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ENVIRONMENTAL REGULATIONS, ZONING, AND WITHHELD MUNICIPAL SERVICES: TAKINGS OF PROPERTY BY MULTI-GOVERNMENT ACTION

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Like many regions of the nation, Florida is in the midst of a pitched battle to save its environment. After decades of phlegmatically ignoring the interrelationship between growth and environmental degradation, governmental concern over land use has blossomed swiftly and pervasively.[1] Legal controls on property subdivision and sanitation facilities are increasing.[2] Statewide zoning and land-use planning are moving closer to reality.[3]

Yet each new barrage of long overdue legislation restricts the property owner's freedom to use his land for certain purposes. Many of the resulting limitations have the admirable effect of forcing the property owner to internalize environmental costs presently borne by society.[4] Other legislative encroachments so severely restrict property rights that some owners face substantial obstacles in making any developed use of their land. In some instances, regulatory schemes passed by several levels of government have combined to effect unconstitutional takings of property.

The need for determining when various types of government action constitute a taking of property has become profound. Florida's Environmental Land and Water Management Act of 1972[5] provides one example. Section 380.08(1) recognizes possible constitutional repercussions from environmental restrictions imposed by the law and cautions that the Act does not authorize any governmental agency to adopt a rule or regulation or issue an order that is "unduly restrictive or constitutes a taking of property" without "the payment of full compensation" if doing so would violate the Florida or United States Constitutions.[6] The Act, however, fails to enunciate the point at which

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1. *See generally* L. JAFFEE & L. TRIBE, ENVIRONMENTAL PROTECTION (1971); J. SAX, DEFENDING THE ENVIRONMENT: A STRATEGY FOR CITIZEN ACTION (1971); U.S. DEP'T OF INTERIOR, ENVIRONMENTAL IMPACT OF THE BIG CYPRESS SWAMP JETPORT 73 (1969); Cornwell, *From Whence Cometh Our Help? Conservationists' Search for a Judicial Forum for Environmental Relief*, 23 U. FLA. L. REV. 451 (1971); Juergensmeyer, *The American Legal System and Environmental Pollution*, 23 U. FLA. L. REV. 439 (1971); Little, *New Attitudes About Legal Protection for the Remains of Florida's Natural Environment*, 23 U. FLA. L. REV. 459 (1971).

2. *See, e.g.*, ORANGE COUNTY, FLA., CODE ch. 32 (1971), *enacted as* Fla. Special Acts 1959, ch. 1646 and Fla. Special Acts 1965, ch. 2274; ORLANDO, FLA., CITY CODE ch. 35A (1971).

3. *See, e.g.*, FLA. STAT. ch. 380 (Supp. 1972); *cf.* HAWAII REV. STAT. §205-2 (Supp. 1970).

4. See notes 175-178 *infra* and accompanying text.

5. FLA. STAT. ch. 380 (Supp. 1972).

6. *Id.* §8.

governmental action becomes so restrictive or constitutes such a taking as to require payment of compensation. That the legislation may have justifiably left this determination to the judiciary does not assist those who must decide whether a particular environmental restriction requires compensation. Court decisions in the area of inverse condemnation are often vague, conflicting, and without pattern. Worse, governmental restrictions in the environmental area pose special problems unanswered by precedent. Basic compensation theories are not easily applied to situations in which the actions of several levels of government merge to prevent an owner from making any reasonable use of his land. Apportioning financial and administrative responsibility for such multi-level taking exacerbates the dilemma. Additional questions are raised where the allegedly improper governmental actions consist of the abandonment or withholding of essential municipal services such as sewage treatment.

Asserting that certain environmental regulations may effect a taking of property, however, is not intended to suggest that a developer should be allowed to escape his fair share of the cost of controlling pollution. If subdividers and entrepreneurs are forced to bear unforeseeable and inordinate expenses in procuring land and planning improvements, these costs will only be passed on to the homeowner and apartment dweller. But again, this does not mean that developers should avoid a share of the costs associated with environmental protection. The question concerns the amount of expense that a developer should be required to bear. Governmental restrictions which effect a taking of property without just compensation force an individual landowner to bear an economic burden that our constitutional heritage says must be shared by the community at large. If the community is unwilling to bear its share of the cost of protecting the environment, the constitutional solution is not to shackle an individual citizen with an unfair part of the community's burden; rather, the answer is to let the environment go unprotected. Only after the full social cost of a given environmental program is known can an appropriate political judgment concerning the advisability of that program be made. Recognition of the instances in which a regulatory scheme effects a taking of property helps delineate the program costs that must be borne by society.

Once such an attribution is made, society may choose to cancel the program or bear its share of the expense through any of several methods. For example, the landowner may be paid just compensation for the loss of all reasonable use of his property. Alternatively, the government may choose to repeal the laws prohibiting use of individual sewage treatment facilities. Further, the municipality may decide to extend the public sewer lines to the restricted property. In other instances the local government may alleviate the impact of the restriction by re-zoning the property to allow some reasonable land use that would not require sewage disposal facilities. The choice of alternatives is essentially political, although factors such as technology assessment,[7] economic

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7. *See generally* NATIONAL ACADEMY OF SCIENCES, TECHNOLOGY: PROCESSES OF ASSESSMENT AND CHOICE (1970); Katz, *The Function of Tort Liability in Technology Assessment,* 38

analysis,[8] and the type of remedy requested by the plaintiff, whether eminent domain,[9] inverse condemnation,[10] or injunctive relief,[11] should influence the decision. Appropriate political authorities should recognize the social nature of the costs imposed and then take calculated action to redistribute these expenses in a manner which is both beneficial to the community and consistent with constitutional requirements.

The key consideration is that more appropriate means of allocating some environmental costs may exist. First, such an allocation seems to be constitutionally mandated. Second, if expenses must be incurred by the citizenry, a strong argument can be made for choosing a method of assessment that is highly visible[12] over one that results in charges hidden from the community as a whole. Expenses paid through concealed channels and borne by a disproportionately small number of citizens seldom undergo the careful weighing found in cost-benefit analyses.[13] As a result, social costs may escalate unequally for years before being discovered and investigated by the proper governmental authority. Finally, although the environment must be protected, development need not be brought to an untimely halt.[14] The rapid growth of the last two decades has admittedly caused much harm to Florida's environment, but the pendulum must not be allowed to swing too far in the opposite direction. If

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CINCINNATI L. REV. 587 (1967) [hereinafter cited as Katz]; Tribe, *Technology Assessment as a Unifying Concept: Legal Frameworks for the Assessment and Control of Technology,* 9 MINERVA 243 (1971).

8. See note 13 *infra.*

9. *See, e.g.,* FLA. STAT. chs. 73-74 (1971).

10. *See, e.g.,* State Road Dep't v. Tharp, 146 Fla. 745, 1 So. 2d 868 (1941); City of Jacksonville v. Schumann, 167 So. 2d 95 (1st D.C.A. Fla. 1964), *cert. denied,* 172 So. 2d 597 (Fla. 1965), *cert. denied,* 390 U.S. 981 (1968); Trippe v. Port of New York Authority, 17 App. Div. 2d 472, 236 N.Y.S.2d 312 (2d Dep't 1962). In *Schumann* the court explained that inverse condemnation is the "popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency." 167 So. 2d at 98.

11. *See, e.g.,* Zabel v. Pinellas County Water & Navigation Control Authority, 171 So. 2d 376 (Fla. 1965); Forde v. City of Miami Beach, 146 Fla. 676, 1 So. 2d 642 (1941); Taylor v. City of Jacksonville, 101 Fla. 1241, 133 So. 114 (1931); *cf.* Ocean Villa Apartments, Inc. v. City of Ft. Lauderdale, 70 So. 2d 901 (Fla. 1954). *See generally* Beuscher, *Some Tentative Notes on the Integration of Police Power and Emient Domain by the Courts: So-called Inverse or Reverse Condemnation,* 1968 URBAN LAW ANN. 1, 6-8; Sackman, *Impact of Zoning and Eminent Domain on Each Other,* 1971 INSTITUTE ON PLANNING, ZONING & EMINENT DOMAIN 107 (Southwestern Legal Foundation 1971).

12. *See generally* Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures,* 83 HARV. L. REV. 705 (1970).

13. *See generally* R. MCKEAN, THE NATURE OF COST-BENEFIT ANALYSIS IN PUBLIC SPENDING 339 (1968).

14. *See A Wall Around the Sunshine State,* BUSINESS WEEK, July 3, 1971, at 46-47, *quoting* Albert Jaeggin: "If the State stops pushing for industrial growth, it will definitely slow development, because industry won't go where it isn't wanted. And then who's going to pay for all the services that are needed? . . . It's wonderful to be for ecology, but I hope someone's left to pay the taxes to produce the salaries of the politicians who espouse such a course."

Florida is to protect its environment while continuing favorable, yet controlled, economic growth, a deliberate compromise between these two policies is necessary.

By demonstrating that some regulatory schemes may effect an unconstitutional taking of private property, this article attempts to stimulate the economic and political analysis required for such a compromise. The discussion of issues is presented in a specific regulatory fact setting to provide both an example for discussion and a model for extension of the conclusions reached in similar areas.

The article focuses upon a factor common to each form of "compensating" the landowner – whether a taking of property in the constitutional sense has occurred. Following a brief consideration of the constitutional relevance of whether property is "taken" or merely "damaged" by government action, the broad question of when a taking of property occurs in the constitutional sense is explored. A discussion of three theories frequently applied by the courts in determining the taking issue is then succeeded by an elaboration and extension of the theories developed by Professors Dunham, Sax, and Michelman. In addition, the problem of whether abandonment or withholding of government services can effectuate a taking of property is discussed. Finally, an overview is presented of several possible methods of apportioning financial and administrative responsibility for a taking caused by the actions of two or more government entities.

A Threshold Question: Is the Property "Taken" or Merely "Damaged"?

The threshold question in any action for inverse condemnation or related injunctive relief is whether the constitutional provision that provides the basis for the property owner's claim requires compensation if the property is merely "damaged" or only if it is actually "taken." The fifth amendment to the United States Constitution[15] applies only to private property "*taken* for public use, without just compensation."[16] Although the constitutions of approximately one-half of the states require compensation for private property "taken *or damaged*" by governmental action,[17] the Florida constitution[18] follows the

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15. The fifth amendment applies to the states through the fourteenth amendment. *See* 1 P. Nichols, The Law of Eminent Domain §§1.3, 4, 4.1 (3d rev. ed. 1970) [hereinafter cited as P. Nichols].

16. *See* United States v. Willow River Power Co., 324 U.S. 499, 510 (1945); United States v. Dickinson, 331 U.S. 745 (1947), *cited in* Batten v. United States, 306 F.2d 580, 583-84 (10th Cir. 1962), *cert. denied,* 371 U.S. 955 (1963); Richards v. Washington Terminal Co., 233 U.S. 546, 554 (1914); City of Chicago v. Taylor, 125 U.S. 161 (1881); Transportation Co. v. Chicago, 99 U.S. 635 (1878).

17. 2 P. Nichols, *supra* note 15, §6.1(3); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria,* 44 So. Calif. L. Rev. 1 n.7 (1970). For a listing of the states with particular constitutional language, see 2 P. Nichols §6.1(3) nn.28-29.

18. Fla. Const. art. X, §6(a) (1968), *formerly* Fla. Const. Decl. of Rights §12; Fla. Const. art. XVI, §29 (1885).

federal pattern. Therefore, regardless of the economic loss involved, governmental action merely damaging the subject property will not support a Florida[19] or federal[20] action for inverse condemnation. The restriction on land use must be so onerous as to effectuate a taking before the constitutional right to compensation attaches.[21]

GOVERNMENTAL ACTION THAT EFFECTS A TAKING OF PROPERTY: USEFUL THEORIES

Although agreement is readily reached that compensation is required only for a governmental taking of property and not for losses occasioned by mere regulation,[22] the difficult task is formulating an analytical framework which is useful in deciding any given case. In some instances it will be clear that compensation is[23] or is not[24] required. In general, however, inverse condemnation law is a welter of confusing and apparently incompatible decisions.[25] The lack of a concise test raises particular difficulties when the courts must consider the application of inverse condemnation concepts to new areas such as airport noise[26] and environmental regulations. The numerous modes of analysis possible and the seeming inconsistency of principal decisions require judicial analysis of inverse condemnation cases on several levels, taking into account major theories suggested by commentators and existing precedent. This section is designed to delineate and explain these theories as they apply both to takings in general and to takings effected by regulations designed to protect the environment.[27]

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19. *E.g.*, Board of Pub. Instruction v. Town of Bay Harbor Islands, 81 So. 2d 637, 642 (Fla. 1955); Arundel Corp. v. Griffin, 89 Fla. 128, 103 So. 422, 424 (1925). *See* 3 J. ADKINS, FLORIDA REAL ESTATE LAW AND PROCEDURE §83.06 (1960). *Compare* Bowden v. City of Jacksonville, 52 Fla. 216, 42 So. 394 (1906) (compensation denied for change in road elevation), *with* Kendry v. State Road Dep't, 213 So. 2d 23, 26 (4th D.C.A. Fla. 1968), *cert. denied*, 222 So. 2d 752 (Fla. 1969). *See also* Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

20. *E.g.*, United States v. Willow River Power Co., 324 U.S. 499, 510 (1945); Transportation Co. v. Chicago, 99 U.S. 635, 642 (1878); *cf.* Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897).

21. A distinction must be made, however, between action that merely damages all or part of a parcel of land and that which actually effects a taking of but a small portion of a larger piece of property. The former would only require compensation in states having the more liberal constitutional provision. But even under the Florida and United States Constitutions, the latter action would require remuneration.

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

23. *E.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

24. *E.g.*, Mugler v. Kansas, 123 U.S. 623 (1887).

25. The uncertainty of any underlying doctrine has effectively been acknowledged by the United States Supreme Court itself, which far too frequently introduces its opinions in the area with the understatement (Sax, *supra* note 22, at 37) that no rigid rules (United States v. Caltex, Inc., 344 U.S. 149, 156 (1952), or set formulas (Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962), are available to determine where regulation ends and taking begins.

26. See notes 67, 76 *infra*.

27. For another study, see Binder, *Taking Versus Reasonable Regulation: A Reappraisal in Light of Regional Planning and Wetlands*, 25 U. FLA. L. REV. 1 (1972).

Evolution of the Physical Invasion – Mere Regulation Distinction: Denial of All Reasonable Use

One of the oldest theories in the inverse condemnation field provides that a compensable taking occurs only when governmental action results in physical encroachment upon, or actual use or occupation of, a privately-owned asset of economic value.[28] Under this approach, "mere regulation" of the manner in which economic assets are used is not a compensable taking.

Although the physical invasion standard is helpful in requiring compensation when an actual appropriation of property occurs,[29] it fails to explain those situations where compensation for physical destruction is denied.[30] Moreover, the test does not recognize that regulation may become so substantial or severe that the owner is precluded from making any reasonable use of his property.[31] Conceptually, the standard assumes that the objectives gained by actual appropriation cannot be achieved by regulation.[32] As the courts have pointed out, however, appropriation and regulation may be merely alternative

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Two caveats concerning the development of compensation theories should be noted at the outset. First, reliance upon tort law concepts to determine when a taking of property occurs is inadvisable. Tort concepts are useful in this context only in developing broad remedial policies to ensure that an injured party receives compensation from some source. Van Alstyne, *Modernizing Inverse Condemnation: A Legislative Prospectus,* 8 SANTA CLARA LAW. 1, 13 (1967). Second, suggestions that compensation is required in eminent domain actions, but not for governmental exercises of the police power, are of little assistance. Although this distinction is frequently asserted, efforts to dichotomize the essential characteristics of these two government powers "have produced much in the way of dilemma and disagreement and little, if anything, that can be described as basic consensus." *Id. See, e.g.,* Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 351, 20 Cal. Rptr. 368, *appeal dismissed,* 371 U.S. 36 (1962), *noted in* 50 CALIF. L. REV. 896 (1962); *In re* Angelus, 65 Cal. App. 2d 441, 454-55, 150 P.2d 908, 914-15 (1944); West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 290, 192 S.E. 881, 889 (1937); Comment, *Distinguishing Eminent Domain from Police Power and Tort,* 38 WASH. L. REV. 607 (1963). *See also* Taylor v. City of Jacksonville, 101 Fla. 1241, 133 So. 114, 116 (1931).

28. Mugler v. Kansas, 123 U.S. 623 (1887); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871). *Cf.* Hadacheck v. Sebastian, 239 U.S. 394 (1915); L'Hote v. New Orleans, 177 U.S. 587 (1900).

29. *E.g.,* Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1949); United States v. Cress, 243 U.S. 316 (1917); United States v. Lynah, 188 U.S. 445 (1903); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871).

30. *E.g.,* Miller v. Schoene, 276 U.S. 272 (1928) (destruction of cedar trees to protect apple orchards from cedar rust); Lawton v. Steele, 152 U.S. 133 (1894) (destruction of fishnets, which could not lawfully be used).

31. *E.g.,* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Ocean Villa Apartments, Inc. v. City of Ft. Lauderdale, 70 So. 2d 901 (Fla. 1954); Taylor v. City of Jacksonville, 101 Fla. 1241, 133 So. 114 (1931); Helseth v. DuBose, 99 Fla. 812, 128 So. 4 (1930); City of Jacksonville v. Schumann, 167 So. 2d 95 (1st D.C.A. Fla. 1964), *cert. denied,* 172 So. 2d 597 (Fla. 1965), *cert. denied,* 390 U.S. 981 (1968); Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962); Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert denied,* 379 U.S. 989 (1965). *Cf.* Armstrong v. United States, 364 U.S. 40 (1960).

32. Alternatively, the theory assumes that even though the same goal is reached in each instance, only the means to that goal is crucial. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 418 (1922) (Brandeis, J., dissenting).

techniques for achieving the same goal.[33] Conditioning compensability on a finding of physical invasion elevates form over substance and risks inequality of treatment for essentially similar claims.

Initially, the physical invasion test played a crucial role[34] in the development of American compensation theory.[35] Although now the physical en-

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33. *See* City of Miami v. Romer, 73 So. 2d 285 (Fla. 1954) (set-back line ordinance implemented to reduce possible price city would have to pay if property ultimately taken for street purposes, gives cause of action to owner of property); Hager v. Louisville & Jefferson County Planning & Zoning Comm'n, 261 S.W.2d 619 (Ky. 1953) (compensation cannot be avoided by zoning private land as a ponding area for water storage as part of a flood control plan); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963) (compensation cannot be avoided by zoning private property exclusively for useful township sewage treatment, water supply facilities, and public recreation); City of Plainfield v. Borough of Middlesex, 69 N.J. Super. 136, 173 A.2d 785 (Law Ct., Div. 1961) (compensation cannot be avoided by zoning private property exclusively for school, park, and playground use).

34. *Compare* Mugler v. Kansas, 123 U.S. 623 (1887) (compensation denied), *with* Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (compensation required).

35. Space limitations do not permit a full discussion of the historical evolution and demise of the physical invasion concept in these pages. An overview of the history, however, is sketched below to assist in the understanding of the position which the physical invasion standard has in contemporary compensation law. For a more detailed explanation, see Sax, *supra* note 22, at 38-46.

The physical invasion concept gained importance during the period of the first Mr. Justice Harlan. Because most of the early authority in the taking field evolved after the adoption of the fourteenth amendment, it was the first Justice Harlan who served as the principal architect of American compensation theory. *Id.* at 38. As the landmark case of Mugler v. Kansas, 123 U.S. 623 (1887), indicates, Justice Harlan was a strong proponent of the physical invasion requirement. Noting that the regulation did not actually appropriate private property for public benefit, *id.* at 668, Justice Harlan carefully distinguished Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871), on the ground that, unlike *Mugler*, it involved a "permanent flooding of private property . . . [a] physical invasion of the real estate of the private owner, and a practical ouster of his possession." 123 U.S. at 668. Justice Harlan also distinguished between noxious and innocent uses of property. *Id.* at 657, 668-69. *See* Fertilizer Co. v. Hyde Park, 97 U.S. 659 (1878) (operation of a fertilizer plant in the middle of a city is a noxious use that the government can abate without payment of compensation, no matter how great the private economic loss involved). Essentially, Justice Harlan was separating takings from police power regulations by using mechanical definitions of the terms "property" and "taking." Because no one can obtain a vested right to injure the public, the abatement of a noxious use could not be a taking of "property" requiring compensation. Sax, *supra* note 22, at 39. Gardner v. Michigan, 199 U.S. 325 (1905), *cited* by Professor Sax as authority for this proposition, is not wholly in point with the present problem of environmental degradation, because the "property," garbage from a hotel, was itself noxious. The hotel producing the garbage, however, was presumably still "property" in the constitutional sense. 199 U.S. at 330-31.

