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Record Group/Collection: George H.W. Bush Presidential Records
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Series: Liberman, Lee S., Files
Subseries: Judicial Candidate Files

OA/ID Number: 45310
Folder ID Number: 45310-011

Folder Title:
Roberts, John G., Jr. [1]

Stack:	Row:	Section:	Shelf:	Position:
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Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Resume	Resume of John G. Roberts, Jr. (redaction of home address and phone number) (1 pp.)	n.d.	(b)(6)	

Collection:

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Liberman, Lee S.
Subseries: Judicial Candidate Files
WHORM Cat.:
File Location: Roberts, John G., Jr. [1]

Date Closed: 9/17/2004 FOIA/SYS Case #: 1998-0205-F Re-review Case #: P-2/P-5 Review Case #:	OA/ID Number: 45310-011
MR Case #: MR Disposition: Disposition Date:	Appeal Case #: Appeal Disposition: Disposition Date:

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P-1 National Security Classified Information [(a)(1) of the PRA]
 P-2 Relating to the appointment to Federal office [(a)(2) of the PRA]
 P-3 Release would violate a Federal statute [(a)(3) of the PRA]
 P-4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
 P-5 Release would disclose confidential advice between the President and his advisors, or between such advisors [(a)(5) of the PRA]
 P-6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Removed as a personal record misfile.

Freedom of Information Act - [5 U.S.C. 552(b)]

(b)(1) National security classified information [(b)(1) of the FOIA]
 (b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
 (b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
 (b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
 (b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
 (b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
 (b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
 (b)(9) Release would disclose geological or geophysical information

John G. Roberts, Jr.

(b)(6)

Principal Deputy
Solicitor General
Department of Justice
Room 5141
Washington, D.C. 20530
(202) 514-2206



Experience

1989-Present: Principal Deputy Solicitor General,
U.S. Department of Justice.

1988-1989: Partner, Hogan & Hartson.

1986-1987: Associate, Hogan & Hartson.

1982-1986: Associate Counsel to the President.

1981-1982: Special Assistant to the Attorney General,
William French Smith.

1980-1981: Law Clerk to Justice William H. Rehnquist,
United States Supreme Court.

1979-1980: Law Clerk to Judge Henry J. Friendly,
United States Court of Appeals
for the Second Circuit.

Bar membership: Supreme Court of the United States,
United States Court of Appeals for the
District of Columbia, Fifth, Ninth, and
Federal Circuits, United States District
Court for the District of Columbia,
United States Claims Court, District of
Columbia Court of Appeals.

Education

Legal: Harvard Law School, J.D., magna cum laude,
1979.

Editor, Harvard Law Review, volumes 91-92,
Managing Editor, volume 92.

College: Harvard College. Entered 1973 with Sophomore
standing. Graduated A.B. summa cum laude in
History, 1976. Honors thesis on British
domestic politics, 1900-1914.

College:
(cont'd)

Election to Phi Beta Kappa, 1976.

Bowdoin Essay Prize, 1976, for "the best dissertation submitted in the English language."

John Harvard Scholarship, 1974, 1975, 1976, "in recognition of academic achievement of the highest distinction."

Detur Prize, 1976, based on cumulative academic record.

William Scott Ferguson Prize, 1974, for "the outstanding essay submitted by a Sophomore concentrating in History."

Edwards Whitaker Scholarship, 1974, awarded to first-year students who "show the most outstanding scholastic ability and intellectual promise as indicated by distinction in studies and general achievement."

Preparatory:

LaLumiere School, LaPorte, Indiana. Graduated 1973 first in class. Varsity football (captain) and wrestling. National Council of Teachers of English Award, 1973. National Merit Scholarship, 1973.

Membership

American Law Institute (elected 1991)
Supreme Court Historical Society
American Judicature Society
Executive Committee, D.C. Lawyers for
Bush/Quayle, 1988
Republican National Lawyers Association

Oral Arguments

U.S. Supreme Court

1. United States v. Halper, 490 U.S. 435 (1989) (appointed by the Court to argue on behalf of Halper).
2. ARCO v. USA Petroleum, 110 S. Ct. 1884 (1990) (argued as amicus curiae).
3. Wilder v. Virginia Hospital Ass'n, 110 S. Ct. 2510 (1990) (argued as amicus curiae).
4. United States v. Kokinda, 110 S. Ct. 3115 (1990).
5. Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990).
6. Irwin v. Veterans Administration, 111 S. Ct. 453 (1990).
7. Grogan v. Garner, 111 S. Ct. 654 (1991) (argued as amicus curiae).
8. Cottage Savings Ass'n v. Commissioner of Internal Revenue, 111 S. Ct. 1503 (1991).
9. United States v. Centennial Savings Bank, 111 S. Ct. 1519 (1991).
10. Florida v. Jimeno, 111 S. Ct. 1801 (1991) (argued as amicus curiae).
11. Freytag v. Commissioner of Internal Revenue, 111 S. Ct. 2631 (1991).

