (10th Cir.), *cert. denied*, 371 U.S. 955 (1963); *Mock v. United States*, 32 U.S.L. WEEK 2435 (Ct. Cl. 1964); *Avery v. United States*, 330 F.2d 640 (Ct. Cl. 1964).

143. See note 142 *supra*.

to resolve the taking issue by quite traditional means: the overflight can be treated as the acquisition of a servitude, an interest in property, accompanied by physical possession and an exclusion of the former owner; this is a taking in a classic form.¹⁴⁴ Indeed the Court's opinion in *Causby* made a special point of stating that the government's act was "a direct invasion of respondent's domain" and held that "it is the character of the invasion, not the amount of damage resulting from it, . . . that determines the question whether it is a taking."¹⁴⁵

Of course it is possible to cause harm identical to that in *Causby* without any such "direct invasion," as when noise and glare is imposed by a flight over a neighboring tract of land, rather than over the plaintiff's own land. Under traditional views the absence of an overflight raises the gravest doubts about whether there has been a compensable taking, and the current position seems to be that in the absence of an overflight there is no taking.¹⁴⁶

Essentially the same factual problem might be presented in yet another way. By appropriate zoning of land near an airport, government might prevent the problem from arising by prohibiting the institution or continuance of uses which would be inconsistent with anticipated airport activities.¹⁴⁷ Here the government act is even less like a traditional taking case than the other two situations, and it is not clear whether compensation would be granted in such a case.

The uncertainty of treatment under the traditional invasion theories is equalled, at least, by uncertainty as to how the cases would be treated under a diminution of value test. In *Causby*, the leading case, it seems that the extent of damage was only a moderate portion of the total value of the land; the evidence as reported by the Court showed only that there was "destruction of the use of the property as a commercial chicken farm,"¹⁴⁸ and the case fell short of being one in which the regulation "deprive[d] the owner of all or most of his interest in the subject matter . . ."¹⁴⁹ In the recent *Goldblatt* case, it should be noted, the Court held that "the fact that [the regulation] deprives the property of its most beneficial use does not render it unconstitutional."¹⁵⁰

144. *I.e.*, the imposition of a servitude; see *Portsmouth Co. v. United States*, 260 U.S. 327 (1922).

145. 328 U.S. 256, 265-66 (1945).

146. See *Batten v. United States*, 306 F.2d 580 (10th Cir.), *cert. denied*, 371 U.S. 955 (1963). The present view of the courts is that physical invasion merely by "sound and shock waves" is not a sufficient invasion to constitute a taking. *Avery v. United States*, 330 F.2d 640, 645 (Ct. Cl. 1964), citing *Batten*.

147. See *Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUPREME COURT REVIEW 63, 90; see text at note 64 *supra*. See also *Indiana Toll Road Comm'n v. Jankovich*, 193 N.E.2d 237 (Sup. Ct. Ind., 1963), *cert. granted*, 84 S. Ct. 1352 (1964). The state courts have usually required compensation in such cases, but not usually for the right reason. See note 64 *supra*; *Roark v. City of Caldwell*, 394 P.2d 641 (Idaho, 1964) (citing cases).

148. 328 U.S. at 259.

149. *Id.* at 262 n.7.

150. 369 U.S. 590, 592 (1962).

And only two months prior to the decision in *Goldblatt* the Court reaffirmed its position in *Causby* by saying that in *Causby* it had "held that the United States by low flights of its military planes over a chicken farm made the property *unusable for that purpose* and that *therefore* there had been a 'taking' . . ."¹⁵¹ In short, as has already been repeatedly indicated, the diminution of value test as used by the Court is wholly unreliable and unpredictable.