During a period marked by increasing governmental regulation of private economic action, the first Justice Harlan left the Court and Mr. Justice Holmes rose to accept leadership in the continuing development of compensation theory. Sax, *supra* note 22, at 40. The social conflict of this period exerted a strong influence upon Holmes' approach to the separation of compensable takings and valid exercises of the police power. Established interests were engaged in conflict with the forces of social change. On both the state and federal levels, vast fields of hitherto free enterprise were brought under governmental supervision. F. FRANKFURTER, MR. JUSTICE HOLMES AND THE SUPREME COURT 50 (2d ed. 1961). To Holmes, the

croachment requirement is seldom invoked,[36] it does reappear on occasion,[37] frustrating otherwise acceptable claims for relief. Because current application of this requirement would effectively block any claim for compensation based upon the adverse impact of environmental regulations, the present status of the physical invasion standard must be briefly reviewed.

The classic example of rejection of the physical invasion standard appears in *Pennsylvania Coal Co. v. Mahon*.[38] In that case, the United States Supreme Court found that a statutory taking of the coal company's property rights had occurred and held the company to be entitled to compensation under the fifth and fourteenth amendments to the Constitution. Speaking for the Court, Justice Holmes reasoned that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[39] Holmes admitted that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such

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limited role of the judiciary in this conflict was to ensure that the contest for power was carried out in an arena of fairness and equality. "Fairness" required restraints by all parties. In the compensation field, the private property owner would have to concede "that the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes if [the government does] not take too much; that some play must be allowed . . . if the machine is to work." Tyson & Bros. v. Banton, 273 U.S. 418, 445-46 (1927). At the same time, the promoters of social change would have to recognize that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922). In a lengthy per curiam opinion citing *Mahon,* the Florida supreme court has made a more emotional commitment to a similar conclusion. L. Maxcy, Inc. v. Mayo, 103 Fla. 552, 570, 139 So. 121, 129 (1932).

Unlike the first Justice Harlan, Mr. Justice Holmes attached no qualitative difference between physical takings and mere regulatory exercises of the police power. To Holmes, each case was part of a continuum "in which established property interests were asked to yield more or less to the pressures of public demands." Sax, *supra* note 22, at 41. Holmes' constitutional focus was on the degree of economic harm inflicted by the governmental action. In Interstate Consol. St. Ry. v. Massachusetts, 207 U.S. 79, 87 (1907), he noted that "the question narrows itself to the magnitude of the burden imposed." Although a governmental action might not require compensation if it involved only a "comparatively insignificant taking," Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911), or "the infliction of some fractional and relatively small losses," Interstate Consol. St. Ry. v. Massachusetts, *supra,* if the affected property were made "wholly useless, the rights of property would prevail over the other public interest, and the police power would fail." Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

36. Sax, *supra* note 22, at 46. *See* 2 P. NICHOLS, *supra* note 15, §6.3.

37. *E.g.,* Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied,* 371 U.S. 955 (1963); Harris v. United States, 205 F.2d 765, 767 (10th Cir. 1953). *See* United States v. Central Eureka Mining Co., 357 U.S. 155 (1958).

38. 260 U.S. 393 (1922). Mr. Justice Brandeis filed the single dissenting opinion. *Id.* at 416, 417: A "restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking. The restriction here in question is merely the prohibition of a noxious use. The property so restricted remains in the possession of its owner." For a discussion of this case, see Binder, *supra* note 27.

39. 260 U.S. at 415.

change."[40] But he warned that when the implied limitation on private property rights "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act."[41]

The difficult question under Holmes' analysis is to determine *when* the regulatory action is so severe that a compensable taking must be found. Although *Mahon* considers the issue to be "a matter of degree" and therefore one which "cannot be disposed of by general propositions,"[42] the test applied seems to turn on whether the regulation so substantially impairs the property that it cannot be put to any reasonable use: "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it."[43]

Although Justice Holmes' approach in *Mahon* provides much of the heritage for contemporary compensation theory, the Court's present stance on the taking question is far from clear. Three well-known decisions exemplify the modern approach.

In *Armstrong v. United States,*[44] the Government had made certain materialmen's liens unenforceable by asserting sovereign immunity.[45] The Court of Claims effectively rejected petitioners' claim that the Government's interposition of the immunity doctrine was a compensable taking of property.[46] On appeal, the Supreme Court held that the Government's action constituted a taking of property without just compensation.[47] Speaking for the Court Justice Black reasoned:[48]

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40. *Id.* at 413.

41. *Id.*

42. *Id.* at 416. Justice Holmes noted that "the greatest weight" is given to the legislature in cases "of this nature." *Id.* at 413.

43. *Id.* at 414. Initially, the *Mahon* opinion seems to use a "balancing" process to determine when a regulation exceeds the bounds of the police power. *Id.* at 413-14. This aspect of the opinion, however, does not seem to be controlling. *See* notes 138-139 *infra.* Justice Holmes expressly distinguished a line of decisions denying compensation under laws intended to meet a temporary emergency and providing for compensation determined to be reasonable by an impartial board. *E.g.,* Marcus Brown Holding Co., Inc. v. Feldman, 256 U.S. 170 (1921); Block v. Hirsh, 256 U.S. 135 (1921). Even in *Mahon* the Court assumed that the statute was passed "upon the conviction that an exigency existed that would warrant it" and that would warrant the exercise of eminent domain. 260 U.S. at 416.

44. 364 U.S. 40 (1960). *See* City of El Paso v. Simmons, 379 U.S. 497, 533-34 (1965) (Black, J., dissenting).

45. The United States had contracted for the building of ships under an agreement providing that, in the event of default by the company, title to all completed and uncompleted work would be transferred to the United States. Default occurred and several hulls passed to the Government. Because the shipbuilder had not paid for all of his materials, petitioners-materialmen sought to enforce their state materialmen's liens against the United States. ME. REV. STAT. ANN. tit. 10, §3842 (1964).

46. Armstrong v. United States, 169 F. Supp. 259 (Ct. Cl. 1959), *rev'd,* 364 U.S. 40 (1960).

47. 364 U.S. at 48.

48. *Id.*

> Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens, something the the Government could do because its property was not subject to suit, but which no private purchaser could have done.

Justice Black also noted that compensation was required regardless of the intent or the means used by the Government to accomplish the act.[49]

Armstrong may turn on either a Holmesian finding that the Government's assertion of sovereign immunity made the liens useless for any reasonable purpose or a determination that the Government wholly appropriated the property for its own advantage in a proprietary capacity. The latter approach would be closely related to the physical invasion concept employed by the first Mr. Justice Harlan.[50] In either event, the ambiguity of *Armstrong* provides little guidance for future decisions.

Two years after *Armstrong* the Court continued to shroud its compensation standard in *Goldblatt v. Town of Hempstead*.[51] Citing the first Justice Harlan's opinion in *Mugler v. Kansas*,[52] the Court announced that if an ordinance is an otherwise valid exercise of the police power, "the fact that it deprives the property of its *most* beneficial use does not render it unconstitutional."[53] Nevertheless, the Court preserved the *Mahon* heritage by stating:

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49. The phrase in the opinion states: "however acccomplished, whether with an intent and purpose of extinguishing the liens or not . . . ." *Id.*

50. For other recent cases that may employ the physical invasion standard, see Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Central Eureka Mining Co., 357 U.S. 155, 165-66 (1958); United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); United States v. Causby, 328 U.S. 256, 266 (1946) ("it is the character of the invasion, not the amount of damage resulting from it . . . that determines the question of whether it is a taking").

The three dissenting Justices in *Armstrong* urged that no taking had occurred because the economic damage inflicted was a mere "consequential incidence" of a valid exercise of the power of sovereign immunity. 364 U.S. at 49 (Harlan, J., joined by Frankfurter and Douglas, JJ., dissenting). The majority simply rejected this suggestion without explanation. 364 U.S. at 48. Although the "consequential incidence" theory is not defined in *Armstrong*, other decisions suggest that it is used in two ways. First, it is a synonym for the physical invasion concept. United States v. Dickinson, 331 U.S. 745, 750 (1947); Gibson v. United States, 166 U.S. 269, 274-75 (1897). Some indication of this use appears in the *Armstrong* dissent: "We are not here dealing with a situation in which the United States has condemned a full fee interest in property, thus purporting to extinguish all claims therein." 364 U.S. at 50. If the *Armstrong* minority was using the phrase in the physical invasion context, then the majority opinion may be a rejection of that standard. Second, the term is apparently used to show that the harm imposed is justified because the governmental act is independently privileged. The injury must be borne as to the incidental consequence of a legally privileged act. Sax, *supra* note 22, at 46 n.60. In the *Armstrong* dissent the sovereign immunity doctrine provided the privilege: "The very nature of the doctrine of sovereign immunity precludes regarding its interposition as a Fifth Amendment 'taking.'" 364 U.S. at 50.

51. 369 U.S. 590 (1962). For an explanation of the facts of this case and a somewhat differing view as to the result reached, see Binder, *supra* note 27, at 4.

52. 123 U.S. 623 (1887).

53. 369 U.S. at 592 (emphasis added). In addition to *Mugler*, the Court cited the following cases for this proposition: Walls v. Midland Carbon Co., 254 U.S. 300 (1920); Hada-

"This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation."[54] *Goldblatt* thus preserves the possibility that a regulation that prevents an owner from making *any* reasonable economic use of his property would require compensation.[55]

Several months later, the Court refused a clear opportunity to clarify the question left open in *Goldblatt*. The appellant in *Consolidated Rock Products Co. v. Los Angeles*[56] posed the issue as "whether zoning ordinances which *altogether* destroy the worth of valuable land by prohibiting the *only* economic use of which it is capable effects a taking of property without compensation."[57] The case arose when the City of Los Angeles zoned appellant's property for agricultural and residential use, thereby prohibiting the removal of rock, gravel, and sand from the land.[58] The trial court found that the property had no "economic value" after the ordinance was enacted,[59] noting that without an expenditure of "prohibitive amounts of money" to build a flood control channel, the property could only serve as a detritus spreading ground for a nearby dam[60] or as a park or wildlife area.[61] Conceding that "in relation to its value for the extraction of rock, sand, and gravel the value of the property for any of the described uses is *small if not minimal*" and that "as to a considerable part of it, seasonal flooding might prevent its continuous use for any purpose,"[62] the California supreme court apparently accepted evidence presented to "the legislative body," which enacted the ordinance, that the property *could*

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check v. Sebastian, 239 U.S. 394 (1915); Reinmen v. Little Rock, 237 U.S. 171 (1915). *See* Laurel Hill Cemetery v. San Francisco, 216 U.S. 358 (1910).

54. 369 U.S. at 594. The Court warned: "There is no set formula to determine where regulation ends and taking begins." *Id.*

55. Although the Court conceded that the ordinance involved completely prohibited a beneficial use to which the property had previously been devoted, it cautioned that "such a characterization does not tell us whether or not the ordinance is constitutional." 369 U.S. at 592. *See* notes 72-91 and accompanying text *infra.*

56. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed,* 371 U.S. 36 (1962), *noted in* 50 CALIF. L. REV. 896 (1962).

57. Brief for Appellant, Jurisdictional Statement at 5 (emphasis added).

58. Although limited excavation operations were being conducted on adjacent properties, appellant's land was not being mined when the ordinance was passed. Appellant, Consolidated Rock Products Co., leased the property from appellant, Valley Real Estate Corp., 57 Cal. 2d at 518, 370 P.2d at 344, 20 Cal. Rptr. at 640.

59. Interestingly, the court refused to find that the land had no "value." The finding was made by the court's stating that ¶4 of the complaint was true, "adding thereto, on page 5, line 32, the word 'economic' before the word 'value.'" Brief for Appellant, Jurisdictional Statement, app. C at 39a. The trial court stated that any suggestion that the property would have economic value for any use other than rock, gravel, and sand excavation would be "preposterous." 40 Cal. 2d at 519, 370 P.2d at 344, 20 Cal. Rptr. at 640. A full statement of the trial court's comments appears in the opinion of the California Second District Court of Appeal, Consolidated Rock Prods. Co. v. City of Los Angeles, 15 Cal. Rptr. 775, 777 n.2, 778 n.3 (Dist. Ct. App. Cal. 1961).

60. 15 Cal. Rptr. at 778 n.2.

61. Brief for Appellant in Opposition to Appellee's Motion To Dismiss at 3, Consolidated Rock Prods. Co. v. City of Los Angeles, 371 U.S. 36 (1962).

62. 57 Cal. 2d at 530, 370 P.2d at 351, 20 Cal. Rptr. at 647 (emphasis added).

be utilized successfully for several other purposes.[63] The court, therefore, held that no right of compensation existed.[64]

In a per curiam decision, the United States Supreme Court dismissed the appeal for lack of a substantial federal question.[65] The dismissal was technically on the merits and therefore good precedent.[66] As such, the case may involve a clouded application of the rule announced in *Goldblatt*. Rather than concluding that compensation is not required when a zoning ordinance prevents any reasonable use of the affected property, the Court may have simply accepted the finding of the California supreme court that the property could be used for other valuable purposes. If this conclusion is correct, *Consolidated Rock Products,* like *Goldblatt,* leaves open the possibility that compensation would be required if a regulation prevents property from being put to any economically feasible use. The former decision, however, does suggest that any claim of "no reasonable use" must be strong and convincing.

The current status of compensation law is outlined with more clarity, if perhaps less authority, in the state decisions. Notwithstanding some lower

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63. *E.g.,* for stabling horses, cattle feeding and grazing, chicken raising, dog kennels, fish hatcheries, golf courses, certain types of horticulture and recreation. 57 Cal. 2d at 530, 370 P.2d at 351, 20 Cal. Rptr. at 647. Appellants strongly contested this suggestion, noting that no such evidence was presented to the city planning commission or the city council. Appellants urged that the court's statement was improperly based upon testimony of the City Planning Commissioner at the trial that the enumerated uses were merely permissible (not necessarily possible). Other testimony at the trial did suggest that the land could be successfully devoted to chicken raising, horse stabling, or cattle feeding. Brief for Appellants, Jurisdictional Statement at 18 n.5.

64. 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 368 (1962).

65. 371 U.S. 36 (1962) (Justices Harlan and Douglas thought that probable jurisdiction should have been noted).

66. H. HART & H. WECHSLER, FEDERAL COURTS AND THE FEDERAL SYSTEM 574 (1953); Note, *Supreme Court Per Curiam Practice: A Critique,* 69 HARV. L. REV. 707, 712 (1956); Note, *The Insubstantial Federal Question,* 62 Harv. L. Rev. 488, 494 (1949). The significance of such dismissals has been the subject of considerable professional discussion. *E.g.,* Hart, *The Business of the Supreme Court at the October Terms, 1937 and 1938,* 53 HARV. L. REV. 579 (1940); Moore & Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure,* 35 VA. L. REV. 1, 45 (1949); Comment, *Per Curiam Decisions of the Supreme Court: 1957 Terms,* 26 U. CHI. L. REV. 279 (1958).

Use of the *Consolidated Rock Products* dismissal as precedent should be approached with caution due to the possibility that the Court's action reflects an "improperly presented" federal question. Naim v. Naim, 350 U.S. 985 (1956). *See generally* Zucht v. King, 260 U.S. 174 (1922); Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921). Professor Sax, however, laments: "The constitutional question was clearly presented and squarely decided below; the record was free of those ambiguities and uncertainties which frequently seem to induce a denial of review; and the appeal was competently presented by one of the country's leading law firms." Sax, *supra* note 22, at 44. Similar caution may be appropriate due to an unapparent lack of finality below. *See* Note, *Supreme Court Per Curiam Practice, supra* at 711. Moreover, the Court may have utilized the dismissal for the questionable purpose of exercising discretion in its jurisdiction over appeals. *See* Wiener, *The Supreme Court's New Rules,* 68 HARV. L. REV. 20, 54 (1954) (quoting Chief Justice Warren). *See generally* D. CURRIE, FEDERAL COURTS 217-23 (1968).

federal court precedent to the contrary,[67] most state courts[68] today have accepted the proposition that whether the government takes title to or possession of the subject property[69] is merely "a matter of the form in which it chooses to proceed."[70] Several state courts have answered the question left open by *Gold-*

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67. *E.g.*, Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963); Harris v. United States, 205 F.2d 765, 767 (10th Cir. 1953). Both decisions refused compensation in airport noise settings because the planes involved did not fly over the subject properties.

68. Sax, *supra* note 22, at 46. For a summary by jurisdictions, see 2 P. NICHOLS, *supra* note 15, §6.3: "The modern and prevailing view is that any substantial interference with private property which destroys or lessens its value . . . 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 remain undisturbed." The courts in Michigan, Pennsylvania, and South Carolina have construed constitutional provisions similar to that in the Florida constitution to mean that a physical invasion is not required. City of Big Rapids v. Big Rapids Furniture Mfg. Co., 210 Mich. 158, 177 N.W. 284 (1920) (blocking a driveway by changing a road grade), *followed in* Thom v. State, 376 Mich. 608, 138 N.W.2d 322 (1965); *In re* Sansom St., 293 Pa. 186, 143 A. 134 (1928) (setback ordinance restricting future building), *followed in* Cleaver v. Tredyffrin Township, 414 Pa. 367, 200 A.2d 408 (1964); Gasque v. Town of Conway, 194 S.C. 15, 8 S.E.2d 871 (1940) (refusal of a permit for operation of a gas station).

Although the South Carolina constitution speaks in terms of takings, judicial decisions in that state must be analyzed with care. The South Carolina courts have consistently adhered to the rather interesting doctrine that "within the purview of this constitutional provision, there is no distinction between taking and damaging . . . . [T]he least damage to property constitutes a taking within the purview of the [South Carolina] Constitution." State Highway Dep't v. Wilson, 254 S.C. 360, 175 S.E.2d 391, 395 (1970).

One questionable line of authority suggests a somewhat contrary position. These decisions urge that cases requiring compensation under the police power were greatly weakened by the Supreme Court's approval of comprehensive zoning legislation in Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). For statements of this position, see Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 349-51, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962); Town of Burlington v. Dunn, 318 Mass. 216, 21 N.E.2d 243, 246, *cert. denied*, 326 U.S. 739 (1945); West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 192 S.E. 881, 889 (1937); *In re* Angelus, 65 Cal. App. 2d 441, 150 P.2d 908, 914-15 (1944). Even though *Euclid* was decided after *Pennsylvania Coal Co. v. Mahon*, later cases in the state and federal courts suggest that the principles espoused in *Mahon* survived *Euclid* with little adverse effect.

69. Modern sophisticated notions of "property" have helped weaken the physical invasion approach applied by the first Justice Harlan. Van Alstyne, *supra* note 17, at 2 n.5. For discussions of contemporary property concepts, see Michelman, *Property, Utility ad Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1202-13 (1967); Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938); Reich, *The New Property*, 73 YALE L.J. 733 (1964). *Cf.* Kass v. Kewin, 104 So. 2d 572, 578 (Fla. 1958).

70. Sax, *supra* note 22, at 46. *See* Michelman, *supra* note 69, at 1186; Van Alstyne, *supra* note 27, at 14-15. "Wordplay—in short dogged adherence to the constitutional formulas of 'taking' and 'property'—cannot justify any sharp line of distinction between governmental encroachments which take the different forms of affirmative occupancy and negative restraint." Michelman, *supra* note 69, at 1186-87. Professor Michelman cautions that the fact that governmental action can be viewed as a "taking" does not necessarily require money compensation, at least under a "fairness" view of compensation theory. *Id.* at 1186 n.44. For

blatt and *Consolidated Rock Products* by holding that a taking of private property occurs when a governmental regulation so restricts the use of the property that the land cannot practically be utilized for any reasonable purpose.[71]

Although not expressly repudiating the physical invasion test, Florida decisions seem to be in accord with this judicial philosophy. Florida law appears to require a physical invasion before relief or damages will be afforded to owners of property adjoining properly condemned land.[72] Further, absent express agreement, a municipal corporation need not compensate an abutting property owner for any incidental losses suffered from the change of grade of

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an explanation of a possible analytical difference between affirmative easements ("easements") and negative easements ("servitudes"), see *id.* at 1187 n.45.