U.S. Court of Appeals for the District of Columbia Circuit

1. Horn & Hardart v. National Rail Passenger Corp., 843 F.2d 564 (D.C. Cir. 1988).
2. City of Rochester v. Environmental Protection Agency, No. 90-5011 (argued October 29, 1990) (pending).

U.S. District Court for the District of Columbia

1. CC Distributors, Inc. v. United States (September 1989, D.D.C., Lamberth, J.) (unreported)

Other legal:

- misc (substantial) trial proceedings @ Hogan
- 30 S.Ct. briefs authored @ Hogan
- 20-25 S Ct/app. briefs authored @ SG's clerk

John Roberts

Hogan & Hartson

George Beall (Maryland)
Joe Bell (represents Citizens Energy--Joseph Kennedy's company)
Sandy Berger (Clinton)
~~Bill Bowman~~ (Specter)
~~Ty Cobb~~ (Rep. Larry Winn, Larry Pressler)
Frank Fahrenkopf
Tony Harrington (Gen. Counsel, DNC, 1981-1985)
~~Mike House~~ (Heflin)
Jack Keeny (Babbitt)
Sherwin Markman (LBJ White House)
E. Barrett Prettyman, Jr.
Paul Rogers (Member of Congress, Fla.)
Arthur Rothkopf
Allen Snyder (represents Alliance for Justice)
David Tatel (Carter Civil Rights official, D. of Ed.)
~~Christine Varney~~ (Gen. Counsel, DNC, 1989-)
~~Elliott Minberg~~ (People for the American Way)
Sally Determan (former D.C. Bar President)

Reagan White House

~~Ed Meese~~
Ken Cribb
Fred Fielding
Dick Hauser
Mitch Daniels
Larry Garrett (Sec. Navy)
Tony Dolan
David Waller (Energy)
Deborah Owen (FTC)
B. Oglesby
Fred McClure
Mark Sullivan
Craig Fuller
~~Dana Rohrabacher~~ (Rep. Cal.)
Chris Cox (Rep. Cal.)
Wendell Willkie (Commerce)
Bill Bennett
Bob Kimmitt (Amb. Germany)

Pam Torm / Nancy Kennedy

Smith Justice Department

Ed Schmults (GTE)
Ted Olson
Carol Dinkens
Tex Lezar
Terry Eastland
~~Rex Lee~~
~~Bob McConnell~~
Rich Willard
Brad Reynolds
Chuck Cooper

Hank Habicht (EPA)
Dave Hiller (Gen. Counsel, Chicago Tribune)
Mit Spears
Jay Stephens

Miscellaneous

Mike Chertoff (U.S. Atty, N.J.)
Kelley Welsh (Dep. Counsel, City of Chicago)
Benna Solomon (Dep. Counsel, City of Chicago)
Perry Pendley (Mountain States Legal Foundation)
Eric Brass (Gen. Counsel, WGBH)
David Shapiro (Prof., Harvard)
Charles Fried (Prof., Harvard)
David Strauss (Prof., Chicago)
Richard Lazarus (Prof., Wash. U., St. Louis)
Tom Merrill (Prof., Northwestern)
Bob Kasten (Wisc.)
Ervin Duggan (FCC)
Mike McConnell (Prof., Chicago)
Tom Metzloff (Prof., Duke)
Dave Leebron (Prof., Columbia)
Ken Geller (Biden)

John Reps

Committee contacts already made

Thurmond

Met with Senator and Duke Short, January 27
Mike House talked with Short
Grandmother and parents live in S.C.

