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**TO REGULATE, OR NOT TO REGULATE—
IS THAT THE QUESTION?
REFLECTIONS ON THE SUPPOSED DILEMMA BE-
TWEEN ENVIRONMENTAL PROTECTION AND
PRIVATE PROPERTY RIGHTS**

*by Michael M. Berger**

I. INTRODUCTION

In the old days we had such abundant land and the land was so rich that waste didn't seem to matter. But millions of acres of our prime agricultural land has fallen to the tract builders and much more is doomed. Litter, endless billboards, honkytonk commercialism, and banal slurb construction line the highways. Poisons and sewage pollute our bays, lakes and rivers. Smog chokes Los Angeles, but what the San Francisco Bay Area and the Central Valley can anticipate will make Los Angeles seem desirable. And this is but part of the story.

. . . .

Despite the awesome political power of those who make money in the process of polluting and destroying the resources of California, we have it within our power to halt the spread of blight and to return this bright land to the splendor it once was. Right now, today, we have the constitutional right, the technology and the money. The problem is how to muster them.¹

* J.D. 1967, Washington University; L.L.M. 1968, University of Southern California; Member, California, Missouri, and United States Supreme Court bars; Adjunct Professor of Law, Loyola University of Los Angeles. The author is a member of the Beverly Hills law firm of Fadem, Berger & Stocker. Agreeing with Justice Douglas that private practitioners who may have "axes to grind" should so note when they enter the scholarly lists, so that "[t]he reader . . . know[s] through what spectacles his adviser is viewing the problem" (Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 228-30 (1965)), the author notes the following: his practice consists of representing property owners in real property litigation. As such, he has sought to invalidate or obtain compensation for the enactment and enforcement of certain types of land use regulations. On the other hand, he has represented some governmental entities. Furthermore, he has participated in "environmental" litigation seeking to slow or curb thoughtless development. A final note: this article has been in the author's head for some time. The catalyst which caused it to leap forth was Professor Robert W. Benson's *Book Review* in a recent issue of this journal. This may help to explain what some might see as undue prominence given that book review herein. Enough digression.

1. W. BRONSON, HOW TO KILL A GOLDEN STATE 9, 10-11 (1968).

Growth begets problems. Thoughtless growth invites disaster.² That much is probably stipulated.³ We have long passed beyond the days when those who are concerned about the adverse environmental effects of growth, development and "progress" can be dismissed as "little old ladies in tennis shoes" or caricatured as the civil counterparts of religious fanatics proclaiming the end of the world.⁴

We've got trouble, folks, right here in River City, as the Music Man would have put it. Trouble brought on by burgeoning population.⁵ Trouble brought on by desires to escape the inner city and live in suburbia. Trouble brought on by increased recreational time, causing an increase in the need for recreational areas. All of these troubles converge on one limited resource for their solution—land. Land is needed for living space. Land is needed for recreation. The bigger our population becomes, the further our cities sprawl. What used to be farms and open fields are now suburbs. Areas available for recreation not only shrink, but also retreat further into the hinterlands. Indeed, one of the problems is that the "hinterlands" are disappearing:

The utter disregard for the integrity of the land and its relationship to man by powerful corporate executives, together with smaller participants caught up in this frantic cycle of devastation, inflicts special penalties on the young and the unborn who are so little represented. The uses of land resources throughout America must be brought under a working philosophy of trust, buttressed by fair, democratically enforced laws and far-sighted planning. This is the same philosophy of trust which inspired the conservationists' partial victory early in the century when the federal government secured and protected large portions of public lands and forests. The demands on our natural resources are

2. For some of this author's earlier comments, see Fadem & Berger, *A Noisy Airport Is A Damned Nuisance!*, 3 Sw. U.L. Rev. 39, 39-44 (1971).

3. For recent exhaustive studies, see, e.g., F. BOSSELMAN & D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* (C.E.Q. 1971); *POWER AND LAND IN CALIFORNIA: THE RALPH NADER TASK FORCE REPORT ON LAND USE IN THE STATE OF CALIFORNIA* (R. Fellmeth ed. 1971); W. RODGERS, *CORPORATE COUNTRY: A STATE SHAPED TO SUIT TECHNOLOGY* (1973) [hereinafter cited as RODGERS]; J. SAX, *DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION* (1971) [hereinafter cited as SAX]; *THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH—A TASK FORCE REPORT SPONSORED BY THE ROCKEFELLER BROTHERS FUND* (W. Reilly ed. 1973).

4. See RODGERS, *supra* note 3; Berger, *You Know I Can't Hear You When the Planes Are Flying*, 4 URBAN LAW. 1, 4-5 (1972); Friedman, *The Operational Impact of NEPA and Related Environmental Laws, Regulations, and Orders on Mineral Operations*, 19 ROCKY MT. MINERAL L. INST. 47, 50 (1974).

5. Cf. Gibbons, *Law in an Age of Social Change*, 57 A.B.A.J. 151, 152 (1971) ("[t]he murder rate of any area may be predicted very accurately by knowing no more than its density of population").

now much greater and much more critical. And time is not so plentiful for the exercise of indifference.⁶

Concern for the future is not only called for but also here. It may be seen in legislative enactments at the highest levels,⁷ and in the seemingly endless flow of litigation which may, in one way or another, be placed beneath the broad umbrella labeled "environmental."

Thus, we have a problem, one for which even the most callous express concern. But what do we *do* about it? The facile answer, of course, is "make it illegal to degrade the environment." In our people's fascination with laws, it is often presumed that if something is unwanted, it may simply be forbidden. And that is the end of it. But this isn't the "Wild West" anymore, and we can't solve all problems with one squeeze on the trigger. First, the problem is too complex; it is in fact an incredible complex of interrelated problems. Second, and perhaps more important, it is largely a question of judgment. One man's "degradation" is another's dream. "When Keats wrote, 'Beauty is truth, truth beauty,' he did not solve very much with the phrase. Both halves of the explanation are vague."⁸ Thus, it is all very well for Congress to solemnly pronounce:

The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can

6. Nader, *Introduction*, in 1 *POWER AND LAND IN CALIFORNIA: THE RALPH NADER TASK FORCE REPORT ON LAND USE IN THE STATE OF CALIFORNIA* xxviii (R. Fellmeth ed. 1971). Securing public title to land, however, is no guarantee of enlightened management. For critiques of regulation, use and misuse of public land, see A. SAKOLSKI, *LAND TENURE AND LAND TAXATION IN AMERICA* (1957); SAX, *supra* note 3.

7. *E.g.*, Federal Aid Highway Act, 23 U.S.C. § 138 (1970); National Environmental Policy Act, 42 U.S.C. § 4331 (1970); Department of Transportation Act, 49 U.S.C. § 1653(f) (1970); Airport and Airway Development Act, 49 U.S.C. § 1716(c)(4) (1970); Environmental Quality Act, CAL. PUB. RES. CODE ANN. § 21000 (West Supp. 1975); Coastal Zone Conservation Act, CAL. PUB. RES. CODE ANN. § 27001 (West Supp. 1975).

8. Steinberg, *Introduction to Aesthetics vs. Free Enterprise—A Symposium*, PRAC. LAW., Feb., 1969, at 17, 18.

exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.⁹

And for the California Legislature with equal fervor to intone:

The Legislature further finds and declares that it is the policy of the state to:

- (a) Develop and maintain a high-quality environment now and in the future, and take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.
- (b) Take all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise.
- (c) Prevent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history.
- (d) Ensure that the long-term protection of the environment shall be the guiding criterion in public decisions.
- (e) Create and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations.
- (f) Require governmental agencies at all levels to develop standards and procedures necessary to protect environmental quality.
- (g) Require governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment.¹⁰

It is all very well, but it does not solve any specific problems.¹¹ Specific problems must be dealt with at the local level, by local governing bodies and sometimes individual property owners.¹² Thus, the

9. 42 U.S.C. § 4331 (1970).

10. CAL. PUB. RES. CODE ANN. § 21001 (West Supp. 1975).

11. See generally *SAX*, *supra* note 3. As Judge Feinberg noted in *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972):

This case raises important issues under the National Environmental Policy Act of 1969, 42 U.S.C. § 4331 et seq., a statute whose meaning is more uncertain than most, not merely because it is relatively new, but also because of the generality of its phrasing.

Id. at 642.

12. One interesting example of this—in a slightly different, but related field—is in the protection of airport neighbors from property damage, personal injuries and emotional distress caused by noisy aircraft. (For a general discussion of the problems as seen by this author, see Berger, *The California Supreme Court—A Shield Against Governmental Overreaching: Nestle v. City of Santa Monica*, 9 CALIF. W.L. REV. 199 (1973); Berger, *Nobody Loves An Airport*, 43 S. CAL. L. REV. 631 (1970); Berger, *You*

plaint for simple laws that will make the problems go away is being expressed at the local level as a demand for stringent regulation of land use. Such regulation takes many forms, ranging from "down-zoning" (*i.e.*, rezoning property to a less intensive use—sometimes leaving some realistic use for the property, sometimes not) to open space zoning, to zoning for uses which are really public rather than private, to freezes and moratoria on development.

These practices, and their various consequences and effects on the public in general, individual property owners in particular, and our elemental constitutional framework, are the subject of this article.

To alleviate the suspense, I do not recommend either uncontrolled use of property or regulated stultification. Nor is it urged here that resources which are needed for the general public welfare should not be regulated to that end. What *is* urged is that "the public" take a long, hard look at what its needs are, assess *all* the costs involved, and proceed accordingly. If "the public" wants land uses (or non-uses) which benefit "the public" generally, then "the public" should buy the property, or an appropriate interest in the property, rather than attempt to force individual property owners to devote their property to public use without compensation. These thoughts are perhaps best summed up in the words of three distinguished academicians: Arvo Van Alstyne, Frank Michelman, and Gideon Kanner. As Professor Van Alstyne put it:

The fundamental question that should be faced, and which deserves a rationally developed legislative response, is not *whether* these costs will be paid; it is *who* will pay them, in accordance with *what* substantive and procedural criteria, and through *which* institutional arrangements.¹³

Know I Can't Hear You When the Planes Are Flying, 4 URBAN LAW. 1 (1972); Fadem & Berger, *A Noisy Airport is a Damned Nuisance!*, 3 SW. U.L. REV. 39 (1971)). In 1968, Congress enacted a law requiring federal noise standards for aircraft (49 U.S.C. § 1431 (Supp. II 1972)) in order to provide "present and future relief and protection to the public . . . from aircraft noise . . ." *Id.* Yet the FAA, which sets the federal standards, consistently takes the position that it is up to the local airport operators to insure that the noise levels FAA sets actually provide relief, *e.g.*, by appropriate land use planning. This cop-out may be found, for example, in the preamble to the FAA's noise standards (34 Fed. Reg. 18358 (1969)), in FAA decisions refusing to take action to curb noise at specific airports (*In re Dreifus*, FAA Regulatory Docket No. 9071 (1969)), in correspondence dealing with the local regulation of noise (letter from Charles J. Peters (for General Counsel Nathaniel Goodrich) to Robert F. Nuttmann, Ass't County Counsel, Orange County, Calif., July 23, 1969) and in law review articles (Danforth, *Mercury's Children In The Urban Trap: Community Planning and Federal Regulation Of the Jet Source*, 3 URBAN LAW. 206, 213-18 (1971)).

13. Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modification in California*, 16 U.C.L.A.L. REV. 491, 543-44 (1969).

Thus, as Professor Michelman concluded:

[There is a] need for resolute sophistication in the face of occasional insistence that compensation payments must be limited lest society find itself unable to afford beneficial plans and improvements. What society cannot, indeed, afford is to impoverish itself. It cannot afford to instigate measures whose costs, including costs which remain "unsocialized," exceed their benefits. Thus, it would appear that any measure which society cannot afford or, putting it another way, is unwilling to finance under conditions of full compensation, society cannot afford at all.¹⁴

Or as Professor Kanner pithily summed it all up:

There is no such thing as a free lunch.¹⁵

II. ARGUMENT BY DEFINITIONAL IPSE DIXIT; OR, DO WE REALLY CARE WHETHER STRINGENT REGULATION OF PROPERTY IS SO SEVERE THAT IT IS A "TAKING" OF PROPERTY WHICH CANNOT—UNDER THE FIFTH AMENDMENT—BE WITHOUT PAYMENT OF JUST COMPENSATION?

The stormy intellectual flap that has been raging recently over just how close to the brink governmental regulation of land use may go before running afoul of constitutional proscription has been centered, almost entirely, on the issue whether the regulation constitutes a "taking" of private property for public use.¹⁶ If it is not a "taking"—so say the exponents of regulation—then it is legal, regardless of its consequences on individual property owners. And "taking" is seen as being only an actual, physical seizure.

There are answers to that argument, and we will deal with it extensively in time.¹⁷ But a more important question to broach at the outset is, "Why frame the issue in such extreme, antediluvian terms?" The notion that the "taking" of real property is the same as the "tak-

14. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1181 (1967) (footnote omitted) [hereinafter cited as Michelman]. For express judicial adoption of the "cost socialization" approach, see *Holtz v. Superior Court*, 3 Cal. 3d 296, 303, 475 P.2d 441, 445, 90 Cal. Rptr. 345, 349 (1970).

15. Address by Professor Gideon Kanner, *Property Rights v. Public Need: There Is No Such Thing as a Free Lunch*, Victor Gruen Foundation for Environmental Planning Symposium, Beverly Hills, Calif., Sept. 18, 1973.

16. E.g., F. BOSSELMAN, D. CALLIES & J. BANTA, *THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL* (1973) [hereinafter cited as *THE TAKING ISSUE*]; Benson, Book Review, 7 LOY. L.A.L. REV. 652 (1974) [hereinafter cited as Benson].

17. See notes 69-115 *infra* and accompanying text.

ing" of the simplest item of personal property¹⁸ has been dead for so long that one noted scholar has referred to it as "anachronistic" and "outmoded,"¹⁹ another calls it "primordial,"²⁰ a third calls it "primitive,"²¹ and the premier text on eminent domain concludes:

The modern and prevailing view is that any substantial interference with private property which destroys or lessens its value or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed, is, in fact and in law, a "taking" in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed.²²

Aside from this troglodytic view of "taking," a more serious question is posed from the standpoint of intellectual honesty, not to mention pragmatic utility.²³ Why structure the argument in such a fashion that a regulation is seen to violate the constitutional proscription only if it is so severe that it effects a "taking"? The only answer this author can muster is that it is easier to respond to an extreme proposition. The intellectual, and pragmatic, problem that arises is that many state constitutions go *beyond* the simple notion that compensation must be provided when property is "taken" and require payment for property "taken or damaged."²⁴ Moreover, in some states, whose constitutions contain only "taking" clauses, the courts have *construed* them as *including* damaging.²⁵

Using *The Taking Issue* by Bosselman, Callies and Banta as an example,²⁶ *nowhere* in its 329 pages of text and footnotes and five pages

18. *E.g.*, unless I actually intend to pick up your coffee pot (or apparently your house) and steal away with it, I haven't "taken" it.

19. Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2 n.5 (1970) [hereinafter cited as Van Alstyne].

20. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207, 210 (1967).

21. Beuscher, *Notes on the Integration of Police Power and Eminent Domain by the Courts: Inverse Condemnation*, in J. BEUSCHER & R. WRIGHT, *LAND USE* 72, 728 (1969).

22. 2 P. NICHOLS, *THE LAW OF EMINENT DOMAIN* 407 (3d ed. J. Sackman ed. 1963) [hereinafter cited as NICHOLS].

23. The Bosselman, Callies and Banta tome has been praised because "[t]he legal analysis is pragmatic . . ." Benson, *supra* note 16, at 656.

24. For a collection of citations to such provisions, see 2 NICHOLS, *supra* note 22, § 6.1[3]. Article I, section 14 of the California constitution is one such provision.