71. *E.g., In re* Kelso, 147 Cal. 609, 82 P. 241 (1905) (invalid ordinance absolutely prohibited maintenance or operation of a rock or stone quarry within a certain part of San Francisco); Burritt v. Harris, 172 So. 2d 820, 822-23 (Fla. 1965); Forde v. City of Miami Beach, 146 Fla. 676, 1 So. 2d 642 (1941); Morris County Land Improvement Co. v. Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587, 591-92 (1938) (the taking was couched in terms of a permanent restriction. The New York constitution allows compensation for damagings as well as takings). The unanimous decision of the New Jersey supreme court in Morris County Land Improvement Co. v. Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963), provides a sound example of this line of state authority. The zoning ordinance was enacted to maintain private land in its natural state, essentially for such public purposes as floodwater detention basins and a wetland wildlife sanctuary. The court distinguished Hager v. Louisville & Jefferson County Planning & Zoning Comm'n, 261 S.W.2d 619 (Ct. App. Ky. 1953); Grosso v. Board of Adjustment, 137 N.J.L. 630, 61 A.2d 167 (1948); Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951), as involving more direct interference with property uses, and held that compensation was required, relying on Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Yara Eng'r Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945) (height zoning ordinance designed to prevent interference with aircraft takeoffs and landings held an unconstitutional substitute for eminent domain and compensation of property owners); City of Plainfield v. Borough of Middlesex, 69 N.J. Super. 136, 173 A.2d 785 (Law Ct., Div. 1961). The court recognized that a compensable taking may occur through "excessive regulation under the police power," which indirectly but substantially restricts the use to which the subject property may be put. 40 N.J. at 554, 193 A.2d at 241. Compensation must be paid, the court explained when the governmental regulation so restricts the land use that it "cannot practically be utilized for any reasonable purpose" or when "the only permitted uses are those to which the property is not adapted or which are economically infeasible." *Id.* at 557, 193 A.2d at 242. This decision, the court noted, was made even though the zoning involved "laudable public purposes" motivated by "high mindedness" and although the owner of most of the affected property supported the regulations. *Id.* at 555, 193 A.2d at 241. This language suggests that the court either rejected the "balancing" test (discussed in the text accompanying notes 130-156 *infra)* or struck a balance in favor of the landowner. If the former conclusion is correct, the case should have an important impact on the Florida courts. Several Florida zoning decisions use the test found in the *Morris County* case, but most if not all of the opinions involved may have turned on an inadequate showing of public necessity for the zoning regulations. See text accompanying notes 141-152 *infra.*

72. *E.g.,* Wier v. Palm Beach County, 85 So. 2d 865 (Fla. 1956); Selden v. City of Jacksonville, 28 Fla. 558, 10 So. 457 (1891); City of Tampa v. Texas Co., 107 So. 2d 216 (2d D.C.A. Fla. 1958). *See* Comment, *Eminent Domain: Inverse Condemnation — What Constitutes a Taking?,* 21 U. FLA. L. REV. 257, 259 (1968).

a public street.[73] However, these two classes of decisions may turn not on the lack of a physical invasion, but on a finding that the affected property was merely "damaged" rather than "taken."

More important in the context of this article are the Florida decisions holding that zoning regulations which deprive an owner of any beneficial use of his land are unconstitutional takings of property.[74] Of similar importance are the cases suggesting that denial of a permit to fill submerged lands[75] or the continuing nuisance of airport noise[76] may be takings of property without just compensation. Whether these decisions would support a cause of action requesting compensation or equitable relief from the onerous effect of environmental regulations has yet to be settled.

One of the Florida supreme court's strongest statements with regard to zoning ordinances came in *Ocean Villa Apartments, Inc. v. City of Ft. Lauderdale*:[77]

> This court is committed to the doctrine that when the application of a zoning ordinance has the effect of *completely* depriving the owner of the beneficial use of his property by precluding the *only* use to which it is *reasonably* adapted, an attack on the validity of the ordinance as applied to the particular property involved will be sustained.

Although later cited as holding by the court,[78] the *Ocean Villa* statement must be used with caution. The decision in *Ocean Villa* merely involved a denial of certiorari from the circuit court's refusal to grant summary judgment against the city. The Florida court carefully reserved judgment on the issue of whether

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73. *Compare* Bowden v. City of Jacksonville, 52 Fla. 216, 42 So. 394 (1906) (no express agreement, compensation denied), *with* Kendry v. State Road Dep't, 213 So. 2d 23, 26 (4th D.C.A. Fla. 1968) (road easements of title contained restriction on grade, compensation required), *cert. denied,* 222 So. 2d 752 (Fla. 1969).

74. *E.g.,* Burritt v. Harris, 172 So. 2d 820, 822-23 (Fla. 1965); Ocean Villa Apartments, Inc. v. City of Ft. Lauderdale, 70 So. 2d 901 (Fla. 1954); Forde v. City of Miami Beach, 146 Fla. 676, 1 So. 2d 642 (1941); State *ex rel.* Taylor v. City of Jacksonville, 101 Fla. 1241, 133 So. 114 (1931); State *ex rel.* Helseth v. DuBose, 99 Fla. 812, 128 So. 4 (1930); Metropolitan Dade County v. Greenlee, 224 So. 2d 781 (3d D.C.A. Fla. 1969); Manilow v. City of Miami Beach, 213 So. 2d 589, 593 (3d D.C.A. Fla. 1968), *cert. discharged,* 226 So. 2d 805 (Fla. 1969), *cert. denied,* 397 U.S. 972 (1970); Kugel v. City of Miami Beach, 206 So. 2d 282, 284 (3d D.C.A. Fla. 1968), *cert. denied,* 393 U.S. 1021 (1969).

75. Zabel v. Pinellas County Water & Navigation Control Authority, 171 So. 2d 376 (Fla. 1965). See note 141 *infra.*

76. City of Jacksonville v. Schumann, 167 So. 2d 95 (1st D.C.A. Fla. 1964), *cert. denied,* 172 So. 2d 597 (Fla. 1965), *rehearing denied,* 199 So. 2d 727 (1967), *cert. denied,* 390 U.S. 981 (1968). *See generally* Hill, *Liability for Aircraft Noise: The Aftermath of* Causby *and* Griggs, 19 U. MIAMI L. REV. 1 (1964).

77. 70 So. 2d 901, 902 (Fla. 1954) (emphasis added), *citing* Forde v. City of Miami Beach, 146 Fla. 676, 1 So. 2d 642 (1941); State *ex rel.* Taylor v. City of Jacksonville, 101 Fla. 1241, 133 So. 114 (1931); State *ex rel.* Helseth v. DuBose, 99 Fla. 812, 128 So. 4 (1930).

78. Zabel v. Pinellas County Water & Navigation Control Authority, 171 So. 2d 376, 381 (Fla. 1965).

the setback lines imposed by the zoning ordinance were "arbitrary or unreasonable or an abuse of the police power."[79]

The *Ocean Villa* statement was apparently based upon the test noted by the Florida supreme court in *Taylor v. City of Jacksonville.*[80] Under the *Taylor* rule, if the application of a zoning ordinance has the effect of "completely depriving an owner of the beneficial use of his property," the zoning board has a duty to relax the restrictions "to prevent confiscation of a complainant's lands without compensation."[81] The *Taylor* test, however, is also dictum, for the court upheld the zoning ordinance in question.

The *Taylor* and *Ocean Villa* dicta are, in turn, based upon the more general formulation announced in *Helseth v. DuBose.*[82] In *Helseth* the Florida supreme court struck down, as arbitrary and unreasonable, a zoning ordinance preventing the erection of a jail on county property located in an undeveloped part of the city.[83] The court stated: "The right of an owner to devote his land to any legitimate use is properly within the terms of the Constitution, and the Legislature may not under the guise of the police power impose unnecessary or unreasonable restrictions upon such use."[84] Coupled with such later decisions as *Ocean Villa,* the *Helseth* doctrine indicates that an unreasonable regulatory scheme can effect an unconstitutional taking of property. This conclusion is supported by a related line of Florida authority involving zoning ordinances that, although reasonable when initially drafted, became overly restrictive due to changes in the community and physical nature of the property regulated.

In *Forde v. City of Miami Beach,*[85] the Supreme Court of Florida held that a zoning ordinance must be sufficiently stable to protect those who comply with the law, but at the same time, must be susceptible to alteration to meet changing conditions not adequately recognized or possible to foresee when the ordinance was adopted.[86] The ordinance under attack in *Forde* zoned numerous oceanfront lots for residential estates rather than for multiple family housing or hotels.[87] Appellants contended that although the ordinance may have

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79. 70 So. 2d at 902.

80. 101 Fla. 1241, 133 So. 114 (1913). Both the *Ocean Villa* and *Taylor* opinions were authored by Justice Terrell. Serving as Chief Justice, Terrell also wrote the opinion in Helseth v. DuBose, 99 Fla. 812, 128 So. 4 (1930).

81. 101 Fla. at 1245, 133 So. at 116, *citing* State *ex rel.* Helseth v. DuBose, 99 Fla. 812, 128 So. 4 (1930); Sundlun v. Zoning Bd. of Review, 50 R.I. 108, 145 A. 451 (1929).

82. 99 Fla. 812, 128 So. 4 (1930).

83. The court carefully explained that no proof had been made that the jail would be a nuisance or that it would unduly affect the health, convenience, or morals of the community. 99 Fla. at 818, 128 So. at 7.

84. *Id. Cf.* State of Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 121 (1928). The *Helseth* case was decided after Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). See note 68 *supra.*

85. 146 Fla. 676, 1 So. 2d 642 (1941).

86. 146 Fla. at 682, 1 So. 2d at 645.

87. Reasons cited by the city in support of this classification included (a) protection of land value, (b) prevention of a serious traffic problem on Collins Avenue, and (c) protection of the general atmosphere of the area. The city also alleged that the building trend followed after adoption of the ordinance indicated that the amount of property available for hotels

been reasonable at the outset, changes in the character of the property made the land unsuitable and undesirable for residential use. The effect of the zoning regulation, therefore, was to deprive them of the beneficial enjoyment of their property. The Florida court apparently agreed, finding "that no demand now exists for this particular property for private estates" and " that it cannot profitably be used for residential purposes."[88] Emphasizing that, as restricted, the property would remain "for the present and for an unpredictable future unimproved and unproductive,"[89] the court reasoned that the value of the land might well be consumed by the payment of annual taxes. "[T]o continue the . . . restrictions in effect would almost, if not quite, amount to a taking without compensation and hence [be] beyond the realm of valid regulation."[90]

In sum, the Florida zoning cases[91] indicate that an actual physical invasion is not a prerequisite to a finding that a taking without just compensation has occurred. Although the present approach of the United States Supreme Court is less clear, the decisions in *Mahon* and *Armstrong* and dicta in other cases suggest that at least some regulatory actions can effect a compensable taking of property without a physical invasion. Just what standard the courts apply in judging whether the government action amounts to a taking of property is unclear. Several other judicial and academic theories, however, may be useful in framing the required distinction.

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and apartments in the area greatly exceeded the requirements in comparison to the property available for single family construction. *Id.* at 680, 1 So. 2d at 644-56.

88. *Id.* at 683, 1 So. 2d at 646.

89. *Id.* at 685, 1 So. 2d at 647.

90. *Id. Accord,* Burritt v. Harris, 172 So. 2d 820, 822-23 (Fla. 1965). *See* City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953) (per curiam) (city justified need to maintain zoning classification); Metropolitan Dade County v. Greenlee, 224 So. 2d 781 (3d D.C.A. Fla. 1969); Manilow v. City of Miami Beach, 213 So. 2d 589, 593 (3d D.C.A. Fla. 1968) (zoning so unreasonable as to constitute taking of property), *cert. discharged,* 226 So. 2d 805 (Fla. 1969), *cert. denied,* 397 U.S. 972 (1970); Smith v. City of Miami Beach, 213 So. 2d 281 (3d D.C.A. Fla. 1968) (zoning reasonable), *cert. discharged,* 220 So. 2d 624 (Fla. 1969) (per curiam); Kugel v. City of Miami Beach, 206 So. 2d 282, 284 (3d D.C.A. Fla. 1968) ("Where changed conditions create a situation where the zoning of appellants' property is so unreasonable as to constitute a taking of his property, then the courts are justified in striking down the arbitrary zoning classification."), *cert. denied,* 212 So. 2d 877 (Fla. 1968), *cert. denied,* 393 U.S. 1021 (1969); Lawley v. Town of Golfview, 174 So. 2d 767, 770 (2d D.C.A. Fla. 1965). *Cf.* Tollius v. City of Miami, 96 So. 2d 122, 126 (Fla. 1957) (need for zoning classification so out of proportion to the interference with appellant's use of his property that the exercise of police power could not be upheld). *See also Ex parte* Wise, 144 Fla. 222, 192 So. 872 (1940).

91. Dictum in *Forde* suggests that the standard applied in that case is similar to the tests used in the zoning cases where no change in circumstances has occurred. Forde v. City of Miami Beach, 146 Fla. 676, 684, 1 So. 2d 642, 647 (1941) (emphasis added): "[W]hen property, restricted to a defined use by a zoning ordinance, changes its physical character from natural causes to the extent that it is no longer adaptable to the use it is zoned for, then it becomes the duty of the zoning board to relax its restrictions to prevent confiscation *just as much so as in the case where the regulation was invalid in the first instance.*"

Diminution-in-Value and Loss-on-Investment

One theoretical approach available to determine when a governmental regulation effects a taking of property utilizes the magnitude of the property owner's loss as the controlling factor.[92] This test is consistent with the non-physical-invasion analysis employed by Florida courts, since the nature of the governmental power being exercised is not important. So long as the quantitative impact of the restriction is small, no taking of property will be found.

Often attributed to Mr. Justice Holmes,[93] the diminution-in-value standard has received some judicial support. Compensation in every case involving a slight reduction in property value cannot be allowed if contemporary government is to function effectively.[94] A taking of property, therefore, should not be found when the governmental regulation merely prevents the owner from using his property in its *most* beneficial use. If other reasonable uses are available,[95] any resulting loss of value should be minimal. On the other hand, when the regulation goes further and prevents *any* reasonable use, a finding that a compensable taking has occurred is much more likely.[96]

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92. *See* Michelman, *supra* note 69, at 1190-93, 1229-34; Sax *supra* note 22, at 50-60; Van Alstyne, *supra* note 27, at 16-17; Van Alstyne, *Taking or Damaging by Police Power, supra* note 17, at 37-41.

93. Tyson & Brother v. Banton, 273 U.S. 418, 445-46 (1927) (Holmes, J., dissenting); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (Holmes, J.). *But cf.* Erie R.R. v. Public Util. Comm'rs, 254 U.S. 394, 410 (1921); Hadacheck v. Sebastian, 239 U.S. 394 (1915). Nevertheless, Holmes is said to have complained of the "petit larceny" of the police power. 1 HOLMES-LASKI LETTERS 457 (Howe ed. 1953). Whether Holmes himself fully accepted the diminution-of-value theory is uncertain. Michelman, *supra* note 69, at 1190 n.53. Professor Binder believes that the *Mahon* decision is an example of the diminution-of-value test. Binder *supra* note 27, at 3-4.

94. Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911); Interstate Consol. St. Ry. v. Massachusetts, 207 U.S. 79, 87 (1907); *cf.* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (where particularly small claims are involved, the cost of running the compensation machinery itself may be prohibitive); Michelman, *supra* note 69, at 122 & n.105.

95. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Walls v. Midland Carbon Co., 254 U.S. 300 (1920); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Reinman v. Little Rock, 237 U.S. 171 (1915); Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed,* 371 U.S. 36 (1962); City of Miami Beach v. Lachman, 71 So. 2d 148, 152 (Fla. 1953); Metropolitan Dade County v. Greenlee, 224 So. 2d 781, 782 (3d D.C.A. Fla. 1969); City of Miami Beach v. Zorovich, 195 So. 2d 31, 36 (3d D.C.A. Fla. 1967), *cert. denied,* 201 So. 2d 554 (Fla. 1967); Polk Enterprises, Inc. v. City of Lakeland, 143 So. 2d 917 (2d D.C.A. Fla. 1962); Levitt v. Incorporated Village of Sands Point, 6 N.Y.2d 269, 160 N.E.2d 501, 189 N.Y.S.2d 212 (1959); McCabe v. Town of Oyster Bay, 24 Misc. 2d 840, 209 N.Y.S.2d 697 (Sup. Ct. 1960), *aff'd sub nom.,* 13 App. Div. 2d 979, 217 N.Y.S.2d 161 (2d Dep't 1961).

96. *See, e.g.,* Armstrong v. United States, 364 U.S. 40 (1960); *Ex parte* Kelso, 147 Cal. 609, 82 P. 241 (1905); Zabel v. Pinellas County Water & Navigation Authority, 171 So. 2d 376 (Fla. 1965); Ocean Villa Apartments, Inc. v. City of Ft. Lauderdale, 70 So. 2d 901, 902 (Fla. 1954); Forde v. City of Miami Beach, 146 Fla. 676, 1 So. 2d 642 (1941); Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 193 A.2d 232, 242 (1963); Arvene Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587, 591-92 (1938). *Cf.* Bydlon v. United States, 175 F. Supp. 891 (Ct. Cl. 1959).

The diminution-in-value test, however, provides no standards for determining exactly where the compensation line should be drawn.[97] Although minor pecuniary losses resulting from appropriation of negligible portions of private real estate are usually fully compensated in eminent domain proceedings,[98] some governmental action may destroy substantial economic values with impunity.[99] This deficiency does not mean that the diminution-in-value test is not or should not be applied by the courts. To the contrary, the standard appears to be one relevant factor in determining when a governmental regulation results in a taking of private property without just compensation.[100] As the United States Supreme Court observed in *Goldblatt v. Town of Hempstead,* "although a comparison of values before and after [the governmental restriction] is relevant, it is by no means conclusive."[101]

A rare variation of the diminution-in-value test employs loss on investment as the crucial factor. As the decision of the New York supreme court in *Town of Hempstead v. Lynne*[102] indicates, the investment-loss standard may be a particularly helpful test in determining when a regulation prevents an owner from making "any reasonable use" of his land.[103]

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97. Van Alstyne, *supra* note 27, at 17. *See* Michelman, *supra* note 69, at 1191-93.

98. *See* FLA. STAT. chs. 73-74 (1971).

99. *E.g.,* Hadacheck v. Sebastian, 239 U.S. 394 (1915) (diminution in value from $800,000 to $60,000); Transportation Co. v. Chicago, 99 U.S. 635 (1878); Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 368, *appeal dismissed,* 371 U.S. 36 (1962); Neubauer v. Town of Surfside, 181 So. 2d 707 (3d D.C.A. Fla.) (zoning; value for permitted use, $60,000; value for proposed use, $200,000; height regulation held reasonable), *cert. denied,* 192 So. 2d 488 (Fla. 1966).

100. *See, e.g.,* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Urann v. Village of Hinsdale, 30 Ill. 2d 170, 195 N.E.2d 643 (1964); Ryan v. County of DuPage, 28 Ill. 2d 196, 190 N.E.2d 737 (1963); McCabe v. Town of Oyster Bay, 24 Misc. 2d 840, 209 N.Y.S.2d 697 (Sup. Ct. 1960), *aff'd sub. nom.* 13 App. Div. 2d 979, 217 N.Y.S.2d 161 (2d Dep't 1961). *Cf.* Ocean Villa Apartments, Inc. v. City of Ft. Lauderdale, 70 So. 2d 901, 902 (Fla. 1954). Following a careful evaluation of fifty decisions across the nation, Professor Anderson concludes that, at least in zoning-appropriation cases, "financial loss is a relevant consideration, but not a single or decisive one." 1 R. ANDERSON, AMERICAN LAW OF ZONING §2.23 (1968).

101. 69 U.S. 590, 594 (1962).

102. 32 Misc. 2d 312, 222 N.Y.S.2d 526 (Sup. Ct. 1961). Although the "no reasonable use" test employed in *Lynne* seems similar to that applied in the Florida zoning cases, *Lynne* must be analyzed with care, since the New York constitution allows compensation for damagings as well as takings.

103. *Id.* at 317, 222 N.Y.S.2d at 532. A detailed explanation of the facts is necessary because the decision has subsequently been carefully limited. *See, e.g.,* Killfeather v. Town Bd., 43 Misc. 2d 328, 330, 250 N.Y.S.2d 599, 602 (Sup. Ct. 1964) (zoning) ("[o]nly if a landowner has incurred substantial expenditures in reliance on a particular zoning provision is a zoning change unconstitutional as applied to his property); Udell v. McFadyen, 40 Misc. 2d 265, 270-71, 243 N.Y.S.2d 156, 162 (Sup. Ct. 1963) (zoning) (*Lynne* standard does not apply to diminution in property value unless "actual and substantial" expenditures made); Rogers v. Town of Brookhaven, 39 Misc. 2d 927, 242 N.Y.S.2d 142 (Sup. Ct. 1963) (zoning) (compensation denied where use of property under the zoning would still be profitable); Mary Chess, Inc. v. City of Glen Cove, 38 Misc. 2d 555, 237 N.Y.S.2d 46 (Sup. Ct. 1963) (zoning) (compensation denied where some permitted use of property can be profitable), *modified in part,* 23 App. Div. 266, 260 N.Y.S.2d 293 (2d Dep't 1965), *modified in part,* 18 N.Y.S.2d 205, 273 N.Y.2d

Over a period of years respondents in *Lynne* had developed most of a 400-acre tract for residential use, 29 acres having been developed during the ten-year period prior to the court action. A separate 11-acre portion of the tract was the subject of the suit. The residential character of respondents' developments was not protected by zoning and from 1944 to 1961 the 29-acre area and the 11-acre tract were zoned for business purposes. The developments, however, were protected by restrictive covenants in the deeds involved.

In June, 1960, respondents entered into a contract to sell the 11-acre tract to several developers for use as a shopping center, contemplating that the existing business zoning would continue up to the closing date. One month after the contract was made, respondents filed an application for a building permit. In June, 1961, the premises were declared safe and suitable for the proposed development. Nevertheless, after all obstacles to construction had been overcome, the Town Board considered a petition filed some 14 months earlier by property owners in the immediate vicinity of the tract. The petition, which requested rezoning of the 11-acre parcel from business to "residence B" was deferred for public hearing at the end of August.

Respondents immediately demanded and were refused their building permit. They then invoked mandamus to gain issuance of the permit on August 17 and began construction on the project, which continued through September 8, 1961, when the Town Board effectively changed the zoning to "residence B."

