Santa Clara University
School of Law

Santa Clara Law Review

Volume 21 | Number 1 Article 6

1-1-1981

Inverse Condemnation and the Alchemist's Lesson: You Can't Turn Regulations into Gold

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INVERSE CONDEMNATION AND THE ALCHEMIST'S LESSON: YOU CAN'T TURN REGULATIONS INTO GOLD

I. INTRODUCTION

"Taking" clauses in the federal and state constitutions mandate that private property will not be appropriated for public use without the payment of just compensation.[1] Separate clauses in the fifth and fourteenth amendments and in state constitutions guarantee that citizens cannot be deprived of property without due process of law.

The existence of separate due process and just compensation clauses strongly suggests that the framers of these documents intended to separate the sovereign powers of eminent

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1. *See* U.S. CONST. amends. V & XIV, § 1; ALA. CONST. art. I, § 23; ALASKA CONST. art. 4, § 18; ARIZ. CONST. art. 2, § 17; ARK. CONST. art. 2, § 22; CAL. CONST. art. 1, § 19; COLO. CONST. art. II, § 15; CONN. CONST. art. 1, § 11; DEL. CONST. art. 1, § 8; FLA. CONST. art. 10, § 6; GA. CONST. art. 1, § 2-301; HAWAII CONST. art. 1, § 18; IDAHO CONST. art. 1, § 1, § 14; ILL. CONST. art. 1, § 15; IND. CONST. art. 1, § 21; IOWA CONST. art 1, § 18; KAN. CONST. art. 12, § 4; KY. CONST. § 13; LA. CONST. art. 1, § 2; ME. CONST. art. 1, § 21; MD. CONST. art. III, § 40; MASS. CONST. pt. I, art. 10; MICH. CONST. art. X, § 2; MINN. CONST. art. 1, § 13; MISS. CONST. art. 3, § 17; MO. CONST. art 1, § 26; MONT. CONST. art. III, § 14; NEB. CONST. art. 1, § 21; NEV. CONST. art. 1, § 8; N.J. CONST. art. 1, § 20; N.M. CONST. art. II, § 20; N.Y. CONST. art. 1, § 7; N.D. CONST. art. 1, § 14; OHIO CONST. art. 1, § 19; OKLA. CONST. art. 2, § 24; OR. CONST. art. 1, § 18; PA. CONST. art. 1, § 10; R.I. CONST. art. 1, § 16; S.C. CONST. art. 1, § 17; S.D. CONST. art. VI, § 13; TENN. CONST. art. 1, § 21; TEX. CONST. art. 1, § 17; UTAH CONST. art. 1; § 22; VT. CONST. ch. I, art. 2; VA. CONST. art. 1, § 11; WASH. CONST. art. 1, § 16; W. VA. CONST. art. 3, § 9; WIS. CONST. art. 1, § 13; WYO. CONST. art. 1, §§ 32, 33. New Hampshire and North Carolina have no such constitutional provisions but courts have held that compensation must be paid to the property owner upon appropriation of his property. Additionally, twenty-three states have broader provisions than the fifth amendment, requiring compensation whenever private property is taken or damaged for public use. ARIZ. CONST. art. 2, § 17; ARK. CONST. art. 2, § 22; CAL. CONST. art. 1, § 19; COLO. CONST. art. II, § 15; GA. CONST. art. 1, § 2-301; ILL. CONST. art. 1, § 15; KY. CONST. § 13; LA. CONST. art 1, § 2; MINN. CONST. art. 1, § 13; MISS. CONST. art. 3, § 17; MO. CONST. art. 1, § 26; MONT. CONST. art. III, § 14; NEB. CONST. art. 1, § 21; N.M. CONST. art. II, § 20; N.D. CONST. art. 1, § 14; OKLA. CONST. art. 2, § 24; S.D. CONST. art. VI, § 13; TEX. CONST. art. 1, § 17; UTAH CONST. art. 1, § 22; VA. CONST. art. 1, § 11; WASH. CONST. art. 1, § 16; W. VA. CONST. art. 3, § 9; WYO. CONST. art. 1, § 33. Additionally the Alabama constitution has been interpreted as requiring compensation for damaged property. *See* Montgomery v. Maddox, 89 Ala. 181, 7 So. 433 (1890).

domain and the police power.[2] Each power, when improperly exercised, results in a different remedy for the aggrieved party.

Although the requirement of procedural due process[3] applies to both eminent domain and police power actions, an adjudication that property has been confiscated in eminent domain results in entitlement to money damages. No such compensation is required, however, when the government exercises its police power to regulate the use of property.[4] The corollary to this rule and the premise of this comment is that if the regulation is adjudged unreasonable or arbitrary, the property owner is properly entitled only to declaratory relief or mandamus.

During the evolution of American property law the distinction between eminent domain and police power regulations has not been consistently observed. As a result, courts, property owners, and commentators alike are confused both as to the definition of "taking" and as to the appropriate remedy to be applied if a taking is found to have occurred.[5]

Prior to the Civil War, the United States Supreme Court did not consider many taking cases.[6] Not until the last third

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2. *See* 1 P. NICHOLS, EMINENT DOMAIN § 1.42 (rev. 3d ed. 1979) which reads in part:

> The distinguishing characteristic between eminent domain and the police power is that the former involves the *taking* of property while the latter involves the *regulation* of such property to prevent the use thereof in a manner that is detrimental to the public interest. The police power may be loosely described as the power of the sovereign to prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare.

See also Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E. 2d 381, 385 N.Y.S.2d 5, *appeal dismissed*, 429 U.S. 990 (1976).

The historical derivations of the due process clause and the eminent domain concept are decidedly disparate. *See* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 53-104 (1973) [hereinafter cited as THE TAKING ISSUE].

3. Due process, whether procedural or substantive, is of course a vast and vague concept. For an interesting treatment of substantive due process in the area of intangible property, *see* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

4. Under the police power a governing body may reasonably restrict the use of private property in the interest of advancing the public health, safety, or general welfare. *E.g.*, Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926). *See also* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962).

5. *See* Bozung, *Judicially Created Zoning with Compensation: California's Brief Experiment with Inverse Condemnation*, 10 ENV. L.J. 67 (1979).

6. THE TAKING ISSUE, *supra* note 2, at 115. The authors also point out that during this time period the Court was actively incorporating certain Bill of Rights provisions into the fourteenth amendment due process clause, so that by the end of

of the nineteenth century did the Court begin to formulate a federal approach to the taking clause.

In 1887, the Court decided *Mugler v. Kansas.*[7] Justice Harlan, writing for the majority, established a clear distinction between police power regulations and eminent domain actions, observing that the former, while impairing the *use* of private property, do not constitute takings[8] while the latter result in a "physical invasion of the real estate of the private owner, and a practical ouster of his possession,"[9] entitling the owner to compensation.