25. *E.g.*, *Morrison v. Clackamas County*, 18 P.2d 814, 816 (Ore. 1933); *Luber v. Milwaukee County*, 177 N.W.2d 380, 386 (Wis. 1970).

26. A proposition which is only fair, as that book promises to become, if it has not already become, the classic work in the field.

of prefatory material is the existence of such constitutional provisions mentioned. To be fair, the "damage" clauses are *alluded* to once:

The state courts also construed a taking of property in very tangible terms. They thought of a taking as an actual appropriation of the property by the taker for the latter's own use. There now began rumblings of concern over this strict interpretation. Dissatisfaction with denial of compensation in cases involving damage to owners of abutting property in street-grade cases, such as *Rigney v. City of Chicago*, contributed to the passage of state constitutional amendments by Illinois and other states to make sure that such losses were compensated.²⁷

But that is all. There is no citation to any of the state constitutional amendments; nor is there any indication that the amendments deal with anything other than damage to abutting owners in street-grade cases. The authors then proceed to launch their all-out attack on Justice Holmes and the decision he rendered for the Court in *Pennsylvania Coal Co. v. Mahon*,²⁸ as being the devil that caused all the land regulation problems.

Why was the "damaged" clause ducked? Surely Bosselman, Callies and Banta, practicing Illinois lawyers, are familiar with such a clause. Their own state's constitution contains one.²⁹ The effect of its addition to the Illinois constitution was the subject of two decisions of the United States Supreme Court.³⁰ In *Chicago v. Taylor*,³¹ a case arising *after* the addition of the "or damaged" clause to the Illinois constitution, the Court stated:

Such a change in the organic law of the State was not meaningless. But it would be meaningless if it should be adjudged that the Constitution of 1870 gave no additional or greater security to private property, sought to be appropriated to public use, than was guaranteed by the former Constitution.³²

One suspects that the "damaged" clause was avoided because it is the *real* problem confronting local planning agencies and because it is a lot tougher to deal with. And therein lies the danger for those who

27. THE TAKING ISSUE, *supra* note 16, at 122 (footnotes omitted). As Professor Hagman notes in a review of the book, there are other shortcomings: "Due process is only briefly mentioned and equal protection is virtually ignored." Hagman, Book Review, 87 HARV. L. REV. 482 (1973).

28. 260 U.S. 393 (1922).

29. ILL. CONST. art. 1, § 15.

30. *Chicago v. Taylor*, 125 U.S. 161 (1888); *Northern Transp. Co. v. Chicago*, 99 U.S. 635 (1879).

31. 125 U.S. 161 (1888).

32. *Id.* at 168-69.

uncritically follow these pied pipers of public proscription. Indeed, the effect of the addition of such clauses was profound. As the California Supreme Court held:

To what kind of damage does this word "damaged" refer? *We think it refers to something more than a direct or immediate damage to private property, such as its invasion or spoliation.* There is no reason why this word should be construed in any other than its ordinary and popular sense. *It embraces more than the taking.* If it did not refer to more than the damage above mentioned, the word "damaged" in the clause relied on would be superfluous. *It seems to us that the direct invasions spoken of would come within the clause as it stood in the constitution of 1849. If the word "damaged" only embraced physical invasions of property, the right secured by this word would add nothing to the guaranty as it formerly stood. . . .*

We cannot think that the convention inserting in the constitution of this state the word "damaged" in the connection in which it is found, and the people in ratifying the work of the convention, intended to limit the effect of this word to cases where the party injured already had a remedy to recover compensation. They engaged in no such empty and vain work. It was intended to give a remedy, as well where one existed before as where it did not; to superadd to the guaranty found in the former constitution of this state, and in nearly all of the other states, a guaranty against damage where none previously existed.³³

Other commentators, perhaps less bent on grinding any particular axe than in providing guidance to legislative bodies trying to deal rationally with the problem, do not duck the issue. For example, Professor Van Alstyne, who has for years served as consultant to the California Law Revision Commission,³⁴ concluded in one of his many scholarly reports that it was of little help to say that government need only pay for what it physically seizes and may "regulate" willy-nilly without fear. And the reason was the "damaged" clause:

Finally, the questionable value of this theoretical approach seems to be even further reduced in a jurisdiction where, like California, the constitution requires payment of just compensation for a "damaging" as well as a "taking" of private property. It is clear, historically, that the damage clauses were introduced precisely for the purpose of enlarging com-

33. *Reardon v. City & County of San Francisco*, 66 Cal. 492, 501, 505, 6 P. 317, 322-23, 325-26 (1885) (emphasis added); *accord*, *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 256-63, 398 P.2d 129, 132-37, 42 Cal. Rptr. 89, 92-97 (1965); *Brown v. City of Seattle*, 31 P. 313, 314 (Wash. 1892).

34. Professor Van Alstyne's views have often been relied on by the California Supreme Court. *E.g.*, *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 933-35, 496 P.2d 480, 489-90, 101 Cal. Rptr. 568, 577-78 (1972).

pensability beyond the outer limits seemingly marked by traditional judicial acceptance of physical invasion as the test of a "taking."

The appropriation-regulation approach thus seems to possess very dubious utility as a tool of legal analysis. Its principal significance, perhaps, lies in the implicit suggestion that when a physical invasion, appropriation, or use by government of private assets occurs, a presumption should arise favoring payment of the constitutionally required compensation. This presumption, however, is only a starting point for further analysis. It may be dispelled by other considerations; and its absence in a particular case, because of lack of physical appropriation, does not foreclose compensability in any way, nor even create a contrary presumption. Its analytical worth is, obviously, of exceedingly modest dimensions.³⁵

Where does that leave us? It leaves us with a group of concededly high-principled reformers whose stated goal is to alleviate the fear in local planners and governing bodies which is said to inhibit orderly regulation of growth.³⁶ But they have pursued their laudable objective³⁷ in a manner which is misleading at best. If taken literally by officials in California and other jurisdictions having a "damaged" clause, they

35. Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus*, 8 SANTA CLARA LAW. 1, 15-16 (1967) (footnotes omitted).

36. THE TAKING ISSUE, *supra* note 16, at 1; Benson, *supra* note 16, at 653. It cannot go without noting, however, that the notion that governmental zeal might be inhibited by the fear of judicial action is both illusory and discredited. In those situations where property owners seek invalidation of the ordinance, the fear is illusory. Judicial invalidation only hurts governmental feelings. It is nothing more than a public wrist slap. Hardly a "deterrent."

As for the fear of monetary damages, the inhibiting factor has been thrashed out in governmental tort cases (*compare, e.g.,* *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *with Sava v. Fuller*, 249 Cal. App. 2d 281, 285 n.2, 57 Cal. Rptr. 312, 314 n.2 (1967)). The most concise comment was probably made by the California Supreme Court in 1968: "*The danger that public employees will be insufficiently zealous in their official duties does not serve as a basis for immunity in California.*" *Johnson v. State*, 69 Cal. 2d 782, 790, 447 P.2d 352, 358, 73 Cal. Rptr. 240, 246 (1968). The fact that the "sovereign immunity" doctrine has been graciously interred (*see, e.g.,* *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961)) should be response enough to this specious argument.

37. Frankly, however, I have never observed that "fear" said to exist in land use planners and their lawyers which supposedly inhibits them both in enacting regulations and informally negotiating with property owners. (*See* Benson, *supra* note 16, at 653-54. I suspect that some anonymous "staff attorney" for an equally anonymous "statewide land use agency" (*id.* at 654 n.10) was pulling Professor Benson's leg.) Quite the contrary. On this point, my experience parallels that of Professor Sax, who notes that too many "government lawyers tend to polarize the issues" (SAX, *supra* note 3, at 197) dealing not only in blacks and whites (or goods and evils) but also in extreme and often unjustified blacks and whites. It may have been an aging French monarch who first mouthed the words, "*l'etat, c'est moi*," but he has his modern counterparts.

are being invited recklessly to embark on a program that will lawlessly injure many innocent property owners and potentially expose the regulators to personal liability.³⁸ Is this a rational way to deal with one of the significant problems of our day?

III. THE BACKGROUND AGAINST WHICH ANY REGULATORY SCHEME MUST BE MEASURED IS A COMPLEX MIXTURE OF POLITICAL BELIEFS WHICH ARE PECULIARLY AMERICAN AND PSYCHOLOGICAL NEEDS WHICH ARE UNIVERSAL

One problem with much of what passes for analysis in this field is the tunnel vision of some of the commentators. They focus only on a particular problem (e.g., cleaning up the environment). Or only on a particular tool.³⁹ Or they downplay the side-effects with comments approximating, "it's not important, it's only money."⁴⁰ In doing so, they engage in intellectual self-crippling. Anyone who is interested in rational problem-solving, must, to borrow a phrase from Justice Cardozo, "make [his] knowledge as deep as the science and as broad and universal as the culture of [his] day."⁴¹

It is therefore important to recall first the distrust in "Big Government" which we, as a people, have always had.⁴² That distrust is the foundation of much of our constitutional law. As Chief Justice Wright summarized:

The framers of the Constitution had two paradoxical objectives: first, to create a durable central government that would mold the separate states into a federal union; and second, to limit that government by reserving certain rights to the states and the people. To accomplish these ends, the framers returned to the writings of Locke and Montesquieu, the same sources used in drafting the Declaration of Independence. These philosophers, who espoused theories of social contract, also advocated systems for the separation of powers designed to protect the natural rights of every person. The framers adapted the separation of

38. See notes 228-29 *infra* and accompanying text.

39. See, e.g., THE TAKING ISSUE, *supra* note 16, *passim*.

40. See, e.g., THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH—A TASK FORCE REPORT SPONSORED BY THE ROCKEFELLER BROTHERS FUND 175 (W. Reilly ed. 1973); Benson, *supra* note 16, at 665.

41. Cardozo, *Our Lady of the Common Law*, 13 ST. JOHN'S L. REV. 231, 232 (1939).

42. See generally Mosk, *Privacy in a Crowded World Is Sought*, Los Angeles Daily J., Apr. 22, 1968, (Report Section), at 28; Sullivan, *Bill of Rights Are Our Way of Life—Another View of Our Constitution*, Los Angeles Daily J., Jan. 22, 1968, (Report Section), at 3; Tobriner, *Individual Rights in an Industrialized Society*, 54 A.B.A.J. 21 (1968); Wright, *The Role of the Judiciary: From Marbury to Anderson*, 60 CALIF. L. REV. 1262 (1972) [hereinafter cited as Wright].

powers theory to their needs and wrote it into the Constitution. They declared that Congress could legislate only for the purposes specified or implied in the Constitution and that, in legislating for permissible purposes, Congress could "not transgress any provision of the Constitution itself."⁴³

In this scheme of limited government,⁴⁴ created by individuals to protect rights which they inalienably possessed as human beings before government was invented,⁴⁵ the judiciary stands as the individual's bulwark against overreaching⁴⁶ or over-zealous⁴⁷ governmental functionaries.⁴⁸ This principle has been repeatedly reinforced from *Marbury v. Madison*⁴⁹ through *United States v. Nixon*.⁵⁰ As the United States Supreme Court recently stated:

Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just.⁵¹

To begin with, then, we believe in a government of limited power, with strict limits on the intrusions into the rights of individuals.⁵² But that is only the first step. Of equal importance is to ask, "why?" Be-

43. Wright, *supra* note 42, at 1264, quoting 1 J. BRYCE, *THE AMERICAN COMMONWEALTH* 242 (3d ed. 1909) (footnote omitted).

44. See *Perez v. Brownell*, 356 U.S. 44, 78 (1958) (Warren, C.J., dissenting).

45. Compare *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 368 (1856) (dissenting opinion), with *Benson*, *supra* note 16, at 664.

46. As Mr. Chief Justice Wright recently put it:

The Constitution is a statement of principles designed to allocate powers between the people and their government. The provisions of that document set forth a system of "enduring general values," and perhaps we can describe judicial review as "institutionalized self-control."

Wright, *supra* note 42, at 1266 (footnotes omitted).

47. [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Stanley v. Illinois, 405 U.S. 645, 656 (1972) (footnote omitted).

48. See, e.g., *Hurtado v. California*, 110 U.S. 516, 531-32 (1884); *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 662 (1875); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119 (1866); Wright, *supra* note 42, at 1265-68.

49. 5 U.S. (1 Cranch) 137, 177 (1803).

50. 418 U.S. 683 (1974).

51. *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971).

52. If nothing else, recent events in Washington have demonstrated the wisdom of this general thesis.

cause, in order to ascertain how far government may go in regulating the lives of its citizens, it is essential to understand the deep psychic underpinnings of the limitation. The obvious answer is that the Constitutional framers had just thrown off the English yoke and wanted to ensure that no such mechanism would be reimposed.⁵³ But it goes beyond mere experience with the edicts of absolute monarchs.

The answer lies buried in the human psyche. Man is a territorial being. From earliest times, he has staked his claim to "his little corner of the world" and has defended it against all intruders. In his seminal work in psychological anthropology, Robert Ardrey expressed the following sentiments:

Man . . . is as much a territorial animal as is a mockingbird singing in the clear California night. We act as we do for reasons of our evolutionary past, not our cultural present, and our behavior is as much a mark of our species as is the shape of a human thigh bone or the configuration of nerves in a corner of the human brain. If we defend the title to our land or the sovereignty of our country, we do it for reasons no different, no less innate, no less ineradicable, than do lower animals. The dog barking at you from behind his master's fence acts for a motive indistinguishable from that of his master when the fence was built.

Neither are men and dogs and mockingbirds uncommon creatures in the natural world. . . . [A]ll of us will give everything we are for a place of our own. Territory, in the evolving world of animals, is a force perhaps older than sex.⁵⁴

The recognized psychological consequence of breaching this deep-seated territorial need is mental and emotional collapse.⁵⁵

53. If for no other reason, references to the arbitrary actions of Elizabeth I (THE TAKING ISSUE, *supra* note 16, at 64; Benson, *supra* note 16, at 657-58; Marcus, *Mandatory Development Rights, Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFF. L. REV. 77, 95 (1974)) are singularly inappropriate to this type of inquiry.

54. R. ARDREY, *THE TERRITORIAL IMPERATIVE* 5 (1966). See generally H. PROSHANSKY, W. ITTELSON & L. RIVLIN, *ENVIRONMENTAL PSYCHOLOGY: MAN AND HIS PHYSICAL SETTING* (1970); Carpenter, *Territoriality: A Review of Concepts and Problems*, in *BEHAVIOR AND EVOLUTION* 224 (A. Roe & S. Simpson eds. 1958); cf. H. HEDIGER, *STUDIES OF PSYCHOLOGY AND BEHAVIOR OF CAPTURED ANIMALS IN ZOOS AND CIRCUSES* (G. Sircorn transl. 1955).

55. E.g., Hall, *The Anthropology of Space: An Organizing Model*, in H. PROSHANSKY, W. ITTELSON & L. RIVLIN, *ENVIRONMENTAL PSYCHOLOGY: MAN AND HIS PHYSICAL SETTING* 17 (1970):

Man's feeling about being properly oriented in space runs deep. Such knowledge is ultimately linked to survival and sanity. To be disoriented in space is to be psychotic.

It is interesting to note that even some of those who might deny what I am saying here, and claim that our concepts of property derived from feudal law, economics and

Though the proponents of zealous land regulation ignore it, the law has taken care to guard against the clear and present danger of psychotic reaction to territorial invasion. The early development of the law to satisfy man's needs for territorial protection was well and recently summarized by the court in *Watson v. Branch County Bank*⁵⁶:

Historically, one of the great missions of the law has been to bring disputes concerning the possession of real and personal property under the control of legal institutions. Except for personal injury, nothing has been so productive of contention and violence as the dispossession of tangible property. The taking of goods from another's possession, without the latter's contemporaneous consent, necessarily involves the *hostile physical invasion of the possessor's personal territory, and is a serious assault upon his dignity, privacy and self-esteem*. Such an invasion naturally tends to excite emotions and to provoke violent retaliation.

