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A New Approach to Regulatory Taking Analysis

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Comment: A New Approach to Regulatory Taking Analysis

"Contrary to plaintiff's urging, nothing . . . persuades us that the eminent domain action here is exempt from commerce clause analysis."[1]

I. INTRODUCTION

The development of modern industry and transportation has stimulated our nation's urbanization. Urbanization, however, creates numerous public problems such as air and noise pollution, overcrowding, traffic congestion, and the destruction of scenic beauty. Many states, in an attempt to combat these problems, now recognize an increasing need for open-space lands.[2]

In the past, acquisition by eminent domain[3] was the technique used by municipalities seeking to create open-space land. Unfortunately, inefficiency of contractual tax incentives[4] and difficulties with

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1. City of Oakland v. Oakland Raiders, 174 Cal. App. 3d 414, 419 n.2., 220 Cal. Rptr. 153, 156 n.2 (Cal. Ct. App. 1985). For a detailed discussion of the *Raiders* line of casses see this issue, Note, City of Oakland v. Oakland Raiders (Raiders IV): Commerce Clause Scrutiny As An End-Run Around Traditional Public Use Analysis.

2. *E.g.*, Agins v. Tiburon, 447 U.S. 255, 261 n.8 (1980). The City Council of Tiburon found that "[i]t is in the public interest to avoid unnecessary conversion of open-space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise, and water pollution." California is one state which considers preservation of open-space land a necessity. *See generally,* CAL. CONST. art. XIII, § 8 (West Cum. Supp. 1981); CAL. GOV'T CODE §§ 65560 *et seq.* (West Cum. Supp. 1980).

3. Taking cases were first reviewed under an eminent domain theory. Eminent domain is the power to take private property for public use by a state or any of its municipalities. Exercise of the eminent domain power almost always results in an enrichment to the government because the government transfers the landowner's rights to itself.

4. Contracts giving special tax advantages to particular taxpayers are used by municipalities to acquire open space land. The underlying principles of this technique allow a municipality to restrict use of land for a minimum number of years in exchange for tax advantages given to the landowner. The contracts are difficult to break and are unaffected by sale or transfer of the property or by the landowner's death. One example of these contracts is California Land Conservation Act, CAL. GOV'T CODE §§ 51200-51295 (West Cum. Supp. 1981), and the Open Space Easement Act, CAL. GOV'T CODE §§ 51050-51097 (West Cum. Supp. 1981).

obtaining funds through tax increases[5] have forced municipalities to depend on police power regulation to control the use of land.[6]

Under the shield of their constitutionally granted police powers, municipalities have exercised considerable control over private property. In many instances, the effect of this control is equivalent to a taking—the deprivation of private property for a public use without just compensation.[7] When police powers are involved, the taking is called a "regulatory taking" because regulations for public use have the effect of depriving an individual of a specific use of his property.

Courts are increasingly called upon to clarify the meaning of the term "regulatory taking." While the notion is straight forward in theory, its application in practice has been troublesome; development of regulatory takings law has been complex and confusing.[8] No clear test has emerged for determining when a regulation crosses the line from a permissible regulation to an unconstitutional taking.

The plea for clarification comes from local governments as well as from landowners. Local governments are uncertain about the validity of their open-space ordinances and other zoning regulations. Landowners are faced with the uncertainty of not knowing whether the expected use of their land will be allowed because of present or future regulation. Additionally, landowners are unsure whether they can obtain compensation when government restricts the use of their land.

Despite the need for clarification, the Supreme Court's recent

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5. One example of tax increase difficulties is California's Proposition 13 (CAL. CONST. art. XIIIA (West Cum. Supp. 1980)) which reduced the amount of public revenue available to purchase open-space lands. Proposition 13 has four major provisions: A 1% limit on property tax revenues; limitations on assessments; voter approval requirements for future tax increases by the state government; and voter approval requirements for future local government tax increases. CAL. ASSEMBLY COMM. ON LOCAL GOV'T, THE IMPACT OF PROPOSITION 13 (THE JARVIS-GANN INITIATIVE) ON LOCAL GOV'T SERVICES AND FACILITIES 12 (1978).

6. Police power regulation is the authority delegated to local governments by the tenth amendment of the United States Constitution. Local governments are thus enabled to adopt such laws and regulations as tend to secure generally the comfort, safety, morals and health of their citizens. Under police power regulation the state is not enriched because there is no transfer of rights.

7. U.S. CONST. amend. V: "No person shall . . . be deprived . . . of property, without due process of law; nor shall private property be taken for public use, without just compensation."

8. *See, generally,* Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls,* 15 RUTGERS L.J. 15 (1983); Costonis, *"Fair" Compensation and the Accomodation Power: Antidotes for the Taking Impasses in Land Use Controversies,* 75 COLUM. L. REV. 1021 (1975); Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law,* 1962 SUP. CT. REV. 63; Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law,* 80 HARV. L. REV. 1165 (1967); Sax, *Taking, Private Property and Public Rights,* 81 YALE L.J. 149 (1971); Stoebuck, *Police Power, Takings, And Due Process,* 37 WASH. & LEE L. REV. 1057 (1980); Van Alstyne, *Taking or Damaging by the Police Power: The Search for Inverse Condemnation Criteria,* 44 S. CAL. L. REV. 1 (1971).

opinions[9] have done little to clear the muddied waters created by earlier United States Supreme Court decisions such as *Mugler v. Kansas,*[10] *Pennsylvania Coal Co. v. Mahon,*[11] and *Penn Central Transportation Co. v. New York City.*[12] Consequently, it is essential that the Supreme Court take steps to develop an adequate, workable test for deciding when police-power regulation becomes a taking.