The town then sought a permanent injunction to bar respondents from erecting any buildings on the tract other than those permitted by the residential zoning. Respondents counterclaimed for a judgment declaring that they had a vested right to use the parcel as a shopping center and that the zoning ordinance, as amended on September 8, was unconstitutional as applied to their property.

The New York supreme court rejected respondents' claim of a vested right to use the parcel as a shopping center.[104] Nevertheless, the court held that the ordinance effected an unconstitutional confiscation of the property in question.[105] The test applied, substantially similar to the standard utilized by the

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46, 219 N.E.2d 406 (1966) (distinction drawn between permitted uses that are technically feasible and those that are economically feasible).

104. This important finding was based on several factors. After a "personal perusal" of the property the court found that: (1) respondents' expenditure of $120,000 to widen roads on the property could not be considered because of a lack of connection between the expenditure and the proposed use, (2) respondents could not claim amounts that they might have spent to improve the property if the zoning change had not occurred, and (3) the expenditure by respondents of $15,000 in actual construction of the exterior walls of one building of the parcel was not only insubstantial but minimal: "Substantiality is to be determined . . . by an assessment of the proportion which the expenditure bears to the total expenditure which would be required to complete the proposed improvement." 32 Misc. 2d at 316, 222 N.Y.S.2d at 531.

105. The court rejected on two grounds the argument that respondents had not exhausted their administrative remedies. First, the size of the parcel made any zoning variance application futile. Second, the Board of Appeals would have had no power to overrule the legislative zoning change granted by the Town Board. *Id.*

Florida courts,[106] was whether the restrictions imposed by the ordinance permanently precluded "the use of the property for any purpose to which it is reasonably adapted."[107] Recognizing that monetary considerations are relevant in determining whether a parcel can be utilized for some reasonable purpose,[108] the *Lynne* court announced the following rule:[109]

> Where . . . in addition to loss of most profitable use, and in addition to actual loss of profits under a contract, an owner of property is compelled by an ordinance either to leave land vacant for the indefinite future, or develop it for the more restricted use at a substantial loss of his actual investment, the land can be said not to be "reasonably" adapted to that use and the ordinance may be held confiscatory.

The key factor supporting the holding was that respondents would have faced a loss of investment of over $90,000 if they had been forced to develop the property for the only purpose permitted by the amended zoning ordinance.[110]

Although the New York constitution allows compensation for damagings as well as takings, careful application of the *Lynne* reasoning to Florida regulatory settings seems possible. Indeed, the *Lynne* test offers a helpful analogy

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106. See cases cited notes 34 and 77 *supra*. Although the Florida standard may imply some notion of "permanence," the *Arverne* test expressly uses the term "permanently." 15 N.E.2d at 591.

107. 32 Misc. 2d at 319-20, 222 N.Y.S.2d at 534. In New York this test was developed in Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 591 (1938).

108. Citing Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587, 591 (1938). For restrictions on and refinements of this notion, see Levitt v. Incorporated Village of Sands Point, 6 N.Y.2d 629, 189 N.Y.S.2d 212, 160 N.E.2d 501 (1959); McCabe v. Town of Oyster Bay, 24 Misc. 2d 840, 209 N.Y.S.2d 697 (Sup. Ct. 1960), *aff'd sub nom.*, 13 App. Div. 2d 979, 217 N.Y.S.2d 161 (2d Dep't 1961).

109. 32 Misc. 2d at 318, 222 N.Y.S.2d at 532. *Cf.* Bernon Park Realty, Inc. v. City of Mt. Vernon, 307 N.Y. 493, 498-99, 121 N.E.2d 517, 520 (1954). For several judicial efforts to interpret this rule conservatively, see cases cited note 103 *supra*.

110. The court found that respondents' total investment in the 11-acre parcel was $351,340. Of this figure, $177,600 was the purchase price, $140,000 was for hydraulic fill to bring the grade up to the minimum required for business development, $8,440 for the additional soil tests to comply with the building permit application requirements, $9,000 for engineering and development plans for the proposed shopping center, and $16,300 for the appropriate share of the cost of widening a road benefiting some 81 acres of the 400 acre tract. The total market value of the 11-acre parcel zoned for residential purposes was $282,000 (47 plots selling for $6,000 each). However, to use the property for such purposes, respondents would have to have expended an additional $22,000 for fill. The net value to respondents was thus $260,000 under the "residential B" zoning. The contract for sale of the land for business purposes was $439,750, but the court did not allow compensation for loss of profits on the contract. 32 Misc. 2d at 318-19, 222 N.Y.S.2d at 533-34.

Although the *Lynne* court did not acknowledge the possibility, proper calculation of the loss on investment would seem to require some recognition of an interest factor on the original investment. Otherwise an investor who purchased property many years before the governmental action would seldom be able to claim an investment loss, even though he could have earned interest on the funds used for the purchase price had he chosen to bank the money in lieu of buying land. The interest rate utilized in calculating investment loss might reflect an average rate paid over the period of investment. Such a rate could be based on local savings bank interest figures or the average interest earned on local land investments.

where an apartment developer or subdivider finds his construction plans blocked in midstream by a combination of environmental controls and utility requirements. Consider the following example. A developer spends $100,000 grading and filling land, pursuing mortgage commitments, and preparing engineering plans and blueprints for an apartment project. He has purchased the land for $300,000 with knowledge that it fronts a municipal sewer trunk line. Although no tap-in to the sewerage system exists at the time of purchase, the municipal plant is not running at capacity and no connection problems are anticipated. Moreover, existing regulations allow the developer the alternative of establishing his own "package plant" for sewerage treatment if the municipal system is operating at capacity. After the developer has expended these funds, the state passes ecological controls prohibiting "package plants" and requiring municipal sewer systems to provide more effective treatment. As a result of the state regulations and continued local growth, the municipal sewer system refuses to accept additional tap-ins. Consequently, the developer is unable to gain a building permit for the project or, if a permit is possible, construction cannot be begun or continued due to the lack of future waste disposal facilities. Further, because of the restrictions on land use, the fair market value of the tract declines to $150,000. The developer then has three alternatives: (1) use the land in some manner that does not require sewer connections, (2) sell the parcel, or (3) leave the land vacant indefinitely. Even if the developer could make some use of the land by spending an additional $25,000, the *Lynne* test[111] should allow a claim that the governmental regulations prevent him from making any "reasonable" use of the property. Hence, a taking of property without just compensation should be found.

In support of his claim, the developer can demonstrate that his total investment in the parcel is $400,000; the present market value of the property, $150,000;[112] the market value of any saleable plans and blueprints, $25,000; and the additional expenditures necessary for him to use the property in its restricted character, $25,000. The total value of the property to the developer if sold would be $175,000,[113] if developed in its restricted use, $150,000.[114] Utilizing the three alternative uses of the land noted above, the losses faced by the developer on his $400,000 initial investment[115] would be: $250,000[116] if the developer himself uses the land in some manner that does not require

111. 32 Misc. 2d at 317-18, 222 N.Y.S.2d at 532. See note 109 *supra* and accompanying text.

112. Presumably, this figure would reflect the loss in value resulting from the governmental restrictions as well as the increase in value from any grading and filling done by the developer.

113. Fair market value of land, $150,000, plus salvage value of any plans and blueprints, $25,000.

114. Fair market value of land, $150,000, plus salvage value of plans and blueprints, $25,000, minus additional cost to developer of preparing land for the restricted use, $25,000.

115. Purchase price of land, $300,000, plus amounts expended for grading and filling, pursuing mortgage commitments, and developing plans and blueprints, $100,000.

116. Total initial investment, $400,000, minus value of land to developer if he developed it in the restricted use, $150,000.

sewer connections, $225,000[117] if the land is sold at its fair market value, or approximately $225,000[118] if the land is left vacant indefinitely. None of these alternatives is a "reasonable" use to the present owner of the property.

The investment-loss figure, however, is not used to calculate the amount of the property owner's inverse condemnation claim. Under the Florida constitution such a claim for mere "damages" would not meet the required "taking."[119] In Florida, therefore, the loss-on-investment amount should be utilized for the sole purpose of demonstrating that the effect of the governmental regulation is to prevent the existing owner from making any reasonable use of the property. The conclusion that a compensable taking has occurred then flows from the finding that the governmental restrictions make "the only permitted uses . . . those to which the property is not adapted or which are economically unfeasible."[120]

The *Lynne* reasoning does not require that the owner prove the existence of a "vested right" to any governmental benefits present at the time of the owner's initial investments in the land.[121] This point is helpful in our example due to doubt that the developer could claim a vested right to sewer tap-in facilities or statutes allowing lax environmental standards. The developer may, however, have to claim reliance[122] upon the existing sewerage facilities and regulations in making the substantial[123] investment in the property. In Florida this could require proof that the developer did not have "good reason to believe, before or while acting to his detriment, that the official mind would soon change."[124] As the *Lynne* decision suggests, however, any reliance require-

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117. Total initial investment, $400,000, minus fair market value of land, $150,000, and minus salvage value of plans and blueprints.

118. This figure approximates the amount by which the present discounted value of the right to own and develop the land for apartment complex purposes exceeds the present discounted value of the right to own and develop the land in its restricted use, both figures being calculated in terms of the "indefinite future." *Cf.* 32 Misc. 2d at 317-18, 222 N.Y.S.2d at 532. In a perfect market, this figure would be the same loss encountered through a sale of the property in the first alternative cited in the text. Technically, the loss in the third alternative would be somewhat less if the developer's special acquaintance with the property and project allowed him an advantage over new purchasers in restarting the project at a later date.

119. Board of Pub. Instruction v. Town of Bay Harbor Islands, 81 So. 2d 637, 642 (Fla. 1955); Arundel Corp. v. Griffin, 89 Fla. 128, 133, 103 So. 422, 424 (1925) (citing cases).

120. Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills, 40 N.J. 539, 557, 193 A.2d 232, 242 (1963). *See* cases cited notes 74 and 77 *supra*.

121. 32 Misc. 2d at 316, 222 N.Y.S.2d at 531.

122. *See* Kilfeather v. Town Bd., 43 Misc. 2d 328, 330, 250 N.Y.S.2d 599, 602 (Sup. Ct. 1964) (zoning) ("Only if a landowner has incurred substantial expenditures in reliance on a particular zoning provision is a zoning change unconstitutional as applied to his property.")

123. Udell v. McFadyen, 40 Misc. 2d 265, 270, 243 N.Y.S.2d 156, 162 (Sup. Ct. 1963) (zoning) (*Lynne* standard does not apply to diminution in property value unless "actual and substantial" expenditures made).

124. Bregar v. Britton, 75 So. 2d 753, 756 (Fla. 1954). *See* Gross v. City of Miami, 62 So. 2d 418 (Fla. 1953); Miami Shores Village v. Wm. N. Brockway Post, 156 Fla. 673, 24 So. 2d 33 (1945). *Cf.* Sharrow v. City of Dania, 83 So. 2d 274 (Fla. 1955); Texas Co. v. Town of Miami Springs, 44 So. 2d 808 (Fla. 1950), *rehearing denied*, 63 So. 2d 491 (1953). *See generally*

ment should be phrased in terms of the initial investment in the land and project. The mere fact that the developer attempts to continue the project after learning of a pending regulatory change should not prevent him from making an inverse condemnation claim based on loss of investment.[125] The appropriate solution would be to exclude from the "total investment" figure any expenditures made after the developer receives notice of a future regulatory change.[126]

As interesting as the *Lynne* test appears, two caveats should be noted. First, the implicit assumptions involved in allowing compensation to turn upon loss on investment may be misleading. The *Lynne* approach, essentially, seems to assume that all land developers do well on their investments. Florida real estate prices may continue to escalate, thus making the *Lynne* assumption realistic. But in areas where the market price of real estate is less than the owner's original investment the theoretical validity of using investment loss to determine when a taking of property occurs seems more questionable. Second, investment loss should not be considered a complete substitute for more comprehensive compensation theories.[127] Evidence of substantial investment loss is only one of several factors available to demonstrate that no reasonable use of the affected property can be made. The criterion may be of little use in borderline situations involving minor investment loss. Moreover, an absence of investment loss need not prevent finding a compensable taking.

Even with these limitations, investment loss is a more helpful compensation standard than dimunition-in-value. Evidence of substantial investment loss resulting from reasonable reliance upon existing statutes and sanitary disposal facilities should create a strong presumption of a compensable taking. On the other hand, proof of dimunition-in-market value does not create such a presumption, although evidence of such a reduction can be a relevant factor in determining whether a taking has occurred.[128] Both standards seem consonant with Florida cases utilizing the "no reasonable use" test for zoning regulations.[129] Moreover, both seem adaptable to the environmental regulation-utility requirement context.

Note, *Effect of Pending or Subsequently Proposed and Enacted Legislation on Applications for Building Permits*, 34 NOTRE DAME LAW. 109, 112 (1958).

125. For example, in *Lynne* the developer began construction immediately upon receiving the building permit in a mandamus action. Even though the developer was aware of the pending change, construction continued until the Town Board passed the new zoning classification. 32 Misc. 2d at 314, 222 N.Y.S.2d at 529.

126. This approach may have been used in the *Lynne* decision. Calculation of the developers' investment in that case included the cost of engineering and development plans for the shopping center as well as a portion of the cost of widening a road, which benefited the subject tract and a larger area. Although construction of the shopping center itself was underway from August 17 through September 8, 1961, none of the $15,000 expended for that purpose was included in the total investment figures used by the court in calculating loss of investment. 32 Misc. 2d at 315, 318-19, 222 N.Y.S.2d at 530, 533.

127. See the discussions of the balancing test, the harm prevention-benefit extraction distinction, the enterprise function versus arbitral function approach, and the fairness standard, in the text, *infra*.

128. See cases cited note 100 *supra*.

129. See cases cited notes 74 and 77 *supra*.

Balancing

Another approach for determining when a compensable taking has occurred involves a balancing test.[130] Under this standard, so long as the social gains resulting from governmental encroachment on property rights "outweigh" the private detriment, no compensation need be provided.

Whether derived from common law nuisance liability[131] or the contemporary perception of litigation as a process for the resolution of conflicts between competing social and economic interests,[132] balancing is a rational and flexible technique for molding a body of inverse condemnation law.[133] The test offers a rough approximation of the extent to which the government has forced unnecessary or severe losses upon individual citizens without offering financial relief or corresponding economic amenities. At the very least, a balancing process delineates the most obvious cases for and against compensation.

On the other hand, a balancing analysis suffers from serious inadequacies. The approach assumes that courts and juries are capable of making reasonably accurate quantitative comparisons between the essentially dissimilar factors of public interest and private detriment. Even if the relevant interests can be identified and assessed in some fashion, the balancing may be unduly subjective. Unless clear rules are developed over time, a balancing technique may make the predictability of results difficult or impossible.

Depending upon the type of balancing employed, serious constitutional and ethical questions may be raised. Balancing may permit the sacrifice of the property of some members of society, without compensation, for the benefit of others or for society as a whole. If no solid criteria exist for distinguishing between the persons benefited and those harmed, use of balancing seems ethically indefensible and constitutionally questionable.[134] The concept of balancing, however, may also mean that compensation will be denied only when all members of the community, including those whose property has been taken, have received a reciprocal advantage to offset their losses. Even so, such an approach may allow some members of the community to receive valuable gratuitous benefits.[135] Whether such result conflicts with the egalitarian ethic

130. *See generally* Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 626-29 (1954); Michelman, *supra* note 69, at 1193-96, 1234-35; Van Alstyne, *supra* note 27, at 17-19.

131. See Kratovil & Harrison, *supra* note 130, at 611-12.

132. *See* 3 R. POUND, JURISPRUDENCE ch. 14 (1959); Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934).

133. Michelman, *supra* note 69, at 1235. Professor Binder is a strong advocate of the balancing approach. In urging certain modifications to the traditional balancing method, he observes: "The main problem with the balancing tests previously proposed is that, aside from a simple statement of the principles to be considered in balancing, no attempt is made to weigh and analyze the varying factors. Certain considerations are obviously more important than others and should bear more weight." Binder, *supra* note 27, at 10.

134. Michelman, *supra* note 69, at 1195. *Cf.* L. Maxcy, Inc. v. Mayo, 103 Fla. 552, 570, 139 So. 121, 129 (1932).

135. *See* United States v. Sponenbarger, 308 U.S. 256 (1937) (floodway project, compensation denied).

of American society largely depends upon whether such windfall benefits will eventually be shared by all citizens, either by random selection or through governmentally-imposed redistribution mechanisms.[136]

Despite these problems, the balancing technique has received some judicial support.[137] Two opinions by Justice Holmes[138] and one decision in which he

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136. Michelman, *supra* note 69, at 1196.

137. *E.g.*, United States v. Central Eureka Mining Co., 357 U.S. 155 (1958); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-14 (1922); Erie R.R. v. Public Util. Comm'rs, 254 U.S. 394, 410 (1921); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965); Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed,* 371 U.S. 36 (1962); Tollius v. City of Miami, 96 So. 2d 122, 126 (Fla. 1957); Forde v. City of Miami Beach, 146 Fla. 676, 1 So. 2d 642 (1941); Metropolitan Dade County v. Pierce, 236 So. 2d 202, 203 (3d D.C.A. Fla. 1970).

138. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Erie R.R. v. Public Util. Comm'rs, 254 U.S. 394 (1921). In *Mahon* Justice Holmes noted that, on one side of the balance, the public interest in minimizing danger to the "single private house" involved was "limited." 260 U.S. at 393. "On the other hand," he explained, "the extent of the taking [was] great." *Id.* at 413-14. Considering the statute solely from the plaintiff's position, therefore, the legislation did not disclose a public interest sufficient to warrant "so extensive a destruction of the defendant's constitutionally protected rights." *Id.* Justice Holmes went further, however, and discussed the general validity of the act. That he did so suggests that even if a balancing technique is used, the "harm" involved should be gauged in terms of all potential plaintiffs and not merely the individual whose property is taken in the instant case. As noted previously, the test formulated in *Mahon* seems to turn upon substantial impairment of all uses to which the property might reasonably be put. The unanswered question is whether Justice Holmes meant to define the concept of "reasonable use" by balancing the harm inflicted on the property owner against the public benefits flowing from the act or by measuring without regard for the public benefits involved. Given the inexact nature of this approach, the suggestion that at least a limited balancing technique was used seems sound.

In *Erie* New Jersey required the railroad to eliminate certain grade crossings by running railroad tracks over or beneath the public streets. The railroad was essentially required to bear the full expense of the plan. In another Holmes' opinion, the Court affirmed the state's power to require the railroad to implement the plan. Reasoning that an adjustment of two conflicting interests was involved, Holmes found that the interest of the public in using its streets was paramount to that of the railroad and its customers. 254 U.S. at 410-11. To Holmes, the state was not constitutionally required to consider the economic ability of the railroad to make the required expenditures. *Id.* at 411.

Whether *Erie* is applicable to other fact-settings is questionable for three reasons. First, Justice Holmes' comments seem particularly applicable to governmental actions designed to protect the health and safety of the public. Second, although Holmes stated that the ability of the railroad to bear the cost was not a constitutional consideration, he admitted that the courts below found that the expense imposed "would not be ruinous." *Id.* Third, that a railroad was involved may have been crucial. Although Holmes cautioned that the "power of the State over grade crossings derives little light from cases on the power to regulate trains," he also commented that the state was the source from which the railroads "ultimately . . . derive their right to occupy the land." *Id.* at 410. *Cf.* Brooks-Scanlon Co. v. Railroad Comm'n of Louisiana, 251 U.S. 396, 399 (1920) (Holmes, J.): "It is true that if a railroad continues to exercise the power conferred upon it by a charter from a State, the State may require it to fulfill an obligation [*e.g.*, to operate in the 'public interest'] imposed by the charter even though fulfillment in that particular may cause a loss." The still-unanswered question, however, is whether Justice Holmes would have applied the same limit in *Erie* if wholly private property were involved.

participated[139] suggest that the degree of economic harm inflicted by an alleged taking must be balanced against the magnitude of the public need embodied in the challenged governmental action.

Several Florida decisions also seem to reflect a balancing approach. In *Zabel v. Pinellas County Water & Navigation Control Authority*,[140] the Florida supreme court held that denial by the Authority of permission to fill submerged lands in Boca Ceiga Bay amounted to a taking of property without just compensation.[141] On first analysis, *Zabel* seems merely to reflect the view that a property owner may not be denied all reasonable use of his land without compensation. Thus, the court's opinion notes that appellants' "statutory rights to dredge, fill and bulkhead the land subject to reasonable limitations,"

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139. Hadacheck v. Sebastian, 239 U.S. 394 (1915). In *Hadacheck* the Supreme Court considered whether a Los Angeles ordinance prohibiting the manufacture of bricks within certain areas of the city required compensation for an owner of clay beds and brick manufacturing equipment. Petitioner owned a valuable bed of clay, which he had excavated to an extent that the land could not be utilized for residential purposes. Machinery to manufacture bricks from the clay had been erected on the property. Petitioner alleged that by denying brick manufacturing on the land, the ordinance would "entirely deprive [him] of his property and the use thereof." 239 U.S. at 405, 408. The ordinance did not, however, prohibit removal of the clay for manufacture of bricks at another location. The Supreme Court refused to invalidate the ordinance as an unconstitutional taking. Noting the necessity for the march of progress, Mr. Justice McKenna reasoned that even though the regulation might "seem harsh in its exercise . . . the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily." *Id.* at 410. The Court thus implied that the public interest in limiting the areas used for brickmaking outweighed the private economic harm inflicted by the ordinance. The *Hadacheck* Court expressly reserved the question of whether a different approach might have been mandated if the petitioner had been prohibited from mining clay for the production of brick at another location. *Id.* at 412. The Court thus distinguished *Ex parte* Kelso, 147 Cal. 609, 82 P. 241 (1905), where the California supreme court invalidated an ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within a certain portion of San Francisco.