In the Anglo-Saxon period of English history, the law recognized, indeed, was almost entirely based upon, the concept of the personal "peace," or *grith*. The *grith* was a person's *psychological sphere of interest*, marked, with regard to tangibles, by possession and control. The concern for the integrity of the *grith* was part of *the common law's concern for the preservation of human dignity in the context of a stable social order*. Where a person's "peace" was respected, there was an absence of violence, and the person's "peace," in its modern connotation, prevailed. In contrast, where the personal peace was breached or broken, there was contention and violence.⁵⁷

Under our system of law, we have institutionalized and constitutionalized the protection of private property to avoid the inevitable self-help conflicts which would otherwise surely arise. The underlying emotional needs remain the same. Man is an animal, with primordial instincts of territoriality. The government that cuts across their grain

politics that are no longer relevant (Marcus, *Mandatory Development Rights, Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFF. L. REV. 77, 89 (1974)), recognize subconsciously that there is a relevance buried deep within them.

Especially with regard to real property, there is a deep-seated feeling that it is more than just a thing that can generate profit. Rather, there exists the feeling that its location, its position in space, is of its very essence.

Id. at 103.

Rather than dealing with this inexplicable emotion, however, Marcus, like too many lawyers, prefers to brush it aside as either an intellectual exercise or of no importance to the practical problem which concerns him. The fact that he felt compelled to add the two quoted lines—otherwise out of place in the article—speaks eloquently for my thesis.

56. 380 F. Supp. 945 (W.D. Mich. 1974) (emphasis added).

57. *Id.* at 965-66.

does so at peril to the social peace and domestic tranquility that are the first duty of governments.

Man has not changed from earliest recorded memories.⁵⁸ That is why the Bible endures as a present day social guide. Thus, we find the Tenth Commandment: "Thou shalt not covet thy neighbor's house, thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is thy neighbor's."⁵⁹ As Justice Holmes expressed it, "Property is protected because such protection answers a demand of human nature, and therefore takes the place of a fight."⁶⁰ Thus, we have developed systems of title recording and title insurance (not to mention statutes of limitation) in order to provide security of land ownership to allay these otherwise deep-seated universal anxieties and, intertwined with personal ownership, satisfy the need for social stability. The United States Supreme Court has repeatedly so recognized:

No class of laws is more universally sanctioned by the practice of nations and the consent of mankind, than laws which give peace and confidence to the actual possession and tiller of the soil.⁶¹

A scheme of land regulation which ignores these deep-seated human yearnings, and ignores or attempts to undo centuries of law developed for their protection, risks more than individual psychoses, for toying recklessly with such ingrained feelings calls forth automatic human responses of a type which no civilized government could desire to encourage.⁶²

With this background in focus, let us turn to the types of regulations which historically have been countenanced and examine the appropriate paths to tread in dealing with the present reality.

58. Several hundred million years of biological evolution have altered not at all the psychological tie between proprietor and property. Neither have those unimaginable epochs of evolutionary time altered the psychological stimulation which enhances the physiological energies of the challenged proprietor. Nor have we reason to believe that the sense of security spreading ease through a troop of black lemurs in their heartland has changed a least whit throughout all of primate history in its effect on the sailor, home from the sea, or the businessman, home from the office.

R. ARDREY, *THE TERRITORIAL IMPERATIVE* 337 (1966).

59. *Deuteronomy* 5:12-17.

60. *Davis v. Mills*, 194 U.S. 451, 457 (1904).

61. *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 466 (1831); see *American Land Co. v. Zeiss*, 219 U.S. 47, 60 (1911) ("the general welfare of society is involved in the security of the titles to real estate"); *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 477 (1831) ("[n]othing so much retards the growth and prosperity of a country as insecurity of titles to real estate. Labor is paralyzed where the enjoyment of its fruits is uncertain").

62. See notes 254-57 *infra* and accompanying text.

IV. PLAYING THE LABEL GAME, OR,
 "NOW I SEIZE IT—NOW I DON'T"

Grown men have spilled a lot of ink trying to reassert the "primordial,"⁶³ "outmoded,"⁶⁴ "anachronistic"⁶⁵ and "primitive"⁶⁶ proposition that governmental entities ought to be able to do anything they please to private property, without fear of constitutional consequences, unless they physically seize it.⁶⁷ In so doing, they have presented us with two classic examples of semantic gamesmanship. As Chief Justice Traynor might have put it, instead of reasoned responses, they present us only with "magic words" which "encase notions that have never been cleaned and pressed and might disintegrate if they were."⁶⁸

Game No. 1: "Taking Means Physical Seizure"

As noted above, "taking" has not meant "physical seizure" for a long time. Yet the argument is repeatedly made. The argument is disingenuous and ignores the fundamental nature of property. Bosselman, Callies and Banta base their attack on a snide reference to "Holmes' fascination with the 'Bundle of Sticks.'"⁶⁹ There are several responses.

First. Holmes was right. Property is *not* a "thing"; it is a group of rights. As any elementary real estate text (indeed, in all likelihood, any person on the street) will note, the interests that make up "property" are frequently divided, *e.g.*, among landlord, tenant and mortgage holder. *Each* has an interest which is property. If the underlying real estate were condemned, each would be entitled to compensation for the "property" taken from him.⁷⁰ Again advertent to elementary

63. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 DICK. L. REV. 207, 210 (1967).

64. Van Alstyne, *supra* note 19, at 2 n.5.

65. *Id.*

66. Beuscher, *Notes on the Integration of Police Power and Eminent Domain by the Courts: Inverse Condemnation*, in J. BEUSCHER & R. WRIGHT, *LAND USE* 722, 728 (1969).

67. See authorities cited in note 16 *supra*.

68. Traynor, *Badlands in an Appellate Judge's Realm of Reason*, 7 UTAH L. REV. 157, 166 (1960). In Shakespearean terms, they are "full of sound and fury, signifying nothing." *MACBETH* act. V, scene 5.

69. *THE TAKING ISSUE*, *supra* note 16, at 240, referring to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

70. See *County of San Diego v. Miller*, 13 Cal. 3d 684, 532 P.2d 139, 119 Cal. Rptr. 491 (1975); *People ex rel. Dep't Pub. Works v. Lynbar, Inc.*, 253 Cal. App. 2d 870, 62 Cal. Rptr. 320 (1967). Interestingly, when the government wants to purchase less than the full fee title, there is seen to be no problem in purchasing one or more "sticks" from

precepts (and elementary textbooks), the right to *use* property is probably chief among the elements of property:

Property, as heretofore defined, is composed of certain constituent elements, namely, the unrestricted right of use, enjoyment, and disposal of the particular subject of property. *Of these elements the right of user is the most essential and beneficial. Without it all other elements would be of little effect, since if one is deprived of the use of his property, little but a barren title is left in his hands.* This right of free and untrammelled user for legitimate purposes is fundamental and within the protection of the United States Constitution.⁷¹

This thought is oft-repeated by judges,⁷² commentators,⁷³ and legislators.⁷⁴ Whatever the semanticists want to make of it, property is a "bundle of sticks."

Second. Why pick on Holmes? He was hardly the first to differentiate among the constituent elements of property. For example, Justice Field did so.⁷⁵ So did Justice McKenna.⁷⁶ So did Justice Day.⁷⁷ So did the Texas⁷⁸ and California⁷⁹ Supreme Courts, for that matter.

the "bundle." *See, e.g.,* United States v. General Motors Corp., 323 U.S. 373 (1945) (temporary taking); Pacific Gas & Elec. Co. v. Hufford, 49 Cal. 2d 545, 319 P.2d 1033 (1957) (power line easement); City of Oakland v. Nutter, 13 Cal. App. 3d 752, 92 Cal. Rptr. 347 (1970) (avigation easement).

71. 63 Am. Jur. 2d *Property* § 3, at 290 (1972) (emphasis added and footnotes omitted).

72. *E.g.,* United States v. General Motors Corp., 323 U.S. 373, 377 (1945); Graves v. Elliott, 307 U.S. 383, 386 (1939); Henneford v. Silas Mason Co., 300 U.S. 577, 582 (1937); Buchanan v. Warley, 245 U.S. 60, 74 (1917); The Pipe Line Cases, 234 U.S. 548, 571 (1914) (McKenna, J., dissenting); White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 19 (1908); Central Pac. R.R. v. Gallatin, 99 U.S. 727, 738 (1879); Munn v. Illinois, 94 U.S. 113, 141 (1877); Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 127 (1873) (Swayne, J., dissenting); Indian Refining Co. v. Ambraw River Drainage Dist., 1 F. Supp. 937, 939-40 (E.D. Ill. 1932); Southern Pac. Co. v. Railroad Comm'n, 13 Cal. 2d 89, 117, 87 P.2d 1055, 1068-69 (1939); Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 664, 137 P. 1119, 1127 (1913); McIvor v. Mercer-Fraser Co., 76 Cal. App. 2d 247, 253, 172 P.2d 758, 762 (1946).

73. *E.g.,* LEWIS ON EMINENT DOMAIN § 65 (3d ed. 1909); Comment, *Distinguishing Eminent Domain from Police Power and Tort*, 38 WASH. L. REV. 607, 612 (1963).

74. *E.g.,* CAL. CIV. CODE § 654 (West 1970):

The ownership of a thing is the right of one or more persons to possess *and use* it to the exclusion of others. In this Code, the thing of which there may be ownership is called property.
(Emphasis added.)

75. Munn v. Illinois, 94 U.S. 113, 141 (1877) (Field, J., dissenting).

76. The Pipe Line Cases, 234 U.S. 548, 571 (1914) (McKenna, J., dissenting).

77. Buchanan v. Warley, 245 U.S. 60, 74 (1917).

78. Spann v. City of Dallas, 235 S.W. 513, 514 (Tex. 1921).

79. Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 664, 137 P. 1119, 1127 (1913).

Likewise, numerous commentators.⁸⁰ And all *before* Holmes wrote his opinion in *Pennsylvania Coal*.

Finally. The argument thus boils down to a semantic one: the Super-regulators establish the erroneous premise that property is *not* a group of rights, but merely a physical thing, and leap from their *ipse dixit* assumption to the conclusion that, if property is only a physical "thing," then it cannot be "taken" without being physically "seized." But if they are wrong,⁸¹ then a "taking" of one of the sticks from the bundle (e.g., the right to *use* the real estate) requires compensation even under the taking clause of the United States Constitution.

And indeed it does. This is clear from cases such as *United States v. Causby*,⁸² where the Court held that a taking occurs when aircraft flights are "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land."⁸³ Clearly, it was not physical possession which constituted the "taking" in *Causby*, but the damage to the right to use the property. Similarly, in *United States v. Certain Parcels of Land*,⁸⁴ the Court held that rendering a high school "ineffective and useless" because of the noise, vibrations, dirt and filth of the nearby highway could be a "taking." In *Baltimore & P.R.R. v. Fifth Baptist Church*,⁸⁵ the operation of a locomotive repair facility which interfered with the use of a house of worship by making excessive noise nearby was held to be a taking. And in *Richards v. Washington Terminal Co.*,⁸⁶ the Court found smoke and fumes from locomotive engines operating *near* the subject property to be a taking even though the owner was *not* wholly deprived of its use.⁸⁷

This discussion is hardly exhaustive. Its purpose is simply to point

80. E.g., LEWIS ON EMINENT DOMAIN § 65 (3d ed. 1909).

81. For an exploration of changing concepts of "property," see Hecht, *From Seisin to Sit-In: Evolving Property Concepts*, 44 B.U.L. REV. 435 (1964); Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938); Reich, *The New Property*, 73 YALE L.J. 733 (1964). For imaginative student efforts in articulating a conceptual nexus between such newly formulated "property" rights and the just compensation guarantee of the Constitution, see Comment, *Unemployment as a Taking Without Just Compensation*, 43 S. CAL. L. REV. 488 (1970); Comment, *Privacy, Property, Public Use, and Just Compensation*, 41 S. CAL. L. REV. 902 (1968). For recent judicial rejection of problem "solving" by definitional means in eminent domain cases, see *County of San Diego v. Miller*, 13 Cal. 3d 684, 532 P.2d 139, 119 Cal. Rptr. 491 (1975).

82. 328 U.S. 256 (1946).

83. *Id.* at 266.

84. 252 F. Supp. 319 (W.D. Mich. 1966).

85. 108 U.S. 317 (1883).

86. 233 U.S. 546 (1914).

87. *Id.* at 554.

out the intellectual bankruptcy of purporting to "solve" the problem with a semantic sleight of hand. Property is many things. Most elements of property can be "taken" without physical seizure.

Game No. 2: "If I Call It Police Power, I Don't Have to Compensate."

This game proceeds even further into Wonderland than the first. It ignores the most elementary of legal maxims:

The law respects form less than substance.⁸⁸

The principle has improved with age. As Justice Stewart recently remarked, "the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*."⁸⁹ Nonetheless, otherwise respectable authorities still play the label game, asserting that if "only" the "police power" is being utilized, then compensation is not required; whereas if the "eminent domain" power is used, compensation must be paid.⁹⁰

With all the respect due it, this is the type of argument which gives lawyers a bad name⁹¹ and inevitably summons forth fictional diatribes:

[T]he trouble with you, you dunder-headed fool, is that all you understand is legal phrases What I'm talking about is *facts*, not legalisms.⁹²

What theoreticians sometimes forget is that we are not fooling around with "Blackacre" any more. We are dealing with fundamental issues that affect *real people*. And real people don't cotton to fast-talking lawyers who play fancy word games with them and end up with title to the family farm.

88. CAL. CIV. CODE § 3528 (West 1970).

89. *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring); cf. *Ackerman v. Port of Seattle*, 348 P.2d 664, 670-71 (Wash. 1950); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 80-81.

90. E.g., Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971). Professor Sax's 1971 views represent an unfortunate backsliding from his earlier work, Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). (For a discussion of some problems in the earlier work, see Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165, 178-79 (1974).) Clearly, Professor Sax has become concerned over the sad state of the environment. See SAX, *supra* note 3. But in seeking solace from the regulators, he blinds himself to what he knows are their abject failings. Compare Sax, *The (Unhappy) Truth About NEPA*, 26 OKLA. L. REV. 239 (1973).

91. E.g., SHAKESPEARE, KING HENRY VI, Part II, act IV, scene 2: "The first thing we do, let's kill all the lawyers." Cf. K. VONNEGUT, GOD BLESS YOU MR. ROSEWATER (1965).

92. R. HEINLEIN, THE PAST THROUGH TOMORROW 375 (1967).

But there is hope for the future.⁹³ Some lawyers find the game-playing distasteful. Professor Waite calls the distinction "illusory."⁹⁴ Professor Michelman calls it "wordplay."⁹⁵ Professor Van Alstyne is less restrained. He calls it "a sterile technique of circular reasoning to describe results without explaining them."⁹⁶

No doubt the most thorough job of eviscerating the supposed distinction between "police power" and "eminent domain" was done by M. Reed Hunter, Esq., of San Francisco. Unfortunately, his thoughts are available at this time only to those cognoscenti who enjoy rifling through amicus curiae briefs in the California Supreme Court.⁹⁷ Hunter's thesis is that there is, in fact, no difference at all between the "two powers." In reality, there is but "one power with two masks."⁹⁸

There is ample factual justification for so viewing it, once we leave the world of the semantic sophists behind. As a leading text expresses it, "the police power is but another name for the power of the government."⁹⁹ That statement, at first blush, may appear no more helpful than Keats' "beauty is truth, truth beauty," which we already dismissed as less than useful in this context. Upon reflection, however, that carefully considered statement¹⁰⁰ may have said it all. For the whole purpose of the Bill of Rights was to curb the over-zealous exercise of the "power of government."¹⁰¹

In fact, try though they might, neither courts nor scholars have been able satisfactorily to distinguish between the "two powers." Professor

93. My hopes for and visions of the future are obviously not universally shared. Compare Benson, *supra* note 16. With each vision, contrast G. ORWELL, 1984.