This comment analyzes the weaknesses of both past and present tests for determining when governmental regulation effects a taking of private property, and recommends an alternative approach similar to dormant commerce clause analysis announced by the United States Supreme Court.[13]

II. Takings Tests Have Been Troublesome Because Of Inconsistencies Within The Tests

A. *The Traditional Takings Tests*

The Supreme Court has applied several tests when deciding whether governmental actions have amounted to "takings" of private property. These tests include physical invasion, public nuisance, diminution in value, and a combination of public nuisance and diminution in value.

1. *Physical invasion*

The physical invasion test[14] is the traditional test and the easiest to apply. Historically, however, the concept provided little protection to landowners. Under the physical invasion test, a taking required an absolute appropriation and dispossession of the owner's land. Later, the Supreme Court decided that an absolute appropriation was not neces-

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9. *E.g.*, MacDonald, Sommer & Frates v. Yolo County, 106 S. Ct. 2561 (1986); Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 105 S. Ct. 3108 (1985); San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981); Agins v. Tiburon, 447 U.S. 255 (1980).

10. 123 U.S. 623 (1887).

11. 260 U.S. 393 (1922).

12. 438 U.S. 104 (1978).

13. U.S. Const. art. I, § 8, cl. 3: "The Congress shall have Power . . . To regulate Commerce . . . among the several States." The dormant commerce clause comes into play when Congress has not exercised the federal commerce clause (art. I, § 8, cl.3) to regulate certain areas of commerce. It prevents states from regulating or taxing in a way that would materially burden or discriminate against interstate commerce.

14. The theory of physical invasion is discussed in greater detail *infra.*, text accompanying notes 36-44 in connection with the *Penn Central* standard.

sary in order for a taking to occur—only a serious interruption to the common and necessary use of the property.[15]

2. *Public nuisance*

The public nuisance test sprang out of common law nuisance cases. The test stresses the government's traditional power to terminate uses of land which are harmful to neighboring property or to the general public.[16] The case which best exemplifies the public nuisance doctrine is *Mugler v. Kansas.*[17]

In *Mugler,* the Supreme Court affirmed the constitutionality of a Kansas statute prohibiting the brewing of beer. Application of the statute forced Mugler to close his brewery. Writing for the majority, Justice Harlan explained that the statute was valid because Mugler's business manufactured and sold liquor which the state considered to be a danger to the public's health, safety, and morals. Harlan stated that police power could be used to destroy the value of a person's property once the property is declared a public nuisance.[18]

3. *Diminution in value*

In the early twentieth century, paralleling the rise of modern industry and urban growth, courts began to recognize that the reach of regulatory takings was much broader than that allowed for by traditional theories of physical invasion and public nuisance. This heightened judical recognition of government's power to "take" lead to the Supreme Court's "diminution-in-value" theory. This theory is a corollary to Justice Holmes's statement in *Pennsylvania Coal Co. v. Mahon* that " . . . if regulation goes too far it will be recognized as a taking."[19] Justice Holmes argued that if diminution in economic value caused by regulation "goes too far," a compensatory taking exists. However, he left unanswered the question of how much diminution in value is required, i.e., how far is "too far."[20]

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15. Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166, 177-78 (1871) (compensable taking occurred when land was destroyed by government-caused flooding).

16. *E.g.,* Miller v. Schoene, 276 U.S. 272, 279-80 (1928) (cedar trees spawned a pest that would destroy nearby apple orchards).

17. 123 U.S. 623 (1887).

18. *Id.* at 667.

19. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

20. *See,* R. Anderson, 1 AMERICAN LAW OF ZONING, § 2.23 at 101 (1968). Because "too far" has no precise definition, a simple showing of pecuniary loss is no indication that a taking has occurred. This is demonstrated by the rather uneven course in the dollar-and-cents evidence used by the courts: "Examination of approximately 50 cases in which the courts mentioned proof of the value of the subject land if used for a permitted purpose, as compared with its value if used for a

4. The combination of public nuisance and diminution in value

Today, the courts agree that diminution in value or some economic loss is a relevant factor, but such loss is not in itself decisive. Even though compensability under Holmes's theory depends on the amount or degree of harm the claimant sustains,[21] a judicial finding that the state has validly exercised its police power often relieves the state of any duty to compensate the landowner, regardless of the degree of loss sustained.[22] This modern reading of the diminution in value theory results from the Supreme Court's gradual melding of Justice Harlan's public nuisance test in *Mugler* with Justice Holmes's "too-far" test in *Mahon.*

The melding of *Mugler* and *Mahon* is most notable in a 1962 Supreme Court decision concerning the question of whether a town, which by exercise of its police power had prohibited a sand and gravel operator from further excavations of property within the town limits, could be said to have taken private property. The Supreme Court held in *Goldblatt v. Town of Hempstead:*[23]

> If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional . . . 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 a compensation . . . There is no set formula to determine where regulation ends and taking begins.[24]

Despite this dicta and notwithstanding the *Mahon* rule, the Court in *Goldblatt* held that a complete prohibition of benefical use was justified even though the landowner might suffer a severe pecuniary loss resulting from the governmental regulation. Thus the Supreme Court has paid lip service to the *Mahon* rule but in practice has adopted *Mugler*'s harsh result. While *Mugler* and *Mahon* are ostensibly at odds with

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proposed purpose outlawed by the ordinance, revealed that about half of the ordinances were approved and half were found unconstitutional." *Id.* at 101.