Justice Harlan thus differentiated police power regulations enacted to prohibit certain uses of property, but leaving title in the owner, from eminent domain actions culminating in the government's taking possession and title to the property itself. The *Mugler* opinion identified the criterion for a valid regulation as "a real or substantial relation to the [objects of protecting] the public health, the public morals, or the public safety."[10] In short, the test for a valid regulation is a rational relationship to the public welfare.

Thirty five years later, in *Pennsylvania Coal Co. v. Mahon,*[11] Justice Oliver Wendell Holmes redirected the course of takings law by declaring that "the general rule at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[12] Justice Holmes thus erased the hitherto clear qualitative distinctions between police power and eminent domain by characterizing eminent domain as police power "gone to far," and inserted in its place an operational model in which the two powers existed along a continuum and were differentiated by degree rather than kind. After *Pennsylvania Coal,* the Supreme Court all but retired from the field of takings law[13] and

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the century "it was clear the states were governed by the taking clause." *Id.*

7. 123 U.S. 623 (1887). In *Mugler,* a Kansas statute prohibited the manufacture and sale of intoxicating liquors. Mugler owned a brewery which, under the statute, was required to cease operation and thus became relatively worthless. Mugler alleged a compensable taking.

8. *Id.* at 667-68.

9. *Id.* (quoting Pumpelly v. Green Bay Co., 80 U.S. 166 (1871)).

10. *Id.* at 661.

11. 260 U.S. 393 (1922). The regulation at issue in *Pennsylvania Coal* prohibited the owner of sub-surface mining rights from taking coal in such a way as to cause subsidence of dwellings on the surface.

12. *Id.* at 415.

13. THE TAKING ISSUE, *supra* note 2, at 138.

has, until recently, appeared reluctant to address the issue.[14]

Little controversy surrounds the government's traditional use of its eminent domain power to appropriate privately-held land, provided the owner is compensated fairly. When landowners assert, however, that their property—or its market value—has been "taken" by the operation of a legislatively imposed use regulation, the owner's entitlement to compensation depends on whether police power enactments are viewed as qualitatively different from eminent domain actions or merely as like in kind, but quantitatively distinct.

Under Justice Harlan's separate powers approach, the landowner's remedy in challenging the validity of a regulation is limited to declaratory relief and mandamus, while under Justice Holmes' continuum approach the landowner is also entitled to seek money damages under a theory of inverse condemnation. Yet a continuum analysis seems to spawn a host of problems. Aside from creating an initial problem of when and where to draw the line between police power and eminent domain, this approach generates the questions of what constitutes "property,"[15] the taking of which entitles a landowner to damages, and what measure should be employed in assessing "just" compensation. Further, these questions must all be answered simultaneously in order to ascertain whether government regulation has gone too far and a taking has occurred. The end result has been labeled by commentators as the "crazy-quilt pattern of Supreme Court doctrine."[16]

On the other hand, recent state supreme court decisions, both in California and New York, have returned to Justice Harlan's separate powers approach, and may signal its renewed vitality in American takings law.

This comment contends that judicial adherence to Justice Holmes' continuum or "gone too far" approach generates results that are unfavorable for governments and claimants alike. A return to Justice Harlan's position that regulations emanating from the police power are qualitatively different from exercises of eminent domain power and should be tested

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14. *See* Consolidated Rock Products Co. v. Los Angeles, 57 Cal. 2d 515, 370 P. 2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962); *see generally* Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1962).

15. Sax, *supra* note 14, at 51.

16. Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63, 105.

under the rational relationship standard will result in simpler classification and application of proper remedies in taking cases.

This comment first explores and criticizes recent federal takings cases that employ the continuum approach and apply, in a rather random manner, various "indices" of a taking. Secondly, several recent state court decisions that reject the continuum theory and which may presage the reemergence of the separate powers approach are examined. The results of adherence to this "separation" approach with its reliance on the reasonableness standard are then compared with the results obtained under the continuum theory. Finally, practical and theoretical benefits and detriments to claimants and governments under each theory are assessed.

II. Basis of the Continuum Theory in Law

As previously stated, the continuum theory can be traced to Justice Holmes' dictum in *Pennsylvania Coal* that, "if a regulation goes too far it will be recognized as a taking."[17] Holmes clearly espoused this matter of degree viewpoint when he characterized eminent domain actions as exercises of police power "gone too far." Although the remedy granted in *Pennsylvania Coal* was invalidation of the offending regulation and not compensation, Holmes' statement created a great deal of legal confusion by suggesting that the proper remedy for excessive regulation must inevitably be monetary compensation.[18] Underlying Justice Holmes' dictum, and implicit in the continuum approach, is the assumption that courts may somehow transmute *ultra vires* police power actions into lawful exercises of eminent domain.[19] Excessive regulation, therefore, is characterized as a "taking" and the device of inverse condemnation[20] is applied as a means of affording monetary relief. There is no constitutional basis to support Justice Holmes'

17. 260 U.S. at 393.

18. *See* Bozung, *supra* note 5, at 69.

19. *See* Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 Stan. L. Rev. 1439 (1973-74), which terms the continuum theory judicial language compelled by neither legal doctrine nor existing case law.

20. Inverse condemnation is defined in 22A Words and Phrases 231 (West 1958) as follows: "Inverse or reverse condemnation contemplates a situation in which the property has been taken by the exercise of the power of eminent domain but without any payment of compensation therefor having been made."

position.[21]

III. Major Taking Indices and the Continuum Theory

Holmes never suggested an answer to the question of where to draw a line between eminent domain and the police power. He preferred to advocate *ad hoc* decisions, and observed that "the question depends on the particular facts."[22]

Although courts applying his approach have developed a multitude of indices for evaluating alleged takings,[23] they generally employ one of the following four methods or "tests" to determine whether the operation of a regulation has effected a taking of private property for which compensation must be offered.[24] These tests are rather like a blind person's attempt to describe an elephant; they are insufficient because no one test is definitive in all factual situations.

A. *Physical Invasion*

When governmental action results in a physical invasion of property, compensation is never denied.[25] This is equally true for formal expropriations and for actions that have the effect of allowing general public use or governmental occupation of a fundamental attribute of property. Thus, when a city temporarily stores construction materials on a landowner's lot, a compensable encroachment has occurred.[26] Even a physical invasion as minor as the installation of a public sidewalk along the edge of a lot results in compensation to the owner of the land. The fact that the invasion may be practically trifling from the owner's point of view does not diminish the govern-

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21. *See generally* The Taking Issue, *supra* note 2, at 124-38; Note, *supra* note 19, at 1445-46.