94. Waite, *Governmental Power and Private Property*, 16 CATH. U.L. REV. 283, 291 (1967).

95. Michelman, *supra* note 14, at 1186.

96. Letter from Arvo Van Alstyne to M. Reed Hunter, Amici Curiae Brief in Support of Plaintiffs and Respondents, at Exhibit A, *HFH, Ltd. v. Superior Court*, L.A. Nos. 30382-83 (Cal. Sup. Ct. 1975).

97. *Id.* The *HFH* file also contains an excellent amicus curiae brief authored by Professors Donald Hagman of U.C.L.A. and Gideon Kanner of Loyola. The author considers all three gentlemen personal friends, and commends them for the research in those briefs, some of which is reflected in this article.

98. *Id.* at 10.

99. 1 NICHOLS, *supra* note 22, § 1.42[7], at 1-153 (3d rev. ed. 1974); *accord*, *Nebbia v. New York*, 291 U.S. 502, 524 (1934). For more extended discussion, see *Mid-Way Cabinet Fixture Mfg. Co. v. County of San Joaquin*, 257 Cal. App. 2d 181, 186-87, 65 Cal. Rptr. 37, 40-41 (1967).

100. Now authored by an eminent lawyer, Julius L. Sackman, who spent more than twenty-seven years as an Assistant Attorney General of New York, handling that State's appellate litigation in eminent domain.

101. Notes 46-52 *supra* and accompanying text.

Van Alstyne characterizes these decisions as consisting of "conclusionary terminology, circular reasoning, and empty rhetoric."¹⁰² Professor Sax calls them "a welter of confusing and apparently incompatible results."¹⁰³ Professor Dunham, examining only decisions of the United States Supreme Court, found a "crazy-quilt pattern."¹⁰⁴ Professor Michelman found this area of the law "liberally salted with paradox."¹⁰⁵ (These are not the comments of untutored novices, incidentally. Professor Hagman—no slouch himself—recently referred to these four as "the best property/land use/local government men in the country . . ." "¹⁰⁶) Professor Beuscher sagely counseled:

The inverse condemnation cases should remind us that those writers who emphasize the separate air tight, non-overlapping character of the two basic powers—police power and eminent domain—have been too glib.¹⁰⁷

Professor Beuscher was a master of understatement. The conceptual difficulties which have arisen in this area are the result of a simple refusal to face reality. Problems are not solved by attempting to define them out of existence. Problems are only solved, as W.C. Fields once expressed it, by "taking the bull by the tail and facing the situation."

Those who have forthrightly confronted the issue have recognized the unitary nature of the governmental power with which we deal. For example, as the New York Court of Appeals recently stated:

Government interference with an owner's use of private property under the police power runs a gamut from outright condemnation for which compensation is expressly provided to the regulation of the general use of land remaining in private ownership so that the use might harmonize with other uses in the vicinity.¹⁰⁸

The same thought appears in the most general of texts: "The power of eminent domain may be exercised to take private property for purposes justifiable only under the police power of the state."¹⁰⁹

102. Van Alstyne, *supra* note 19, at 2.

103. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964).

104. Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 80-81.

105. Michelman, *supra* note 14, at 1170.

106. Hagman, Book Review, 87 HARV. L. REV. 482, 486 (1973).

107. Beuscher, *Notes on the Integration of Police Power and Eminent Domain by the Courts: Inverse Condemnation*, in J. BEUSCHER & R. WRIGHT, LAND USE 724 (1969).

108. *Lutheran Church in America v. City of New York*, 316 N.E.2d 305, 310, 359 N.Y.S.2d 7, 14 (1974).

109. 29A C.J.S. *Eminent Domain* § 31 (1965) (citing *In re Brewster Street Housing Site*, 289 N.W. 493 (Mich. 1939)).

The United States Supreme Court's most explicit recognition of the concurrent nature of the "two powers" is in its 1954 decision of *Berman v. Parker*.¹¹⁰ *Berman*, of course, is best remembered (particularly by governmental entities) for its expansive interpretation of "public use."¹¹¹ The coextensiveness of the "two powers" is best expressed in the Court's own words:

We deal, in other words, with what traditionally has been known as the police power. An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. In the present case, the Congress and its authorized agencies have made determinations that take into account a wide variety of values. It is not for us to reappraise them. If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

. . . .

*The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.*¹¹²

In other situations, the courts have not only held "police power" actions to be perfectly valid, but also held that their exercise required compensation under the fifth amendment.¹¹³

As a recent publication of the California Bar subtly stated, "the alleged distinction between exercises of the police power and the eminent domain power is . . . conceptually tenuous"¹¹⁴

110. 348 U.S. 26 (1954).

111. Neither "police power" nor "eminent domain," of course, can be exercised except for public purposes.

112. 348 U.S. at 32, 33, 36 (emphasis added).

113. Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974); *United States v. Causby*, 328 U.S. 256 (1946); *Lynch v. United States*, 292 U.S. 571 (1934); *Bydlon v. United States*, 175 F. Supp. 891 (Ct. Cl. 1959); see *Turner v. County of Del Norte*, 24 Cal. App. 3d 311, 315, 101 Cal. Rptr. 93, 96 (1972).

114. CONDEMNATION PRACTICE IN CALIFORNIA § 13.22, at 357 (M. Reed Hunter ed. 1973) (in the interest of candor, it must be noted that the author of the quoted section is a senior partner in the firm with which Mr. Hunter (see notes 96-98 *supra* and accompanying text) now practices).

The reason that the scholars have had such trouble with these cases, and the reason that the upshot of the cases is "conceptually tenuous," is the obvious one. It doesn't require all the elaborate analysis and attempts at categorization that have been made in an effort to bring order out of chaos. All that is needed is a small dose of reality—stop relying on labels and examine the *effect* of the action taken. If damage is done (or if any of the "sticks" in the "bundle" are taken), then compensation is constitutionally and morally required.

Any other result, and we might as well leave all constitutional interpretations to Mr. Dooley, who makes as much sense as some present-day philosophers:

[T]h' constitootion iv th' United States is applicable on'y in such cases as it is applied to on account iv its applicability.¹¹⁵

V. THE NOTION THAT PROPERTY COULD BE TAKEN (I.E., REGULATED INTO WORTHLESSNESS) WITHOUT COMPENSATION AROSE IN THE CONTEXT OF CONTROLLING NOXIOUS USES WHICH CAUSED ACTUAL HARM TO THE OWNERS OF NEIGHBORING PROPERTY

It is probably time to deal with one question which has doubtless crossed the minds of some readers by now. Clearly *some* land regulations which virtually wipe out interests which certainly look like property have been approved.¹¹⁶ If the constitutional guarantees against confiscation are absolute,¹¹⁷ then how are these cases reconciled?

With a small amount of embarrassment, it is noted that "property" used in such a way as to create a nuisance on neighboring lands is attacked by the courts with a semantic sword. As Professor Hagman notes: "A noxious use amounting to a nuisance or a near-nuisance is not considered a property right."¹¹⁸ Aside, however, from the glib,

115. F. DUNNE, MR. DOOLEY ON THE CHOICE OF LAW xxi (E. Bander ed. 1968).

116. *E.g.*, *Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887); *Consolidated Rock Prods. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962).

117. Clearly, none of the constitutional guarantees of the sanctity of private property carries any facial limitations.

118. D. HAGMAN, J. LARSON & C. MARTIN, CALIFORNIA ZONING PRACTICE § 3.12, at 52 (C.E.B. 1969). This theory, of course, is neither bereft of practical and conceptual problems nor of vocal and literate critics. See Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165, 174-75 (1974). Candidly, I would be a lot happier if the courts just stopped playing this type of game. Nonetheless, it continues. Off-hand, in other fields, one notes that pornography is not protected by the Constitution because it is not protected speech (*Roth v. United States*, 354 U.S. 476, 481-85 (1957))

definitional answer to the question, there is some substance. The law has always frowned on nuisances and cursed them with latin phrases.¹¹⁰ From earliest times, man has been compelled to refrain from making uses of his property which cause injury to his neighbors. Thus, California defines a nuisance as follows:

Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.¹²⁰

A nuisance may be prosecuted both civilly¹²¹ and criminally.¹²²

This disfavoring of noxious uses led to a long series of cases holding that no one may prescriptively acquire the right to maintain a nuisance, even though other types of usage may so give rise to a servitude.¹²³ For example, in *Vowinckel v. N. Clark & Sons*,¹²⁴ the defendant had operated its nuisance-producing pottery factory for seventeen years before plaintiff bought the adjoining property and for forty years before trial. The California Supreme Court refused even to consider the argument that this length of time either gave defendant the right to continue the nuisance or barred plaintiff from court.

This line of authority is simply one manifestation of the demise of the discredited doctrine that he who "comes to a nuisance" must grin

and that a fetus is not protected by the Constitution because it is not a person (*Roe v. Wade*, 410 U.S. 113, 158 (1973)). This comment is not intended to reflect my opinion on the ultimate decision reached by the Court in any of these matters. But there must be a more honest way of getting there than by defining the issue out of existence.

119. *Sic utere tuo ut alienum non laedas* (use your own property in such a manner as not to injure that of another). See generally 6A AMERICAN LAW OF PROPERTY 64-98 (A.J. Casner ed. 1954); Berger, *The California Supreme Court—A Shield Against Governmental Overreaching: Nestle v. City of Santa Monica*, 9 CALIF. W.L. REV. 199, 205-211 (1973); Fadem & Berger, *A Noisy Airport is A Damned Nuisance!*, 3 SW. U.L. REV. 39 (1971). For a recent discussion of the relation between zoning and nuisance, see *CEEED v. California Coastal Zone Conservation Comm'n*, 43 Cal. App. 3d 306, 318-19, 118 Cal. Rptr. 315, 324-25 (1974).

120. CAL. CIV. CODE § 3479 (West 1970).

121. *Id.* §§ 3491-95, 3501-02.

122. CAL. PENAL CODE § 372 (West 1972).

123. *E.g.*, *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 937, 496 P.2d 480, 492, 101 Cal. Rptr. 568, 580 (1972); *Vowinckel v. N. Clark & Sons*, 216 Cal. 156, 164, 13 P.2d 733, 737 (1932); *Kafka v. Bozio*, 191 Cal. 746, 750-53, 218 P. 753, 755-56 (1923); *Smallpage v. Turlock Irrigation Dist.*, 26 Cal. App. 2d 538, 541-42, 79 P.2d 752 (1938); *Williams v. Blue Bird Laundry Co.*, 85 Cal. App. 388, 395-96, 259 P. 484, 487 (1927).

124. 216 Cal. 156, 13 P.2d 733 (1932).

and bear it. That doctrine was moribund so long ago that, in 1927, the court could proclaim in *Williams v. Blue Bird Laundry Co.*¹²⁵ that "the doctrine of coming to a nuisance was *long ago* exploded."¹²⁶ As the California Supreme Court has crisply noted:

The fact that a business was established in the open country remote from habitations will not defeat a proceeding for the maintenance of a nuisance after the land in its vicinity has been built up and occupied; such business must give way to the rights of the public, and when buildings and habitations approach the place of its location means must be devised to avoid the nuisance, or it must be removed or stopped.¹²⁷

In *Hadacheck v. Sebastian*,¹²⁸ the City of Los Angeles tried to eliminate a brickyard which had become a nuisance to its late-blooming residential neighbors.¹²⁹ The brickyard owner vigorously defended his rights on the basis of his prior occupation. The United States Supreme Court rejected his argument:

A vested interest cannot be asserted against it because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieu.¹³⁰

In the context of this long-standing abhorrence for noxious uses of property, the first "taking by regulation" cases arrived in the courts. Thus, in *Hadacheck*, the Court upheld an ordinance compelling the shutdown of brickyards in residential areas because they constituted a nuisance to the neighbors.¹³¹ And in *Miller v. Schoene*,¹³² trees afflicted with cedar rust, a disease which threatened the destruction of nearby apple orchards, were ordered destroyed under authority of a state anti-nuisance act. Likewise, in *Reinman v. City of Little Rock*,¹³³

125. 85 Cal. App. 388, 259 P. 484 (1927).

126. *Id.* at 392, 259 P. at 487.

127. *Eaton v. Klimm*, 217 Cal. 362, 369-70, 18 P.2d 678, 680-81 (1933), *quoting with approval* *People v. Detroit White Lead Works*, 46 N.W. 735 (Mich. 1890).

128. 239 U.S. 394 (1915).

129. See *Ex parte Hadacheck*, 165 Cal. 416, 418, 132 P. 584, 585 (1913), *aff'd sub nom.* *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

130. 239 U.S. at 410.

131. *Id.* at 409-10.

132. 276 U.S. 272 (1928); *accord*, *Coelho v. Truckell*, 9 Cal. App. 2d 47, 48 P.2d 697 (1935) (no compensation for destruction of diseased cattle).

133. 237 U.S. 171 (1915).

an ordinance requiring the removal of a livery stable from a densely populated part of town was upheld.

The point will not be bludgeoned further, as virtually all agree that the classic cases upholding the right to regulate property into worthlessness were based upon findings that the use made (and to be forbidden in the future) was a noxious one.¹³⁴ The point is that the police power-noxious use cases boil down to a pragmatic principle which can be stated by example: it may be a man's good fortune to discover that his land is sitting on a pool of oil; but that hardly confers upon him the unbridled right to erect an oil derrick and unleash a gusher in the middle of a bedroom community. His activity would impinge on the rights of his neighbors.¹³⁵ Hence, by regulation, the zoning entity may forbid him to do so in order to protect the health, safety and welfare of that community. It is an altogether different story when the government seeks to excessively regulate a *lawful* innocuous activity posing no threat to the health and safety of the community. To continue in the vein of the above hypothetical example, it would be a different matter altogether if the zoning entity—in the name of its police power—said to an owner of a residential lot in that bedroom community, "You may not build a home on your lot, or do anything else with it except to maintain it as a green spot for the enjoyment of the community (and while you're at it, don't forget to pay your taxes on that lot)."¹³⁶ In sum, regulation can protect the public from injurious acts of individuals; it

134. *E.g.*, FREUND, *THE POLICE POWER* § 511 (1904); D. HAGMAN, J. LARSON & C. MARTIN, *CALIFORNIA ZONING PRACTICE* § 3.12, at 52 (C.E.B. 1969); Sax, *Takings and the Police Power*, 74 *YALE L.J.* 36, 39 (1964).

A recent and perverse mutation of this principle appears in *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972). There, an ordinance prohibited the filling of land within 1000 feet of navigable lakes without a permit. Instead of examining the effect of the regulation on the owner (as I would argue is constitutionally required), the court stooped to semantic sophistry. Adverting to the classic noxious use cases, the court said that the restriction was not serving a benefit for the public, but preventing a harm. Unfortunately, that sort of reasoning is the same sort of circular, conclusionary, confusing, paradoxical "logic" noted earlier (see notes 99-102 *supra* and accompanying text). It is no help at all in providing guidance for the future. If that is the rationale, a different group of judges could apply precisely that rule to the same facts and arrive at precisely the opposite result. Indeed, shortly after *Just*, the same court decided *KMIEC v. Town of Spider Lake*, 211 N.W.2d 471 (Wis. 1973), in which another lakeshore zoning ordinance was held unconstitutional.

135. *Compare* *Green v. General Petroleum Corp.*, 205 Cal. 328, 333, 270 P. 952, 954-55 (1928), with *Pacific Palisades Ass'n v. City of Huntington Beach*, 196 Cal. 211, 237 P. 538 (1925).

136. See Michelman, *Toward a Practical Standard for Aesthetic Regulation*, 15 *PRAC. LAW.*, Feb., 1969, at 36, 38.

is not a device whereby the public can take an individual's lawful property.