21. In one case, decided just four years after Mahon, the landowner's diminution in value was alleged to be seventy-five percent of the original value of the property. This was not enough to convince the court that a taking had occurred, however. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

22. *See e.g.* Agins v. Tiburon, 447 U.S. 255, 262-63. *But see,* San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981).

23. 369 U.S. 590, 592-94 (1962).

24. *Id.* at 592-94.

each other,[25] certain of the current Supreme Court Justices advocate their use in tandem.[26]

B. The Present Takings Standard

Between 1928 and 1974, the Supreme Court decided only two regulatory taking cases: *Berman v. Parker*[27] and *Goldblatt.*[28] Unfortunately, these two cases did little to clarify the takings test[29] voiced in previous Supreme Court decisions.[30] In 1978, the Supreme Court handed down *Penn Central Transportation Co. v. New York City,*[31] formulating the Supreme Court's present regulatory takings standard.

The Supreme Court in *Penn Central* formulated a balancing standard with the following three factors:[32] 1) What is the character of the governmental action;[33] 2) to what extent has value been diminished;[34] and 3) to what extent has the regulation interfered with reasonable expectations, specifically, distinct investment-backed expectations?[35]

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25. *Mugler* holds that no exercise of the police power is a taking. *Mahon* holds that an exercise of the police power is a taking if it goes too far.

26. *See,* Dissenting opinion by Justices Renquist, joined by Chief Justice Burger and Justice Stevens. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978). The dissent attempts to propose a taking doctrine that accomodates both *Mahon* and *Mugler.* A regulation that destroys property rights amounts to a taking except when the regulation is necessary to prevent the owner's using the land in a way injurious to the public health, safety, and morals; or when the restricted property covers a large area.

27. 348 U.S. 26 (1954) (involves urban renewal).

28. *Goldblatt* 369 U.S. at 590.

29. Bauman, *The Supreme Court, Inverse Condemnation and the Fifth Amendment: Justice Brennan Confronts the Inevitable in Land Use Controls,* 15 RUTGERS L.J. 15, 36-37 (1983).

30. Cases reviewed by the Court in *Penn Central* include: Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); and Mugler v. Kansas, 123 U.S. 623 (1887).

31. 438 U.S. 104 (1978). New York designated Penn Central Station as a "landmark" and denied its owner a permit to erect a building in excess of fifty stories on an arch above the station. The city's Landmarks Preservation Law allowed the owner to transfer the lost development right to certain other sites, thus permitting development that would have been excessive at the other site. Although the New York Court of Appeal treated the legal question as one of substantive due process and not eminent domain (*See* Penn Central 42 N.Y.2d 324, 397 N.Y.S.2d 914, 366 N.E.2d 1271 (1977)) the Supreme Court analyzed the issue as one of police power taking. 438 U.S. at 131-33.

32. *See,* Bowden & Feldman, *Take It or Leave It: Uncertain Regulatory Taking Standards and Remedies Threaten California's Open Space Planning,* 15 U.C.D. L. REV. 371, 380 n.40 (1981). Although Bowden and Feldman derive five standards, this comment chooses to focus on only three which apply to regulatory takings generally and not to regulations involving unique public functions.

33. *Penn Central,* 438 U.S. 104, 124 (1978).

34. *Id.* at 124.

35. *Id.* at 124-25.

1. The governmental action

Penn Central's first factor asks, "what character has the governmental action assumed?" Governmental action can take two forms, physical invasion or regulation.[36]

a. *Physical invasion*

Although proof of a physical invasion is not an absolute requirement, the *Penn Central* majority stated that a taking is more readily found when interference with property can be characterized as a physical invasion. However, by placing too much emphasis on the concept of physical invasion, courts often rule out any possibility that the exercise of police power regulation will constitute a taking. The concept of physical invasion, traditionally thought of as requiring an absolute appropriation, is often associated with an element of eminent domain, i.e., that the landowner's property rights must transfer to the government.[37] Courts are often reluctant to find a "taking" unless some transfer of rights, express or implied, has occured.[38]

b. *Regulation*

Police power regulation also diminishes a landowner's property rights. However, peculiar to such regulation, no property rights pass to the government. This theory accounts for the statement by the California Court of Appeal in *San Diego Gas & Elec. Co. v. San Diego*[39] that, "[u]nlike the person whose property is taken in eminent domain, the individual who is deprived of his property due to the state's exercise of its police power in not entitled to compensation."[40]

Regulatory taking is also described as a negative restraint (as opposed to physical invasion, which is often described as an "affirmative action" by the government).[41] However, use of terms like "affirmative"

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36. Justice Marshall in Loretto v. Teleprompter Manhatten CATV Corp., 458 U.S. 419 (1982), stated: "More recent cases confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property." This indicates that land can be physically invaded or physically occupied. According to *Loretto,* only permanent physical occupation consititues a taking. The majority in *Penn Central* did not indicate whether they meant to include physical occupation as well as physical invasion as a possible characteristic.