22. 123 U.S. at 623.

23. *See* Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. Rev. 165 (1974) for a comprehensive, though superficial, compilation of major taking indices.

24. *See generally* Sax, *supra* note 14; Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, (1967); Berger, *supra* note 23.

25. Michelman, *supra* note 24, at 1184; Sax, *supra* note 14, at 46; Berger, *supra* note 23, at 170-71; Van Alstyne, *Taking or Damaging By Police Power: The Search for Inverse Condemnation Criteria*, 44 S. Calif. L. Rev. 1 (1971).

26. *E.g.*, Herman v. City of Los Angeles, 30 Cal. 2d 746, 185 P.2d 597 (1947); Granone v. County of Los Angeles, 231 Cal. App. 2d 629, 42 Cal. Rptr. 34 (1965), where flooding was called a temporary taking and found compensable.

ment's duty to reimburse. The rationale is simply that under the Constitution, the owner has a right to undisturbed possession of his land until it has been condemned according to law.[27]

Historically, *only* physical encroachment and occupation of property resulted in compensable takings.[28] There are two serious shortcomings of the physical invasion test. First, it can be used to identify when compensation must be paid (*i.e.*, when property is invaded physically) but cannot be used to indicate when compensation should be denied. It does not deal adequately with the concept of impairment or diminution of beneficial use or value of the land.

Secondly, the test does not deal consistently with comparatively harmless invasions, (*e.g.*, easements for utility lines) nor with non-physical or intermittent invasions,[29] treating the former as takings, but not the latter. Because compensation is usually calculated as a ratio of the total market value of the property compared to the percentage taken, the result can be substantial compensation for nominal physical harm,[30] yet no compensation for substantial but non-physical governmental interference.

B. *Nuisance or Harm-Benefit Analysis*

Another common analysis identified with the continuum approach is based on the notion that uses which are found to be noxious or harmful may be prohibited without compensa-

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27. 3 P. NICHOLS, *supra*, note 2, §§ 10.7(1), 25.41(2), states:

> [W]hen land has been actually entered and put to a public use, or some permanent structure has been erected upon it, there is taking in the constitutional sense no matter how trivial the pecuniary injury may be or how little the owner's use of his property has been interfered with, since he has a constitutional right to undisturbed possession of his land until it has been condemned according to law.

28. For an interesting treatment of the early history of eminent domain, *see* Bassett, *Private Hospitals and the Public Right: Needed Standards of Consent for the Statutory Delegation of the Power of Eminent Domain*, 11 U.S.F. L. REV. 53 (1976).

29. United States v. Central Eureka Mining Co., 357 U.S. 155 (1958), is an example of non-physical invasion. In *Central Eureka* the War Production Board shut down privately owned gold mines for the purpose of inducing miners who were in short supply to go into more essential war work. United States v. Causby, 328 U.S. 256 (1946), dealing with aircraft overflights, is illustrative of intermittent invasion.

30. Michelman, *supra* note 24, at 1185 n.39.

tion.[31] Accordingly, the distinction between compensable and non-compensable governmental impositions may depend on whether the imposition restrains conduct or property uses that are harmful to others. For example, given a situation in which "the public simply requires one of its members to stop making a nuisance of himself,"[32] governmental actions designed to limit or prohibit the complained-of activity are non-compensable.

This second type of analysis also suffers serious shortcomings. In application it fails to recognize that in certain circumstances it may be necessary to regulate neutral conduct that does not constitute a true nuisance. Such neutral conduct is neither inherently "bad" nor "noxious." As a result, this test may fail to justify even the most common zoning decisions where the "nuisances" may simply be innocent uses of property infelicitously located.[33]

Another major failure of the nuisance analysis is that it does not assign priorities to uses. That is, it fails to identify which of two mutually incompatible uses should be regarded as a "nuisance."[34] In this sense the "test" is not a true test because the court is left without decision-making guidelines and must often resort to *ad hoc* considerations.

The now famous case of *Hadacheck v. Sebastian*[35] is illustrative. There, a profitable and otherwise lawful brickworks built on an isolated plot of clay-rich land was eventually surrounded by residential development. The brickworks was deemed a nuisance and was required to cease operation without compensation to the owner. Likewise, in *Miller v. Schoene*,[36] the Court approved the destruction of ornamental cedar trees without compensation to their owner after they were found to harbor a disease fatal to nearby income-produc-

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31. Sax, *supra* note 14, at 47; Michelman, *supra* note 24, at 1196; Berger, *supra* note 23, at 172; Van Alstyne, *Modernizing Inverse Condemnation, A Legislative Prospectus*, 8 SANTA CLARA LAWYER, 1, 19-20 (1967).

32. Michelman, *supra* note 24, at 1196.

33. A harmless use in an inappropriate place may be a nuisance: "A nuisance may be merely a right thing in a wrong place, like a pig in the parlor instead of the barnyard." Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926).

34. Michelman, *supra* note 24 at 1198.

35. 239 U.S. 394 (1915). While the Court there held that the brickworks' owner had no vested right to continue operation in view of changed circumstances, later courts and commentators have applied nuisance rationales to the case in strenuous effort to justify its result.

36. 276 U.S. 272 (1928).

ing apple trees. In neither *Hadacheck* nor *Miller* is it clear just which party was the true nuisance.[37]

Because the nuisance test cannot adequately describe what a nuisance is, in many circumstances it cannot accurately be applied to determine when compensation is appropriate. As a result, the test deals inadequately with legislative action designed to regulate seemingly neutral conduct. Furthermore, since it does not determine the relative value of incompatible uses, it creates an extra burden for the courts in the guise of providing a standard. At best the nuisance test provides only a very general rule of when compensation definitely should *not* be paid.

C. *The Balancing Test—Social Gains Versus Private Losses*

A third test commonly used under the continuum theory is the balancing test. This test is directed toward establishing the validity of legislation and thus does not qualitatively distinguish police power from eminent domain power. The test involves a weighing of society's need for the regulation against the harm that will be visited on the individual or group affected by the regulation.[38] If individual losses are outweighed by social gains, the legislation is upheld.[39]

Two very basic problems attend the balancing approach. First, it is based on the questionable assumption that the interests of a specific individual may somehow be separated and weighed against those of a "society" of which he is a member. By its very nature the test is subjective and imprecise, requiring the isolation of and the assignment of comparative weights to a variety of complicated interests that in fact cannot be meaningfully quantified or compared. This test therefore generates the obvious risk that the individual will find his rights entirely balanced away in the name of serving the public interest.

On the other hand, the balancing test poses the subtler problem of the effect of judicial reevaluation of the validity of legislative measures.[40] A finding that individual losses out-

37. *See* Penn Central Transp. Co., v. City of New York, 438 U.S. 104, 126 (1977).