VI. BY UNIFORMLY SETTLED LAW, ZONING WHICH DEPRIVES THE
LANDOWNER OF ALL REASONABLE USE OF HIS PROPERTY IS
DEEMED CONFISCATORY AND HENCE CONSTITUTES A
"TAKING." SUCH ZONING GIVES RISE TO
RELIEF BY INVERSE CONDEMNATION

The principle stated in the above heading rests on so large a body of decisional law that it would be unduly burdensome (and perhaps cruel and unusual punishment) to recount all of it here. Treatises not only can be, but also have been written on the subject, and they make it clear that such authority is overwhelming.¹³⁷

However, since we appear to have entered an era when some *quandam* scholars are urging that the whole idea of protecting private property is a "myth,"¹³⁸ and others urge the "discard[ing] [of] the taking myth in order to allow the new land use control systems to work effectively,"¹³⁹ perhaps it is well to dwell momentarily on the development of the law of inverse condemnation and its relation to over-zealous zoning.

A. *Federal Cases*

The United States Supreme Court has refused to sully its hands with zoning cases on anything resembling a regular basis. Thus, we are left with a handful of decisions from which to divine the law. No time need be spent analyzing *Village of Euclid v. Ambler Realty Co.*¹⁴⁰ Everyone knows that in *Euclid* the concept of zoning withstood a general challenge based on the "taking" clause. But two things deserve note. First, the exercise of the police power to divide a city into zones was expressly related to the power to control nuisances.¹⁴¹ Second, the Supreme Court was careful to note that while the *concept* of zoning *in general* was not unconstitutional, zoning *as applied* to specific prop-

137. *E.g.*, C. RATHKOPF & A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* (3d ed. 1972) which devotes an entire chapter to the topic: "Ordinance Invalid If Confiscatory" (Vol. 1, ch. 6). See numerous authorities collected in Sackman, *The Impact of Zoning and Eminent Domain Upon Each Other*, in *SOUTHWESTERN LEGAL FOUNDATION INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN* 107, 109-10 (1971).

138. *THE TAKING ISSUE*, *supra* note 16, *passim*.

139. Benson, *supra* note 16, at 655.

140. 272 U.S. 365 (1926).

141. *Id.* at 387-88; compare notes 116-36 *supra* and accompanying text.

erty might not pass the constitutional matrix.¹⁴²

Euclid was followed almost immediately by *Nectow v. Cambridge*.¹⁴³ In *Nectow*, the property owner accepted the invitation held out in *Euclid* to challenge the effect of a comprehensive zoning ordinance on his particular property. The subject property was zoned residential. It was bordered by a Ford Motor Company factory and near the Boston and Albany Railroad tracks. A special master found that "no practical use can be made of the land in question for residential purposes" ¹⁴⁴ The Supreme Court held the zoning confiscatory and violative of the fourteenth amendment.¹⁴⁵ Similarly, in that same formative period, in *Washington ex rel. Seattle Title Trust Co. v. Roberge*,¹⁴⁶ the Court, in striking down a zoning ordinance that delegated too much control to people living within the zones, reiterated:

Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities.¹⁴⁷

The Court's two most recent zoning decisions, *Goldblatt v. Town of Hempstead*¹⁴⁸ and *Village of Belle Terre v. Boraas*,¹⁴⁹ upholding the questioned zoning, offer little assistance. In *Goldblatt*, land containing a long-used sand and gravel pit, which had become completely surrounded by residential use, was regulated so as to prevent excavation below the water table and to compel filling of any such excavation heretofore made. Although the ordinance was challenged as a taking of property,¹⁵⁰ there was "no evidence in the . . . record which even remotely suggest[ed] that prohibition of further mining [would] reduce the value of the lot in question."¹⁵¹ Thus, while the challenge was made, it was apparently unsupported. . The Court referred to the noxious use cases discussed earlier as well as to the cases holding that severe restriction could, if proved, be a compensable taking.¹⁵² In *Boraas*, no challenge under the taking clause was made,¹⁵³ and the property owners

142. 272 U.S. at 395-97.

143. 277 U.S. 183 (1928).

144. *Id.* at 187.

145. *Id.* at 188-89.

146. 278 U.S. 116 (1928).

147. *Id.* at 121 (citing numerous authorities).

148. 369 U.S. 590 (1962).

149. 416 U.S. 1 (1974).

150. 369 U.S. at 592.

151. *Id.* at 594.

152. *Id.* at 592-94.

153. 416 U.S. at 7.

conceded that they faced no "economic loss."¹⁵⁴

While the Supreme Court has remained essentially aloof from the problems under consideration here, the lower federal courts have been asked to take (and have taken) an active role. Governmental defendants have consistently argued in numerous cases that no relief could be granted because all that was involved was an exercise of the "police power."¹⁵⁵ The courts lost no time in dismissing this argument and letting it be known that some exercises of the "police power" may be invalid unless accompanied by compensation.

B. California Cases

California law, not surprisingly, has developed in much the same way as federal law. Indeed, contemporaneously with *Euclid*, the California Supreme Court approved the concept of zoning,¹⁵⁶ and the United States Supreme Court affirmed.¹⁵⁷ The California Supreme Court, as had the United States Supreme Court, noted immediately thereafter that there were limits to the zoning power. In *Pacific Palisades Association v. City of Huntington Beach*,¹⁵⁸ the subject property was zoned residential, even though the property was in a proven oil producing region and nearby properties were developed for such production. The supreme court refused to accept the "mere regulation" defense:

We are of the opinion that the appellant has stated a cause of action. The business of boring for and producing oil is a lawful enterprise. The effect of the ordinance, absolutely prohibiting the maintenance or opera-

154. *Id.* at 11.

155. *Dahl v. City of Palo Alto*, 372 F. Supp. 647 (N.D. Cal. 1974) (holding that rezoning residential property from one acre minimum lots to ten acre minimum lots could be an unconstitutional taking); *Cordeco Dev. Corp. v. Vazquez*, 354 F. Supp. 1355 (D.P.R. 1972) (holding that the refusal to grant a permit for sand extraction could be an improper taking); *Immobilieria Borinquen, Inc. v. Garcia Santiago*, 295 F. Supp. 203 (D.P.R. 1969) (holding that an attempt to freeze development in anticipation of future acquisition could be an unconstitutional taking); *Shellburne, Inc. v. New Castle County*, 293 F. Supp. 237 (D. Del. 1968) (holding that a rezoning from commercial to residential, resulting in an alleged diminution in value of at least \$200,000, could be an unconstitutional taking); *Drakes Bay Land Co. v. United States*, 424 F.2d 574 (Ct. Cl. 1970) (a series of governmental actions designed to bar development of property which the United States eventually wanted to acquire for the Point Reyes National Seashore, was, on the facts as proved, a taking of property); *Bydlon v. United States*, 175 F. Supp. 891 (Ct. Cl. 1959) (regulation which banned air access to remote property was a taking which required compensation).

156. *Zahn v. Board of Pub. Works*, 195 Cal. 497, 234 P. 388 (1925), *aff'd*, 274 U.S. 325 (1927).

157. *Zahn v. Board of Pub. Works*, 274 U.S. 325 (1927).

158. 196 Cal. 211, 237 P. 538 (1925).

tion of oil wells within certain designated limits of the City of Huntington Beach, is to deprive the owners of real property within such limits of a valuable right incident to their ownership. While the use to which one may put his property may be restricted or regulated by the state, in the exercise of its police power, so far as it may be necessary to protect others from injury from such use, it is elementary that the enjoyment of the property cannot be interfered with or limited arbitrarily.¹⁵⁹

For the next fifteen years, little of note occurred, as local governments experimented with the newly-approved comprehensive zoning power.¹⁶⁰ In the late 1930's, the supreme court issued two important decisions—*Reynolds v. Barrett*¹⁶¹ and *Skalko v. City of Sunnyvale*.¹⁶² In *Reynolds*, the City of Piedmont zoned the owner's land for residential use even though it was surrounded by commercial uses. This could not be legally done:

[R]easonable minds cannot differ as to the arbitrary and discriminatory nature of the ordinance as applied to the particular parcel here involved. Obviously, a city purporting to act under its police power, cannot create a business district, and entirely within it create an "island" of one lot restricted to residential purposes when no rational reason exists for such a classification. Clearly, and without possibility of doubt, such classification is discriminatory as to the isolated parcel, completely surrounded by business property. That is exactly the situation here presented.¹⁶³

In *Skalko*, the zoning ordinance restricted the owner's land to residential uses even though it was utterly unsuited to such use. The property was adjacent to a cannery which at times worked around the clock,

159. *Id.* at 216, 237 P. at 539. Note again the emphasis on the control of noxious use inherent in the approval of the zoning.

160. Except for occasional aberrations, such as *Jones v. City of Los Angeles*, 211 Cal. 304, 295 P. 14 (1930), in which the court refused to permit retroactive application of a residential zoning ordinance in such a way as to force closure of pre-existing sanitariums.

161. 12 Cal. 2d 244, 83 P.2d 29 (1938).

162. 14 Cal. 2d 213, 93 P.2d 93 (1939).

163. 12 Cal. 2d at 251, 83 P.2d at 33. The supreme court again adverted to the question whether the proposed use of the property would be injurious to its neighbors:

Obviously the property is valueless for a single family residence, and while that fact is not by itself conclusive, when it also appears that the property at no point is adjacent to residential property so that its use for business purposes would not at all adversely affect residential property, the business use should be permitted. To hold otherwise would be to needlessly injure plaintiffs, without a compensating benefit to the public.

Id. at 250, 83 P.2d at 33; *accord*, *La Salle Nat'l Bank v. County of Cook*, 145 N.E.2d 65 (Ill. 1957); *Arverne Bay Constr. Co. v. Thatcher*, 15 N.E.2d 587 (N.Y. 1938); *State ex rel. Tingley v. Gurda*, 243 N.W. 317 (Wis. 1932); *see* *Pera v. Village of Shorewood*, 186 N.W. 623 (Wis. 1922) (ordinance zoning land residential although surrounded by commercial upheld, but case returned to trial court to compensate owner).

subjecting nearby land to noise, traffic, and insects emanating from the cannery. The property simply could not be put to residential uses—its residential zoning notwithstanding—because no one would live next to a cannery. Noting the United States Supreme Court decisions in *Nectow* and *Roberge*, the court wasted little time in holding the ordinance oppressive and unreasonable.

In 1950, the supreme court reaffirmed its adherence to the rule of reason as well as to the concept of a nexus between zoning and noxious uses. In *City of Beverly Hills v. Brady*,¹⁶⁴ the city brought an action to enjoin a writer's use of his R-1 zoned home for some of his activities involving very extensive correspondence with his readers. The trial court denied an injunction, and the supreme court affirmed, holding that Dr. Brady's reasonable use of his home was lawful and inoffensive to the community and hence could not be prohibited.¹⁶⁵ Since Dr. Brady's use of his home for his writing did not interfere with or threaten any of the objects of the regulatory scheme (*i.e.*, preservation of public health, safety or welfare), it could not be forbidden under the police power.¹⁶⁶

The decade beginning in 1958 was an active and instructive one. During that period, the courts struck down a down-zoning designed to reduce the value of the property before city acquisition,¹⁶⁷ invalidated a set-back ordinance which reduced the available building area to a parcel "adapted to nothing more than a large size doll house,"¹⁶⁸ overturned a height limitation ordinance in the approach zone to an airport on the ground that a flight easement should have been purchased,¹⁶⁹

164. 34 Cal. 2d 854, 215 P.2d 460 (1950).

165. *Id.* at 857-58, 215 P.2d at 462.

166. In the court's words, "Application of zoning restrictions to particular facts is subject to investigation by the courts and each case is determinable on its individual merits." *Id.* at 857, 215 P.2d at 462.

167. *Kissinger v. City of Los Angeles*, 161 Cal. App. 2d 454, 327 P.2d 10 (1958) (R-3 [apartments] to R-1 [single family]); *accord*, *City of Plainfield v. Borough of Middlesex*, 173 A.2d 785 (N.J. Super. Ct. 1961) (property zoned for parks, playgrounds and schools; held: confiscatory, oppressive and invalid); Sackman, *The Impact of Zoning and Eminent Domain Upon Each Other*, in SOUTHWESTERN LEGAL FOUNDATION INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN 107, 118 (1971).

168. *Hoshour v. County of Contra Costa*, 203 Cal. App. 2d 602, 603, 21 Cal. Rptr. 714, 715 (1962). As the court put it, "Nothing was left to them but bare ownership and the burden of taxation." *Id.* at 604, 21 Cal. Rptr. at 715; *accord*, *Faucher v. Sherwood*, 32 N.W.2d 440 (Mich. 1948); *Householder v. Town of Grand Island*, 114 N.Y.S. 2d 852 (Sup. Ct. 1951), *aff'd*, 113 N.E.2d 555 (1953) (90 foot setback invalid).

169. *Sneed v. County of Riverside*, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963); *accord*, *Indiana Toll Road Comm'n v. Jankovich*, 193 N.E.2d 237 (Ind.), *cert. dismissed*, 379 U.S. 487 (1965).

nullified a one acre minimum lot size requirement in an area built-up with smaller lots,¹⁷⁰ refused to permit forced dedication of land for a county street construction project as a condition to granting a use permit (the project not being required by the proposed development)¹⁷¹ and held that an extended freeze on any type of development while the government decided whether it wished to acquire property was a taking.¹⁷²

Finally, as the age of extreme environmental concern burst upon us, the supreme court, in *Klopping v. City of Whittier*,¹⁷³ noted that "a particularly harsh zoning regulation"¹⁷⁴ could give rise to an inverse condemnation action.

VII. CAN THE "POLICE POWER" BE UNRESTRAINEDLY USED TO "MAKE THE WORLD SAFE FOR THE ENVIRONMENT"?¹⁷⁵

OR

HAVE SOME PEOPLE FORGOTTEN THAT THE STATE'S POLICE POWER IS NOT (YET) THE POWER OF A POLICE STATE?

Having individually examined a number of threads in our national background (legal, cultural and anthropological), we arrive at the dec-

170. *Hamer v. Town of Ross*, 59 Cal. 2d 776, 382 P.2d 375, 31 Cal. Rptr. 335 (1963). In the words of Justice Tobriner:

In reality we contemplate here an isolated area that has become an "island" of one-acre minimum lot size zoning in a residential ocean of substantially less restrictive zoning.

Id. at 782, 382 P.2d at 379, 31 Cal. Rptr. at 339.

171. *Mid-way Cabinet Fixture Mfg. Co. v. County of San Joaquin*, 257 Cal. App. 2d 181, 65 Cal. Rptr. 37 (1967).

172. *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); accord, *State v. Griggs*, 358 P.2d 174 (Ariz. 1960) (statute allowing the state two years after passage of condemnation resolution to decide whether it wanted the property and valuing property as of issuance of summons held unconstitutional); *Lomarth Corp. v. Mayor & Common Council*, 237 A.2d 881 (N.J. 1968) (statute permitting city to designate property on official maps as "park" for one year construed to be option to purchase; case returned to trial court to determine cost of one year option to purchase); *Miller v. City of Beaver Falls*, 82 A.2d 34 (Pa. 1951) (ordinance designating 4½ acres as a park and giving city three years to decide whether to buy the land was invalid).

173. 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972).

174. *Id.* at 46, 500 P.2d at 1351, 104 Cal. Rptr. at 7. This thought was recently reiterated in *Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974): "The primary constitutional concern is that as applied to a particular land parcel, a zoning regulation might constitute a compensable 'taking' of property." *Id.* at 511 n.4, 522 P.2d at 14 n.4, 113 Cal. Rptr. at 838 n.4.