140. 171 So. 2d 376, 381 (Fla. 1965) (three judges dissented).

141. The result reached by the Fifth Circuit in Zabel v. Tabb, 430 F.2d 199 (5th Cir. 1970), *rev'g* 296 F. Supp. 764 (M.D. Fla. 1969), *cert. denied*, 401 U.S. 910 (1971), does not affect the decision of the Florida supreme court in *Zabel v. Pinellas County Water & Navigation Control Authority*, even though the same land and property owners were involved in both cases. The Fifth Circuit refused to find a taking, explaining that the landowner who bought the submerged property from the state had not received a fee simple interest: "The waters and underlying land are subject to the paramount servitude in the Federal government which the Submerged Lands Act expressly reserved as an incident of power incident to the Commerce Clause." 430 F.2d at 215. *See* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 524 n.157, 528 n.174 (1970). *See generally* F. MALONEY, S. PLAGER & F. BALDWIN, WATER LAW AND ADMINISTRATION: THE FLORIDA EXPERIENCE ch. 12 (1968). The result of the federal and state decisions in the *Zabel* cases may be that the state is restrained from denying the dredging and filling permits without compensation while the federal government faces no such restriction because no taking exists under federal law. Professor Little suggests that a fairer result to the frustrated landowners in the federal cases may be to "treat the denial of permits in the nature of inverse condemnation and require compensation based on whatever value the land might have in its natural state without rights of exploitation." Little, *supra* note 1, at 495. Professor Little leaves open the question of who would pay for the taking. *Id.* 495 n.227.

were the "only present rights attributable to ownership of the submerged land itself."[142] Such rights could not be denied, explained the court, and the owners "deprived of the only beneficial use of their property without compensation."[143]

On closer analysis, however, the court's opinion is far more suggestive of a balancing approach under which the Authority had not demonstrated a public need that would justify the restrictions imposed. The court stated "it was not established that the granting of the permit would materially and adversely affect the public interest."[144] Indeed, for purposes of the *Zabel* case, the court conceded "that, under certain conditions, a police power could, by prohibiting filling or dredging, deprive the owner of any valuable use of his property."[145] The court based this questionable assumption upon a statement in *Corneal v. State Plan Board*:[146]

> [T]he absolute destruction of property is an extreme exercise of the police power and is justified only within the narrowest limits of actual necessity, unless the state chooses to pay compensation.

The view that a sufficient showing of "necessity" may justify a governmental action that, without compensation, prevents a property owner from making any reasonable use of his land also appears in several Florida zoning decisions. The cases involving the validity of zoning ordinances under "changed circumstances" are particularly instructive. Striking down the existing zoning classification in *Burritt v. Harris*,[147] the Florida supreme court explained that an owner will not be required to sacrifice his property rights "absent a substantial need for restrictions in the interest of the public health, morals, safety or welfare." As Justice Caldwell reasoned: "If the zoning restriction exceeds the bounds of necessity for the public welfare, as, in our opinion, do the restrictions controverted here, they must be stricken as an unconstitutional invasion of property rights."[148] Similarly, upholding the zoning classification in *City of Miami Beach v. Lachman*[149] the Florida court observed that the adverse effects "must be weighed against the public welfare or the effect on the community at large."[150]

In *Tollius v. City of Miami*[151] the court found that the need for a particular zoning classification had been dissipated by the phenomenal growth

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142. 171 So. 2d at 381. *Cf.* Hayes v. Bowman, 91 So. 2d 795, 800 (Fla. 1957).
143. 171 So. 2d at 381.
144. *Id.*
145. *Id.* at 379.
146. 95 So. 2d 1, 4 (Fla. 1957).
147. 172 So. 2d 820, 823 (Fla. 1965).
148. *Id.*
149. 71 So. 2d 148, 152 (Fla. 1953), *appeal dismissed*, 348 U.S. 906 (1955).
150. *Id.* The fact that the properties involved would be much more valuable in a different zoning classification than in their existing classification did not determine whether the ordinance was "fairly debatable" and therefore constitutional.
151. 96 So. 2d 122 (Fla. 1957).

of the metropolitan area since the ordinance was passed. Thus, the court held that the need was "so out of proportion to the interference with the use of the appellant's property" that exercise of police power could not be upheld.[152]

In each of these decisions the rule expressed was that governmental action that prevents an owner from making any reasonable use of his land effects a taking of property. However, the court implied that in some instances a showing of actual public necessity can justify severe restrictions upon private property. No decision researched for this study directly holds that compensation need not be paid when the governmental action involved prevents the property from being utilized in its *only* reasonable use. Moreover, if a showing of public need can ever justify such a result, no decision explains the amount of public interest or benefit necessary to support a finding of the requisite "actual necessity."

On balance, the view that a showing of necessity can prevent a finding of a compensable taking seems highly questionable. Even if evidence of public need should prevent payment of compensation, the degree of public necessity should not determine whether a "taking" of property has or has not occurred. Under the Florida constitution, private property cannot be taken except for a "public purpose."[153] Put very simply, the constitutional provision prevents "takings" without full compensation. Nothing in the language used suggests that the constitutional prohibition can be rendered ineffective by a mere showing of some unknown degree of public "necessity."

Even if evidence of "actual necessity" can in some instances justify a taking of property without compensation, the serious and unusual consequences of authorizing such result demand a more objective test than the balancing approach provides.[154] Courts searching for an improved standard might be well-advised to reject any legislative claim of "actual necessity" that does not expressly approve the resulting encroachment upon private property rights. In format, their judicial approach might be similar to the mechanics used by courts under the Massachusetts version[155] of the public trust doctrine.[156] If

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152. *Id.* at 126.

153. FLA. CONST. art. X, §6(a).

154. See notes 133-136 *supra* and accompanying text.

155. *E.g.*, Robins v. Department of Pub. Works, 355 Mass. 328, 244 N.E.2d 577, 580 (1969); "We think it is essential to the expression of plain and explicit authority to divert parklands, Great Ponds, reservations and kindred areas to a new and inconsistent public use that the Legislature identify the land and that there appear in the legislation not only a statement of the new use but a statement or recital showing in some way legislative awareness of the existing public use. In short, the legislation should express not merely the public will for the new use but its willingness to surrender or forgo the existing use." *See* Gould v. Greylock Reservation Comm., 350 Mass. 410, 215 N.E.2d 114 (1966).

156. *See generally* Sax, *supra* note 141. No suggestion is made that all public trust criteria are present in the taking-without-just-compensation context. Nevertheless, that the government, as representative of the people, must hold constitutional rights in trust for all citizens is hardly a surprising concept. For a detailed discussion of the Massachusetts public trust doctrine, see *id.* at 491-509. Not all approaches to the public trust doctrine involve a "remand" to the legislature. The general public trust concept has been recognized in Florida.

the court found that governmental action deprived the owner of all reasonable use of his property, a compensable taking would be found unless the government could adequately demonstrate that some quantum of "actual necessity" justified refusing compensation. Even then, the court would require payment of compensation unless the authorizing legislation included an explicit finding that the public need justified a taking without payment of compensation.

This analogy to the public trust approach is not meant to condone such a balancing technique. Rather, two purposes are reflected: first, to offer a means by which courts intent on applying an ultimate balancing test might provide more complete protection to private property rights; and, second, to demonstrate the serious risk that a balancing test, even coupled with public trust doctrine mechanics, poses to the constitutional rights of real property owners.

Applied to environmental regulations and utility requirements, the Florida balancing approach offers no ready answers. Certainly the public purposes behind these government promulgations are important. Whether the health and ecological benefits involved are adequate to warrant a finding of "actual necessity" is unclear, as is the impact of such finding on the question of whether a compensable taking of property has occurred. Several implications, however, are apparent. First, the dicta in Florida cases which suggest use of a balancing approach offer tremendous potential for judicial discretion. Given the present judicial awareness of the need to protect the environment, an enterprising trial judge could easily refuse to find a taking because of an important public need for the regulations involved. That such a ruling would survive on appeal seems unlikely, but hardly impossible. Second, although balancing seems apparent in some Florida cases, where the owner has clearly been deprived of all reasonable use of his property a "taking" has been found. Even under a balancing technique, therefore, precedent would support a finding of a compensable taking in an environmental regulation-utility requirement situation. Although the public need for such regulations must not be underestimated, the social and political impact of depriving an individual of all reasonable use of his land is also strong. Third, to the extent that a court might apply public trust doctrine mechanics in the environmental regulation context, a compensable taking would probably be found. One of the most pervasive factors in the utility restriction area is the indirect or consequential manner by which private property rights are diminished.

The Distinction Between Harm Prevention and Benefit Extraction

Aside from the judicially developed doctrines distinguishing between compensable takings and non-compensable regulations of property, commentators have also searched for workable solutions. Professor Dunham's theory uses as the key factor the *purpose* of the governmental interference with land use.[157]

Brickell v. Trammell, 77 Fla. 544, 559, 82 So. 221, 226 (1919); State *ex rel.* Ellis v. Gerbing, 56 Fla. 603, 47 So. 353 (1908); FLA. STAT. §§253.12, 307.16 (1971).

157. Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 663-69 (1958).

Thus, if the primary effect of governmental action is to prevent nuisance-like conduct in order to protect the health and welfare of the community, compensation need not be awarded. On the other hand, if the restriction compels the property owner to confer a benefit upon the public, compensation must be paid.[158]

Under this analysis, harm-prevention regulation is generally narrow and particular in scope, "aimed [at] elimination of a detrimental use, but leaving a broad area in which private options are available for engaging in other useful but non-harmful activities."[159] In contrast, governmental action that compels a private party to benefit the community tends to impose more comprehensive restrictions upon private choices, "leaving the owner free only to abandon all activities that are economically feasible or engage in the kind of use which will confer the desired public benefit."[160] Phrased in these terms, the Dunham approach bears strong resemblance to a distinction drawn in Freund's landmark treatise on the police power:[161]

> It may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful. . . . From this results the difference between the power of eminent domain and the police power, that the former recognizes a right to compensation while the latter on principle does not.

Case law does seem to reflect some distinction between harm prevention and benefit extraction.[162] The first Mr. Justice Harlan may have used such an approach as an alternative principle in *Mugler v. Kansas*.[163] In certain fact settings the line between prevention of harm and extraction of benefit can be drawn with some clarity. For example, an owner cannot be compelled to use

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158. *See generally* Michelman, *supra* note 69, at 1196-1201, 1235-45; Sax, *supra* note 22, at 48-50; Van Alstyne, *supra* note 27, at 19-21; Van Alstyne, *supra* note 17, at 23-26.

159. Van Alstyne, *supra* note 27, at 20.

160. *Id.*

161. E. FREUND, THE POLICE POWER §511, at 546-47 (1904); *see* Dunham, *supra* note 157, at 664-65.

162. Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 356 U.S. 346 (1953); Nashville C. & St. L. Ry. v. Walters, 294 U.S. 405, 429 (1935); Reichelderfer v. Quinn, 287 U.S. 315 (1932); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416-18 (1922) (Brandeis, J., dissenting); Gardner v. Michigan, 199 U.S. 325 (1905); Mugler v. Kansas, 123 U.S. 623, 669 (1887); Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878); Pasternack v. Bennett, 138 Fla. 663, 190 So. 56 (1939) (prohibition against use of property declared by valid legislation to be injurious to the health, morals, or safety of the community cannot be deemed a taking or appropriation of property for the public benefit for which compensation must be paid); State *ex rel.* Davis v. Rose, 97 Fla. 710, 122 So. 225 (1929) (statutory regulation of real estate brokers, including creation of state real estate commission, not invalid as a taking of property without just compensation); Pompano Horse Club v. State *ex rel.* Bryan, 93 Fla. 415, 111 So. 801 (1927) (use of injunctions to prohibit operation or maintenance of premises used for gambling or games of chance approved). *Cf.* United States v. Central Eureka Mining Co., 357 U.S. 155, 179 (1958) (Harlan, J., dissenting); United States v. Caltex, Inc., 344 U.S. 149, 156 (Douglas J., dissenting).

163. 123 U.S. 623, 669 (1887). *See* note 34 *supra* and accompanying text.

his land as a parking lot so that the community will gain parking facilities,[164] but he can be ordered to provide a lot for the parking needs of activities on his own land.[165] An owner cannot be required, without compensation, to leave his land vacant so that the property may be used as public open-space or saved for future government purchase,[166] but he may be compelled to leave a portion of the property unused where building would be harmful to the use and enjoyment of other land.[167] A ban on brickyards in a residential neighborhood may[168] or may not[169] be constitutionally acceptable, but without compensation the state may not limit the use of commercially valuable land to a bird sanctuary.[170]

In other circumstances the distinction between harm prevention and benefit extraction is less clear.[171] An ordinance restricting the height of structures within an airport approach zone may be viewed as a compensable taking that confers improved airport service or as a noncompensable limitation on tall buildings that threaten the safety of users and neighbors of adjacent airport property.[172] A provision conditioning housing construction upon installation of an adequate sewer system[173] may be seen as an effort to protect the public from the noxious effects of improperly-treated sewerage. Similarly, a state law prohibiting a municipal sewerage treatment facility from operating at overcapacity[174] may be designed to prevent harm to the public. But when several regulations involving sewerage facilities and subdivision requirements converge to compel an owner to postpone all development on his property indefinitely, the distinction between harm prevention and benefit extraction becomes less meaningful. Indeed, in situations where the harm-benefit line can-

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164. Vernon Park Realty Co. v. Mount Vernon, 307 N.Y. 493, 121 N.E.2d 517 (1954), *noted in* 68 HARV. L. REV. 1089 (1955).

165. *See* New Orleans v. Leeco, Inc., 226 La. 335, 76 So. 2d 387 (1954) (by implication).

166. Galt v. County of Cook, 405 Ill. 396, 91 N.E.2d 395 (1950); *cf.* Beck v. Littlefield, 68 So. 2d 889, 890 (Fla. 1953) (dictum: any attempt by city to ordain that a property owner may not erect any building on his land would run afoul of the guaranty of due process).

167. Gorieb v. Fox, 274 U.S. 603 (1927); City of Miami v. Homer, 58 So. 2d 849 (Fla. 1952), *revised,* 73 So. 2d 285 (1954). *But cf.* Mayer v. Dade County, 82 So. 2d 513 (Fla. 1955).

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

169. *In re* Kelso, 147 Cal. 609, 82 P. 241 (1905).

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

171. Professor Dunham has acknowledged the potential difficulty involved in this area. He admits that one might argue that elimination of a nuisance technically confers a public benefit. He asserts, however, that "[p]ractially speaking . . . the benefit resulting from elimination of a harm does not result from any particular land use; the benefit results from non-use in a particular way rather than from any of the permissible uses." Dunham, *supra* note 157, at 664-65.

172. Van Alstyne, *supra* note 27, at 20 & n.96. *See* Yara Eng'r Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945).

173. For examples of municipal subdivision requirement ordinances see note 2 *supra. See generally* 2 P. NICHOLS, *supra* note 15, §§6-12.

174. This result could occur indirectly as well as directly; for example, a law imposing strict new pollution standards would indirectly influence the treatment capacity of a sewage plant.

not be sketched with clarity, the Dunham standard risks subjective factual assessments and conclusionary reasoning.

Nevertheless, the harm prevention-benefit extraction concept may prove useful when phrased in terms of cost internalization.[175] Under this view, no compensation would be required where the effect of governmental action is merely to force the landowner to internalize a presently external social cost directly resulting from his use of the property. Payment of compensation in such circumstances would be inappropriate because the only effect of the governmental action is to require the landowner to consider all "enterprise" costs when determining how to utilize his property.[176] Consider the developer who plans to construct a large apartment complex on the banks of a scenic river in central Florida. The developer will treat construction materials as a cost of development and repair and management expenses as costs of operation. But if sewage from the complex can be given minor "primary" treatment and then dumped into the adjacent river, only part of the total cost associated with that sewage will be included in the developer's cost of doing business. The expense of constructing and operating the primary treatment plant, of course, will be an "internal" or "enterprise" cost. But the "social" cost of having inadequately treated sewage befouling local waterways will be "externalized" and borne either by society as a whole or by the more limited public that utilizes the river.[177] Under the Dunham view, a regulation requiring the developer to provide more adequate sewage treatment facilities would not require compensation because the effect of the governmental action would be harm prevention. Under a cost internalization analysis, the same result would occur, but for the slightly different reason that the governmental action merely requires the developer to recognize a legitimate cost of "doing business" or utilizing his property for a particular use.[178]

The cost internalization standard is particularly helpful when applied to areas in which the distinction between harm prevention and benefit extraction is difficult to delineate. Consider the following fact-setting in which a land developer is faced with converging environmental regulations and utility requirements. Viewed separately, the regulations and statutes require developers to install adequate sanitary sewer facilities on all newly-developed land, impose

175. The terms of contemporary economic analysis of the differences between enterprise ("internal") and social ("external") costs and their consequences derive largely from Pigou, who wrote: "[O]ne person *A* in the course of rendering some service, for which payment is made, to a second person *B*, incidentally also renders services or disservices to other persons . . . of such a sort that payment cannot be exacted from the benefited parties or compensation enforced on behalf of the injured parties." A. PIGOU, THE ECONOMICS OF WELFARE 183 (4th ed. 1932). *See generally* Coarse, *The Problems of Social Cost,* 3 J. LAW & ECON. 1 (1960); Katz, *supra* note 7, at 592-93; Katz, *Decision-making in the Production of Power,* 225 SCIENTIFIC AM. 191 (1971).

176. *Cf.* A. PIGOU, *supra* note 175, at 172: "It might happen for example . . . that costs are thrown upon people not directly concerned, through, say, uncompensated damage done to surrounding woods by sparks from railway engines. All such elements must be included — some of them will be positive, others negative elements — in reckoning up the social net product of the marginal increment of any volume of resources turned into any use or place."

177. *Cf.* Katz, *supra* note 7, at 592-93.

178. *See* note 176 *supra; cf.* Katz, *supra* note 7, at 592.

strict new pollution limits on municipal and private sewage treatment facilities, and prohibit use of "package plant" or individualized sewage treatment facilities in most areas. *A* owns Sunacre, an existing apartment development in Orlando. *A* pays property taxes on the value of both the land and apartment buildings and *A*'s tenants pay small user-fees for municipal sewer service. Since the development's completion, it has been connected to the municipal sewage treatment plant.

For some years environmentalists had been warning city authorities that the municipal sewage facility provided inadequate treatment of phosphates and some organic matter. Critics alleged that effluent from the plant was excessive in biological oxygen demand (BOD).[179] Following passage of strict new environmental protection laws on state and federal levels, the city was forced to recognize the validity of these criticisms and to provide better sewage treatment by an announced deadline. Having limited funds, the easiest method for the city to postpone construction of new tertiary treatment facilities was to reduce capacity at existing plants. Alternatively, under the new regulations the city found it financially impossible to increase existing capacity as had been done regularly over the past decade.

C, owner of Funacre, a prime parcel of undeveloped land in the western part of the city, had paid a premium several years ago to buy land in an area served by the municipal sewer system. She is unable to develop the property because the municipal treatment plant is running at capacity and not accepting new tap-ins. *C,* therefore, offers to pay the full cost of installing a "package plant" sewage facility to service the planned development, but existing city sewer ordinances and new environmental laws prohibit the installation of such units within the city limits.

Applying cost internalization concepts to this situation, *C* should be required to internalize the expense of providing adequate sewage treatment for any waste water generated by the apartment project. Allowing *C* to escape this responsibility would require society to bear this element of *C*'s enterprise costs. *C,* however, has offered to fulfill this responsibility by either connecting the apartment to the municipal treatment plant or building a "package plant" to serve the apartment development. The first alternative is rejected because the city cannot afford to increase the capacity of the municipal treatment plant, due to more stringent pollution limitations. The second alternative is refused because (a) financial and managerial considerations require that the city operate all treatment plants within the municipal limits, and (b) adequate protection of the environment can be gained only through use of centralized, well-run, and easily-inspected plants. Although each of these reasons benefits the community as a whole, *C* is unable to make any reasonable use of her property.

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179. For explanations of the technical aspects of sewage treatment, see J. CLARK & W. VIESSMAN, JR., WATER SUPPLY AND POLLUTION CONTROL (1966); ENVIRONMENTAL STUDY GROUP, NATIONAL ACADEMIES OF SCIENCES & ENGINEERING, WATER QUALITY IN SOUTH FLORIDA, PART II (1970); S. GRAVE, URBAN PLANNING ASPECTS OF WATER POLLUTION CONTROL (1969); A. KNESSE & B. BOWER, MANAGING WATER QUALITY: ECONOMICS, TECHNOLOGY, INSTITUTIONS (1968).