37. Eminent domain occurs only if certain events are present: There must be some activity by an entity having eminent domain power; the activity must diminish the landowner's property rights; and there must be a transfer of property rights from the landowner to the government. These factors flow naturally from the constitutional language that "private property shall not be taken for public use without just compensation." U.S. CONST. amend. V.

38. Stoebuck, *Police Power, Takings, And Due Process,* 37 WASH. & LEE L. REV. 1057, 1084 (1980).

39. 146 Cal. Rptr. 103 (1979), *aff'd* 450 U.S. 639 (1981). (81 Cal. App. 3d 844 has omitted the text of the case).

40. *Id.* at 110.

41. An example of an affirmitive physical invasion would be a condemnation action by the

and "negative" to distinguish when a taking occurs should be inconsequential. Justice Brennan made this point in his dissenting opinion in *San Diego Gas & Elec. Co. v. San Diego.*[42] He stated that governmental encroachment, be it affirmative invasion or negative restraint, constitutes a taking because the impact and effect upon the landowner is the same regardless of the nature of the situation.[43] More often than not, however, the courts are reluctant to find a taking if the interference can only be characterized as a restraint. In practice, therefore, *Penn Central*'s "nature of the governmental action" factor has been heavily skewed toward so called affirmative governmental action, i.e., eminent-domain takings.

2. *To what extent has value been diminished*

The second factor of *Penn Central* is a restatement of the diminution in value theory announced in *Mahon*—a taking occurs when the regulation results in an unduly harsh impact upon a landowner's property value. Recently the Supreme Court noted that a land ordinance will rarely deprive private land of all its use. The Supreme Court went on to intimate that if any use remains in the land at all, no taking has occurred.[44] If this reasoning were taken literally, a landowner could never be compensated for a taking. A later case, however, casts doubt on this line of analysis. Justice Brennan, joined by Justices Stewart, Marshall, and Powell, stated in the dissenting opinion[45] to *San Diego Gas & Elec.:*

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government for a public use (e.g., taking property to build a public highway). Similarly, land which is subsequently damaged by a public use or improvement of land would be an affirmative physical invasion (e.g., flooding of land due to the construction of a highway embankment without provisions for adequate drainage).

42. 450 U.S. at 639.

43. Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion or property. From the property owner's point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.

San Diego, 450 U.S. at 652. *See also,* Olson, *The Role of "Fairness" in Establishing a Constitutional Theory of Taking,* 3 THE URBAN LAW. 440 (1971).

44. Agins v. Tiburon, 447 U.S. 255, 259 n.6 (1980): The California Supreme Court found that "[t]he terms of the ordinance permit construction of one to five residence on the appellants' 5-acre tract. The court therefore rejected the contention that the ordinance prevents all use of the land."

45. Justice Rehnquist stated in his concurring opinion in *San Diego* that he "would have little difficulty in agreeing" with the dissenting opinion of Justice Brennan if there had been no ripeness question in the case. *San Diego,* 450 U.S. at 643-35. Justice Rehnquist's vote would have made the dissent the majority opinion.

> It would be a very curious and unsatisfactory result if . . . it shall be held that if government refrains from the absolute conversion of real property to the uses of the public it can destroy its value, entirely, can inflict irreparable and permanent injury to any extent. . . .[46]
> . . . It is only logical, then, that government action . . . can be a "taking," . . . where the effects [of the action] completely deprive the owner of all or most of his interest in the property.[47]

It would appear that *Penn Central*'s second factor is still one of degree.[48]

3. To what extent have investment-backed expectations been diminished

The focus of *Penn Central*'s third factor is on interference with reasonable expectations—specifically, "distinct investment-backed expectations." However, as with diminution in value, the majority in *Penn Central* failed to define what an "investment-backed expectation" is. One year later, the Supreme Court again used the term in *Andrus v. Allard,*[49] but again failed to define the term. Soon after *Allard* the Supreme Court reformulated the language of *Penn Central* by replacing "distinct investment-backed expectation" with "an owner['s] economically viable use of his land."[50] Some courts apply the Supreme Court's language by requiring a total absence of "economically viable use."[51] Landowners rarely meet this difficult requirement because most land normally has varied uses.

4. Summary

Penn Central is a burdensome standard for landowners. The burden of proof on the landowner to show a diminution in value or a loss of investment-backed expectations requires proof of absolute or near-absolute appropriation and dispossession. The bottom line is that the *Penn Central* standard is no standard at all.

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46. *Id.* at 651 (quoting Pumpelly v. Green Bay Co., 13 Wall. 166, 177-78 (1972)).

47. *Id.* 633.

48. The "degree," however, has not been precisely defined by the Supreme Court, so the Court relies on an "ad hoc, factual inquiry" of previous decisions in takings cases. It should not be concluded that diminution of value is an irrelevant factor in takings cases. Despite the *Agins* language, courts still seek to determine whether the general welfare advanced by a particular land use regulation is proportional to the landowner's loss of all or substantially all the value of his land.

49. 444 U.S. 51, 61 n.21 (1979).

50. *Agins,* 447 U.S. at 260.