175. With apologies to Professor Irving Kristol, who concluded an excellent overview of environmental issues by noting: "Making the world safe for the environment is not the same thing as making the environment safe for our world." Kristol, *The Environmentalist Crusade*, Wall Street J., Dec. 16, 1974, at 12, col. 4 & 6.

ade of the 1970's—the time of environmental concern; the time of sudden awakening to how we have blindly sinned in the past; the time when all right-thinking liberals should be joining ranks behind the zoning zealots and urging that the world stop while we study the situation for a while.¹⁷⁶

But is that actually where we are? Can the situation honestly, if simplistically, be forced into a “good guy environmentalist” versus “bad guy developer” mold? Isn't the real intellectual/psychological/gut-wrenching problem caused by the fact that we cannot simply view it as a “good guy-bad guy” problem? When a city zones an area for large lots, or seeks to exclude apartments, is it preserving the environment?¹⁷⁷ Or is it discriminating against the poor?¹⁷⁸

After being in the forefront of the “environmental” movement to slow development and zone for large lots and open spaces, many liberals came uncomfortably face-to-face with this other edge of the sword they had so lustily wielded. One supposes that it all really hit the fan for them in Petaluma, California. Petaluma is a small, northern California town in the path of San Francisco's suburban expansion. Concerned about its growth rate, Petaluma, in 1971, adopted a plan whereby only 500 home building permits could be issued annually for the next five years, roughly half its then-current growth rate.¹⁷⁹ The area north of San Francisco is some of the loveliest country around, and we would have thought that “liberals” would hail the plan for its environmental rightness. When the plan was challenged in court, however, the key witness for the developers, economist Claude Gruen (usually associated with liberal, environmentally oriented issues), explained:

176. Studying problems to death is another American mania. But its use is not restricted to “good guys” who are honestly searching for solutions—though their innocent delays sometimes cause injury (see, e.g., *Peacock v. County of Sacramento*, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969)). For the use (or abuse) sometimes made by the “black hats,” see RODGERS, *supra* note 3.

177. *E.g.*, *Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956 (1st Cir. 1972).

178. *E.g.*, *Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974); *Southern Alameda Spanish Speaking Organization v. Union City*, 424 F.2d 291 (9th Cir. 1970); *Ogo Associates v. City of Torrance*, 37 Cal. App. 3d 830, 112 Cal. Rptr. 761 (1974); *G & D Holland Constr. Co. v. City of Marysville*, 12 Cal. App. 3d 989, 91 Cal. Rptr. 227 (1970).

The decision of *In re Appeal of Kit-Mar Builders, Inc.*, 268 A.2d 765 (Pa. 1970), probably best illustrates the ideological division. In a 4-3 decision, large-lot (2 acre) zoning was invalidated: three justices thought the ordinance exclusionary, one thought the zoning was generally unconstitutional, and the remaining three thought planning was a good idea.

179. The plan is discussed in detail in *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974).

"[T]he social implications of this case could tear up the fabric of the Republic" The people of Petaluma "were waging class warfare; they didn't want people who live in tract housing to come in and share their city services."¹⁸⁰

An extensive discussion of the exclusionary zoning controversy¹⁸¹ is obviously beyond the scope of this article.¹⁸² The very existence of the issue, however, should help to indicate that there is not necessarily a "right" or "wrong" result in cases dealing with restriction of land use—it depends on whose pet ox ends up turning on the spit. Thus, I would urge that when we view the legality of land regulation, we do so in light of the enduring constitutional principles for which this Nation has long struggled. Too many of those who urged concentration of executive power under Roosevelt and Kennedy found to their horror under Nixon¹⁸³ that such power could be abused.¹⁸⁴ The task, then,

180. Lawson, *Civil Libertarians Join Developers to Oppose Cities' Growth Curbs*, Wall Street J., Jan. 31, 1975, at 16, col. 1-2. Indeed, as one resident put it, "Petaluma had decided to 'pull up the ladder. The city hereafter was for the people already on board.'" *Id.* at 1, col. 1.

181. Speaking of definitional game-playing, did you notice how it's "exclusionary zoning" when restrictive land regulation is viewed as keeping out the urban poor, and "environmentally sound land management" otherwise?

182. For a good discussion, see, e.g., FAIR HOUSING AND EXCLUSIONARY LAND USE (National Commission Against Discrimination in Housing & Urban Land Institute 1974); Aloï & Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?*, 1971 URBAN L. ANN. 9; Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent*, 21 STAN. L. REV. 767 (1969). Of particular interest is Freilich & Bass, *Exclusionary Zoning: Suggested Litigation Approaches*, 3 URBAN LAW. 344 (1972). Professor Freilich is the architect of the Ramapo "phased growth" plan (approved in *Golden v. Planning Bd.*, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972)). While Professor Freilich stoutly denies that the Ramapo plan is "exclusionary" (Freilich, *Current Developments in Local Government Law*, 6 URBAN LAW. 288, 312 (1974)), and notes that in fact, under the plan, low income housing is being built in Ramapo (Freilich, *Editor's Comments*, 4 URBAN LAW., Summer, 1972, at xiii) others opine that maybe it was just "clever enough" to pass judicial scrutiny (see Lawson, *Civil Libertarians Join Developers to Oppose Cities' Growth Curbs*, Wall Street J., Jan. 31, 1975, at 16, col. 2). Or maybe it's a good tool as utilized by Professor Freilich and the present administration of Ramapo, but there is concern about the way the method could be used by less enlightened planners.

183. See generally THE WHITE HOUSE TRANSCRIPTS (1974).

184. In the planning and zoning context, Professor Williams' decade-and-a-half old comments still ring true:

In looking at planning law, we should not depend too heavily on the idealized image of public regulation by legislators or administrators—the image of the liberal intellectual, with considerable freedom from political pressures, applying his expertise first to develop an overall public policy and then to devise legal means for its implementation. This must not be simply laughed off: it can happen, and does, probably with increasing frequency. But this is far from the whole story. We are not dealing with federal agencies having experienced and competent professional staffs. Even now, it is difficult to argue that most "planning controls" are based upon anything that could remotely be called comprehensive planning. Moreover,

is to ensure that the power is under control, so that it may be benignly wielded regardless of the helmsman.¹⁸⁵

What about the recent environmental-regulatory decisions? Some see a "revolution" in judicial thought going on, either quietly,¹⁸⁶ or not so quietly.¹⁸⁷ I demur.

The California courts have been fairly quiescent of late. This may not be entirely their fault. After all, they are not "self-starters"; they can only decide cases that are brought to them.¹⁸⁸ Whether this means that California's regulators are being reasonable, or that the cases are too recent and still in the pipeline is open to speculation. It is probably a little of each.¹⁸⁹

exclusionism and favoritism are rife in the field, and sheer muddleheadedness is even more so. The planning policies adopted by some communities run directly contrary to basic democratic rights and values. The actions of local authorities (legislative bodies, planning and zoning commissions, boards of appeal, etc.) sometimes simply ignore the supposedly controlling rules of law as if they didn't exist—and may descend to pure political favoritism. Moreover, what looks like a sinister conspiracy is quite likely, on closer inspection, to turn out to be sheer confusion. The amount of confusion is often appalling; for example, small towns, and occasionally even large cities, sometimes do not even have a readable copy of their zoning map. As a result of this, there are many examples of purely arbitrary governmental action—leaving land in private ownership, subject to taxes, and yet preventing any reasonable use of it, or imposing severe burdens on its use for no visible reason. This may be the result of public authorities yielding to political pressure; quite as often it comes from pure stupidity, undiluted by baser motives.

Williams, *Planning Law and the Supreme Court: 1*, 13 ZONING DIGEST 57 (1961), reprinted in D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* 485-86 (1966); cf. 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1.05, at 34 (1958).

185. See generally *Hurtado v. California*, 110 U.S. 516, 531 (1884); *Loan Ass'n. v. Topeka*, 87 U.S. (20 Wall.) 655, 662 (1874); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119 (1866); Wright, *supra* note 42, at 1266. Compare Freilich, *Editor's Comments*, 4 URBAN LAW., Summer, 1972, at xiv:

All zoning and planning tools are essentially neutral. They can be used correctly or incorrectly depending upon the motivation of the regulators. Our efforts must be to eliminate the abuses, while simultaneously developing stronger efforts to preserve the quality of our communities and of the environment and to assure economic and racial equality in planning not *without* planning.

My only dispute with Professor Freilich—since we both agree that the tools themselves are neutral—boils down to my belief in relatively simple tools, which any ignoramus can properly apply, rather than the development of complex mechanisms which can be innocently misused by those who don't know any better as well as malevolently wielded by closet Caesars.

186. THE TAKING ISSUE, *supra* note 16, at 212.

187. Benson, *supra* note 16, at 660.

188. Unless, of course, the Courts of Appeal have been burying their decisions under California's quaint Rule 976—which permits selective publication by the Court of Appeal—and Rule 977—which forbids the citation of unpublished decisions. Some lawyers aren't wild about that idea. See generally Kanner, *The Unpublished Appellate Opinion: Friend or Foe?*, 48 CALIF. ST. B.J. 386 (1973); Lascher, *Lascher at Large*, 50 CALIF. ST. B.J. 36, 38-39 (1975). But that's another story for another day.

189. The author is presently involved in several such cases, but all are still in the pre-appellate decision stages.

Three significant decisions affecting the coastline have been rendered. Their significance, however, is often overblown by over-eager government lawyers, for *none* of the appellate courts reviewed the merits of a contested trial, and *all* based their holdings that no unconstitutional taking had occurred on the limited, study-period nature of the restrictions.

The California Supreme Court's only contribution is one of those anonymous things entitled *State v. Superior Court (Veta)*.¹⁹⁰ The Veta Company sought a permit from the California Coastal Zone Conservation Commission¹⁹¹ to develop its property.¹⁹² The Regional Commission granted the permit. The State Commission, however, denied the permit on appeal.¹⁹³ Veta then filed suit seeking to overturn the denial and, alternatively, seeking inverse condemnation damages of \$14,777,-987.¹⁹⁴ The case reached the supreme court on a pleading matter, the trial court having overruled the Commission's demurrers and the Commission having sought instant review by extraordinary writ rather than risking trial. The supreme court held that the demurrer to the inverse condemnation cause of action should have been sustained. But for our purposes, its reasons are more important than its result. No fewer than five times in less than two pages, the court emphasized that the permit control being contested was temporary¹⁹⁵ and would cease to exist, by the terms of the statute,¹⁹⁶ in 1976.¹⁹⁷ Thus, the court

190. 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974).

191. A personal note. The Coast Commission (referring here jointly to the state commission and the six regional commissions (see CAL. PUB. RES. CODE ANN. §§ 27200, 27201 (West Supp. 1975)) is the proverbial Exhibit "A" of everything that can be wrong with the administrative process. This is not said, incidentally, because I am, a property owners' lawyer and the Coast Commission has halted all development along the coast. On the contrary, the Commission is authorized to issue development permits (*id.* § 27400) and proudly notes that the vast majority of applications are granted (*see, e.g.,* CALIF. COASTAL ZONE CONSERVATION COMM'N, 1973 ANNUAL REPORT 7). Nor is it said by one who opposed the initiative measure which created the Coast Commission—I voted for it. It is said because the Commissions display—almost proudly—such an utter disregard for elementary due process, equal treatment and simple consideration for people that it is astounding. Don't take my word for it. Spend a couple of hours at a permit hearing—with an open mind. You will hear lots of applications. Judge for yourself.

192. CAL. PUB. RES. CODE ANN. § 27400 *et seq.* (West Supp. 1975).

193. *Id.* § 27423.

194. The supreme court's opinion gives no clue as to either the location of the project (other than that it was either in Los Angeles County or Orange County) or the nature of the project.

195. 12 Cal. 3d at 253-55, 524 P.2d at 1292-93, 115 Cal. Rptr. at 508-09.

196. CAL. PUB. RES. CODE ANN. § 27650 (West Supp. 1975).

197. 12 Cal. 3d at 253, 524 P.2d at 1291-92, 115 Cal. Rptr. at 507-08.

concluded that the "denial of a building permit . . . does not amount at this time to a taking of property for public use without compensation."¹⁹⁸

That significant inverse condemnation liability *could* result after 1976, as alluded to by the court, was *expressly* told to the voters when they enacted this legislation by initiative. The voter's pamphlet distributed to each registered voter in the state noted:

The state plan must propose reservation of land or water in the coastal zone for certain uses or prohibition of certain uses. The acquisition of such land would probably be necessary but would require additional legislation. *However, stringent application of the permit processes could result in unknown damages from inverse condemnation suits on lands not acquired.*¹⁹⁹

The court of appeal recently upheld the general constitutionality of the Coast Act relying on *Veta* and the interim nature of the permit controls.²⁰⁰ No specific project was in issue.

Finally, in *Candlestick Properties, Inc. v. San Francisco Bay Conservation & Development Commission*,²⁰¹ the court of appeal examined what could be called a precursor of the State Coast Act which involved interim permit control over San Francisco Bay.²⁰² In *Candlestick Properties*, the Commission denied a permit to fill a parcel of property which was covered by the waters of the Bay at high tide. The refusal was upheld by the courts. The inverse condemnation claim was thrown out, however, because of the interim nature of the controls pending development of an overall plan for the Bay.²⁰³ The court recognized,

198. *Id.* at 255, 524 P.2d at 1293, 115 Cal. Rptr. at 509 (emphasis added).

199. STATE OF CALIFORNIA, PROPOSED AMENDMENTS TO THE CONSTITUTION, PROPOSITIONS AND PROPOSED LAWS 52 (1972). Elections Code Section 3566 requires the State's Legislative Analyst to prepare an impartial financial analysis of each ballot measure.

200. *CBEED v. California Coastal Zone Conservation Comm'n*, 43 Cal. App. 3d 306, 313-14, 316, 324, 118 Cal. Rptr. 315, 320-21, 322, 328 (1974).

201. 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970).

202. The similarities are briefly discussed in Jackson & Baum, *Regional Planning: The Coastal Zone Initiative Analyzed in Light of the BCDC Experience*, 47 CALIF. ST. B.J. 426 (1972).

203. 11 Cal. App. 3d at 571-72, 89 Cal. Rptr. at 905-06. Even under the famous (or infamous) Ramapo plan (*Golden v. Planning Bd.*, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972) (see note 182 *supra*)) the court placed heavy and repeated emphasis on what it viewed as the temporary nature of the restrictions. Before uncritical expansion of the Ramapo plan is attempted by less-skilled architects, note should be taken of the following factors considered important by the New York Court of Appeals in *Golden*: (1) the restriction was temporary; (2) the restriction forbade intensive development, not all useful development; (3) while those protesting the plan *claimed* that property values were grossly affected, they offered *no proof* on the

however (relying on two east coast cases that will be subsequently discussed), that an undue restriction which left only public uses would be a taking.²⁰⁴

The California Supreme Court's most recent foray into zoning reached no issues of concern here. In two companion cases,²⁰⁵ the court simply decided that zoning by initiative is not unconstitutional, without reaching the merits of either measure as applied to specific property.

The upshot is that the law applied to "environmental regulation" cases in California has so far been no different from the law applied to other regulations, which is reassuring more than surprising. Looking at the United States as a whole, however, the pattern is not consistent.²⁰⁶

Bosselman, Callies and Banta discuss a number of cases in which they detect a change.²⁰⁷ To the extent they rely on California authorities, they overstate.²⁰⁸ Cases from other states which they either downplay or fail to mention show no haste to abandon basic values. For example, the New Jersey Supreme Court refused to allow the use of the police power to maintain wetlands property for flood plain and recreational purposes, stating:

These are laudable public purposes and we do not doubt the high-mindedness of their motivation. But such factors cannot cure basic unconstitutionality Both public uses are necessarily so all-encompassing as practically to prevent the exercise by a private owner of any worthwhile rights or benefits in the land. So public acquisition rather than regulation is required.²⁰⁹

The following year, the Connecticut Supreme Court invalidated a flood plain zoning which limited uses to recreation, farming and wild-

issue; (4) the key to the plan was Ramapo's claim that municipal facilities were inadequate for intensive growth, and that claim was *not contested*. *Id.* at 295-304, 334 N.Y.S. 2d at 143-56. Compare other cases, where the "lack of facilities" argument was contested. *E.g.*, *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974); *National Land & Inv. Co. v. Kohn*, 215 A.2d 597 (Pa. 1965).