38. Michelman, *supra* note 24, at 1193; Van Alstyne, *supra* note 31, at 17.

39. *See* Michelman, *supra* note 12, at 1192 n.62.

40. *Id.* at 1195.

weigh social gains results in a *per se* rejection of the legislation. Since the balance must be restruck with each shift in perception of society's "need," judicial action of this type runs a substantial risk of creating wholesale unfairness—effectively, tyranny of the minority—under the pretense of vindicating individual rights.

D. *The Diminution in Value Test*

The diminution in value standard is perhaps based on a confusion of "damages" with "damage,"[41] since the accepted standard for measuring compensation in eminent domain is diminution of value. This standard takes as its yardstick of compensability the magnitude of harm suffered by the claimant.[42] Unlike the physical invasion and nuisance tests, the magnitude of harm standard is usually applied when examining regulations of "innocent" property uses and is therefore often applied in zoning cases.[43]

Correctly applied this test compares the value of the claimant's entire parcel of property before imposition of the restriction with the value of the parcel afterward. The more nearly all value is removed, the more likely the court will conclude that compensation is due. Courts, however, are frequently confused as to whether the diminution in value is to be determined by comparing pre- and post-regulation values of all the claimant's properties, of the particular parcel in isolation, or of the specifically affected property right, such as an acknowledged development right.[44]

Simply stated, the courts do not know which "property" they should evaluate—the claimant's entire holdings or the

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41. The California Supreme Court in HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 518, 542 P.2d 237, 244, 125 Cal. Rptr. 365, 372 (1975), rejected the equation of the two concepts:

> Plaintiffs fail to distinguish between the "damaged" property which is a requisite for a finding of compensability and the damages by which courts measure compensation due. Reasoning backwards, plaintiffs erroneously contend that since they can calculate damages . . . they must have been "damaged" within the meaning of the state constitution.

42. Sax, *supra* note 14, at 50; Michelman, *supra* note 24, at 1190; Van Alstyne, *supra* note 31, at 16; Berger, *supra* note 23, at 175-76. Holmes apparently espoused the test in *Pennsylvania Coal*, stating, "One factor for consideration in determining such limits . . . is the extent of diminution." 260 U.S. at 413.

43. Sax, *supra* note 14, at 60; Michelman, *supra* note 24, at 1192.

44. *Id.*

particular right or attribute reduced in value. As a result, courts often answer the related but different question of what is and is not "property."[45] The various twigs of Justice Cardozo's notorious "bundle of sticks,"[46] are commonly thought of as "property" and yet they are not uniformly subject to constitutional protection.[47] This *ad hoc* decision-making on what constitutes "property" often ends in tautologies. Instead of asking whether a taking has occured, the courts instead inquire as to whether there is property being taken. This backdoor approach is aptly expressed in *United States v. Willow River Power Co.*: "[b]ut not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them . . . whether it is a property right is really the question to be answered."[48] In short, both the proper application and focus of the test are easily misunderstood.

The continuum approach to determining "takings" uses the foregoing tests to discern whether a regulation has "gone too far" and has become a taking. Each test is fraught with problems. The physical invasion test is inadequate because it stipulates compensation only for a narrow range of circumstances. The nuisance test is unsophisticated, cannot define precisely what a nuisance is, and does not assign priorities to potentially incompatible uses. The balancing test is both subjective and imprecise while the diminution in value test is so vastly misunderstood that courts are lured into focusing on collateral issues. Furthermore, the diminution standard should be applied only to measure the amount of just compensation in eminent domain, and not to determine if a "taking" has occurred. Nevertheless, federal courts in large measure utilize the continuum theory[49] and do not treat the

45. *Id.*

46. "The bundle of power and privileges to which we give the name of ownership is not constant through the ages. The faggots must be put together and rebound from time to time." B. CARDOZO, *Paradoxes of Legal Science*, in SELECTED WRITINGS 331 (M.E. Hall ed. 1947).

47. In academic circles there is a preference for sophisticated use of the word "property" to denote the legal relationships among people with respect to things, or to describe the institution or system of relationships within which "ownership" occurs; "things" and the relationships among them are the *subjects* of property. RESTATEMENT OF PROPERTY, Ch. 1, Introduction (1936).

48. 324 U.S. 499, 502-03 (1945).

49. *But see* Nectow v. Cambridge, 299 U.S. 183 (1928).

eminent domain power as qualitatively different from the police power.

The results of adherence to the continuum theory are clearly demonstrated in two recent United States Supreme Court decisions, *Penn Central Transportation Co. v. New York City*[50] and *Kaiser Aetna v. United States*.[51] In both decisions the Court was reduced to reciting in the guise of rationale a laundry list of considerations derived from the tests described above, along with a series of potentially relevant factors. The only firm position taken by the Court was to concede that it has no set formula for evaluating a taking.[52]

IV. Case Law Reflecting The Continuum And Separation Approaches

A. *Penn Central Transportation Co. v. New York City*

The *Penn Central* case exemplifies the current continued reliance of the United States Supreme Court on the continuum approach. Penn Central, owner of the Beaux-Arts style Grand Central Station building in New York City, proposed to build a 55-story office tower atop the present building, but was prohibited from completing construction according to the plans it submitted, since to do so would violate restrictions imposed by the city's Landmarks Law.[53]

Writing for the Court, Justice Brennan stated the issue in the case to be whether "a city may . . . place restrictions on the development of individual historic landmarks . . . without effecting a 'taking' requiring the payment of 'just compensation'."[54] In attempting to analyze the claimants' request for declaratory and injunctive relief from the operation of the Landmarks Law and the alternative request for damages for what was termed a "temporary taking"[55] of their right to construct the office tower, Brennan confessed:

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50. 438 U.S. 104 (1978).

51. 444 U.S. 164 (1979).

52. 438 U.S. at 124.

53. *Id.* at 119; New York City, N.Y. Admin. Code ch. 8-A, § 205-1.0 (1976) provides that properties designated as landmarks must be kept in "good repair" and that a city commission must approve in advance any proposal to alter the exterior architectural features of the structure or construct any exterior improvements on the landmark site.

54. 438 U.S. at 107.

55. *Id.* at 119.

> [T]his court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . . Indeed we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."[56]

According to Justice Brennan, previous courts have followed Holmes' model and have engaged in essentially *ad hoc* inquiries using "factors that have particular significance"[57] to determine whether a taking has occurred. Some of these factors are the impact the regulation has on the claimant's investment-backed expectations; the character of the government's action (*e.g.*, physical invasion versus mere regulation of use); the extent to which the regulations advance the public health, safety, and general welfare; the claimant's reasonable expectations as to what constitutes "property" for purposes of the fifth amendment; and whether a public use is contemplated.