51. *E.g.,* Oceanic Cal., Inc. v. City of San Jose, 497 F. Supp. 962, 973 (N.D. Cal. 1980) (no taking found where some economic use of land remains).

III. Using Commerce Clause Analysis In Taking Situations

Einstein is said to have remarked that "everything should be made as simple as possible, but not simpler."[52] The simplest means for developing an adequate test is to employ a test (or its analysis) that has already proven effective. As an alternative to the current balancing test, this comment suggests that courts faced with regulatory takings claims should use the analysis developed by the Supreme Court when addressing dormant commerce clause claims. This comment proposes an adoption of the dormant commerce clause analysis developed by the Supreme Court in *Pike v. Bruce Church Inc.*[53]

A. *The Definition of the Dormant Commerce Clause*

The United States Constitution gives Congress the power to regulate commerce "among the several States."[54] The Supreme Court's decisions have interpreted this power to mean that Congress has power to regulate any activity which affects interstate commerce, including many intrastate activities. Thus, Congress has broad powers over commerce and uses these powers regularly to protect the general public from harm. However, the Constitution does not say what the states may or may not do in the absence of congressional action.[55] Fortunately, the inclinations which have guided the Supreme Court's decisions occasionally surface in its opinions. The Supreme Court's long line of cases indicate that the general proposition of the dormant commerce clause is that in the absence of Congressional action, the states are free to regulate as long as the regulation does not unduly burden interstate commerce. If state regulation unduly burdens interstate commerce, "the dormant commerce clause" steps in and bars the state action which has unduly burdened the interstate commerce. It was this power which the Supreme Court invoked in *Pike.* Subsequent cases have merely built on the *Pike* analysis.

B. *The* Pike *balancing test*

In *Pike* the Supreme Court dealt with an Arizona statute which required that all Arizona cantaloupes be packed in Arizona. Church, an Arizona cantaloupe grower, transported his melons to nearby California facilities. When the melons were packed in California, they were

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52. Gayler, How to Break the Momentum of the Nuclear Arms Race, N.Y. Times, Apr. 25, 1982, §6 at 49.

53. 397 U.S. 137 (1970).

54. U.S. Const. art. I § 8, cl. 3.

55. H.P. Hood & Sons v. Dumond, 336 U.S. 525, 534-35 (1949).

not identified as Arizona grown. The State's purpose for the statute was to enhance the reputation of Arizona's cantaloupes by prohibiting deceptive packaging. The Supreme Court found the State interest in enhancing its reputation was legitimate; however, the State's interest was outweighed by the natural interest in unencumbered commerce. "[T]he Courts have viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal."[56] From this holding, the Supreme Court formulated a three prong test: 1) is there a legitimate state interest; 2) is the regulation rationally related to a legitimate end; and 3) is the burden on interstate commerce incidental?[57] Concise in its requirements, the *Pike* test is used without hesitation by the courts.[58]

C. *Similarities Between Claims Requiring Dormant Commerce Clause Scrutiny and Regulatory Takings Claims*

Use of dormant commerce clause analysis in regulatory takings situations may appear novel. Upon closer examination, however, some similarities between claims requiring dormant commerce clause scrutiny and claims which invite traditional regulatory taking analysis are apparent. First, in both situations, the objective of government is to protect the general public.[59] Second, the power to regulate commerce and the power to regulate land use are constitutionally re-

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56. *Pike* 397 U.S. at 145.

57. *Id.* at 142. Justice Stewart stated for a unanimous Court the gerneral rule in commerce clause cases: "Where the statute regulates evenhandedly to effectuate a legitmate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree."

58. This, no doubt, is because the *Pike* test reflects the Supreme Court's attempt in previous cases to balance the interests of the parties, the states and the federal government. With *Pike,* the Court progressed beyond Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How.) 299 (1851). The "direct-indirect" distinction, which was often a mechanical distinction, gave way to a more subtle balancing turning upon the weighing of relevant circumstances. *Pike* reflects both *Southern Pacific* and *Barnwell's* insistence on greater judical scrutiny. Finally, *Pike* alludes to Justice Cardozo's opinion in *Baldwin v. G.A.F. Seelig, Inc.,* 294 U.S. 511 (1935), when he addressed the issue of protectionism. Justice Cardozo said that the distinction made between direct and indirect burdens is "irrelevant when the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition between the states." 294 U.S. 511 at 522. *Pike* is a succinct summary of the dormant commerce clause cases to date.

59. Stern, *The Commerce Clause and the National Economy, 1933-1946,* 59 HARV. L. REV. 645, 947 (1946); Feiler, *Zoning: A Guide to Judical Review,* 47 J. URB. L. 319 (1969).

stricted—government's power to regulate is tempered with a corresponding concern for individual rights.[60] And third, both dormant commerce clause and regulatory taking analysis use the following standards to measure the constitutionality of state action: 1) Is the government regulation based upon a legitimate state interest; 2) is there a rational relation between this interest and the regulation; and 3) do the benefits from the regulation outweigh the burden imposed on individual interests?[61]

1. The statutory objective of both the dormant commerce clause and the police power is to protect the general public

The ultimate objective of both the commerce clause and police power (of which regulatory taking is a part) is protection of the public. Regulation under the commerce clause protects the national interest,[62] while police power regulation protects local interests.[63] While these observations might seem self-evident, they are nonetheless useful as a point of departure for any evaluation of governmental interference with private rights. A loss of focus on the real objective of both powers hampers dormant commerce clause and regulatory taking analysis alike.