204. 11 Cal. App. 3d at 572, 89 Cal. Rptr. at 906; *cf.* *Steel Hill Dev., Inc. v. Town of Sanbornton*, 469 F.2d 956, 962 (1st Cir. 1972) (large-lot zoning unhappily approved because it appeared to be an interim, study measure; if not interim, it might be a taking).

205. *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974); *Builders Ass'n of Santa Clara—Santa Cruz Counties v. Superior Court*, 13 Cal. 3d 225, 529 P.2d 582, 118 Cal. Rptr. 158 (1974).

206. But even *that* is reassuring in its consistency.

207. THE TAKING ISSUE, *supra* note 16, at 212-35.

208. They rely a bit broadly on *Candlestick Properties*, for example.

209. *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 193 A.2d 232, 241-42 (N.J. 1963).

life sanctuaries, resulting in a 75 percent reduction in value. Again the court emphasized that valid community goals could not be attained by forced environmental philanthropy:

[A]lthough the objective of the Fairfield flood and erosion control board is a laudable one and although we have no reason to doubt the high purpose of their action, these factors cannot overcome constitutional principles Where most of the value of a person's property has to be sacrificed so that community welfare may be served, and where the owner does not directly benefit from the evil avoided . . . , the occasion is appropriate for the exercise of eminent domain.²¹⁰

The Connecticut Supreme Court reaffirmed this position in 1971, striking down a zoning regulation which left the property owner with no use except those associated with boats and ditches. His property value shrank from \$37,000 to \$1,000.²¹¹

In another wetlands case—this time from Maine—the environmental interests were again significant, but so was the method of public protection:

Between the public interest in braking and eventually stopping the insidious despoliation of our natural resources which have for so long been taken for granted, on the one hand, and the protection of appellants' property rights on the other, the issue is cast.

Here the single Justice has found that the area of which appellants' land is a part "is a valuable natural resource of the State of Maine and plays an important role in the conservation and development of aquatic and marine life, game birds and waterfowl," which bespeaks the public interest involved and the protection of which is sought by Section 4702 of the Act. With relation to appellants' interest the single Justice found that appellants' land absent the addition of fill "has no commercial value whatever." . . .

The cost of its preservation should be publicly borne. To leave appellants with commercially valueless land in upholding the restriction presently imposed, is to charge them with more than their just share of the cost of this state-wide conservation program, granting fully its commendable purpose [T]heir compensation by sharing in the benefits which this restriction is intended to secure is so disproportionate to their deprivation or reasonable use that such exercise of the State's police power is unreasonable.²¹²

210. *Dooley v. Town Plan & Zoning Comm'n*, 197 A.2d 770, 773-74 (Conn. 1964); *accord*, *Hager v. Louisville & Jefferson County Planning & Zoning Comm'n*, 261 S.W.2d 619 (Ky. Ct. App. 1953) (ordinance designating subject property as temporary storage basin in connection with flood control project enjoined as confiscatory).

211. *Bartlett v. Zoning Comm'n*, 282 A.2d 907 (Conn. 1971).

212. *State v. Johnson*, 265 A.2d 711, 716 (Me. 1970).

The Massachusetts Supreme Court decided several "environmental regulation" cases recently.²¹³ By 1970, it had obviously tired of the game and curtly disposed of the town's position:

The preservation of privately owned land in its natural, unspoiled state for the enjoyment and benefit of the public by preventing the owner from using it for any practical purpose is not within the scope and limits of any power or authority delegated to municipalities under the Zoning Enabling Act.²¹⁴

Continuous case briefing and disputation would appear to be superfluous at this point. Suffice it to say that while some judges have inexplicably²¹⁵ gone off the deep end in approving questionable regulations, most appear to have their feet solidly placed on the elementary legal precept that

the Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.²¹⁶

Unquestionably, a cogent argument can be made that the institution of private property is an unworthy one, in that it may subordinate a greater public good (as perceived by a government official) to selfish individual concerns. But we do not write on some socio-political clean

213. *Commissioner of Natural Resources v. S. Volpe & Co.*, 206 N.E.2d 666 (Mass. 1965); *Aronson v. Town of Sharon*, 195 N.E.2d 341 (Mass. 1964).

214. *MacGibbon v. Board of Appeals*, 255 N.E.2d 347, 351 (Mass. 1970).

215. Perhaps Chief Justice Traynor had the answer:

Apart from such homework on behalf of counsel to articulate the issues of a controversy, an appellate judge still confronts his own homework. How can he be sure that between counsel's efforts and his own all pertinent materials have been rounded up? Suppose there lies undiscovered some pertinent statute still at large? Many a judge is haunted by the muddle that ensues when a court overlooks such a statute even when it is in plain sight. Thus an 1898 case in our state involving a land-purchase contract overlooked a provision against forfeiture in the Civil Code. It begat confusion for over fifty years, at last dispelled in a series of cases ending in 1951. A judge in 1960 mindful of the consequences of such an error of omission is understandably apprehensive of possible oversights that might beget like confusion until the year 2013 or longer.

Traynor, *Badlands in An Appellate Judge's Realm of Reason*, 7 UTAH L. REV. 157, 159-60 (1960) (footnote omitted).

216. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). And it bears emphatic note that articulation of the above principle of social cost distribution was pioneered by the California Supreme Court in inverse condemnation cases, long before *Armstrong*; it remains firmly a part of our decisional law. See *Holtz v. Superior Court*, 3 Cal. 3d 296, 303, 475 P.2d 441, 445, 90 Cal. Rptr. 345, 349 (1970); *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 263, 398 P.2d 129, 136, 42 Cal. Rptr. 89, 96 (1965); *Clement v. State Reclamation Bd.*, 35 Cal. 2d 628, 642, 220 P.2d 897, 906 (1950); *Bacich v. Board of Control*, 23 Cal. 2d 343, 350, 144 P.2d 818, 823 (1943).

slate. Both the federal and state constitutional conventions have covered much of the slate with deeply rooted policy decisions and value judgments. Probably the central theme of the American constitutional system is the ascription of positive value judgments to certain rights, institutions and processes that are of such magnitude as to foreclose future impairment even by the collective voice of the people speaking through their legislative bodies, initiatives or referenda.

Pervading the entire constitutional structure is the principle that certain rights of the individual (including his property rights²¹⁷) are to be safeguarded even if such safeguards impair the efficient functioning of various governmental decision-making endeavors.²¹⁸ That is what the Bill of Rights is all about. As a prominent member of California's appellate bench so aptly articulated:

Constitutional judgments no less than the adjudication of private disputes demand that the bare words of the law be infused and warmed by recognition of purpose and result. The Constitution is not a set of neutral pronouncements. It is [a] structure of law implicit with values: moral values, civic values, social values. It takes sides—usually the side of the individual, guarding his security, his dignity, his claims to equal and fair treatment, against the ponderous demands of the collective state. There is nothing neutral in the assertion of freedom of the press, in the guarantee against self-incrimination, in the guarantees of due process of law and equal protection of the laws.²¹⁹

Thus, the central point is that the zoning zealots' basic position constitutes massive, and regrettable, confusion between ends and means.²²⁰ In the final analysis, the means whereby governmental pur-

217. The recent observation of the United States Supreme Court seems quite pertinent:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (emphasis added).

218. In this context, it may be useful to recall that not even a presidential act of seizure of private property to avert national catastrophe under warlike conditions can be accomplished in disregard of constitutional limitations. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). And even where commandeering of private property in wartime is permissible, the government must compensate the owner for damage caused thereby. *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951).

219. Friedman, *The Courts and Social Policy*, 47 CALIF. ST. B.J. 558, 563 (1972).

220. Query whether excessive regulation is not an unconstitutional bill of attainder (see U.S. CONST. art. 1, § 10, cl. 1). A bill of attainder is defined simply as "a legislative act which inflicts punishment without a judicial trial." *Cummings v. Missouri*,

poses are accomplished distinguishes a free society from autocratic rule. It is not by accident that our Constitutions safeguard so many *procedural* rights which are the *means* whereby the substantive rights of the citizenry are protected.²²¹ As the Supreme Judicial Court of Massachusetts recently stated in an "environmental regulation" case:

The [governmental entities] argue as though all that need be done is to demonstrate a public purpose and then no regulation . . . can be too extreme

In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the department of conservation to look after the interests of the former, and it is the duty of the courts to stand guard over constitutional rights.²²²

VIII. THE ENVIRONMENT CAN BE PROTECTED WITHOUT TRAMPLING ON THE CONSTITUTIONAL RIGHTS OF INNOCENT LANDOWNERS.

ALL THAT NEEDS TO BE DONE IS TO ZONE RESTRICTIVELY AND COMPENSATE FOR THE RESTRICTION

Planners and planning lawyers are fond of saying that there are only two choices available: regulate the property restrictively or allow it to be freely used in a manner which may not be consistent with public needs:

Underlying all legal structure in the area of land-use control is a Hobson's choice between full compensation (under eminent domain) and no compensation (under the police power). A land-use regulation that falls as unconstitutional leaves a void. While the public might condemn

71 U.S. (4 Wall.) 277, 323 (1867). A bill of attainder need not designate its victims by name, but may do so by class or general description. *Id.* The punishment may consist of confiscation of property or the profits thereof. *Id.* at 321 (*quoting* Blackstone). Further, in *United States v. Brown*, 381 U.S. 437, 458-61 (1965), Chief Justice Warren indicated that the punishment (in order to be the type which is constitutionally proscribed) need not be punitive or retributive, but might be merely preventive. As the Court noted in *Cummings*:

The clauses in the Missouri Constitution, which are subject of consideration, do not, in terms, define any crimes, or declare that any punishment shall be inflicted, but they produce the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared.

71 U.S. (4 Wall.) at 327.

Could it not be argued that people owning property sought to be environmentally protected by stringent regulation are being punished by legislative action by deprivation of the right to use their property?

221. *See, e.g., Estate of Buchman*, 123 Cal. App. 2d 546, 559-60, 267 P.2d 73, 84 (1954).

222. *Commissioner of Natural Resources v. S. Volpe & Co.*, 206 N.E.2d 666, 671 (Mass. 1965).

the affected property to achieve the public objective, in America this does not happen.²²³

Indeed, not surprisingly, most of the judicial decisions in this area deal in blacks and whites, rather than varying shades of gray. But when the only question before the court is "whether this ordinance is confiscatory or not," it is really hard to expect much more from them.

Another problem leading to lack of planning flexibility is the penchant of local agencies to consider an ordinance which approaches or goes beyond the bounds of constitutionality and, in effect, to say "let's just pass it and let the courts decide whether it's valid."²²⁴ The problem with this approach is that it leaves the initiative—and the choice of weapons—to the property owner. Thus, if the regulation is too severe, he may seek to invalidate the ordinance,²²⁵ seek damages in inverse condemnation,²²⁶ or seek damages in federal court for either inverse condemnation (against the municipality)²²⁷ or for violation of the Civil Rights Act²²⁸ (against individual municipal officials²²⁹). Somehow, one gets the impression that such a hit-or-miss system leaves something to be desired for those who want to plan rationally for the future.²³⁰

There is, however, an alternative, a middle-ground, if you will, that avoids the either/or extremes and protects the rights of the community at the same time that it protects the rights of individual property

223. D. MANDELKER, *MANAGING OUR URBAN ENVIRONMENT* 501 (1966).

224. My experience is thus directly contrary to that related in Benson, *supra* note 16, at 653-54. Compare Benson with Michelman, *supra* note 14, and Van Alstyne, *supra* note 19.

225. *E.g.*, Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 327 P.2d 10 (1958).

226. *E.g.*, Peacock v. County of Sacramento, 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969); Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963).

227. Beaver v. Borough of Johnsonburg, 375 F. Supp. 326 (W.D. Pa. 1974); Dahl v. City of Palo Alto, 372 F. Supp. 647 (N.D. Cal. 1974).

228. 42 U.S.C. § 1983 (1970). See Lynch v. Household Fin. Corp., 405 U.S. 538 (1972), in which the Supreme Court put an end to an anomalous line of older cases which suggested that the Civil Rights Act did not protect property rights. For an excellent example of the intellectual anguish which the now disapproved line of cases caused conscientious federal judges, see Eisen v. Eastman, 421 F.2d 560, 563-66 (2d Cir. 1969).

229. Harrison v. Brooks, 446 F.2d 404 (1st Cir. 1971); Beaver v. Borough of Johnsonburg, 375 F. Supp. 326 (W.D. Pa. 1974); Cordeco Dev. Corp. v. Vazquez, 354 F. Supp. 1355 (D.P.R. 1972); Inmobiliaria Borinquen, Inc v. Garcia Santiago, 295 F. Supp. 203 (D.P.R. 1969); Shellburne, Inc. v. New Castle County, 293 F. Supp. 237 (D. Del. 1968).

230. Of course, for those who prefer the political soap-box, the system does provide periodic opportunities to blast either "developers" or "those damn courts" for interfering in municipal affairs.

owners who are fortunate (or unfortunate) enough to own property still in an "unspoiled" state—regulate it in such a way as to preserve as much of its natural state as is desired and compensate the owner for whatever option is taken from him.²³¹ This system has been used extensively in England,²³² sparingly in the United States,²³³ and commended, in various forms, by numerous commentators.²³⁴

231. Whatever happened to "scenic easements"? The acquisition of less than full fee ownership for the purpose of preserving natural beauty (while compensating the owner) is authorized. *E.g.*, 23 U.S.C. § 319 (1970); CAL. GOV'T CODE ANN. §§ 6950-54, 7000-01 (West 1966); see Sussna, *New Tools For Open Space Preservation*, 2 URBAN LAW. 87 (1970). Yet the authorization is apparently being ignored by those who prefer to attempt to steal these rights rather than purchase them.

232. The first enactment was in 1909, The Housing, Town Planning, & c. Act, 9 Edw. 7, c. 44, § 58(1), which provided:

Any person whose property is injuriously affected by the making of a town planning scheme shall . . . be entitled to obtain compensation in respect thereof from the responsible authority.

The law has been revised several times, the current version being the Town and Country Planning Act 1971, c. 78. For discussion, see generally C. HAAR, *LAND PLANNING IN A FREE SOCIETY* (1951); Hagman, *Articles 1 and 2 of the ALI Model Land Development Code: The English are Coming*, 1971 ASPO LAND USE CONTROLS ANNUAL 3 (1972); Hagman & Pepe, *English Planning Law: A Summary of Recent Developments*, 11 HARV. J. LEGIS. 557 (1974); Mandelker, *Notes From the English: Compensation in Town and Country Planning*, 49 CALIF. L. REV. 699 (1961).

233. See *Attorney General v. Williams*, 55 N.E. 77 (Mass. 1899); *State ex rel. Twin City Bldg. & Inv. Co. v. Houghton*, 174 N.W. 885 (1919), *rev'd on rehearing*, 176 N.W. 159 (Minn. 1920); *City of Kansas City v. Kindle*, 446 S.W.2d 807 (Mo. 1969).