Addressing Penn Central's claims, the Court attempted to focus simultaneously on the character of the government's regulation and on the nature and extent of the interference with the claimant's rights in the parcel as a whole.[58] The Court reasoned that Penn Central's right to build was not totally denied since the company could transfer its development rights to another location, and hence, the city's Landmarks Law did not constitute a taking. This reasoning demonstrates the dilemma courts experience when using the continuum theory to evaluate an alleged taking of "property." Although the logic of the *Penn Central* decision rests on the assumption that not all the value of pre-existing air rights was "taken" by operation of the statute, there is little real support for that position. Penn Central was clearly deprived of all of the air rights over its property. To reach its conclusion that no taking had occurred, the Court was forced to stress the availability and value of the transferrable development rights created by

56. *Id.* at 124 (citations omitted).
57. *Id.*
58. *Id.* at 124, 136-38.

the Landmarks Law.[59] The availability of development rights transfers, however, is more germane to an analysis of the reasonableness of the regulation than it is to a valuation question.[60] Had the Court analyzed more thoroughly the reasonableness of the Landmarks Law, it would undoubtedly have reached the same end point by a less circuitous route.

The *Penn Central* Court admitted that it was simultaneously attempting to define a "taking" and to determine if one had occurred. The Court then proceeded with an *ad hoc* application of "significant factors." The Court avoided the tortuous and often arbitrary judicial sleight of hand attendant in redefining "property" and "non-property" by focusing on the value of the transferable development rights. Yet other courts have avoided dealing with the logical impossibility of defining and deciding a "taking" at the same time by viewing eminent domain as a power distinct from the police power.

B. *Kaiser Aetna v. United States*

The Court again relied on Justice Holmes' continuum theory in *Kaiser Aetna v. United States*.[61] The case holds that the fifth amendment's taking clause precludes the federal government from using the Commerce Clause[62] to require public access to certain navigable waters, without first paying just compensation. In *Kaiser Aetna* a private pond was dredged and opened to a navigable bay which was then developed for use as a private marina. Even though the marina constituted navigable water subject to federal regulations under the Commerce Clause, the Court held that a "taking" requiring compensation had occurred when public access was imposed.

The decision in *Kaiser Aetna* is essentially fair in view of the developers' large expenditures and their reliance on Army Corps of Engineers advice.[63] Yet historically, due to the over-

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59. Transferable Development Rights (TDR) permit a property owner to detach his development rights from an unusable location and shift them to another lot (called a receiving lot) where development is permitted. The TDR's scheme is based on the notion that development rights are an essential component of the value of the underlying property because they constitute one of the economic uses to which the property may be put.

60. *See* text accompanying notes 35-36 *supra*.

61. 444 U.S. at 174-75.

62. U.S. CONST., art. I, § 8, cl. 3, which reads in part: "To regulate Commerce . . . among the several states . . . ."

63. The Court pointed out that claimants "had invested millions of dollars."

whelming presumption of validity attaching to federal laws made pursuant to the Necessary and Proper Clause,[64] regulation of navigable waters have not been regarded as takings. An alternative analysis might have equated the provision of public access with physical invasion,[65] thus giving the Court a more principled method of reaching the same result.

Kaiser Aetna pits the investment-backed expectations of a landowner against the most presumptively valid of all regulations, those made specifically pursuant to constitutional mandates. Perhaps fear of failure in the face of this presumption led the claimants to frame their suit in terms of damages for inverse condemnation rather than for declaratory relief. It appears that the claimants did not include the latter cause of action in their pleadings at all.

Kaiser Aetna is also significant for the way in which it attempts to decide the taking question. It represents another occasion on which the Court was compelled to form an *ad hoc* definition of the right of the landowner to exclude others as a property right[66] "taken" by the imposition of a public right.

Once again, the Court misused the diminution in value standard by focusing on the loss of investment-backed expectations to define a taking, rather than using diminution of value as a measure of the amount of compensation due. Had the separate powers approach been employed, the Court's analysis would have centered on determining the reasonableness of the servitude *as applied* to the claimants' marina. The case would logically have taken the posture of a mandamus action. In all likelihood, the Court would have found the imposition of the navigational servitude to be arbitrary and unreasonable, especially in view of the private nature of the pond under Hawaiian law. Accordingly, the appropriate remedy would have been a declaration that the claimants were exempt from the navigational servitude over the marina.

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444 U.S. at 169.

64. U.S. CONST. art. I, § 8, cl. 4, which reads in part: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States . . . ."

65. *See* text accompanying note 9 *supra*.

66. 444 U.S. at 178. The court used United States v. Willow River Power, 324 U.S. 499 (1945), as the basis for its rationale.

C. *Separate Functions Suggest Different Remedies*

Lately, some state supreme courts have returned to Justice Harlan's separate powers approach to decide cases in which a regulation allegedly has worked a taking.[67] Courts which have resuscitated the separate powers approach focus first on the type of governmental interference and then on the appropriate remedy. These courts do not focus simultaneously on both elements as a court adhering to the continuum approach must.

One useful way to consider the type of situation in which inverse condemnation damages *may* be recovered is first to identify the two major variables in taking cases: 1) the nature of the harm caused to the property (*i.e.*, whether or not a physical invasion has occurred), and 2) the nature of the governmental action causing the harm (*i.e.*, regulatory or non-regulatory). The following chart[68] should aid in visualizing this approach.

67. *See, e.g.*, Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 446 U.S. ___ (1980); HFH, Ltd. v. Superior Court, 15 Cal. 3d 508, 542 P.2d 237, 127 Cal. Rptr. 365 (1975); Fred F. French Investing Co., v. City of New York, 39 N.Y. 2d 587, 350 N.E. 2d 381, 385 N.Y.S. 2d 5, *appeal dismissed*, (1976).

68. The verbal equivalent of this graphic representation is outlined in Note, *supra* note 19, at 1146-47.

CHART I

NATURE OF HARM	NATURE OF ACTION	EXAMPLE
Physical invasion	Non-regulation	Land flooded by water project[A]
Physical invasion	Regulation	Property destroyed in mistaken belief it constituted a nuisance[B]
Non-physical invasion	Non-regulation (administrative or executive action)	Gold mine closed by government order because miners needed elsewhere in work force[C]
Intermittent physical invasion	Non-regulation	Aircraft overflights[D]
Non-physical interference	Regulation	Zoning ordinance[E]

A. United States v. Cress, 243 U.S. 316 (1900).
B. McMahon v. City of Telluride, 79 Colo. 281, 244 P. 101 (1926).
C. United States v. Central Eureka Mining Co., 357 U.S. 155 (1958).
D. United States v. Causby, 328 U.S. 256 (1946). *See also* United States v. Bydlon, 175 F. Supp. 891 (Ct. Cl. 1959).
E. Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980).