The crucial question is whether the burden imposed on *C* exceeds the internalization of enterprise costs. In this situation the burden is excessive. Even if *C*'s proposed private treatment facility would fully protect the public health and environment, thus internalizing all costs of sewage treatment, *C* must bear additional costs. *C* is compelled to internalize costs due not to her proposed development of the land, but to the general community problems of environmental degradation and inadequate sewage treatment facilities. The costs of earlier, improper planning and careless treatment of the environment[180] are being thrust upon *C* to such an extent that she can no longer make any reasonable use of her property.

From a policy standpoint, the question is whether *C* should be required to sacrifice the development rights to her property so that *A* and other local taxpayers will not have to suffer the higher tax rates or sewer-use fees necessary to expand the municipal sewerage system or to compensate *C* for her loss. Viewed under the Dunham approach, the substantial effect[181] of the governmental actions is to extract a public benefit at *C*'s expense. Translated into contemporary terms, *C* is required to internalize a public or socal cost unrelated to her enterprise use of Funacre. In each case, the public element is so severe as to deprive *C* of any reasonable use of her property. Under either analysis, a taking of property without just compensation should be found.

Enterprise Function Versus Arbitral Function

Professor Sax has proposed a compensation theory[182] somewhat related to the benefit extraction concept.[183] Sax asserts that the analytical distinction should be between "the role of government as participant and . . . as mediator in the process of competition among economic claims."[184] When private economic loss results from governmental enhancement of its resource position in an enterprise or participant capacity, then compensation is constitutionally required. But when such loss is a consequence of the government's acceptance

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180. *See* Marshall, *Who's Responsible for Pollution?*, 57 A.B.A.J. 21 (1971).

181. The effect of the governmental actions can be calculated in terms of two components: (1) the burden imposed on the developer, which can fairly be said to result from a forced internalization of the enterprise costs of treating sewage resulting from the development; and (2) the burden imposed, which represents the developer's "unfair share" of the community costs associated with inadequate planning and improper sewage treatment over a long period. When factor (2) reaches a substantial level, the hypothesis is that the developer will be unable to make any reasonable use of her property. A compensable taking should then be found.

The effective prohibition of new construction in this situation should not be confused with less severe ordinances that, especially in connection with urban renewal projects, attempt to regulate or forbid construction for a relatively short period of time. *See* 2 P. NICHOLS, *supra* note 15, §6.351. *Cf.* Board of Comm'rs v. Tallahassee Bank & Trust Co., 108 So. 2d 74 (1st D.C.A. Fla. 1958) (compensation allowed), *aff'd*, 116 So. 2d 762 (Fla. 1959).

182. Sax, *supra* note 22, at 62. *See also* Note, *Public Use Doctrine: "Advance Requiem" Revisited*, 1969 LAW & SOCIAL ORDER 688.

183. See notes 157-181 *supra* and accompanying text.

184. Sax, *supra* note 22, at 62.

of an arbitral role in society, then no compensation need be paid.[185] Rejecting the position that protection of existing economic values is central to the "eminent domain clauses," the Sax theory is based upon the view that the framers of those clauses were primarily concerned with preventing unfair or arbitrary governmental action.[186]

The Sax analysis is complicated by two exceptions to the general compensation test. First, compensation is denied where a property restriction clearly enhances the resource position of a governmental enterprise and the owner of the restricted property receives "benefits which equal or exceed the detriment imposed."[187] An example of this concept is found in the compulsory subdivision dedication laws,[188] which require a developer to dedicate some portion of his tract for roads, schools, and parks. In theory, the promise of urban

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185. Professor Sax distinguishes this approach from that of Justice Harlan on two counts: First, the finding of an enhancement of the government's resource position does not necessarily require a physical invasion or an acquisition of a formal proprietary interest. Second, non-compensability will turn not on a finding that governmental action is a "mere restriction upon use," but rather on an examination of the identities of the parties involved and of the government's role in that conflict. *Id.* at 63.

186. *Id.* at 58-60. *See generally* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135-36 (1810); Magna Charta, 9 Hen. 3, c. 29 (1225); I. BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 60 (1950); 2 J. STORY, CONSTITUTION 547-48 (4th ed. 1873); 1 BLACKSTONE'S COMMENTARIES 305-06 (Tucker ed. 1803).

In applying this approach to the decided cases, Professor Sax asserts that although compensation would be required in the leading airport noise decisions, regardless of overflight, no payment would be necessary in zoning cases like *Goldblatt* and *Consolidated Rock Products. Compare* Griggs v. Allegheny County, 369 U.S. 84 (1962) (overflight, compensation required) *and* United States v. Causby, 328 U.S. 256 (1946) (overflight, compensation required) *and* Batten v. United States, 306 F.2d 580 (10th Cir. 1962) (no overflight, compensation denied), *cert. denied,* 371 U.S. 955 (1963), *with* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (compensation denied) *and* Consolidated Rock Prods. Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed,* 371 U.S. 36 (1962) (compensation denied). In the airport decisions, the government has gained the right to impose noise, smoke, and glare on the properties adjoining the airport enterprise. "[B]y virtue of its special position the government has acquired this asset for its own account without buying it." Sax, *supra* note 22, at 69. Conversely, in the zoning regulation situations, the restriction of private property rights does not add to the resources of any governmental enterprise. Rather, only the neighbors of the regulated property receive direct benefit. The government's position is solely that of mediator. *Id.* Professor Sax states that the decision denying compensation in Miller v. Schoene, 276 U.S. 272 (1928) (cedar trees destroyed to prevent spread of plant disease to apple orchard) was correct. However, he contends that the denials of compensation in the railroad grade crossing cases, *e.g.,* Atchison, T. & S.F. Ry. v. Public Util. Comm'n, 346 U.S. 346 (1953); Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935), and in the war industry case of United States v. Central Eureka Mining Co., 357 U.S. 144 (1958) (Sax views this case as enhancement of the Government's position as supplier of war machines), were improper. Sax, *supra* note 22, at 70-71. For a criticism of the Sax theory, see Van Alstyne, *supra* note 27, at 21-24.

187. Sax, *supra* note 22, at 73. The Court apparently took this position in United States v. Sponenbarger, 308 U.S. 256 (1939) (floodway project, compensation denied). This exception to the Sax theory is similar to one interpretation of the "balancing" approach explained earlier. *See* text accompanying note 135 *supra.*

188. *E.g.,* see note 2 *supra.*

facilities and services will more than offset any loss sustained in the dedication.[189] An ordinance requiring the developer to provide reasonable sewerage treatment facilities or connections would fit into this category. That such a provision could, alone or in conjunction with other subdivision regulations, require a developer to spend more on such facilities than he could possibly recoup from the development income seems doubtful. However, if such a point were reached, in the language of the Sax test the developer would no longer receive benefits that "equal or exceed" the detriments imposed.[190]

The second exception to the Sax approach denies compensation where the government merely obtains an incidental benefit. Enhancement of the government's resource position, therefore, is in no way due to any special status accorded the sovereign. For example, if this approach had been applied in *Pennsylvania Coal Co. v. Mahon*[191] compensation would have been denied because the ordinance requiring subadjacent support for mining operations benefited private lands as well as the state-owned highway. Thus, where the government merely receives a prorata share of the general community benefits flowing from a cleaner environment, the environmental regulations involved would not be held to effect compensable takings.

The task of applying the full Sax theory to the context of sewer restrictions and utility requirements must be approached with care. With regard to subdivision sewer requirements, so long as the required construction or dedication is reasonable and necessarily related to the use of the developed land, compensation should not be required.[192] In such instances, the reciprocal benefit exception should justify denial of compensation. To be sure, the government benefits in its enterprise capacity to the extent that the subdivider rather than the city is compelled to pay for the dedicated lands or services provided. But the reciprocal benefit concept remains sound so long as the developer is not required to relieve the government of potential expenses unrelated to the development of his parcel. The reciprocal benefit theory would seem to be stretched dangerously thin, for example, if the developer were required to provide sewer lines not only for his own project but also for an unrelated, neighboring government housing project. If environmental regulations are considered separately, so long as the property owner is able to make some reasonable use of his land, a denial of compensation again seems necessary. For example, an ordinance prohibiting a property owner from constructing and operating his own sewage treatment facility does not benefit the government in its "participant" or enterprise capacity.[193]

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189. Sax, *supra* note 22, at 74. *See generally* Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).

190. Sax, *supra* note 22, at 73.

191. 260 U.S. 393 (1922). For a detailed discussion of this case, see text accompanying notes 38-43 *supra*.

192. *See* text accompanying notes 187-188 *supra*.

193. Admittedly, even in this instance the government may receive the benefit of being able to utilize less expensive administration, inspection, and bulk treatment methods by operating a single, large-scale sewage treatment facility.

The analysis becomes more complex, however, when environmental restrictions and utility requirements are considered together. As previous examples have indicated, the result of these converging restrictions is to frustrate development of the property. As a result, the city does not have to build sewer lines on the affected property and therefore receives a benefit. More importantly, the city need not expand the municipal treatment plant when increasingly stringent environmental protection regulations make such expansion difficult and costly.

If compensation is denied in this situation, the owner of the restricted parcel must bear an unfair share of the costs of environmental degradation by giving up the full value of the development rights to his property.[194] Owners of unaffected property also benefit from the restricted owner's inability to develop his land, since expansion of the municipal sewerage plant could well lead to increased taxes and user charges. Members of the community therefore receive an indirect benefit analogous to that urged by Sax in the airport noise cases.[195] If the owner of restricted property is forced to bear the full burden, without compensation, the taxpayers as a whole, and thereby the government itself, benefit.

The "benefit" to the government in its enterprise capacity must be calculated with care. As suggested in the earlier discussion of cost internalization concepts,[196] the government should not be viewed as receiving a benefit when the developer is merely required to internalize the sewage treatment costs associated with his parcel of land. The benefit to the government results from forcing the developer to bear an unfair share of the social costs of poor planning and environmental degradation. As a result, the government is able to minimize the expense of compliance with new pollution standards.

In sum, the Sax analytical framework would also require compensation in the utility requirement-environmental regulation fact setting. As discussed later[197] this result is not affected by the government's claim that it has no duty to expand the existing municipal sewer system to serve a particular landowner. In the sewer requirement context considered alone, the lack of such obligation may be relevant. But when the government requires property owners to utilize its sewerage facilities and then refuses to provide the necessary service, basic equitable principles should prevent the government from relying on this premise. The government may have no legal duty to provide parks for its citizens, but if it chooses to do so by compelling a landowner to leave his property undeveloped, a benefit is received and compensation must be paid. When the government seeks to extract similar public benefits through direct or indirect means, the result should be the same.

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194. The owner is not merely called upon to bear his proportionate share of environmental protection costs. See notes 175-181 *supra* and accompanying text. This is true whether the share is calculated on a per capita basis or by determining the amount of environmental harm resulting from the owner's use of his property.

195. Sax, *supra* note 22, at 69.

196. See notes 175-181 *supra* and accompanying text.

197. See notes 208-253 *infra* and accompanying text.

The "Fairness" Standard

Perhaps the most theoretical approach to the compensation question has been offered by Professor Michelman.[198] In an extensive analysis of the ethical foundations of compensation policy, Michelman asserts that the most appropriate guidepost is the concept of "justice as fairness," as corroborated by utilitarian social policy.[199] The Michelman thesis is far too complex to be summarized adequately in these pages. For present purposes the important fact is that, assuming an informed and perceptive claimant,[200] a decision to deny compensation will be "fair" if the restricted property owner "ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser long-run risk to people like him than would any consistent practice which is naturally suggested by the opposite decision."[201] In determining when such an appreciation should be present the hypothetical claimant must consider the risks involved in various compensation patterns. The risk that may result from liberal compensation is that settlement costs (compensation paid plus the cost of operating the compensation framework) may force abandonment of efficient and desirable social projects. The risk that may accompany inadequate compensation is that the claimant will bear such a concentrated loss that he will be unable to share effectively in the general gains from social activity.[202] These two risks are minimized, thus suggesting a "fair" result, by insistence on compensation when "settlement costs are low, when efficiency gains are dubious, and when the harm concentrated on one individual is unusually great."[203] The risks are also minimized if the requirement of compensation is relaxed when there are "visible reciprocities of burden and benefit, or when burdens similar to that for which compensation is denied are concomitantly imposed on many other people."[204]

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198. Michelman, *supra* note 69. *See* Olsen, *Role of "Fairness" in Establishing a Theory of Taking*, 3 URBAN LAW. 440 (1970); Van Alstyne, *supra* note 27, at 24-25.

199. Professor Michelman cautions that his essay is not designed to make a case for utilitarian ethics. Michelman, *supra* note 69, at 1220.

200. The decision of whether compensation is required by "fairness" is made from the vantage point of the disappointed claimant. Michelman assumes that such a claimant will have the capacity " (a) to appraise his treatment and calculate his advantage over a span of time (that is, he is not without patience) and (b) to view the particular decision in question as a specific manifestation of a general practice which will be applied consistently to situations involving other people." *Id.* at 1221. These two conditions are necessary if the claimant is to be able in some cases to decide that immediately disadvantageous treatment will be acceptable because it is "fair."

201. *Id.* at 1223.

202. *Id.* at 1222 & n.105; Van Alstyne, *supra* note 27, at 24 & n.112.

203. Michelman, *supra* note 69, at 1223.

204. *Id.* The latter situation indicates that settlement costs are high and that those sustaining the burden are probably incurring relatively small net losses. If the losses were not small, then the large number of affected citizens presumably would have mobilized to deflect the burden in some way. For a discussion of Professor Sax's use of the reciprocity theory in compensation theory, see notes 187-190 *supra* and accompanying text.

Although admitting that the fairness approach is difficult to apply as a practical test or rule of decision, Michelman, *supra* note 69, at 1245-53, Professor Michelman states that the

Applied to the environmental regulation-utility requirement situation, the fairness approach requires a step-by-step analysis of the relevant criteria. Viewed from one perspective, compensation seems necessary. The owner of restricted land faces an unfair[205] economic burden resulting from his inability to make any reasonable use of his property. The "visible reciprocities" involved in such regulation explain only a portion of the economic impact on the owner.[206] Although all owners of vacant land in a given area could face a similar burden, owners of developed or semi-developed property with existing sewer service would receive an increased advantage. In most areas, the number of vacant properties restricted by the convergence of utility and environmental regulations would probably be small in comparison to the total number of unrestricted properties. This concentration of harm suggests that the owners adversely affected by governmental action would be unable to mobilize politically to "deflect the burden."

On the other hand, some of the fairness criteria used by Michelman suggest that compensation need not be paid in such cases. Settlement costs could be excessive, depending upon the number of parcels severely affected by the regulations. Moreover, any adverse impact on efficiency caused by interference with community planning could be minimal in comparison to the economic and administrative burdens accompanying any program of compensation or relaxation of the regulations.

The efficiency gained by denial of relief in this context is at best dubious. By refusing compensation or, alternatively, by continuing the restrictions in full force, the government restricts or biases community growth in a manner wholly unrelated to area-wide zoning and long-range community planning. The question is not whether growth should or should not occur. The important point is that the government restrictions may work against the area's master plan.

Although the result is by no means certain, on balance the Michelman criteria seem to support payment of compensation in the environmental-utility regulation context. The arguments supporting an "insistence on compensa-

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concept is significantly reflected in the various judicial doctrines used to determine compensability. *Id.* at 1226. Although he does not support this proposition with a list of cases, Michelman's lengthy analysis of traditional compensation doctrines indicates that his conclusion represents more than mere "academic wishful thinking." *See id.* at 1226-45. *Cf.* Thom v. State, 376 Mich. 608, 138 N.W.2d 322, 326-27 (1965). Admittedly, Professor Michelman's fairness standard helps to explain some of the mysterious judicial results under the more traditional doctrines. Michelman, *supra* note 69, at 1226-45. *Cf.* Hadacheck v. Sebastian, 239 U.S. 394 (1915).

205. To propose that a developer should be required to pay the reasonable costs of providing sewer connections on his land seems fully consistent with "fairness" concepts. To urge that all property owners must utilize their property in a manner that will protect the environment is also sound. To demand that a developer leave his property vacant, however, is highly questionable on fairness grounds when the practical reason for such a requirement is to enable the government to provide an improved environment and low-cost sewage treatment to the community as a whole. See text accompanying notes 178-181 and 193-196 *supra.*

206. See notes 193-196 *supra* and accompanying text.

tion" are strong while those supporting non-compensation are relatively weak and uncertain. If settlement costs are high, their reduction may possibly be affected by allowing the government to lessen restrictions in lieu of paying compensation. This alternative need not involve the risks to the environment attendant upon relaxation of the regulations involved. Rather, the government could simply expand its sewerage service to include the restricted properties. Conversely, if expansion costs exceed the total settlement costs, the government could utilize the alternatives of paying compensation or reducing the concentrated impact of the regulations on certain landowners.

"Takings" by Abandonment or Withholding of a Government Service

As discussed above,[207] the manner in which a governmental restriction of property rights takes place may be an important factor in determining whether a "taking" of property without just compensation has occurred. Several types of governmental action may effectively curtail the property rights of individual landowners. For example, the government may physically invade and destroy the property involved. Alternatively, the government can enact regulations that require a property owner to use or not to use his land in a particular manner. Finally, the government may change or withhold an existing municipal benefit, such as highway access or sewer service.

The first two types of action have been discussed previously. The remaining type of action, withholding a municipal service, is an integral part of the environmental regulation-utility restriction fact setting used in this article. A municipality's refusal to supply public sewer service to a developer's property may be an important factor in preventing the land from having any reasonable use. If the compensation cases involving physical invasions and regulatory restrictions of property are to be applied to the environmental regulation-utility requirement context, any analytical differences in the "withheld benefit" cases must be overcome.

The decisions involving a withheld governmental benefit fall into two general fact settings: the discontinuance of roads and the abandonment of other types of public works and projects. The highway cases sometimes result in a finding that a compensable taking has occurred. The decisions dealing with other types of public works, however, usually hold that no taking of property has been effectuated. For present purposes, the question is whether the restrictions upon land use resulting from an owner's inability to gain sewer service more closely resemble the first or second line of decisions.

Discontinuance of Streets and Highways

Although abandonment of a road may in fact damage adjoining or abutting land, such action does not necessarily constitute a "taking" of property in the

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207. See notes 28-91 *supra* and accompanying text.

constitutional sense.[208] When the fee of a street is in the public, an adjoining owner will generally suffer only incidental or consequential injury if the road grade is changed[209] or the street is abandoned.[210] The result, however, is different if the governmental action destroys "all reasonable access" to the property. Thus, if the government destroys access by changing a local connector road into a limited-access highway,[211] if the closing of a street deprives a property owner of all reasonable access to her land,[212] or if a road is abandoned due to construction of a new highway that does not serve the affected property,[213] then a compensable taking will be found. Although statutory provisions in some jurisdictions may authorize compensation,[214] mere deprivation of some access routes is not a "taking."[215] Even if the only public way on which a parcel abuts is discontinued, compensation may be denied if the owner is also the owner of the fee of the discontinued way.[216]

Two aspects of the highway line of decisions deserve special consideration. The first is whether the finding of a taking depends solely upon the loss of an "easement" to the land. The second is the importance of governmental discretion in designing and allocating municipal improvements.

In some cases, the finding of a compensable taking seems to turn on the destruction or removal of the property owner's easement of access rather than his resulting inability to utilize the property for "any reasonable use."[217] For

208. 2 P. NICHOLS, *supra* note 15, §6.32(2).

209. Bowden v. City of Jacksonville, 52 Fla. 216, 42 So. 394 (1906). *But cf.* Kendry v. State Rd. Dep't, 213 So. 2d 23 (4th D.C.A. Fla. 1968), *cert. denied,* 222 So. 2d 752 (Fla. 1969).

210. *See* 2 P. NICHOLS, *supra* note 15, §6.32(2).

211. *Id. See, e.g.,* Benerofe v. State Rd. Dep't, 217 So. 2d 838 (Fla. 1969) (limited access highway); Anhoco Corp. v. Dade County, 144 So. 2d 793 (Fla. 1962) (land service road converted into limited-access facility); State Road Dep't v. McCaffrey, 229 So. 2d 668 (2d D.C.A. Fla. 1969) (limited access highway); Jordan v. Town of Canton, 265 A.2d 96 (Me. 1970) (town road classified as "limited-user highway"). *See generally* Note, *Substantial Impairment: A Standard of Recovery for Deprivation of Access,* 22 BAYLOR L. REV. 404 (1970).

212. *E.g.,* Standiford Civic Club v. Commonwealth, 289 S.W.2d 498, 500 (Ky. 1956); State Highway Comm'n v. Phillips, 267 N.C. 379, 148 S.E.2d 282 (1966).

213. *Ex parte* Commonwealth Dep't of Highways, 291 S.W.2d 814 (Ky. 1956); *cf.* Boney v. State Dep't of Transp., 250 So. 2d 650 (1st D.C.A. Fla. 1971).