234. *E.g.*, THE TAKING ISSUE, *supra* note 16, at 302; J. DELAFONS, *LAND USE CONTROLS IN THE UNITED STATES* (2d ed. 1970); Badler, *Municipal Zoning Liability in Damages—A New Cause of Action*, 5 URBAN LAW. 25 (1973); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L. REV. 165 (1974); Bosselman, *The Third Alternative in Zoning Litigation*, 17 ZONING DIGEST 73 (1965); Carmichael, *Transferable Development Rights as a Basis for Land Use Control*, 2 FLA. ST. U.L. REV. 35 (1974); Costonis, *Development Rights Transfer: A Proposal for Financing Landmark Preservation*, 1 REAL ESTATE L.J. 75 (1973); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y.U.L. REV. 1238 (1960); Hagman, *A New Deal: Trading Windfalls for Wipeouts*, PLANNING, Sept., 1974, at 9; Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179 (1961); Krasnowiecki & Strong, *Compensable Regulations for Open Space: A Means of Controlling Urban Growth*, 29 J. AM. INST. PLANNERS 87 (1963); Rose, *From the Legislatures: Proposed Development Rights Legislation Can Change the Name of the Land Investment Game*, 1 REAL ESTATE L.J. 276 (1973); Rose, *A Proposal for the Separation and Marketability of Development Rights as a Technique to Preserve Open Space*, 2 REAL ESTATE L.J. 635 (1974); Sussna, *New Tools For Open Space Preservation*, 2 URBAN LAW. 87 (1970); Waite, *Governmental Power and Private Property*, 16 CATH. U.L. REV. 283 (1967); Comment, *An Evaluation of the Rights and Remedies of a New York Landowner For Losses Due To Government Action—With a Proposal for Reform*, 33 ALBANY L. REV. 537 (1969); Comment, *Compensable Regulations: Outline of a New Land Use Planning Tool*, 10 WILLAMETTE

Actually, once the theory is stated, there is little to add, except that it will add rationality to long range planning and fair distribution of the costs.²³⁵ If *all* costs are known in advance, they can be planned for²³⁶ and rationally weighed. Rather than presuming that the luckless owner of an undeveloped parcel can be forced (by "mere" regulation) to donate its use (or non-use) to the public, the public will be in a position to ask itself whether the "protection" of that property is worth the cost to it in dollars and cents. As Justice Sullivan aptly noted, "there are many people who are unperturbed over the rights of their neighbors largely because any challenge to their own seems remote."²³⁷ It is sad (but, facing reality, it is also true) that too many in what is loosely called the "environmental movement" are unconcerned with the rights of individuals who may stand in the way of what they view as right.²³⁸ As Professor Kristol expressed it:

L.J. 451 (1974); Note, *Development Rights Transfer in New York City*, 82 YALE L.J. 338 (1972); see Michelman, *supra* note 14; Van Alstyne, *supra* note 19.

235. Fairness is said to have been the touchstone of Chief Justice Warren's theory of justice. See Tobriner, *A Salute to Justices Burke and Mosk*, 50 CALIF. ST. B.J. 14 (1975). It has long been the basis of "taking" law. *E.g.*, *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 631 (1961); *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950); *United States v. Cors*, 337 U.S. 325, 332 (1949).

236. Rather than having courts in inverse condemnation decisions "unexpectedly" inject unplanned and unexpected items into tightly drafted municipal budgets.

237. Sullivan, *Bill of Rights Are Our Way of Life—Another View of Our Constitution*, Los Angeles Daily J., Jan. 22, 1968, (Report Section), at 5.

238. For example, I remember a February 4, 1972 hearing before the California Assembly Judiciary Committee, at which a representative of the Sierra Club urged—with what is recalled as a straight face—that because of "turkey drives" conducted by Indians hundreds of years ago along the California coastline, a prescriptive easement in favor of "the public" had been acquired, to which all privately-owned coastal property was subject. While no court to my knowledge has gone quite that far (*cf.* *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Ore. 1969); *compare Hughes v. Washington*, 389 U.S. 290 (1967)), limited public theft of such property has been countenanced (*Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970)). The extent of such rights is now being thrashed out in trial courts. For my published views on this subject, see Berger, *Gion v. City of Santa Cruz: A License to Steal?* 49 CALIF. ST. B.J. 2 (1974); Berger, *Nice Guys Finish Last—At Least They Lose Their Property: Gion v. City of Santa Cruz*, 8 CALIF. W.L. REV. 75 (1971). For other views, pro and con, see Armstrong, *Gion v. City of Santa Cruz: Now You Own It—Now You Don't*, 45 L.A. BAR BULL. 529 (1970); Gallagher, Jure & Agnew, *Implied Dedication: The Imaginary Waves of Gion-Dietz*, 5 SW. U.L. REV. 48 (1973); Shavelson, *Gion v. City of Santa Cruz: Where Do We Go From Here?*, 47 CALIF. ST. B.J. 414 (1972); Note, *The Supreme Court of California 1969-1970*, 59 CALIF. L. REV. 30, 231 (1971); Note, *Implied Dedication in California: A Need For Legislative Reform*, 7 CALIF. W.L. REV. 259 (1970); Note, *The Common Law Doctrine of Implied Dedication and Its Effect on the California Coastline Property Owner: Gion v. City of Santa Cruz*, 4 LOY. L.A.L. REV. 438 (1971); Note, *Californians Need Beaches—Maybe Yours!*, 7 SAN DIEGO L. REV. 605 (1970); Comment, *Implied Dedication: A Threat to the Owners*

There is in the United States a tradition of evangelical reform that has no exact counterpart in any other nation

In some respects, this reform impulse is one of our glories. It gives American politics a permanent moral dimension and moral thrust that is entirely proper to a democratic republic, one of whose major functions must be to ennoble the common men and women we all most certainly are. But it has its dangers, too. It is so easy to move from the moral to the moralistic, from a concern for what is right to a passionate self-righteousness, from a desire to improve our social reality to a blind and mindless assault against the real world which so stubbornly fails to conform to our ideological preconception. In short, the great temptation which all American reform movements experience is to become a crusade. It is a temptation, alas, that the reform impulse will frequently succumb to, with all the disagreeable results that have always attended upon crusades.²³⁹

One way to temper the unfortunate excesses of the crusaders is to confront them with the bill. Indeed, to do so is no more than an application of well-established law that when society benefits, society—not some hapless individual—should pay.²⁴⁰ In sum, serious, rational environmental planning cannot be done unless the public considers the full cost.²⁴¹ Beyond that, this type of regulation works not only in England,²⁴² but also in the United States. The system has been used here to limit building height surrounding a public park,²⁴³ to preserve the existing character of a unique historical boulevard,²⁴⁴ and to restrict the type of residential use to be made of property.²⁴⁵ In praising the concept, the Missouri Supreme Court noted:

of California's Shoreline, 11 SANTA CLARA LAW. 327 (1971); Note, *This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches*, 44 S. CAL. L. REV. 1092 (1971); Comment, *Public Access to Beaches*, 22 STAN. L. REV. 564 (1970); Comment, *Public or Private Ownership of Beaches: An Alternative to Implied Dedication*, 18 U.C.L.A.L. REV. 795 (1971).

239. Kristol, *The Environmentalist Crusade*, Wall Street J., Dec. 16, 1974, at 10, col. 4.

240. *Armstrong v. United States*, 364 U.S. 40 (1960); *Holtz v. Superior Court*, 3 Cal. 3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970); *Bartlett v. Zoning Comm'n*, 282 A.2d 907 (Conn. 1971); *State v. Johnson*, 265 A.2d 711 (Me. 1970); *MacGibbon v. Board of Appeals*, 255 N.E.2d 347 (Mass. 1970); *Morris County Land Improvement Co. v. Parsippany-Troy Hills Township*, 193 A.2d 232 (N.J. 1963); *Arverne Bay Constr. Co. v. Thatcher*, 15 N.E.2d 587 (N.Y. 1938).

241. See Michelman, *supra* note 14, at 1181; Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modifications in California*, 16 U.C.L.A.L. REV. 491, 543-44 (1969).

242. Authorities cited in note 232 *supra*.

243. *Attorney General v. Williams*, 55 N.E. 77 (Mass. 1899).

244. *Kansas City v. Liebi*, 252 S.W. 404 (Mo. 1923).

245. *State ex rel. Twin City Bldg. & Inv. Co. v. Houghton*, 174 N.W. 885 (1919),

Zoning with compensation is a joint exercise of the power of eminent domain and the police power. It is zoning with extraordinary consideration for the property owners involved for it compensates those whose property rights are taken in the process²⁴⁶

The only argument raised against the concept of compensated regulation is the morally moribund one that it will cost too much, *i.e.*, the governmental entities would just as soon have the burden placed on the individuals who happen to be in the public's way. The argument is unconscionable and has been repeatedly rejected in various contexts. Perhaps the United States Supreme Court said it all in *Watson v. Memphis*²⁴⁷: "[V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny [them] than to afford them."²⁴⁸ Other courts have echoed this eminently sensible and fair principle.²⁴⁹ In short, there *is* a way to protect everybody's interest. All we need is the honesty and moral and intellectual integrity to use it.

IX. CONCLUSION

And so we return to basics.

It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but

rev'd on rehearing, 176 N.W. 159 (Minn. 1920); *City of Kansas City v. Kindle*, 446 S.W.2d 807 (Mo. 1969).

246. *City of Kansas City v. Kindle*, 446 S.W.2d 807, 813 (Mo. 1969).

247. 373 U.S. 526 (1963).

248. *Id.* at 537.

249. *Rozecki v. Gaughan*, 459 F.2d 6, 8 (1st Cir. 1972), *quoting* *Jackson v. Bishop*, 404 F.2d 571, 578 (8th Cir. 1968) ("[h]umane considerations and constitutional requirements are not, in this day, to be measured or limited by dollar considerations"); *Hamilton v. Love*, 328 F. Supp. 1182, 1194 (E.D. Ark. 1971) ("[i]nadequate resources can never be an adequate justification for the state's depriving any person of his constitutional rights"); *accord*, *Gates v. Collier*, 501 F.2d 1291, 1322 (5th Cir. 1974); *Holt v. Sarver*, 309 F. Supp. 362, 385 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971); *Baldwin v. State*, 6 Cal. 3d 424, 436, 491 P.2d 1121, 1128-29, 99 Cal. Rptr. 145, 152-53 (1972); *Holtz v. Superior Court*, 3 Cal. 3d 296, 304, 475 P.2d 441, 446, 90 Cal. Rptr. 345, 350 (1970); *Dillon v. Legg*, 68 Cal. 2d 728, 743, 441 P.2d 912, 922, 69 Cal. Rptr. 72, 82 (1968); *Connor v. Great W. Savings & Loan Ass'n*, 69 Cal. 2d 850, 867, 447 P.2d 609, 618, 73 Cal. Rptr. 369, 378 (1968). For extended discussion, see *Berger, The California Supreme Court—A Shield Against Governmental Overreaching: Nestle v. City of Santa Monica*, 9 CALIF. W.L. REV. 199, 244-59 (1973).

a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism.²⁵⁰

Those words were uttered by the United States Supreme Court a hundred years ago. Their validity endures.²⁵¹

We are faced today with a heightened awareness of the abuse which we have heaped upon our natural surroundings. We have literally embarked upon a crusade to change things and make them right. We cannot, however, crush individual, human rights in the name of environmental concern and hope to have a social system worth preserving when we are through.²⁵² That is why the end *cannot* justify the means. As the Supreme Court so recently noted, "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."²⁵³

It is one thing to regulate. It is quite another to set up a system in which interests, endemic to us as a species, are left to the whim of an official or even to the whim of the majority. These times are perilous to more than the environment. The people's confidence in government is at an all-time low. To restore it, we must stand firm in protecting the basic virtues that are the heart and soul of the Nation. Only recently, newly appointed Attorney General Edward H. Levi noted what he called, "an enormous amount of cynicism about the administration of justice in the United States."²⁵⁴

Mr. Levi's sad conclusion has prestigious company. With increasing regularity, California's appellate justices have commented on the growing number of people who are losing faith in Government and questioning the quality of justice dispensed in the courts.²⁵⁵ Indeed, the

250. *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 662 (1875).

251. Their recently repeated echo by the Chief Justice and three Associate Justices of the California Supreme Court is noteworthy: Mosk, *Privacy in a Crowded World is Sought*, Los Angeles Daily J., Apr. 22, 1968, (Report Section), at 28; Sullivan, *Bill of Rights Are Our Way of Life—Another View of Our Constitution*, Los Angeles Daily J., Jan. 22, 1968, (Report Section), at 3; Tobriner, *Individual Rights in an Industrialized Society*, 54 A.B.A.J. 21 (1968); Wright, *supra* note 42.

252. Indeed, it may not be an exaggeration to say that the stability which our society has achieved derives from the ability to acquire and use land freely. Societies without this tradition have, by comparison, been stultified. See Kristjanson & Penn, *Public Interest in Private Land: Private and Public Conflicts*, in *LAND USE POLICY AND PROBLEMS IN THE UNITED STATES* 336-49 (H. Ottoson ed. 1963).

253. *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972).

254. Ostrow, *Levi Calls Broad Distrust of Law System a Problem*, Los Angeles Times, Feb. 4, 1975, pt. 1, at 4, col. 1.

255. See Thompson, *Appellate Court Reform—The Near Term*, 6 BEVERLY HILLS B.J., Sept., 1972, at 9, 13, 18; Tobriner, *Can Young Lawyers Reform Society Through the Courts?*, 47 CALIF. ST. B.J. 294 *passim* (1972); Wright, *supra* note 42, at 1268.

California Court of Appeal recently took "judicial notice of the fact that a large cross-section of the citizenry entertains an opinion that the Government is no longer representative of the people."²⁵⁶

Those same learned jurists, while decrying the implications of their own thoughts, express the view that when the just expectations of individuals are thwarted or bled lifeless by government officials, the inevitable result will be to "take to the streets."²⁵⁷ Such a prospect is far from fanciful if the insidious notion of unbridled regulation becomes reality. The issues, instincts, values and needs which would be frustrated, obstructed and discommoded are simply too deep-seated to ignore. Such a system would tear the fabric that binds us as a nation and as a society. As Justice Cardozo remarked:

Deep into the soil go the roots of the words in which the rights of the owners of the soil find expression in the law. We do not readily uproot the growths of centuries.²⁵⁸

There is room for regulation. More than that, there is a *need* for regulation. But if it is truly to serve our best interests as a people, it must be a balanced regulation; a type which is fair to all. In a way, those calling for a change are right: we do need new, flexible tools to deal with the modern world. The problem is that they really propose nothing new. Their "new" regulation is really no more than old-hat Euclidean zoning without any safeguards. That just will not wash. What will work is a realistic look at the governmental powers involved, an abandonment of fascination with labels and an effort at purchasing the hard-earned property which society wants to preserve. That may not be the most sugar-coated message to deliver, but, in the late Chief Justice's words, "it's *fair*."

256. *Gayle v. Hamm*, 25 Cal. App. 3d 250, 257-58, 101 Cal. Rptr. 628, 634 (1972).

257. See *Watson v. Branch County Bank*, 380 F. Supp. 945, 957 (W.D. Mich. 1974); W. DOUGLAS, *POINTS OF REBELLION* 78 (1970); Address by Arthur Goldberg to the Cleveland Bar Association, *quoted in* 18 A.B. NEWS, Mar., 1973, at 6; Tobriner, *Can Young Lawyers Reform Society Through the Courts*, 47 CALIF. ST. B.J. 294, 298 (1972); Wright, *supra* note 42, at 1268; compare Traynor, *The Stinking Violets of Violence*, 4 LOY. L.A.L. REV. 1 (1971); Kingsley, *Change and Civil Disobedience*, 5 BEVERLY HILLS B.J., June-July, 1971, at 6.

258. *Techt v. Hughes*, 128 N.E. 185, 191 (N.Y. 1920); see *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 210 (1920) (Black, J.) ("[c]oncepts of real property are deeply rooted in state traditions, customs, habits, and laws"); *City of Knoxville v. Knoxville Water Co.*, 212 U.S. 1, 18 (1909) (Moody, J.) ("[o]ur social system rests largely upon the sanctity of private property, and the State or community which seeks to invade it will soon discover the error in the disaster which follows"); *Davis v. Mills*, 194 U.S. 451, 457 (1904) (Holmes, J.) ("[p]roperty is protected because such protection answers a demand of human nature, and therefore takes the place of a fight").