In cases of both regulatory and non-regulatory physical invasions, inverse condemnation damages will lie to remedy the taking.[69] Intermittent physical invasions caused by non-regulations are also compensable. Just compensation, then, is available in three categories out of four.

The availability of just compensation in the last category, police power enactments which do not involve a physical interference, *e.g.*, zoning ordinances, are the center of the present controversy. Not suprisingly, this type of regulation has provided the impetus for vast amounts of inverse condemnation action. As the chart illustrates, however, the governmental action causing the alleged harm in zoning actions is *regulation*. Under the separate powers analysis, regulations should be examined solely as an exercise of the police power; if found

69. *See* text accompanying note 9 *supra*.

to be so arbitrary or unreasonable[70] as to bear no rational relationship to the general health, safety, or welfare, such regulations should be declared void and the landowner granted declaratory relief. Because an *ultra vires* regulation does not become an eminent domain action, a claimant may not recover monetary damages. Thus, under the separate powers rationale, the police power is treated as qualitatively distinct from the power of eminent domain. The diminution in value test is not used to test a regulation but is relegated to its proper application of determining the *amount* of compensation to which a claimant in inverse condemnation is entitled. When diminution in value is no longer a police power issue, the sole question becomes whether the property owner is entitled to declaratory relief from arbitrary legislative acts with the "reasonableness" standard applied to non-invasionary regulations to test their conformity with police power objectives.

While clarifying the approach to the taking question, the separate powers theory does not address the thorny problem of pinpointing reasonableness criteria. An examination of two California cases, *HFH, Ltd. v. Superior Court*,[71] and *Agins v. City of Tiburon*[72] will go far to illustrate the utility of the separate powers analysis in isolating appropriate remedies by clearly identifying the sovereign power being exercised.

1. *HFH: The California Supreme Court Confronts the Holmesian Confusion*

In *HFH* plaintiffs contended that a zoning ordinance enacted by the City of Cerritos had sharply reduced the market value of their land[73] thus giving rise to an action for damages in inverse condemnation. Noting that California courts "have not hesitated to validate claims appropriately employing this

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70. *See* Lawton v. Steele, 152 U.S. 133, 137 (1894), defining the test of a valid regulation: "To justify the state . . . in thus interposing its authority on behalf of the public, it must appear, first, that the interests of the public require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."

71. 15 Cal. 3d 508, 542 P.2d 237, 127 Cal. Rptr. 365 (1975).

72. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980); *but see* Eldridge v. City of Palo Alto, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976) disapproved in *Agins*.

73. The market value was reduced from about $380,000 to $75,000. 15 Cal. 3d at 512, 542 P.2d at 240, 125 Cal. Rptr. at 368.

theory of recovery,"[74] the court reiterated that the diminution in value standard applies to eminent domain valuations and then concluded, "we have never, however, suggested that inverse condemnation lay to challenge a zoning action whose only alleged effect was a diminution in the market value of the property in question."[75]

Significantly, the claimant in *HFH* did not assert bad faith on the part of the city in its zoning action. Wrongfulness of the government's action is not a relevant question in inverse condemnation actions.[76] If a taking has occurred under the California state constitution's article I, section 19,[77] compensation is due without inquiry into the motives of the public agency.

HFH tacitly holds that invalid police power regulations cannot be transmuted into valid eminent domain actions. One of the two exceptions to this rule is that of a claimant alleging diminution in market value caused by "inequitable precondemnation actions by the public agency."[78] The court cited *Klopping v. City of Whittier*[79] and *Peacock v. County of Sacramento*[80] as examples of this type of activity.

This willingness to characterize "inequitable precondemnation actions" as eminent domain actions is an apparent contradiction to the separation of police power and eminent domain functions embodied in *HFH*. But this inconsistency may be reconciled by noting that the clear intent of the public agencies in *Klopping* and *Peacock* was to devalue the property prior to acquiring it for public use. Employment of a two-step process of downzoning and subsequent condemnation

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74. *Id.* at 513, 542 P.2d at 240-41, 125 Cal. Rptr. at 368-69.

75. *Id.* at 514, 542 P.2d at 241, 125 Cal. Rptr. at 369.

76. *Id.* at 516 n.13, 542 P.2d at 243 n.13, 125 Cal. Rptr. at 371 n.13 (citing Holtz v. Superior Ct., 3 Cal. 3d 296, 475 P.2d 441, 90 Cal. Rptr. 345 (1970)).

77. CAL. CONST. art. 1, § 19 provides in part:

> Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner.

78. 15 Cal. 3d at 517 n.14, 542 P.2d at 243 n.14, 125 Cal. Rptr. at 371 n.14.

79. 8 Cal. 3d 39, 500 P.2d 1345, 104 Cal. Rptr. 1 (1972). The city made public announcements of intent to acquire claimant's land and then delayed commencement of eminent domain proceedings; the property predictably became commercially valueless.

80. 271 Cal. App. 2d 845, 77 Cal. Rptr. 391 (1969). The county refused development of the land and even barred growth of vegetation, while giving assurances that it intended to acquire the land for an airport.

cannot mask the fact of the government's ultimate intention to proceed in eminent domain. In fact, the court in *Klopping* held that the plaintiff's eminent domain damages should include the decline in property value which is attributable to the city's unreasonable actions. The second exception to the *HFH* rule is that a public agency cannot employ a zoning ordinance to evade the requirement that the state must acquire property which it uses for public purposes. This exception falls into the area of physical invasions, which are always compensable.[81]

Perhaps in deference to *Pennsylvania Coal,* the *HFH* court averred that it did not base its conclusion on the verbal distinction between "taking" and "police power,"[82] but rather utilized an analysis of the benefits and burdens inherent in zoning. Yet the court employed the substantive distinction, as the rationale of the case is unmistakably oriented to assessing the reasonableness of the zoning regulation. *HFH* laid the groundwork for *Agins,* which clearly rejected the continuum theory and espoused the separate sovereign powers approach.

2. *Agins v. City of Tiburon*

Because *HFH* left open the possibility that a landowner might be entitled to compensation in the event a zoning regulation prohibited substantially all use of his land,[83] it perpetuated some doubts about the credibility of the continuum theory in California.

The California Supreme Court squarely addressed this remaining issue in *Agins v. City of Tiburon* and concluded that a landowner may not recover damages under the theory of inverse condemnation for excessive police power regulation.[84] A landowner contesting the validity of such regulations may challenge their constitutionality and may seek an order invalidating the ordinance in general or as specifically applied to an affected property.