*Deliberate
Funding
release*

Hatch

Talked with Mark Disler
Barbara Drake talked with Miller Barker (advised Hatch
will help)

Bent

Simpson

Talked with Mike Tongour and Carl Hampe

Grassley

Meeting scheduled March 4 at 3:30 p.m.
Sam Gerdano talked with staff
Barbara Drake talked with Melissa Patack

Specter

Barbara Drake talked with Pat Meehan
Family from Pennsylvania

Brown

Met with Senator and John Bliss, February 25
John McGovern and Bill Bowman called John Bliss

Biden

Mike House talked to Jeff Peck

Kennedy

Metzenbaum

DeConcini

ASU Law School Dean letter

Leahy

Lester Hyman letter
Mike House talked to Ann Harkins
Marty Morris to call Ellen Lovell

Heflin

Mike House, Sam Gerdano, and John Mackey talked
to Winston Lett
Judge Higginbotham talked to Karen Crkmer

Simon

Dick Phelan

Kohl

D.C. Lawyer May Be Named to Fill Thomas's Seat

By Sandra Torry
Washington Post Staff Writer

President Bush is expected to nominate Deputy Solicitor General John Roberts Jr., a 36-year-old conservative with political credentials going back to the Reagan administration, to fill the vacancy left by Justice Clarence Thomas on the federal appeals bench in the District, according to knowledgeable sources.

Roberts, a former partner at the law firm of Hogan & Hartson, has a reputation as a superb lawyer, according to lawyers who have worked with him, and one described him as a "conservative without a political agenda."

A White House spokesman refused to confirm or deny word of Roberts's

selection, first reported by the Legal Times. Sources said the FBI and the American Bar Association judicial screening panel have begun background checks on Roberts. Roberts also declined to comment.

The U.S. Circuit Court of Appeals in the District is often considered the second most important court in the nation, and its nominees often come in for heavy scrutiny.

Leaders of civil rights groups said last week that they knew little about Roberts. Two lawyers said Roberts's youth—he will turn 37 in January—may be the only issue to spark controversy.

Several young nominees have passed muster in Senate confirmation hearings, including Solicitor General Kenneth Starr, who was 36

when he was nominated to the federal appeals bench in the District, and Michael Luttig, recently sworn in on the 4th U.S. Circuit Court of Appeals at 37.

Roberts, now Starr's top deputy, is a Harvard law graduate who clerked for Chief Justice William H. Rehnquist. In 1981, he went to work for Starr as a special assistant to Attorney General William French Smith.

Former White House Counsel Fred Fielding said he was so impressed with Roberts that he "raided the attorney general's office" and brought Roberts to the Reagan counsel's office, where he remained until going to Hogan & Hartson.

"He is an outstanding lawyer and his appellate experience is far beyond his years," Fielding said.

Roberts "has got every possible ticket punched," one judge said.

While in private practice, Roberts specialized in Supreme Court work. "Without using too many superlatives," said Hogan & Hartson partner Allen Snyder, "John is one of the handful of most brilliant lawyers I have ever met." Snyder said that while Roberts is "clearly a conservative," he is one with whom "you could freely discuss issues even when you disagree."

Roberts's nomination also defuses a longtime battle, in which the D.C. Bar argued that nominees to the court were out-of-towners with no District ties. "He meets the test as a D.C. practitioner," said Paul Friedman, former president of the D.C. Bar.

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Withdrawal/Redaction Sheet

(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
02. Memo with attachment	From John P. Mackey to John Roberts Re: Judicial Nominee (3 pp.)	01/24/92	P-2, P-5	

Collection:

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Liberman, Lee S.
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WHORM Cat.:
File Location: Roberts, John G., Jr. [1]

Open on Expiration of PRA
 (Document Follows)

By N&D (NLGB) on 12/12/2007

Date Closed: 9/17/2004 FOIA/SYS Case #: 1998-0205-F Re-review Case #: P-2/P-5 Review Case #:	OA/ID Number: 45310-011
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U.S. Department of Justice
Office of the Deputy Attorney General

January 24, 1992

TO : John Roberts
Deputy Solicitor General

FROM: John P. Mackey *JPM*
Associate Deputy Attorney General

The list of pro civil rights, voting rights, and labor briefs were most helpful; particularly since some were from your private practice days.

What would also be helpful now is to have you think through the briefs or arguments you were involved with, that might be used against you if opposition develops.

What would be useful, are copies of each brief you believe could be used in anyway against you. Also any particular sections in those briefs that someone could likely focus on in opposition research, or even taken out of context, should be marked for particular attention.

Finally, a question or two on each controversial brief should be developed that you might want to have asked of you by a friendly Senator, (if opposition arises) that you could use to recoup, if needed.