214. *See* Anhoco Corp. v. Dade County, 144 So. 2d 793 (Fla. 1962); Grove v. Allen, 92 Iowa 519, 61 N.W. 175 (1894); DeMoss v. Police Jury of Bossier Parish, 167 La. 83, 118 So 700 (1928); Grand River Dam Authority v. Misenhimer, 195 Okla. 682, 161 P.2d 757 (1945); Heil County v. Allegheny County, 330 Pa. 449, 199 A. 341 (1938).

215. *E.g.,* Wright v. Flood, 304 Ky. 122, 200 S.W.2d 117, 119 (1947); State Dep't of Roads v. Nickol Grain Co., 182 Neb. 191, 153 N.W.2d 727 (1967); Fougeron v. Seward County, 174 Neb. 753, 119 N.W.2d 298, 303-04 (1963).

216. *See* Southern Ry. v. Albes, 153 Ala. 523, 45 So. 234 (1907) (compensation denied even though constitution allowed compensation for damagings); Kimball v. Homan, 74 Mich. 699, 42 N.W. 167 (1889); Commonwealth v. Hession, 430 Pa. 273, 242 A.2d 432 (1968), *cert. denied,* 393 U.S. 1049 (1969); *In re* Appropriations of Land of Mitchell, 209 Pa. Super. 288, 228 A.2d 53, 56 (1967) (mere "consequential damage"); Cherry Hill v. Fewell, 48 S.C. 553, 26 S.E. 798, 801 (1897). *But cf.* Boney v. State Dep't of Transportation, 250 So. 2d 650 (1st D.C.A. Fla. 1971) (allowing compensation for deprivation of some right of access, possibly due to statutory requirements); Mississippi State Highway Comm'n v. Myers, 184 So. 2d 409 (Miss. 1966) (special damages awarded).

217. *E.g.,* Schiefelbein v. United States, 124 F.2d 945, 947 (8th Cir. 1942); Standiford

example, in *Schiefelbein v. United States*[218] the United States Court of Appeals for the Eighth Circuit stated: "The property taken and for which compensation is payable is not the land to which access is cut off but the private property of the condemnee in the public highway."[219] Whether an owner of property has a similar easement for water and sewer service is questionable. The important point, however, is that viewing highway abandonment cases in terms of easement loss is conceptually improper.

Several reasons suggest that such an approach is overly narrow under contemporary compensation theories. First, loss of access to a single roadway is seldom held to be a "taking" in the constitutional sense.[220] Yet in such instances the easement to the abandoned road is wholly destroyed. If the easement concept is to be meshed with the general rule that a taking occurs only if the abandonment removes "all reasonable access" to the property, the term "easement" must be stretched to include not just one, but "all reasonable access" routes to the land. Second, cloaking a determination in terms of the loss of some neatly-packaged property right (for example, an easement) is distressingly similar to saying that a constitutional taking does not occur unless some clearly-defined property is invaded or destroyed. Yet, as discussed earlier,[221] physical invasion is no longer required under contemporary judicial doctrines. Third, as admitted in *Schiefelbein,* the value of the easement allegedly taken by the highway closing "cannot be ascertained without reference to the dominant estate to which it was attached."[222]

These factors indicate that the effect of governmental action in road abandonment controversies should be judged on the same terms as in other taking cases. The crucial factor is not whether some easement is lost, but whether the abandonment of the road deprives the owner of "all reasonable use" of his property. Although admittedly open to various interpretations,[223] this standard appropriately distinguishes between the cases in which all reasonable access is denied and those in which only some access routes are blocked. In the first line of decisions, loss of all practical access routes deprives the owner of all reasonable use of the property. In the second, inconvenience or economic damage may result, but the governmental action does not prevent "any reasonable use" of the land.

The second important factor in the highway cases is the effect of governmental discretion. Although this concept is emphasized more frequently in the decisions dealing with abandonment of other types of public works,[224] the

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Civic Club v. Commonwealth, 289 S.W.2d 498, 500 (Ky. 1956); Jordan v. Town of Canton, 265 A.2d 96 (Me. 1970).

218. 124 F.2d 945 (8th Cir. 1942).

219. *Id.* at 947.

220. See cases cited notes 214-216 *supra.*

221. See the discussion of the physical invasion standard in text accompanying notes 28-91 *supra.*

222. 124 F.2d at 947.

223. *See* the compensation theories discussed following subheading GOVERNMENTAL ACTION THAT EFFECTS A TAKING OF PROPERTY: USEFUL THEORIES, *supra.*

224. See notes 232-253 *infra* and accompanying text.

older highway abandonment cases occasionally state that the removal of a road cannot be a compensable taking because the government has discretion to determine the location and extent of public highways.[225] Legislative judgment concerning such matters is ordinarily conclusive unless "the action is so unreasonable, arbitrary, and oppressive as to render it void."[226]

That governmental action which deprives an owner of all reasonable use of her property should be held so "unreasonable, arbitrary, and oppressive" should not be surprising. The Kentucky court of appeals has taken this view.[227] Noting that authority for the exercise of governmental discretion in closing roads derives from the concept of "public convenience and necessity," the court nevertheless refused to allow this discretion to be exercised in a manner that effected a taking of property without due process of law.[228] The Utah supreme court has announced a similar approach. Quoting from the McQuillin treatise in *Davidson v. Salt Lake City*[229] that court admitted that the "propriety, advisability, necessity, extent, and character of public improvements is vested in the discretion of the municipal authorities." But the court cautioned:[230]

> The law is well settled that where bad faith, fraud or corruption appear, or manifest oppression or gross abuse is shown, for example, unreasonable interference with private property rights, or where the action is unlawfully in violation of mandatory legal provisions designed to safeguard private property rights, the power of the courts may be invoked by appropriate action.

These statements suggest what other courts have apparently taken for granted: an allegation of governmental discretion will not prevent finding a compensable taking.[231] The government must have discretion to abandon highways, lest the country be paved with concrete. But the decision to close a street, like all government decisions, must not be so arbitrary or oppressive as to violate constitutional provisions designed to protect the people. If the abandonment of a highway removes all reasonable access to a parcel of land, a taking of

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225. *E.g.*, Arkansas Valley & W.R.R. v. Bullen, 31 Okla. 36, 119 P. 414 (1911); *see* Con Realty Co. v. Ellerstein, 125 N.J.L. 196, 14 A.2d 544, 546 (1940); 2 P. NICHOLS, *supra* note 15, §6.32(2).

226. Lyddy v. City of Rock Island, 45 Ill. App. 2d 76, 194 N.E.2d 647, 652 (1963).

227. Standiford Civic Club v. Commonwealth, 289 S.W.2d 498 (Ky. 1956).

228. *Id.* at 500.

229. 81 Utah 203, 17 P.2d 234, 237 (1932). *See* 10 E. MCQUILLIN, MUNICIPAL CORPORATIONS §30.31 (3d ed. 1966).

230. 81 Utah at 209, 17 P.2d at 237.

231. A similar result is generally reached with regard to sovereign immunity. *See* United States v. Lee, 106 U.S. 196 (1882); Thom v. State, 376 Mich. 608, 138 N.W.2d 322 (1965). *See generally* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) (federal officer); Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944) (state officer); *Ex parte* Young, 209 U.S. 123 (1908) (state officer). For discussions of the use of the abstention doctrine by federal courts faced with the task of interpreting state eminent domain provisions, *compare* County of Allegheny v. Mashuda Co., 360 U.S. 185 (1959), *with* Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1969). *Cf.* Madisonville Tractor Co. v. St. Bernard Mining Co., 196 U.S. 239, 257 (1905) (Holmes, J., dissenting).

property occurs. Under contemporary approaches to inverse condemnation, the "property" taken is not the "easement of access" but rather the "right" to use the subject land for *some* reasonable purpose. Unless some use can be made, the owner effectively owns nothing – other than the questionable right to pay real estate taxes on his property.

Abandonment of Other Government Projects

Generally, case law suggests that "[a]n owner of land has no private rights in the continued existence of any public work upon or near his land other than a highway."[232] *Reichelderfer v. Quinn*[233] offers one example of this approach. Reichelderfer had attempted to enjoin the District of Columbia Commissioners from building a fire station in the public park adjoining his property. Assuming that the construction would divert the use of the public land from park purposes[234] and admitting that the park enhanced the value of plaintiff's property, the United States Supreme Court quashed the injunction issued below. Compensation need not be paid, the Court explained, when the value is "both created and diminished as an incident of the operations of the government."[235] If the enjoyment of a benefit derived from the public acts of government "were a source of legal rights to have it perpetuated," the mere exercise of governmental powers would be self-defeating.[236] The *Quinn* approach is also found in earlier state and federal cases. Hence no action has been held to lie when a state capitol is moved away,[237] when water pipes in the street are relocated,[238] or a canal[239] or railroad[240] is discontinued, provided the change is made by authority of law.

Some of these decisions, and perhaps *Quinn,* can be explained on the ground that the complainant only suffered "incidental damages" rather than a "taking" of property.[241] To this extent, the cases are consistent with the highway decisions involving grade changes or partial loss of access. Three public works decisions, however, deserve deeper analysis.

In *Fox v. Cincinnati,*[242] the Ohio Board of Public Works leased the surplus water in the state's canals for hydraulic purposes, reserving the right to resume use of the water, if it should be needed for navigation. A statute was sub-

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232. 2 P. NICHOLS, *supra* note 15, §6.32(3).

233. 287 U.S. 315 (1932) (Stone, J.). See Caldwell v. City of Seattle, 75 Wash. 565, 135 P. 470 (1913) (construction of public sewer damaged public park).

234. The court distinguished the public trust doctrine issue. 287 U.S. at 320 & n.3.

235. *Id.* at 319.

236. *Id.*

237. Edwards v. Lesueur, 132 Mo. 410, 415, 33 S.W. 1130, 1135 (1896).

238. Asher v. Hutchinson Water, Light & Power Co., 66 Kan. 469, 71 P. 813 (1903).

239. Kirk v. Maumee Valley Elec. Co., 279 U.S. 797 (1929); Fox v. Cincinnati, 104 U.S. 783 (1881).

240. Bryan v. Louisville & N.R.R., 244 F. 650 (8th Cir. 1917), *appeal dismissed, cert. denied,* 246 U.S. 651 (1918).

241. See notes 72-73 *supra* and accompanying text.

242. 104 U.S. 783 (1881).

sequently passed granting a portion of one canal to a city for use as a highway. Plaintiff claimed that the resulting loss of his leased hydraulic power was a taking of property without due process of law. The United States Supreme Court held that no deprivation of property had occurred. Three factors apparently influenced this result. First, the principal object of the canal was navigation; thus, the state could not be expected to keep up the canal regardless of cost solely to meet its water requirement leases. Second, if the water had been diverted to navigational needs, the state's only duty would have been to forego further collection of rents; abandonment of the canal for another reason should not have created a different result. Finally, plaintiff leased the water power with full knowledge of possible future diversion.

Virtually the same fact situation arose some fifty years after *Fox* in *Kirk v. Maumee Valley Electric Co.*[243] Appellee electric company unsuccessfully claimed that abandonment of the water leases impaired the obligation of the lease contracts and deprived the company of property without due process of law. Relying heavily upon *Fox,* the *Kirk* opinion focused on the "nature and extent" of the company's right to withdraw water from the canal. The proper construction of the leases, the Court said, was that "they imposed no obligation on the state to maintain the canal either for navigation *or other purposes* and when abandoned by the state the rights of lessees to surplus water ceased."[244]

In one respect the canal cases are similar to a situation in which the government ceases to provide municipal sewer service to certain property. Under the common assumption that the government has no legal duty to provide such service,[245] the municipality could allege that the "contracts" impliedly provide for discontinuance of service following reasonable notice. On the other hand, several distinctions between the canal cases and the sewer situation can be made. First, the water leases in *Fox* and *Kirk* were only incidental to the operation of the canal, while the provision of sewer service is itself the principal purpose[246] of the governmental operation. Second, the property allegedly taken

243. 279 U.S. 797 (1929).

244. *Id.* at 803 (emphasis added). The Court relied on the consistent interpretations of the leases by the Ohio courts: Vought v. Columbus, Hocking Valley & Athens R.R., 58 Ohio St. 123, 50 N.E. 442 (1898); Elevator Co. v. Cincinnati, 30 Ohio St. 629 (1876); Hubbard v. City of Toledo, 21 Ohio St. 379 (1871).

245. *See* Lyddy v. City of Rock Island, 45 Ill. App. 2d 76, 194 N.E.2d 647, 651-52 (1963); Tott v. Sioux City, 261 Iowa 677, 155 N.W.2d 502, 505, 506 (1968) (citing cases); Lace v. City of Oskaloosa, 143 Iowa 704, 121 N.W. 542, 544 (1909); Davidson v. Salt Lake City, 81 Utah 203, 17 P.2d 234, 237 (1932). *But see* Bowers v. Machir, 191 S.W. 758 (Tex. Ct. Civ. App. 1916); Dwyer v. Hosea, 1 Posey Unrep. Cases 596 (Tex. 1880); City of Norfolk v. Norfolk County Water Co., 113 Va. 303, 74 S.E. 226 (1912). *But cf.* Taylor v. Wentz, 15 Ill. 2d 83, 153 N.E.2d 812 (1958); Corey v. Commissioners of Highways, 158 Ill. 197, 41 N.E. 1105 (1895); Lyddy v. City of Rock Island, 45 Ill. App. 2d 76, 194 N.E.2d 647, 652 (1963); St. Louis County v. State Highway Comm'n, 409 S.W.2d 149 (Mo. 1966). *See generally* Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971) (denial of equal protection); Garvin v. Barker, 59 So. 2d 360, 364 (Fla. 1952); Chardkoff Junk Co. v. City of Tampa, 102 Fla. 501, 135 So. 457 (1931).

246. Admittedly, an argument might be made that sewer service is merely "incidental" to the principal municipal business of supplying water. *Cf.* State v. City of Miami, 157 Fla. 726, 740, 27 So. 2d 118, 126 (1946).

in the canal cases was hydraulic water power, not the properties on which the power was utilized. No allegation was made that denial of the water power prevented "any reasonable use" of the properties served by the canal water. In the sewer example, however, the taking of property is not the loss of municipal sewage treatment, but the inability of the owner to make "any reasonable use" of his property without such service.

More difficult to explain is the Kansas case of *Asher v. Hutchinson Water, Light & Power Co.*[247] In that action, plaintiff unsuccessfully attempted to enjoin the power company from removing a water main supplying plaintiff's stockyards. The company supplied water to the city under a contract enacted by municipal ordinance. Exercising its contractual right to designate the areas to be served, the city council passed a resolution approving the removal and relocation of the water mains leading to plaintiff's property. The Kansas supreme court affirmed denial of the injunction warning that the courts have no right to interfere with the "political power" and municipal "discretion" involved in the operation of public utilities. The court asserted: "An individual can acquire no vested right as against the public in the continued service of a public utility. Such a doctrine, once admitted, would destroy the convenience as a public utility."[248] The court recognized that by its action plaintiff's property would be rendered practically valueless for the purposes for which it was improved and for its existing use.[249] Nevertheless, the defendant had alleged that the business at the stockyards was "very inconsiderable" and that water could be supplied to the property "by means of a gas engine at a cost not to exceed $500."[250] Thus, although *Asher* expresses broad principles concerning governmental discretion in the provision of municipal services, the decision does not deal with discontinuance of a municipal benefit depriving the property owner of "all reasonable use" of his land. Moreover, as the earlier discussion of highway abandonment cases indicated,[251] municipal discretion in removing public works may not control the question of whether a taking of property has occurred. So far as the removal of an *existing* governmental service is concerned, a compensable taking should be found when governmental action prevents the property owner from making any reasonable use of his land.

If discretion is not a defense when a governmental service is discontinued or abandoned, the same result should be mandated where the government fails to provide the service to some segments of the citizenry. Because administrative action and decisionmaking can occur by inaction as well as by action, the crucial compensation question should be the *effect* of the given government decision, not the manner in which it is made.[252] Recognition of this uniform

247. 66 Kan. 496, 71 P. 813 (1903).

248. *Id.* at 500, 71 P. at 814.

249. *Id.* at 497-98, 71 P. at 813. Reference should also be made to the syllabus by the court.

250. *Id.* at 498, 71 P. at 814.

251. See notes 208-231 *supra* and accompanying text.

252. See discussion of the physical invasion approach in the text accompanying notes 28-91 *supra.*

approach would neither alter existing precedent nor bankrupt government treasuries. Governmental refusal to supply or continue municipal services seldom frustrates "any reasonable use" of property, although the exact meaning of those words is unclear.[253]

In the sanitary sewer example, whether a refusal to initially supply or continue municipal service constitutes a taking would depend on such factors as whether alternate means of waste water disposal were available and whether existing zoning would allow reasonable property uses that would not produce sewage effluent. Only in unusual situations would the government's failure to provide sewer service amount to a denial of all reasonable use of the land. In most cases some practical use of the land could be made, notwithstanding the unavailability of municipal sewer service, because either: (a) private sewage companies serve the area, (b) individual waste water disposal methods are authorized, or (c) existing zoning allows reasonable land uses that do not require sewer connections. If combined government action prevents the property from being put to "any reasonable use," the government has several methods of alleviating the economic impact on the landowner. It may extend municipal sewer service to the land, allow private sewage treatment companies to serve the property, authorize the landowner to install his own waste water control apparatus, change the existing zoning to allow some economically-feasible use of the land which does not produce sewage effluent, or pay just compensation to the landowner.

In sum, the cases involving a withheld government benefit do not appreciably alter the "taking" theories enunciated earlier. Once governmental actions combine to prevent an owner from making any reasonable use of his property, the manner in which the government inflicts these restrictions should not be decisive.

Assessing Responsibility for the Taking: Who Should "Pay"?

The question of which governmental entity should be required to alleviate restrictions that effect a taking of property is often simple. Where a single government requires use of its sewage disposal system, refuses to allow extension of that system to a claimant's property, and also zones the subject parcel in such a manner that any reasonable use of the land requires a sewage disposal method, then that government alone should be held responsible for the taking. Even if the responsible local government feels that one or more of its regulations was passed in response to more stringent state and federal environmental standards, the landowner should not be forced to join these latter parties in his request for relief. The task of gaining any needed assistance for the local government should not fall to the owner whose property is taken. Rather, equalization of the financial and administrative burdens among the

253. See the various theories developed following subheading Governmental Action That Effects a Taking of Property: Useful Theories, *supra*.

several levels of government should be effectuated through intergovernmental negotiations and the general political process.

In some instances, however, no single government can be held fully responsible for the owner's inability to put his property to any reasonable use. For example, the county may refuse to extend sewer service to the subject property and zone the property such that any reasonable use of the land would necessitate sewage disposal facilities. Although the county may allow individual "package plant" treatment operations on the property, state environmental regulations could prohibit such operations in the given location. The result of these combined restrictions would be clear: the owner could make no reasonable use of his land. The question is two-fold: First, should both governments be allowed to avoid responsibility because either action, taken alone, effects a taking of property? Second, if the landowner is to receive relief from the combined effect of the regulations, what formula should be used in allocating governmental responsibility?

Existence of Governmental Responsibility for Takings Effected by Actions of Two Government Entities

As a general principle, two levels of government should not be able to avoid responsibility for a taking of property merely because neither of their actions, considered individually, would unconstitutionally infringe upon private property rights. Several factors support this position. First, if the prohibition against takings is designed to prevent arbitrary governmental action,[254] the broad legal context in which a governmental decision is made is relevant to any determination of arbitrariness. Government decisions are not produced in a vacuum. Existing laws at other levels, just as much as growth patterns and economic statistics,[255] are important considerations in the decisionmaking process. The multi-level nature of our political process requires that each government entity frame its decisions with due regard for conflicting laws and regulations of other jurisdictions. An analogous theory is applied in some tort cases where the actions of two or more defendants combine to interfere with an owner's use and enjoyment of his property. Both defendants are held liable for some portion of the damage even though the conduct of a single defendant would not support a judgment. The opinion of the Maryland court of appeals in an early nuisance case, *Woodyear v. Schaefer,* offers one example of this concept:[256]

> The extent to which the appellee has contributed to the nuisance may be slight and scarcely appreciable. Standing alone, it might well be that it would only, very slightly, if at all, prove a source of annoyance. And so it might be, as to each of the other numerous persons contributing to the nuisance. Each standing alone, might amount to little

254. This is the view taken by Professor Sax. See note 22 *supra* and accompanying text.

255. See the Florida "changed circumstances" zoning cases cited note 90 *supra* and text accompanying notes 85-91 *supra.*

256. 57 Md. 1, 10 (1881). *See* Katz, *supra* note 7, at 618 n.66.

> or nothing. But it is when all are united together, and contribute to a common result, that they become important as factors, in producing the mischief complained of. . . . [E]ach element of contributive injury is a part of one common whole, and to stop the mischief of the whole, each part in detail must be arrested and removed.