In so holding, the court openly acknowledged the Holme-

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81. 15 Cal. 3d at 517 n.14, 542 P.2d at 243 n.14, 125 Cal. Rptr. at 371 n.14. The court cited Sneed v. County of Riverside, 218 Cal. App. 2d 205, 32 Cal. Rptr. 328 (1963), where an ordinance arguably prohibited structures or vegetation more than three inches high on land over which aircraft were operated.

82. 15 Cal. 3d at 522, 542 P.2d at 247, 125 Cal. Rptr. at 375.

83. *Id.* at 518 n.16, 542 P.2d at 244 n.16, 125 Cal. Rptr. at 372 n.16.

84. 24 Cal. 3d at 272, 598 P.2d at 28, 157 Cal. Rptr. at 375.

sian assumption[85] and flatly rejected it,[86] relying on Nichols' authoritative treatise on eminent domain: "Such legislation is an invalid exercise of the police power since it is clearly unreasonable and arbitrary. It is invalid as an exercise of eminent domain since no provision is made for compensation."[87] Valid exercises of eminent domain, then, include provision for payment.

After holding that inverse condemnation is never an appropriate remedy for unreasonable or arbitrary regulation, the *Agins* court went on to examine the question of whether the claimant had established a right to declaratory relief. The court set out a test for determining when an ordinance is unconstitutional and subject to invalidation. In order to award declaratory relief, a court must find that the regulation works to deprive the landowner of "substantially all reasonable use of his property."[88] Because the Tiburon zoning ordinance, by its terms, entitled the claimant to build up to five dwellings on his land, the court concluded that as a matter of law he was not deprived of substantially all reasonable use. Declaratory relief was therefore denied.

3. *Fred F. French Investing Co. v. City of New York*

New York courts have also applied the separate powers approach in zoning cases. Declaratory relief was granted in *Fred F. French Investing Co. v. City of New York*.[89] There, the New York Court of Appeals found that although the regulation imposed so onerous a burden on the property as to deprive the owner of all reasonable use and economic value, the regulation did not work a "taking." Rather, the regulation caused a deprivation of property rights without due process of law, and was therefore invalid.[90]

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85. *Id.*

86. *Id.*

87. 1 P. NICHOLS, *supra* note 2, § 1.42(1).

88. 24 Cal. 3d at 277, 598 P.2d at 31, 157 Cal. Rptr. at 378.

89. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976). In the *French* case the issue was whether transferable development rights (*see* note 59 *supra*) were "taken" by a zoning amendment, thus entitling the owner to damages in inverse condemnation. More specifically, a "buildable" private park, with development rights attached to it, was rezoned exclusively as a park open to the public.

90. The court said:

> While the police power of the State to regulate the the use of private property by zoning is broad indeed, it is not unlimited. The State may

The New York court, as did the court in *Agins*, examined the Holmesian assumption, termed it metaphorical[91] and cautioned that such a "metaphor should not be confused with the reality."[92] After reiterating the same exceptions that *HFH* enumerated,[93] the court concluded:

> Absent factors of governmental displacement of private ownership, occupation or management, there was no "taking" within the meaning of constitutional limitations . . . . Since there was no taking within the meaning of constitutional limitations, plaintiff's remedy . . . would be a declaration of the amendment's invalidity, if that be the case. Thus, it is necessary to determine whether the zoning amendment was a valid exercise of the police power under the due process clauses of the State and Federal Constitutions.[94]

Because the court in *French* adopted the separate sovereign powers approach it was able to isolate declaratory relief as the appropriate remedy. It then analyzed the reasonableness of the zoning regulation. Since the owner was unable to move the development rights to another parcel,[95] the court found that the owner was deprived of "all but a bare residue" of value.[96] Therefore, the regulation was unconstitutional.

New York and California courts have put forth a clear, analytical method under which separate sovereign powers generate different legal results. Yet the United States Supreme Court seems resigned to, if not entirely pleased with, its multi-focal, continuum-oriented approach, as evidenced by its treatment of *Agins* on appeal.[97] In an opinion relying heavily

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> not, under the guise of regulation by zoning, deprive the owner of the . . . use of his property and thus destroy all but a bare residue of its economic value. Such an exercise of the police power would be void as violative of the due process clauses of the State and Federal Constitutions.

Id. at 591, 350 N.E.2d at 383, 385 N.Y.S.2d at 7.

91. *Id.* at 594, 350 N.E.2d at 385, 385 N.Y.S.2d at 9.

92. *Id.*

93. *See* text accompanying notes 79-81 *supra*.

94. *Id.* at 595, 350 N.E.2d at 386, 385 N.Y.S.2d at 10.

95. The development rights were left floating, in a marvelously surreal manner, over mid-town Manhattan, "disembodied abstractions of man's ingenuity, float[ing] in a limbo until restored to reality by reattachment to tangible property." *Id.* at 598, 350 N.E.2d at 388, 385 N.Y.S.2d at 11. The present owner had no parcel or place to "plant" the rights.

96. *Id.* at 596, 350 N.E.2d at 387, 385 N.Y.S.2d at 10.

97. 447 U.S. 255 (1980).

on the role of California's state Supreme Court in interpreting state law as applied to Tiburon's zoning ordinance, the Court cursorily analyzed the fact situation in which *Agins* arose. It then noted, quoting *Kaiser Aetna*, that "no precise rule determines when property has been taken,"[98] before settling on a balancing of social gains against individual losses as the proper focus for its analysis.

While the balancing approach is an appropriate method for determining the reasonableness of legislation, the Court here seemed to utilize it to determine whether a taking had occurred, and thus showed that it relied implicitly on the continuum model. Hinting that a taking might have occurred if the Tiburon ordinance "prevented the best use of appellant's land," or "extinguish[ed] a fundamental attribute of ownership,"[99] the Court nevertheless held that the ordinance was constitutional and did not deny appellants the " 'justice and fairness' guaranteed by the Fifth and Fourteenth Amendments."[100] The Court therefore did not reach the question of whether inverse condemnation damages may be available or whether the state may limit the landowner's remedies to mandamus and declaratory judgment.

It is not clear why the Court agreed to review *Agins*, if not to consider the availability of inverse condemnation damages as a cause of action in zoning circumstances. The Court, however, recently heard oral arguments in another California case, *San Diego Gas & Electric Co. v. City of San Diego*[101] that involves issues substantially similar to those in *Agins*, although arising in a somewhat different posture.

San Diego G & E is concerned with the downzoning of land purchased by the utility for possible future construction of a power plant. The San Diego City Council downzoned a portion of the land from industrial to agricultural use designating the agricultural zone for further industrial development. The city then adopted, as required by state law,[102] an open space element to its general plan and included San Diego G & E's acreage in it. The utility brought suit in inverse

98. *Id.* at 260-61.