Thanks

cc: Barbara Drake *John Mackey*
Office of the Attorney General

* = Private Practice

Re: TPBCKT3
DC Circuit
per request JPM

Pro-civil rights briefs and arguments:

- * 1. United States v. Halper. Supported double jeopardy claim against the United States.
- 2. Hudson v. McMillian. Supported prisoner's Eighth Amendment claim against state prison officials.
- 3. EEOC v. Aramco. Supported extension of Title VII protection overseas.
- * 4. Arkansas Writers' Project v. Ragland. Supported media First Amendment claim.
- * 5. Washington v. Harper. Supported due process claim on behalf of mentally ill prisoner against state officials.
- * 6. Tenneco Oil v. Kern Oil. First Amendment claim arguing against restrictions on disclosure of information.
- * 7. Group W Cable v. Florida Power. Arguing against claim that a law effected a "taking" of private property. Reply brief in Supreme Court.
- 8. Astoria Federal v. Solimino. Supported plaintiff in a suit under the Age Discrimination in Employment Act.
- 9. International Union, UAW v. Johnson Controls. Supported union challenging fetal protection policies on behalf of women workers.

Pro-voting rights briefs:

- 1. Norfolk v. Collins. Supported black voters' challenge to at-large Norfolk city council.
- 2. Clinton v. Jeffers. Supported black voters' challenge to Arkansas apportionment.
- 3. County of Los Angeles v. Garza. Supported Hispanic voters' challenge to apportionment of Los Angeles County Council.
- 4. Clark v. Roemer. Supported black voters' effort to enforce Section 5 preclearance requirement in judicial elections in Louisiana.
- 5. Mexican American Bar Ass'n v. Texas. Supported Hispanic voters' effort to enforce Section 5 preclearance requirement in judicial elections in Texas.
- 6. United States v. Roemer. Supported Louisiana black voters' contention that Voting Rights Act applied to judicial elections.

7. Houston Lawyers' Ass'n v. Attorney General of Texas;
LULAC v. Attorney General of Texas. Supported Texas black and
Hispanic voters' contention that Voting Rights Act applied to
judicial elections.

8. Presley v. Etowah County; Mack v. Russell County.
Supported Georgia black voters' claim that certain practices were
required to be precleared under Section 5 of the Voting Rights Act.

Pro-labor briefs:

1. Yellow Bus Lines v. Drivers, Chauffeurs and Helpers
Local Union 639. Argued against application of RICO to union
strike activities. (Acting SG.)

2. Delta Air Lines v. Association of Flight Attendants.
Supported union's arbitration demand. (Acting SG.)

3. English v. General Electric. Supported whistleblower
employee's claim for relief for retaliatory discharge.

THE WHITE HOUSE
Office of the Press Secretary

*See
E-12*

For Immediate Release

January 27, 1992

NOMINATIONS SENT TO THE SENATE:

— Edward E. Carnes, of Alabama, to be United States Circuit Judge for the Eleventh Circuit, vice Frank M. Johnson, Jr., retired.

— Sidney A. Fitzwater, of Texas, to be United States Circuit Judge for the Fifth Circuit, vice Thomas Gibbs Gee, retired.

— John G. Roberts, Jr., of Maryland, to be United States Circuit Judge for the District of Columbia Circuit, vice Clarence Thomas, elevated.

— John A. Smietanka, of Michigan, to be United States Circuit Judge for the Sixth Circuit, vice a new position created by Public Law 101-650, approved December 1, 1990.

— Karen J. Williams, of South Carolina, to be United States Circuit Judge for the Fourth Circuit, vice Robert F. Chapman, retired.

— Kenneth R. Carr, of Texas, to be United States District Judge for the Western District of Texas, vice a new position created by Public Law 101-650, approved December 1, 1990.

— James W. Jackson, of Ohio, to be United States District Judge for the Northern District of Ohio, vice Richard B. McQuade, Jr., resigned.

— Terral R. Smith, of Texas, to be United States District Judge for the Western District of Texas, vice a new position created by Public Law 101-650, approved December 1, 1990.

— Jack W. Selden, of Alabama, to be United States Attorney for the Northern District of Alabama for the term of four years, vice Frank W. Donaldson, term expired.

— Shirley D. Peterson, of Maryland, to be Commissioner of Internal Revenue, vice Fred T. Goldberg, Jr., resigned.

— Fred T. Goldberg, Jr., of Missouri, to be an Assistant Secretary of the Treasury, vice Kenneth W. Gideon, resigned.

— The following named persons to be Members of the Board of Directors of the State Justice Institute for terms expiring September 17, 1994:

David Brock, of New Hampshire, vice Clement Clay Torbert, Jr., term expired.