By contrast, under the test here proposed the three airport noise situations would be treated identically, and as quite simple and straightforward cases. Plainly the operation of the airport facility is an example of a government enterprise. Plainly, too, the acquisition of a right to impose such noise and glare on the enterprise's neighbors, whether called an easement, a servitude, or whatever, is a valuable addition to the assets of the enterprise; assuming that property or tort doctrines, such as negative easement or nuisance, prevented the private enterpriser from so imposing on his neighbors, it is a resource which the private party would have either to forego or to buy for a valuable consideration. But by virtue of its special position the government has acquired this asset for its own account without buying it; this is precisely what the rule proposed here will not allow. Compensation must be paid.

Conversely, cases like *Goldblatt*¹⁵² or *Consolidated Rock Products*,¹⁵³ which are treated as difficult ones by the courts, are readily recognizable as non-compensable under the proposed theory. The zoning regulation in those situations does not add to the resources of any official enterprise; it is the regulatee's neighbors as citizens who benefit directly.¹⁵⁴ The industrial user has simply been subjected to a competition with his new neighbors, and he has lost.

Likewise the famous decision in *Miller v. Schoene*,¹⁵⁵ denying compensation, must be recognized as a correct one. There a Virginia statute required the destruction of red cedar trees in order to prevent the spread of a communicable plant disease to apple orchards nearby. The difficulties created by looking at the extent of harm, the imposition of economic loss on one person to aid another, or the lack of a formal invasion are all eliminated if one concentrates on the critical fact that the regulation at issue did not add to the assets of any government enterprise, but merely resolved a case of conflicting uses between neighboring proprietors.

151. *Griggs v. Allegheny County*, 369 U.S. 84, 88 (1962) (emphasis added).

152. 369 U.S. 590 (1962).

153. 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36 (1962).

154. It will be seen that the test of benefit received by the government enterprise is being used in the sense of the rather direct addition of a value which would economically be considered an asset by a private business. It is of course true that every safety law might be considered an asset of the police or fire or health departments, in the sense that good health and safe conditions will reduce their work load. But such collateral benefits are not considered assets or resources here any more than the prevalence of cancer is considered an asset of any given doctor or hospital. No such person could claim his property was taken if the government found a cure for cancer.

155. 276 U.S. 272 (1928).

Of course the test proposed here is not limited to cases involving land ownership, but is equally applicable to the many other areas in which taking problems arise. Thus nationalization of the railroads would be compensable for the obvious reason that such an act would itself be the acquisition of a government enterprise. Conversely such common regulations as health and safety laws, liquor regulation, and statutes such as workmen's compensation would not require compensation for the reason that in none of these situations is government operating in its resource-acquiring, enterprise-enriching capacity.¹⁵⁶

As the preceding examples show, the test proposed here would leave the majority of current holdings intact. There is, however, one established line of cases that would seem to require reversal, and therefore special mention is appropriate. This is the venerable group of grade crossing cases.¹⁵⁷ It has been almost the universal rule to charge the costs of the grade separation to the railroad.¹⁵⁸ Certainly the maintenance and operation of the public highway must be considered a governmental enterprise. In acquiring the building of a grade separation the state is simply adding to the economic status of the highway by extinguishing a servitude (the railroad grade crossing) appurtenant to its highway property. Thus viewed, the grade crossing cases seem indistinguishable in principle from cases like *Causby*, which present the reverse of the same coin. In *Causby*, the government facilitates the flow of traffic to and from its airport enterprise by taking an easement across private property; here the government facilitates the flow of traffic across its highway enterprise by extinguishing a private easement across its property. Despite their long and quite consistent history, the grade crossing cases simply will not withstand this analysis and must therefore be disapproved.¹⁵⁹

There are, to be sure, some cases which do not so readily submit to analysis and classification as those treated in the preceding few pages. The idea of a

156. In a technical sense certain situations like workmen's compensation, since they may involve a payment to a government fund, seem to fit the description of an enterprise. *E.g.*, *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (workmen's compensation); *Noble State Bank v. Haskell*, 219 U.S. 104 (1911) (Bank depositor's protection fund); *California Auto. Ass'n v. Maloney*, 341 U.S. 105 (1951) (assigned risk law). But here the government acts only as a stakeholder for the redistribution of economic values to the regulatee's private competitors, usually a customer or employee in these situations. The clue that these cases are to be treated as non-compensable non-enterprise situations is the fact that they might alternatively be administered either through a private or a government agency. Thus the involvement of the government, when it occurs, is irrelevant. For an alternative analysis of these cases, see note 175 *infra*.