2. Constitutional restrictions bar the state's power to regulate

The pivotal question in dormant commerce clause analysis is whether a state can regulate some activity in interstate commerce when Congress has not spoken to the issue. In *Wilson v. Black Bird Creek*

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60. B. SCHWARTZ, CONSTITUTIONAL LAW: A TEXTBOOK, 125 (2d. ed. 1979); Stoebuck, *Police Power, Takings, and Due Process,* 37 WASH & LEE L. REV. 1057 (1980).

61. *Pike,* 397 U.S. at 137; Feiler, *supra* note 59, at 319. Admitedly, differences between these two distinct constitutionally granted powers do exist. First, dormant commerce clause raises federalism questions. Regulatory taking concerns only individual rights. Second, the language of the dormant commerce clause is implicit—what can the state regulate when Congress has not acted—whereas the language of the taking clause is explicit " . . . nor shall private property be taken for public use, without just compensation" (U.S. CONST. amend. V). Finally, unlike regulatory taking analysis, the dormant commerce clause analysis includes defined exceptions: Congressional consent, preemption, and market participant. These differences, however, are incidental and do not defeat application of dormant commerce clause analysis in taking situations.

62. Cooley v. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How.) 299, 319 (1851). "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

63. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962), citing Lawton v. Steele, 152 U.S. 133, 137 (1894): "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference . . . ." Futher, "The ordinance in question was passed as a safety measure, and the town is attempting to uphold it on that basis." 369 U.S. at 595.

Marsh Co.,[64] the Supreme Court held that a state may regulate commerce in areas where Congress has not exercised its power as long as the regulation does not conflict with the implicit power of the commerce clause. A regulation does not conflict with the commerce clause when it furthers interests of health and welfare specific to the state, i.e., when the state has a legitimate purpose for the regulation.[65] However, the Supreme Court will not accept at face value a state's contention that it is acting for these purposes. Courts may examine evidence to determine whether a state's purported interest is real and substantial enough to justify police-power regulation.[66] Even though a presumption of validity is given to the state action, this presumption can be overcome by a clear showing that the national interest outweighs any state objectives.[67]

In comparison, when a state regulation limits use of private land, the spectre of regulatory taking tempers state action much like the shadow of the dormant commerce clause on unrestricted state regulation of commerce. Two issues arise when a state or local government exercises its police powers to regulate land use. The first question is whether the regulation has a discernable tendency to serve the public health, safety, morals, or welfare?[68] The second question is whether the regulation represents a reasonable exercise of police power? That is, do the means the local government has chosen to regulate the uses of private land fit the stated ends? Similar questions are asked when a state is challenged with a violation of the dormant commerce clause.

Thus, the pivotal question underlying any state land use regulation is whether general welfare demands that certain uses of the land be prohibited.[69] Justice Harlan stated in *Mugler* that courts will not accept the constitutional validity of a regulatory measure if they are satisfied that "its real object is not to protect the community or to promote the general well being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of

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64. 27 U.S. (2 Pet.) 245 (1829).

65. Southern Carolina State Highway Dept. v. Barnwell Brothers, Inc., 303 U.S. 177 (1938).

66. *See,* Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981).

67. Southern Pacific Co. v. Arizonia, 325 U.S. 761 (1945). The Arizona Train Limit Law imposed restrictions on the number of cars permitted on any train operating within the state. Arizona sued Southern Pacific, an interstate carrier, for violation of the statute. Southern Pacific defended on the grounds that the statute unconstitutionally burdened interstate commerce. The trial court made extensive findings of fact and concluded that any possible safety benefits of the law were outweighed by increased hazards. The law imposed unconsitituional burdens on interstate commerce and was void.

68. Anderson, *supra*, note 20 at § 2.19 at 80.

69. *E.g.,* Mugler v. Kansas, 123 U.S. 623 (1887); Villiage of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Goldblatt, 369 U.S. at 590.

law."[70] Courts may examine evidence to determine whether the state's interest is real and substantial. Even though today's courts tend to reject Harlan's search for legislative motive,[71] they still claim judical responsibility for assessing the reasonableness of the effect of a regulatory measure.[72]

3. Standards to measure the constitutionality of state action

The *Pike* test is a balancing test skewed toward the legislature. The problems with the regulatory takings test[73] could be remedied if the Supreme Court would employ the *Pike* test in regulatory takings situations.

The three-prong test of *Pike* can be restated to reflect regulatory taking issues as follows: 1) does the taking of private property in this instance advance a legitimate state objective; 2) is the land use regulation related to the legitimate state objective; and 3) is the regulatory burden on the landowner disproportionately great compared to the burden the municipality would bear by not regulating the landowner's use?

a. *A legitimate state objective*

The first prong of the *Pike* analysis as applied in the regulatory takings context asks whether the taking of private property advances a legitimate state objective. "Legitimate-objective" issues in the land-use context ask whether a regulation is valid insofar as it affects a particular piece of land?[74] Rather than challenge the decision to regulate, the landowner challenges the specific application of a particular statute or regulation to his land.

In *Nectow v. City of Cambridge,*[75] the Supreme Court invalidated a residential zoning classification as it applied to a parcel of land.[76]

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70. *Mugler* 123 U.S. at 669.