99. *Id.* at 262 (referring to United States v. Causby, 328 U.S. 256, 262, and Kaiser Aetna v. United States, 444 U.S. 164 (1979)).

100. *Id.* at 263.

101. 49 U.S.L.W. 3423 (1980).

102. CAL. GOV'T CODE § 65302(a), (c) (West Supp. 1979).

condemnation,[103] alleging that the zoning regulations, combined with the open space element of the general plan, had rendered the property useless.

The city appealed from a trial court finding that a compensable taking had occurred. The state court of appeals affirmed. On appeal to the California Supreme Court the case was retransferred to the court of appeals for reconsideration in light of *Agins*. In an unpublished opinion, the court of appeals then reversed its earlier holding. A further hearing by the state supreme court was denied, and the utility brought the case to the United States Supreme Court on appeal.

The key distinction between *Agins* and *San Diego G & E* seems to be that in the latter case the only issue before the Court is the availability of inverse condemnation damages, since the declaratory relief and mandamus issues were not addressed by the trial court in its findings of fact. The trial court in *San Diego G & E* found both that the best use of the land was industrial and that the land had "been devoted to use by the public as open space."[104] Thus, the Court is in a position to reach the unanswered question in *Agins* of whether the state may limit the landowner's remedies.

In light of the Court's strong dictum that it might have decided *Agins* differently had the ordinances in question either prevented the best use of the land or extinguished an essential attribute of property ownership, the Court in *San Diego G & E* has a principled basis to hold that in this context, zoning that reduces market value *may* give rise to a cause of action in eminent domain.

The effect of such a decision would be to ratify the continuum approach, as well as to limit the California Supreme Court opinion to its holding that the zoning ordinance in *Agins* was not facially unconstitutional.

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103. The utility in its complaint also sought declaratory relief and mandamus, alleging arbitrary exercise of police power, but the trial court did not include findings of fact on these issues.

104. Trial Court Findings of Fact and Conclusions of Law of the San Diego County Superior Court, April 9, 1976.

V. Conclusion: The Practical and Legal Considerations of the Continuum and Separate Powers Theories

A. *The Continuum Orientation*

In addition to the body of law following Holmes' statement[105] it can be argued that the language of the opinions allowing inverse condemnation as a remedy in the three classes—physical invasions, non-physical or intermittent invasions by regulations, and physical invasions by non-regulatory government actions—described in Chart I, may be broad enough to support the extension of this remedy to zoning regulation cases. Further, some commentators[106] have argued that since legislative land use restrictions such as zoning should be imposed only if it can clearly be demonstrated that gains flowing from the restrictions outweigh their costs, the availability of inverse condemnation "helps strike a balance" by reminding legislative bodies of the unplanned-for liability resulting from careless or irrational land use regulations.

On a more practical level, the availability of inverse condemnation gives the claimant one more bite of the apple; he may plead two causes of action rather than only one, perhaps thereby multiplying his chances for success in court. On the other hand, pleading dual causes of action may prove extremely taxing. A court oriented toward a simultaneous focus on the character of the government's action and the extent of its interference with the claimant's parcel as a whole uses an admittedly *ad hoc*, fact-oriented list of "various significant factors." Therefore, the attorney trusted to draft the complaint may face an impossible burden. Indeed, if both causes are allowed, the entire success of the case depends on the cleverness of the attorney's drafting, since there is no assurance that declaratory relief will be favored over inverse condemnation damages—or vice versa—except to the extent that one or the other may be shown to be appropriate based on the facts at hand.

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105. *See* text accompanying note 3 *supra*.

106. *See* Dunham, *From Rural Enclosure to Re-Enclosure of Urban Land*, 35 N.Y.U. L. Rev. 1238 (1960); Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L.J. 385 (1977).

B. *The Separate Powers Theory*

Adoption of the viewpoint that regulations flowing from the police power are qualitatively different from actions in eminent domain, and that an invalid regulation cannot become a valid taking simplifies the classification of virtually all potential "taking" cases by focusing the inquiry on the nature of the harm and the type of governmental action. Only in zoning-type cases involving non-physical interference by regulation will there be any doubt; in all other cases inverse condemnation damages would be available, and the court could proceed to (albeit difficult) valuation assessments. In regulatory actions, those cases falling under the two *HFH* exceptions of "inequitable precondemnation activity" and regulations providing for public use of property, should be treated as takings as well, thus leaving only purely regulatory actions such as zoning to be examined for potential declaratory relief.

Adherence to systematic classification, that incidentally narrows the number of cases for which inverse condemnation damages may be awarded, helps preserve reliance on budgetary judgments at the local level. While decisions as to the *amount* of compensation to be awarded are properly judicial, decisions as to compensability should properly be legislative.[107] In the absence of clear criteria as to what constitutes a taking, legislative bodies find it difficult to weigh the potential costs of any proposed policy; thus legislatures would be assisted by a clear determination of which cases are to be considered as takings.[108]

Since the separate sovereign powers orientation avoids *ad hoc* decision-making of the type alluded to in *Penn Central,* the claimant's attorney can work with an integrated body of law, and, since the relief sought is merely from the operation of a statute, the complaint becomes somewhat simpler to frame. The claimant is indirectly benefited because municipalities not faced with unexpected reallocation of public funds to satisfy inverse condemnation awards will not have to curtail public services or take on new debt. Thus, the claimant

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107. The expenditure of public funds is not an appropriate function for two reasons: not only are courts ill-equipped in terms of time, personnel, and basic institutional personality to debate and consider a range of possible community interests and solutions, but on another level, separation of powers doctrine dictates that since courts, like the executive branch, cannot tax, they cannot properly spend.

108. *See* note 19 *supra.*

may rely on both the quality and the cost of living in his community.

Yet the reality of the relief embodied in declaratory relief is founded on faith in the continued functioning of the democratic system over time, and in a reliance on long-term fairness rather than on a compensatory bird in the hand even at the expense of proper fiscal governmental functioning.

As the United States Supreme Court observed more than fifty years ago,

> [P]roblems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to exisiting conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day . . . . And in this there is no inconsistency, for while the meaning of constitutional guaranties [*sic*] never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.[109]

Rapid urban development and the necessity of preserving scarce resources mandate the development of a clear and useable standard for determining takings. Fiscal responsibility demands that compensability decisions be left to legislative bodies.

Using the simple analytical device provided by two constitutional clauses, one for traditional takings, the other for reviewing regulations to obtain declaratory relief, courts and claimants should find it easier to assess the propriety of any potential cause of action. Continued adherence to the continuum theory only perpetuates the difficulty of having to define a "taking" while simultaneously reviewing the evidence to see if one has occurred.

Susan Bayerd

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109. Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926).