157. *E.g.*, *Atchison, T. & S.F. Ry. v. Public Util. Comm'n*, 346 U.S. 346 (1953); *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935); *Erie R.R. v. Public Util. Comm'rs*, 254 U.S. 394 (1921). See text at notes 71-72 *supra*.

158. *Chicago, M. & St. P. Ry. v. Minneapolis*, 232 U.S. 430, 438 (1914).

159. The typical rationale used in the cases, that having caused the harm the railroads must bear the cost of eliminating the evil, has been critically discussed in the text accompanying notes 73-78 *supra*.

government enterprise is not a rigid and mechanical notion, nor is it always crystal clear whether, if there is a government enterprise involved, it is being enriched by the challenged regulation. Although the precise elements of the enterprise function cannot be mechanistically delineated, the concept is nonetheless workable in even the most difficult taking cases, as will be shown by the following discussion. The two cases about to be analyzed are representative of the most difficult and unorthodox forms in which the taking issue arises. Yet the concepts and tests proposed here can be applied even to these cases with reasonable clarity.

*Central Eureka Mining*¹⁶⁰ is perhaps the best known of these cases. It is not easy to determine at first glance whether or not the government order shutting down the gold mines was an act of enterprise resource-acquisition. From one perspective the case looks very much like *Miller v. Schoene*, seeming to involve the prohibition of one enterprise in order to foster those which are deemed to have a higher usefulness to society. But closer examination reveals a critical difference. It was clear in the *Central Eureka* case that the order shutting the mines was designed to force the miners into essential war work. Since the true effect of the order was to decrease the competition for labor in favor of war industries, and since government was the sole customer of these industries, the order in essence forced a reduction in price for the customer of these industries — the government. The real competitor of the gold mines in that instance was the government in the form of its suppliers as rival employers. Thus, despite superficial appearances, the situation was not one of competition between two private industries. Circuitous though the approach was, its net effect was to enhance the government's position as the enterpriser supplying a war machine. The situation in its effect is rather like that which would obtain if, instead of condemning land for a road, the state zoned it "for highway right of way only," thus making itself the sole possible buyer. No doubt everyone would consider such an act compensable.¹⁶¹ For the same reason the closing of the mines should have been held compensable.

It ought to be noted in regard to the *Central Eureka* case that it presented precisely the sort of dangers against which the compensation clause seems to have been aimed. Government imposed specifically upon the gold mining industry a heavy burden which was unique and quite beyond the ordinary competitive situation in that industry; it imposed a burden created by the waging of the war. The pressures upon government agencies to wage the war as expediently as possible led to the realization of the potential for self-interested regulation lacking the safeguard of detached consideration by a neutral mediator. And, finally, as the petitioners claimed, they seem to have been singled out for special treatment, unlike that accorded other similarly situated industries. For all these reasons compensation should have been required in the *Central Eureka* case.

160. 357 U.S. 155 (1958); see discussion in notes 68-70 *supra* and accompanying text.

161. *Joint Meeting v. Borough of Middlesex*, 69 N.J. Super. 136, 173 A.2d 785 (1961).