71. *E.g.,* Kissinger v. City of Los Angeles, 161 Cal. App. 2d 454, 464, 327 P.2d 10, 16 (1958) " . . . [T]he motives which influence a legislative body in passing an ordinance which is within its power to pass may not be inquired into . . . ."

72. *See e.g.,* Gabe Collins Realty, Inc. v. Margate City, 112 N.J. Super. 341, 271 A.2d 430, 432-33 (1970).

73. *See,* nn. 32-53 and accompanying text.

74. Feiler, *supra* note 59, at 326-34. A second inquiry would be whether the regulation as a whole is invalid. This inquiry involves both equal protection and substantive due process questions. Because this comment has not dealt with these problems, the inquiry will not be explored futher. For a detailed discussion on equal protection and substantive due process. *Id.*

75. 277 U.S. 183 (1929).

76. When the zoning ordinance was enacted, the plantiff owned a tract of land containing 140,000 square feet. The parcel of land at issue consisted of 29,000 square feet. This land was zoned residental while all the land around it was industrial. Because of the zoning, a purchaser refused to comply with his contract to buy the land. *Id.* at 186-87. *Compare,* Grand Trunk Western R. Co. v. Detroit, 326 Mich. 387, 40 N.W.2d 195 (1949) (a zoning restriction limited a

The validity of the zoning ordinance was not challenged, but the ordinance's application to a particular portion of land was. The ordinance was held invalid based on a determination that the land was unsuited for residential use because of its industrial surroundings. The *Nectow* majority held that the regulations impact on the landowner was not inspired by a desire to benefit the public health, safety, morals, or general welfare.[77] The Court in *Nectow* found that the "necessary basis" for the regulation was wanting.[78]

Thus, a zoning regulation can be invalidated because its effect on specific land has severely reduced the land's use value while providing marginal benefit to the community. Such a regulation furthers no legitimate municiple interest because it makes little or no contribution to the public health, safety, morals, or general welfare.

A comparable claim to *Nectow* is the claim that the landowner's proposed use bears a direct relation to the general welfare but the municipality's regulation does not. Typically, this claim is raised by instutional landowners who wish to use their property for schools, churches, hospitals or other charitable uses, but are hindered by the municipality's exclusion of the use.[79]

This claim is alluded to in *Village of Euclid v. Ambler Realty Co.*[80] "It is not meant by this however [in sustaining the zoning restriction], to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way."[81] Albeit this claim deals mostly with recognized public service institutions, it is no less applicable to private landowners who show a substantial relation between their proposed use and a benefit to society.[82]

b. *A rational relation between the state objective and the regulation*

The second prong of the reformulated *Pike* test asks whether there exists a substantial relation between a state's objective and the means chosen to achieve that objective. If a regulatory objective is valid on its

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district 95 percent developed for industrial and other nonresidential uses to multiple-family dwellings).

77. *Nectow*, 277 U.S. at 187-88.

78. *Id.* at 189.

79. *E.g.*, Andrews v. Board of Adjustment of the Township of Ocean, 30 N.J. 245, 152 A.2d 580 (1959) (finding a need for parochial schools in the community and stating that the education of children directly futhers the general welfare).

80. 272 U.S. 365, 390 (1926).

81. *Id.*

82. *E.g.*, National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1966) (the regulation specifying a minimum lot size were held invalid in view of individuals living outside the community who wanted to build homes on these lots and immigrate into the community).

face—within the police power—and the regulation furthers the state objective, it will be held valid. But, if the regulation only slightly serves the objective, a court may disapprove the regulation even if it is valid on its face. The Illinois courts, which process a large number of regulatory-zoning cases,[83] have recognized the importance of this distinction in the takings context. These courts frequently hold that a land-use ordinance "must have a real substantial relation to the public health, safety, morals or general welfare. If the gain to the public is slight and the loss to the individual property owner is substantial, the regulation is not a proper exercise of the police power and is consequently invalid."[84] Stated succinctly, a land-use regulation, in order to be valid, must bear some relation to a legitimate state objective, and cannot be sustained unless it bears such a relation.

c. *Does the incidental burden rest with the state or the landowner?*

The final prong of the reformulated *Pike* test considers whether the landowner's burden is disproportionately great compared to the burden on the municipality. Regulations imposing severe limitations on private land have been upheld when they substantially advanced a public interest lying neatly within the police power.

In *Miller v. Schoene,*[85] a Virginia statute requiried the destruction of ornamental red cedar trees that were or could be the source of a communicable plant disease called "cedar rust." The disease destroyed the fruit and foliage of apple trees without affecting the cedars. The cedar trees, unlike apple trees, were not cultivated commercially on any substantial scale; their value was shown to be small compared to that of the state's apple orchards. The Supreme Court held that the cedar tree owner's burden was incidental compared to the burden on the state.[86] The Supreme Court held that "[t]he only practicable method of controlling the disease" was the destruction of the trees.[87] In the view of the Court, there existed only two alternatives—destruction of the cedars or destruction of the apple orchards by cedar rust. However, had the treatment been available, a less burdensome solution to the problem in

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83. Anderson, *supra* note 20, at 81.