Commentators and other courts have applied this reasoning[257] in cases involving pollution,[258] flooding of land,[259] diversion of water,[260] obstruction of a highway,[261] and noise nuisance.[262] The basis for the approach is that the standard of conduct applicable to *each* defendant is governed by all existing circumstances, including the activities of other defendants. "Pollution of a stream to even a slight extent becomes unreasonable when similar pollution by others makes the condition of the stream approach the danger point. The single act itself becomes wrongful because of what others are doing."[263]

Even if both levels of government should not be held jointly or severally liable, the "final actor" should be held responsible for adding its regulatory scheme "on top of" the existing legal restrictions. Thus, the regulatory framework passed by "prior actors" forms merely part of the over-all framework in which the reasonableness of the final actor's conduct must be judged. In effect, the only contributing cause of the taking of property is the restrictive measure passed by the "final actor." Even under this approach, however, the legal responsibility might fall to a prior actor if the final actor were a superior level of government.

A second reason for requiring compensation in the dual-level taking situation is that constitutional prohibitions against uncompensated takings of property are not phrased in terms of separate levels of government. Rather, as the Florida constitution demonstrates, the broad concern is that "[n]o private property" be taken for a "public" purpose without compensation.[264] If the compensation standard applied turns upon the owner's inability to make any reasonable use of his property, the source of the governmental restriction should not be a critical factor. Whether phrased in terms of diminution of value,[265] loss on investment,[266] or destruction of all reasonable use,[267] the key

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257. *See* W. PROSSER, TORTS 322-23 (4th ed. 1971) [hereinafter cited as W. PROSSER].

258. Warren v. Parkhurst, 45 Misc. 466, 92 N.Y.S. 725 (1904); Northup v. Eakes, 72 Okla. 66, 178 P. 266 (1918).

259. Woodland v. Portneuf Marsh Valley Irrigation Co., 26 Idaho 789, 146 P. 1106 (1915); Sloggy v. Dilworth, 38 Minn. 179, 36 N.W. 451 (1888); Town of Sharon v. Anahna Realty Corp., 97 Vt. 336, 123 A. 192 (1924).

260. Hillman v. Newington, 57 Cal. 56 (1880).

261. Sadler v. Great Western R.R., [1895] 2 Q.B. 688.

262. Lambton v. Mellish, [1894] 3 Ch. 163.

263. W. PROSSER, *supra* note 257, at 323. As Professor Prosser indicates, assessment of liability under this theory is a separate question from the allocation of responsibility among the culpable parties. For an example of apportionment of damages in this situation, see Sloggy v. Dilworth, 38 Minn. 179, 36 N.W. 451 (1888).

264. See note 18 *supra*.

265. See notes 92-101 *supra* and accompanying text.

266. See notes 102-129 *supra* and accompanying text.

criterion under this approach is the *effect* of the government actions. If "fairness"[268] is the test, compensation from one or both participating governments seems required. Although application of the fairness thesis is often difficult, that Michelman's hypothetical claimant would consider an otherwise compensable restriction "fair" solely because of its dual components seems doubtful.

The argument in favor of compensation is somewhat more complex when the theories involving a determination of government benefit are considered. The difficult question is whether the "benefit" involved is measured in terms of any general social gain or in terms of benefit to a specific level of government. The balancing approach[269] offers one example. The weighing process could be applied separately at each level of government, thereby defeating recovery or, alternatively, the total "public" benefit could be balanced against the cumulative private harm incurred from all government actions. The latter approach seems favorable, both in terms of constitutional construction and fairness.

If the Dunham distinction between harm prevention and benefit extraction[270] is utilized, a similar problem arises. Again, the "public" benefit seems to be the crucial consideration. If the taking occurs as a result of actions by the county and the city, that only the city receives a clear benefit may be relevant in determining financial responsibility. This should not, however, prevent the landowner from recovering from someone, because the "public" has extracted a benefit.

Finally, under the Sax distinction between enterprise benefit and arbitral function,[271] compensation is still warranted. Allocating responsibility for a taking among two or more levels of government need not conflict with the "enterprise" concept. Any benefit involved can accrue to two governments as well as one. If only one government clearly benefits from the property restriction, then the action of that government may itself be a taking of property when viewed under the "broad legal context" approach. Analyzed under the Sax standard, the dual-level taking problem seems more easily explained in terms of enterprise benefit than in terms of arbitral function. To the extent that an arbitral role is present at all, the conflict resolution involves government entities as well as private economic interests.

In sum, a claimant's right to relief should not be destroyed merely because a taking results from the actions of two or more government entities. Determining how economic and administrative responsibility for the taking should be allocated, however, is a more difficult endeavor.

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267. See notes 71-91, 141-152 *supra* and accompanying text.
268. See notes 198-206 *supra* and accompanying text.
269. See notes 130-156 *supra* and accompanying text.
270. See notes 157-181 *supra* and accompanying text.
271. See notes 182-191 *supra* and accompanying text.

Allocation of Financial and Administrative Responsibility for a Taking of Property by Two or More Government Entities

The allocation of responsibility for a multi-level governmental taking of property has received little treatment by the commentators. Although some case law exists concerning the entities liable in eminent domain and inverse condemnation actions, a single level of government is usually held liable.[272] Using the concepts suggested in these decisions in conjunction with tort theories dealing with apportionment of damages, the following pages develop several apportionment approaches which may be useful in the present context. In general, the outlined theories are not intended to provide definitive answers in this embryonic area. Rather, the concepts are offered to stimulate future thought and research.

Cooperative Effort. Where the taking of property results from a *cooperative effort* by two or more levels of government, each entity should be held jointly and severally liable for the encroachment upon private property rights. This result seems logical even where the actual taking of property is "caused" by the action of a single government body.

The Florida supreme court has applied this approach in a case involving the construction of a limited access highway by Dade County, the State Road Department, and the Turnpike Authority. In *Anhoco Corp. v. Dade County,*[273] the taking involved the property owner's temporary loss of access before his land was properly condemned. The county had agreed to obtain the right-of-way and convey it to the Road Department. In an earlier decision[274] the supreme court had enjoined the three governments from interfering with Anhoco's access rights until the fee had been properly condemned. In the instant decision the court held the county jointly and severally liable for the temporary loss of access.[275]

In contrast to decisions in which a single government is found responsible for the taking,[276] *Anhoco* offers certain advantages to the property owner. By claiming joint and several liability, the owner need not face the problem of proving which government was "responsible for" or maintained "control" over the development project involved.[277] Moreover, if compensation is sought, the

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272. *E.g.,* Corbett v. Eastern Air Lines, Inc., 166 So. 2d 196 (1st D.C.A. Fla. 1964); Petrovich v. State, 181 So. 2d 811 (La. Ct. App. 1966); Vuljan v. Board of Comm'rs, 170 So. 2d 910 (La. Ct. App. 1965); Bower v. City of Columbus, 27 Ohio St. 2d 7, 271 N.E.2d 860 (1971). It is not suggested that multiple liability was necessarily mandated in these cases.

273. 144 So. 2d 793 (Fla. 1962).

274. Florida State Turnpike Authority v. Anhoco Corp., 116 So. 2d 8 (Fla. 1959).

275. 144 So. 2d at 796-97. For a discussion of the related tort doctrine requiring joint and several liability for persons acting "in concert," see W. PROSSER, *supra* note 257, at 314-15. "In legal contemplation, there is a joint enterprise, and a mutual agency, so that the act of one is the act of all, and liability for all that is done must be visited upon each." *Id.* at 315.

276. See note 272 *supra.*

277. *See, e.g.,* Corbett v. Eastern Air Lines, Inc., 166 So. 2d 196 (1st D.C.A. Fla. 1964); Van Szyman v. Town of Auburn, 345 Mass. 444, 188 N.E.2d 453, 457 (1963); Schesch v. Peo-

plaintiff's ability to levy judgment claims against several government entities may increase the chances of speedy recovery. Finally, if relief from the regulatory scheme is requested, joint and several responsibility increases the chance that a comprehensive change in the multi-level regulatory structure will be accomplished with minimal economic and temporal burden on the claimant.

Whether the requisite "cooperative effort" can be shown in the environmental regulation-utility restriction context is questionable. Where local regulations are required to be formulated as part of a state legislative enactment such a showing may be possible. For example, if a state environmental protection act directly requires local governments to refuse to accept new sewer system tap-ins and the state itself limits the operation of individual sewage treatment facilities, the requisite "cooperative effort" might be found. On the other hand, a claimant would probably fail if the state merely required municipal sewage operations to produce a higher grade of effluent. In this instance, the local government may have freely chosen to limit tap-ins rather than improve sewage treatment.

Joint Liability for Violation of a Common Duty. Joint liability may still be imposed if two governmental entities have a "common duty" not to take claimant's property without payment of just compensation.[278] As the prior discussion of contributing causation suggests,[279] such a "common duty" may be imposed by holding that the actions of each government entity should be judged by considering existing laws in other jurisdictions. Once the regulations of two or more governments combine to effect a taking, both become liable for failing to take action preserving the owner's property rights. Both governments are then under a similar duty to prevent a particular occurrence. This view is supported in tort theory,[280] for example, where two or more defendants are under an obligation to maintain a party wall,[281] railroad track,[282] or highway.[283]

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ple, 65 Misc. 2d 44, 316 N.Y.S.2d 862 (Sup. Ct. 1970). For examples of statutory allocation, see Department of Highways v. Alexander, 388 S.W.2d 599 (Ky. Ct. App. 1965); Department of Highways v. Thacker, 384 S.W.2d 79 (Ky. Ct. App. 1964); City of Charleston v. Ailey, 210 Tenn. 211, 357 S.W.2d 339 (1962).

Unfortunately, a test based on a government's "control over" or "responsibility for" a particular project is not helpful in the regulatory-restriction multiple-level taking situation.

278. *See* W. PROSSER, *supra* note 257, at 315. *Cf.* Johnson v. Chapman, 43 W. Va. 639, 28 S.E. 744 (1897).

279. See text accompanying note 254 *supra*.

280. W. PROSSER, *supra* note 257, at 315.

281. Simmons v. Everson, 124 N.Y. 319, 26 N.E. 911 (1891); Klauder v. McGrath, 35 Pa. 128 (1860); Johnson v. Chapman, 43 W. Va. 639, 28 S.E. 744 (1897).

282. Schaffer v. Pennsylvania R.R., 101 F.2d 369 (7th Cir. 1939); Wisconsin Cent. R.R. v. Ross, 142 Ill. 9, 31 N.E. 412 (1892); Lindsay v. Acme Plaster Co., 220 Mich. 367, 190 N.W. 275 (1922).

283. Doeg v. Cook, 126 Cal. 213, 58 P. 707 (1899); *cf.* Walton, Witten & Graham v. Miller's Adm'x, 109 Va. 210, 63 S.E. 458 (1909).

Single Indivisible Result. Another theory imposing joint and several liability is found in a line of tort cases involving a "single indivisible result." Professor Prosser states the general rule as follows: "Where two or more causes combine to produce such a single result, incapable of any logical division, each may be a substantial factor in bringing about the loss, and if so, each must be charged with all of it."[284] The basis for joint liability is a recognition that certain results, by their very nature, are incapable of any logical, reasonable, or practical division. Although only culpable causes are held jointly responsible,[285] the theory is applied where either cause would have been sufficient in itself to bring about the result.[286] The same doctrine, moreover, is used where both causes are essential to the injury.[287]

In the tort field, single indivisible results have been found in cases involving deaths,[288] single wounds,[289] merging fires that burn a building,[290] and colliding vehicles that injure a third person.[291] The theory seems equally applicable in the dual-level taking situation so long as both government entities can be held "culpable" for the destruction of property rights. The necessary responsibility should be present if each level of government can be held to act with notice of the interacting rules and laws imposed by the others.[292] Once an owner is denied any reasonable use of his property, apportionment of liability for the continuing loss would seem difficult, if not impossible.

Single Level Liability. If joint liability is rejected, the landowner can still assert that one of the two government entities imposing the restrictions should be held responsible. At least three theories are available.

A "final actor responsibility" approach[293] would place liability on the government whose action increases the total restrictions on a claimant's property to the level necessary for a taking to occur. The restriction passed by the final actor would be the cause of the taking; earlier regulations on land use would

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284. W. PROSSER, *supra* note 257, at 315-16.

285. *Id.* at 316 & n.40.

286. See note 290 *infra.*

287. *E.g.,* Washington & Georgetown R.R. v. Hickey, 166 U.S. 521 (1897) (horse car driven onto railway tracks with negligent operation of crossing gates); Barnes v. Masterson, 38 App. Div. 612, 56 N.Y.S. 939 (2d Dep't 1899) (defendants successively piled sand against plaintiff's wall, causing it to collapse); Ramsey v. Carolina-Tennessee Power Co., 195 N.C. 788, 143 S.E. 861 (1928) (railway shunting cars, which struck negligently maintained light pole).

288. Hackworth v. Davis, 87 Idaho 98, 390 P.2d 422 (1964); Bolick v. Gallagher, 268 Wis. 421, 67 N.W.2d 860 (1955).

289. *Cf.* Brown v. Murdy, 78 S.D. 367, 102 N.W.2d 664 (1960) (loss of foot due to negligence of two physicians).

290. *E.g.,* Miller v. Northern Pac. R.R., 24 Idaho 567, 135 P. 845 (1913); Anderson v. St. P. & S.S.M. Ry., 146 Minn. 430, 179 N.W. 45 (1920). *Cf.* Orton v. Virginia Carolina Chem. Co., 142 La. 790, 77 So. 632 (1918).

291. W. PROSSER, *supra* note 257, at 316. *See* Arnst v. Estes, 136 Me. 272, 8 A.2d 201 (1939).

292. See text accompanying note 254 *supra.*

293. See text following note 263 *supra.*

merely serve as the factual and legal background in which the reasonableness of the final actor's conduct would be judged.

A related apportionment theory would place sole responsibility on any subordinate level of government which might be said to have a duty to act with due consideration for the laws and regulations of superior government entities. For example, a city government might be held responsible if the taking occurred from the combined effect of state and city land-use restrictions. The rationale would be that: (1) the state will not purposefully allow an unconstitutional taking of property to occur; (2) state laws have supremacy over local ordinances; (3) even if the city action precedes passage of the state law, the effect of the municipal ordinance is to make the state law a contributing factor in a taking of property; therefore, (4) the city ordinance must fail under traditional supremacy concepts. If the city does not accept its obligation to repeal the action, then the city must indemnify the state for any indirect liability the state may face for its unwilling part in the taking. This approach would not be possible, of course, if the government entities causing the taking were roughly equal in supremacy terms. In that situation, reliance would have to be placed upon one of the alternative theories discussed in these pages.

A final method of apportionment is also possible. This theory would apportion responsibility on one of two alternative bases: the amount of injury inflicted by each government or the amount of benefit received by each government. To be sure, difficult problems of proof would arise under either allocation method. Once a taking of property was proved, the responsible governments might be allowed to choose the methods by which they would jointly alleviate the restrictions on the plaintiff's property. One alternative would be for each government to contribute a portion of the money required to condemn the land. Ownership rights could then be divided or sold accordingly. Another alternative would be for both governments to repeal their offending laws. If repeal of the regulations of only one jurisdiction would prevent the taking from occurring, one government might agree to repeal its law upon receipt of compensation (representing the latter's share of responsibility for the taking) from the other government. In the absence of agreement, the court might order joint payment of compensation or repeal of both offending regulatory schemes.[294] The exact relief ordered could be based upon the wishes of the injured plaintiff or upon a balancing of the public interest and private detriment involved in each alternative.

Burden of Proof. If joint and several liability is not imposed, the landowner may face serious problems in attempting to prove which governmental entity should bear responsibility for his loss. The claimant's plight would be less complex if he could utilize one of two tort concepts to shift the burden of proof on the apportionment question to the defendants. The *Restatement (Second) of Torts*[295] offers two useful approaches, both requiring some finding

294. For cases indicating that the court would probably be unable to order a government to extend municipal services to a given parcel of land, see note 255 *supra*.

295. RESTATEMENT (SECOND) OF TORTS §433B (1965) (W. Prosser, Reporter).

that the conduct of all defendants involved is tortious. In the taking context, both levels of government can be held culpable after the taking occurs. Once the owner loses all reasonable use of his property, even if the government restrictions taken separately would not effect a taking, both governments should have a duty to ensure relief.

The *Restatement* theory most analogous to the taking area is:[296]

> Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

The burden of proof in this situation is shifted to avoid the injustice of allowing a proved wrongdoer, who has in fact caused harm to the plaintiff, to escape liability merely because another wrongdoer was also involved. "As between the proved tortfeasor who has clearly caused some harm, and the entirely innocent plaintiff, any hardship due to lack of evidence as to the extent of the harm caused [by the single tortfeasor] should fall upon [the tortfeasor]."[297]

A related theory of shifting the burden of proof, set forth in the second *Restatement* is applicable to situations in which harm has been caused by only one of two or more tortious actors, but uncertainty exists as to which defendant caused the harm. Under this approach, the burden is upon each defendant to show that he did not cause the injury.[298] For example, assume that both *A* and *B,* independently hunting quail, negligently shoot at the same time in the direction of *C*. *C* is struck in the face by a single shot, which could have come from either gun. In *C*'s action against *A* and *B,* each of the defendants has the burden of proving that the shot did not come from his gun. Any defendant failing to meet this burden will be subject to liability for the harm to *C*.[299]

This example is also helpful in the dual-level taking context. Consider the situation in which on the same day two government entities pass separate regulations that together effect a taking of plaintiff's property. Each government refuses to repeal its regulation. Assume that under a "final actor" apportionment standard only the government acting last would be liable for the taking. Under the tort theory just noted, each government would be responsible for

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296. *Id.* §433B(2).

297. *Id.* Comment on Subsection (2), at 444. A helpful example can be found in this comment. Through the negligence of defendants *A, B,* and *C,* water escapes from irrigation ditches on their land and floods part of *D*'s farm. In *D*'s action against *A, B,* and *C,* or any one of them, each defendant has the burden of proving the extent to which his negligence contributed to the damage caused by the flood, and if he does not do so is subject to liability for the entire damage to the farm. *Id.* illustration 7, at 445. See Katz, *supra* note 7, at 617 & n.63.

298. RESTATEMENT (SECOND) OF TORTS, *supra* note 295, §433B(3).

299. *Id.* Comment on Subsection (3), Illustration 9, at 447. The example is apparently taken from Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). *See* Katz, *supra* note 7, at 616-17.

proving that it in fact acted last. In the absence of such proof, joint and several liability would be imposed.

A third method of shifting the burden of proof may be available in some instances under a variation of the doctrine of *Ybarra v. Spengard.*[300] In *Ybarra,* the California supreme court held that the *res ipsa loquitur* requirement that the injury inflicted must be caused by some agency within the defendant's exclusive control is subject to an exception. The court made the test one of "right of control" rather than actual control where the purpose of the doctrine would otherwise be defeated. The shift in burden of proof necessitated by the *res ipsa loquitur* theory is invoked when the chief evidence of the true cause of a culpable or innocent injury is practically accessible to the defendant, but inaccessible to the injured party.[301]

The doctrine was applied in *Ybarra* to a hospital operating room setting. The court stated that where a plaintiff receives unusual injuries while unconscious and undergoing medical treatment, all the defendants having any *control* over plaintiff's body or over instrumentalities that might have caused the injuries may be required to meet the inference of negligence by explaining their conduct. In the dual-level taking context, a landowner might rely upon the *Ybarra* approach where the taking results from state and local regulations and the state refuses to exercise its supremacy powers to negate the restrictive effect of the local ordinance.

Final Thoughts on Apportionment. The various theories discussed indicate that the problem of allocating responsibility for a multi-level taking should not bar a plaintiff's request for relief. No single approach is recommended as the only means of apportioning liability. Indeed, the apportionment theory used in a given case may turn upon the compensation standard chosen to prove the existence of an unconstitutional taking. Other allocation concepts not discussed may also prove helpful. In sum, although the apportionment issue should not block a claimant's cause of action, additional thought concerning this subject seems necessary.

CONCLUSION

Various types of governmental action can have essentially similar effects upon a landowner's ability to utilize his property. Physical invasions, regulatory restrictions, and withholdings of government services can each prevent an owner from making any reasonable use of his land. Once such a deprivation of use occurs, the practical effect is a taking of property. Although any of the six compensation theories discussed might be used to determine whether the property owner should receive judicial relief, the loss-on-investment standard, the Sax approach, and the cost internalization variation of the Dunham test

300. 25 Cal. 2d 486, 154 P.2d 687 (1944). *See* Katz, *supra* note 7, at 616-17.

301. 25 Cal. 2d at 493, 154 P.2d at 691. *But cf.* Madden v. Fulton County, 102 Ga. App. 19, 115 S.E.2d 406 (1960).

seem to be particularly helpful. Regardless of the compensation theory applied, however, the form of the governmental action should not be controlling. Thus, that the taking of property is effected by regulatory action or the withholding of government services should not prevent judicial relief otherwise dictated by general compensation theories. Similarly, that the denial of all reasonable use results from the actions of several governmental entities should not alone defeat an otherwise valid claim for relief. Although apportionment of financial and administrative responsibility in such situations may raise problems, adequate allocation theories can be developed.

The environmental regulation-utility restriction fact setting discussed in this article offers a prime target for the application of each of these principles. Delineating when a compensable taking of property occurs in such a context would assist both the community and the property owner. The community would be aided in assessing the full social costs of worthy environmental protection programs, while the owner would be assured that his property rights will be protected to the full extent mandated by relevant constitutional provisions.