Central Eureka became a problem case because the government proceeded in an unconventional manner to achieve its purpose. But that case is by no means unique. Indeed, local governments have become highly ingenious at using the form of use regulation to accomplish almost any result desired.¹⁶² Perhaps the most interesting and instructive example is found in a recent New Jersey case, which unfortunately did not reach the United States Supreme Court.¹⁶³ In that case plaintiff owned a tract of swampy land at the edge of Parsippany, a large and developing township. The land was particularly suitable for wildlife and flood control purposes, and it was clear that no significant commercial uses could be made of the land unless it were filled. The evidence showed that township officials had "the expectation or hope that higher governmental authority might well acquire the area as part of a large and much discussed flood control project to benefit the entire . . . Valley."¹⁶⁴

Against this background a fascinating series of zoning ordinances was enacted. First the swamp area was zoned in the township's most restrictive residential classification. "[S]ince no one would build an expensive home in a marsh," the ordinance "served the practical purpose of precluding all development."¹⁶⁵ A few years later the ordinance was amended to create an "Indeterminate Zone Classification" which "forbade any new use or change in existing use except for agricultural purposes or the growing of fish, water fowl and water plants and also forbade any dumping . . ."¹⁶⁶ Finally, in 1960, the township devised the form of regulation which produced the legal challenge. The introductory paragraph to the new regulation expressly stated that "these areas can perform a function for the Township . . . if they are properly regulated in their uses."¹⁶⁷ The ordinance then proceeded to specify the uses which could be made of the land, among which the following were dominant: (1) "outdoor recreational uses operated by a governmental division or agency;" (2) "conservation uses 'including drainage control, forestry, wildlife sanctuaries and facilities for making same available and useful to the public;'" (3) "township sewage treatment plants and water supply facilities."¹⁶⁸

By the time they had finished, the township authorities had made it about as explicit as possible that they were treating the plaintiff's land as a public facility. The consequence of the so-called zoning law was to make the property almost as much an adjunct of the government park, recreation, and utility system as if it had purchased a fee simple interest. Under the test proposed here there can be no doubt that the land had, at least in substantial part, been

162. See cases cited at notes 62-66 *supra*.

163. *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963).

164. 193 A.2d at 235.

165. *Ibid.*

166. *Ibid.*

167. *Id.* at 236.

168. *Ibid.* No practical economic uses were in fact available under these restrictions. *Id.* at 239-40.

added to the resources of the township in several of its enterprise capacities; thus compensability is clear despite the facade of "mere" regulation.

A somewhat more difficult question is presented by the first of the zoning ordinances, where the regulation did not blatantly open the land to the public but appeared to be nothing more than a traditional example of residential zoning. While it is necessary in order to resolve this question to go behind the face of the ordinance, the result ought not to be in doubt. Plainly this ordinance was not a mere classification for restricted residential uses, since the evidence showed that the land could not and would not be used for residence. The real consequence of the regulation was to prevent any development of the land in order to effect an option on the property at present undeveloped values for future use in official flood control and conservation uses. The evidence showed that this zoning law was merely a less candid form of the device used in *Miller v. City of Beaver Falls*¹⁶⁹ — that is, platting undeveloped private lands for parks or roads or schools, with the effect of preventing development and thus holding down the price for future proposed public acquisition. Since such platting has the economic effect of acquiring an option to buy at a given price, it should be treated as a resource acquisition for whatever governmental enterprise is receiving the benefit of the option. Thus, under the proposed test, even the original residential zoning ordinance, which had none of the characteristics of a traditional "taking," would require compensation.

The *Central Eureka* and *Parsippany* cases have been selected for extended treatment because they particularly exemplify the kind of taking cases which today give the courts trouble. They are difficult cases for the courts because they present situations where there has been no acquisition of title or physical invasion and where the challenged act has been in a form traditionally treated as a non-compensable exercise of the police power; that is, cases where government's act is in the form of mere restriction upon use. Moreover, in representing instances of total or near total destruction of value, the two cases illustrate the inconsistency with which the factor has been handled; in *Central Eureka* the Court found no taking; in *Parsippany* the court found a taking expressly because of the extent of economic loss incurred.

Hopefully the treatment of these unorthodox cases here demonstrates that the proposed test of compensability provides a workable doctrine in both conventional and so-called difficult cases. Nonetheless, this discussion cannot be concluded without noting a few classes of cases which call for independent treatment.