84. Langguth v. Village of Mount Prospect, 5 Ill. 2d 49, 54, 124 N.E.2d 879, 881 (1955). *See also,* containing similar statements: Tillitson v. Urbana, 29 Ill. 2d 22, 193 N.E.2d 1 (1963); Franz v. Morton Grove, 28 Ill.2d 246, 190 N.E.2d 790 (1963); Weitling v. Du Page, 26 Ill. 2d 196, 186 N.E.2d 291 (1962); Gregory v. Wheaton, 23 Ill. 2d 402, 178 N.E.2d 358 (1961). *Compare,* San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981).

85. 276 U.S. 272 (1928).

86. No compensation was allowed by the statute for the value of the trees standing or for the decrease in the market value of the cedar tree owner's land. *Id.* at 277.

87. *Schoene,* 276 U.S. at 278.

Schoene would have simply been to require the state to spray for cedar rust. Both alternatives (destruction of the trees and spraying the trees) satisfy the same objective; however, requiring the state to spray would have relieved cedar owners of a heavy economic burden. The state, on the other hand, could have spread the cost of spraying among many people.

(1). Less burdensome alternatives are a means of determining who carries the burden. The theory of less burdensome alternatives is equated most often with a dormant commerce clause case decided in 1951: *Dean Milk Co. v. Madison.*[88] However, even before *Dean Milk,* the Supreme Court of New Hampshire, in 1943, used a less-burdensome-alternative test in the regulatory takings context.

In *Willis v. Wilkins,*[89] the New Hampshire court held that a regulation prohibiting bathing and swimming in a lake constituted an unreasonable impairment of riparian owners' right to a benefical use of the lake. The town of Pembroke, members of the Board of Health, and members of the Board of Water Commissioners alleged the town's public water supply, obtained from the lake, was in danger of contamination. They requested an amendment to the existing regulations to prohibit any bathing or swimming in any part of the lake.

After the court reviewed the public-health objectives it found that prohibiting bathing and swimming was not the only antipollution method available. There was evidence that lowering the intake of the water system of the lake to a depth of twenty feet would be a near-perfect safeguard against summer pollution. Chlorination would also render the water practically sterile. Both methods were shown to be moderate in cost.

Plantiffs then offered evidence that the market value of their land would be reduced from fifty to seventy-five percent if the regulations were amended. After balancing the state's objective against the regulation's restrictive effect, the New Hampshire court decided that the additional public cost of lowering the depth of the water at the intake of the lake or of chlorinating the water was slight in comparision to the riparian owner's private loss.

Thus, the less-burdensome-alternative theory suggests that whenever the reasonableness and fairness of a regulation are at issue, the availability or unavailability of alternative methods is germane. Justice Frankfurter, in *Shelton v. Tucker*[90] stated, "[t]he issue remains, whether in the light of the particular kind of restriction upon individual

88. 340 U.S. 349 (1951).
89. 92 N.H. 400, 32 A.2d 321 (1943).
90. 364 U.S. 479 (1960) (dissenting opinion).

liberty which a regulation entails, [is it] reasonable for a legislature to choose that form of regulation rather than others less restrictive."[91]

(2). Less-burdensome-alternatives analysis refines the balancing test. Using the less-burdensome-alternative approach does not deprive the state of its regulatory objective. It simply reaches the objective without affecting the private individual to the same extent as would the regulation in controversy.

Before deciding whether the challenged regulation is so onerous that it constitutes a taking, courts should test the regulation under the less-burdensome-alternative principle. In *Goldbatt,* Justice Clark pointed out two separate tests for measuring a regulation's validity. First, a regulation "cannot be so onerous as to constitute a taking;"[92] and second, a regulation must be "reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[93] The second test implies at least a less-burdensome-alternative standard.

In addition, the courts must decide whether the less burdensome alternative is equally effective. Usually the alternative is less burdensome on the landowner but more burdensome for the municipality. When this is the case, the courts revert to a balancing test and value judgment as to where the burden should rest.

When the less-burdensome-alternative test fails to demonstrate that a satisfactory alternative is available, the courts in effect have balanced the governmental purpose with the interests affected and have found those interests lacking. Consistent application of the less-burdensome-alternative principle would greatly assist sound balancing by sharpening the courts' awareness of the facts and the conflicting interests.[94]

V. CONCLUSION

Dealing with regulatory-takings issues has proven troublesome. Traditional takings tests and the present balancing test found in *Penn Central* have done nothing to alleviate the problems which arise when dealing with this constitutional doctrine. The numerous problems created by urbanization demand that the courts address the takings problem and formulate a workable test. Municipalities and landowners need to know what constitutes a valid regulation or an unconstitutional

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91. *Id.* at 494.

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

93. *Id.* at 595 (quoting Lawton v. Steele, 152 U.S. 133, 137 (1894)).

94. *See generally,* Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process,* 80 HARV. L. REV. 1463 (1967).

regulatory taking. By adopting dormant commerce clause analysis, the courts have at their disposal an established and respected test. *Pike*'s three standards for measuring the constitutionality of state action equally applies in regulatory takings cases because it asks three fundamental questions: Is there a legitimate state objective in regulating; is the regulation rationally related to the state's objective; and is the burden of the regulation incidental? These standards provide the courts with a guideline which leads to clear and consistent decisions. The adoption of dormant commerce clause analysis in regulatory takings cases will enable courts to easily and efficiently deal with these issues.

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