Reciprocal Benefit. First, and simplest, of the exceptions is the group of reciprocal benefit cases. These are cases in which a restriction clearly enhances the resource value of a government enterprise, but where compensation is properly denied on the ground that the "victims" received benefits which equal or exceed the detriment imposed.¹⁷⁰ Compulsory dedication laws often may

169. 368 Pa. 189, 82 A.2d 34 (1951).

170. *United States v. Sponenbarger*, 308 U.S. 256, 267 (1939).

be so analyzed. While a developer may be required to dedicate some portion of his tract for roads, schools, or parks, the prospect and promise of urban facilities and services will often improve the value of the remaining portion of the tract sufficiently to more than offset the loss sustained in the dedication.¹⁷¹

Incidental Benefit. Another group of cases in which compensation must be denied, despite the fact of increase in the value of a government enterprise, are those in which the government obtains the benefit incidentally along with all the private citizens in a community, rather than as a result of its special status as the sovereign. Suppose, for example, that a town enacts an ordinance requiring all mining enterprises to operate so as to maintain subjacent support for all neighboring properties. The result of such a rule would be protection for private landowners insofar as they bordered on mining properties, and it would also protect government property which borders on the mining property. Thus, if a state highway adjoins the mine, the consequences of the ordinance would be an enhancement of the value of the government enterprise, the highway. Yet this advantage would be non-compensable, because the government profited only as an incidental beneficiary of a rule enacted to resolve a controversy between private parties. In this sense it can be said the government benefits as a private competitor. The reason for this distinction seems clear enough. The rule of compensability proposed here is predicated on the distinction between losses incurred as a result of competition among private interests and those which result solely from the government's operation of its enterprises. When government benefits in such cases as the subjacent support situation, a form of private competition rather than government resource acquisition has occurred. Thus, the government need not compensate whenever it benefits as any other member of the community does from an activity which would not require compensation from any private property owner.¹⁷²

Perhaps the most important current application of this exception to the general rule is in the access cases which have been so numerous and so troublesome for the courts.¹⁷³ In these cases, typically, government changes the location of its highway enterprise by diverting traffic, or by replacing an old highway with a new limited-access turnpike, or by closing a road completely. As a result property owners may sustain an economic loss. It would seem helpful to consider these cases in the same category as those in which one individual has received a benefit as a result of his proximity or favorable location in respect to the property of another. When, in the private sphere, an economic loss is sustained as a result of one party's moving or closing his business, no action for damages or compensation is allowed. Insofar as government exer-

171. See Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).

172. Application of this rule to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 417 (1922), would have required a decision for the government, as Brandeis urged in dissent.

173. Cases are collected in the note at 73 A.L.R.2d 640, 652 (1960). See also Covey, *Frontage Roads: To Compensate or Not to Compensate*, 56 NW. U.L. REV. 587 (1961).

cises the same privilege which is available to every private citizen, it ought likewise to be free from a duty to compensate.

While freedom to change uses or location has been only fitfully recognized as the essence of the access cases in state courts, the Supreme Court has never had any trouble with this species of case. Thus in *Reichelderfer v. Quinn*,¹⁷⁴ when the United States decided to convert some park land next to the claimant's property into a site for a fire station, the Court did not hesitate in holding that no compensation was due. The government in *Reichelderfer* had done no more than any private citizen may do to his neighbor; if one man owns a theatre which benefits his neighbor's restaurant, the restaurant owner is without remedy if his neighbor converts the theatre into a warehouse and thus terminates the primary source of customers for the restaurant. In this sense, situations like *Reichelderfer* and the access cases are wholly unlike the typical compensation case — acquisition of a highway right of way, or a flight easement, or a ship — in which the government inflicts a loss in a way which no private citizen would be permitted to do.

Finally, it is important to keep in mind that the test proposed here is intended only as a guide to dealing with the general problem presented by government activity which inflicts economic loss upon an individual or selective group within the society. No claim is made that the enterprise test is a magical formula which will with perfect symmetry solve every conceivable question of government activity which affects the economic status of individuals. Legal problems are simply too diverse and complex for the application of any such universal solvents. Certainly there are any number of situations which might abstractly qualify as "takings" under the test proposed here, which cannot be deemed to require compensation. The imposition of a fine in a criminal proceeding, the proceeds of which go into the state's general funds, is conceptually a taking under the formula suggested here. But we recognize a privilege to impose such deprivations in order to promote an important policy, just as we recognize an exception to the involuntary servitude proscription by permitting involuntary military service to be required. That such exceptions may be logically inconsistent with other possible cases when a privilege is denied proves only that law must pay some deference to tradition and history, even in derogation of antiseptic rationality.

Likewise, it is recognized that every tax technically fits the description of a taking as formulated here (just as it does, incidentally, under the old Harlan invasion theory). But here, too, the temptation to turn the proposed rule into an intellectual plaything must yield to an attempt to find workable rules for a real world. Of course a government act is not immunized from the compensation provision of the Constitution merely because it has been labelled a tax. But most taxes are not takings because they incorporate precisely the goal which the compensation rule is designed to achieve: they spread the

174. 287 U.S. 315 (1932).

cost of operating the governmental apparatus throughout the society rather than imposing it upon some small segment of it. Once that cost has been broadly diffused, though perhaps not to every member of the society nor to each in identical amount, it would seem that the essential problem of the taking provision, as delineated earlier, would be overcome.¹⁷⁵

With these perspectives in mind, it should be possible to approach the problem fruitfully. In essence, a court ought to ask itself these questions: first, does this case raise the sort of issue with which the taking provision was designed to deal; that is, does it present a case of essentially individualized cost-bearing of some public improvement? If the answer to this question is no, as it is with most tax measures, then the constitutional issue may be dismissed forthwith. Second, is some privilege being invoked which must be recognized as an exception to the compensation rule, such as the right to impose fines in a criminal proceeding? Unless the answer here is yes, we must then go on to ask the last question: is the loss incurred here a consequence of resource-acquisition by a governmental enterprise? The response to that final question should determine the issue of compensation.

175. The cases where the cost has already been widely spread do not provide the usual taking litigation. The typical and classic cases — the ones that have presented difficulties — are almost uniformly cases where loss has been sharply individualized, as in *Mugler*, *Hadacheck*, *Caltex*, *Causby*, *Central Eureka*, *Goldblatt*, *Consolidated Rock Products* and *Miller v. Schoene*.

But certain cases in which taking problems have been raised might well have been treated as non-compensable on the ground that the cost was, through cost increases of the products involved, so widely diffused that no substantial taking problem was raised. See cases cited in note 156 *supra*. Interestingly, these are cases in which the diminution of value test may finally play a useful role. It can be said that it is only insofar as the regulation does not destroy the business that it is possible to spread the cost sufficiently through price adjustment. It is to be noted that in such cases the burden seems to be uniformly imposed on all competitors throughout the industry, which fact makes the cost-passing-through-price-increase notion possible. The railroad grade crossing cases (cited in note 157 *supra*) are distinguishable for the reason that the burden there lacks such uniformity.

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BELLA SEIDENBAUM
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CONTRIBUTORS TO THIS ISSUE

THOMAS I. EMERSON. B.A. 1928; LL.B. 1931; M.A. 1946, Yale University.

JOSEPH L. SAX. A.B. 1957, Harvard University; J.D. 1959, University of Chicago.

JOSEPH W. BISHOP. B.A. 1936, Dartmouth College; LL.B. 1940, Harvard University.

WALTER F. BERNS. Ph.D. 1953, University of Chicago.

NELSON W. POLSBY. A.B. 1956, The Johns Hopkins University; M.A. 1958; Ph.D. 1961, Yale University.