Vivi L. Dilweg, of Wisconsin.
(Reappointment)

Carlos R. Garza, of Texas, vice Daniel John Meador, term expired.

— The following named persons to be Members of the Board of Regents of the Uniformed Services University of the Health Sciences for the terms indicated:

John E. Connolly, of California, for a term expiring June 20, 1997, vice Sam A. Nixon, term expired.

William D. Skelton, of Georgia, for a term expiring June 20, 1997, vice Mario Efrain Ramirez, resigned.

THE WHITE HOUSE
Office of the Press Secretary

For Immediate Release

January 24, 1992

The President has announced his intention to nominate John G. Roberts, Jr., of Maryland, to be United States Circuit Judge for the District of Columbia. He would succeed Clarence Thomas.

Since 1989, Mr. Roberts has served as Principal Deputy Solicitor General at the United States Department of Justice in Washington, D.C. Prior to this, he served with the law firm of Hogan & Hartson as a Partner, 1987-1989; and as an Associate, 1986-1987. From 1982-1986, Mr. Roberts served as an Associate Counsel to the President in the White House Counsel's Office.

Mr. Roberts was graduated from Harvard College (A.B., 1976) and Harvard Law School (J.D., 1979). He was born January 27, 1955 in Buffalo, New York. Mr. Roberts resides in Bethesda, Maryland.

#

to fall on a few unfortunate neighboring owners. Moreover, prohibiting the state from protecting property values seems to clash, in spirit although not in letter, with the takings clause. The takings clause prohibits a state, in certain instances, from causing a decline in property values through direct action;¹⁴⁰ to disallow zoning measures protecting property values would in effect require a state to cause a decline through inaction.¹⁴¹

However strong these arguments are, they do not excuse the uncritical approach many state courts have taken to zoning justified as a means of protecting neighboring property values.¹⁴² Such a justification should almost never be accepted in cases involving possible prejudice against racial or economic minorities. In other cases, courts should ascertain the policies underlying the various limits on the zoning power and ensure that these policies are not thwarted. Finally, instead of accepting speculations about property values, courts should insist upon a substantial showing that they will actually be impaired;¹⁴³ otherwise municipal decision-makers considering a land use they simply dislike may too readily infer that prospective buyers also will be repelled and that property values will decline.

III. THE TAKINGS CLAUSE

The police power defines merely a threshold test of the legitimacy of any land use regulation.¹ Although a given measure may be reasonably related to the health, safety, morals, or general welfare of society, it may still violate the "takings clause" of the fifth amendment to the United States Constitution. The fifth amendment provides, in part, that "private property [shall not] be taken for public use, without just compensation."² This pro-

¹⁴⁰ See Part III, pp. 1462-501 *infra*.

¹⁴¹ Indeed, it might be argued that zoning is so pervasive and the granting of variances and zoning amendments is so common that the distinction between governmental action and inaction is particularly tenuous in the zoning area.

¹⁴² See, e.g., *Fischer v. Bedminster Township*, 11 N.J. 194, 93 A.2d 378 (1952); *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 68-69, 192 N.E.2d 74, 76 (1963); *State ex rel. Saveland Park Holding Co. v. Wieland*, 269 Wis. 262, 69 N.W.2d 217, *cert. denied*, 350 U.S. 841 (1955).

¹⁴³ Cf. *Rogers v. Mayor of Atlanta*, 110 Ga. App. 114, 137 S.E.2d 668 (1964) (substantial showing of actual impairment of property values required to justify zoning restrictions on houses of worship); *Board of Zoning Appeals v. Decatur, Ind. Congregation of Jehovah's Witnesses*, 233 Ind. 53, 117 N.E.2d 115 (1954) (same); *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 50 Wash. 2d 378, 312 P.2d 195 (1957) (same).

¹ See Part II, pp. 1443-62 *supra*.

² The protection granted by the takings clause is now applicable to the states through the fourteenth amendment. *Chicago, B. & Q.R.R. v. City of Chicago*, 166 U.S. 226, 235-41 (1897).

vision, together with similar provisions in state constitutions,³ has come increasingly to determine the limits to public regulation of private property.

While the takings clause requires the government to compensate landowners in instances of actual physical acquisition—or eminent domain—the clause has also come to safeguard property holders against regulations which fall short of the formal exercise of the eminent domain power. Typically, if a court concludes that a particular regulation violates the takings clause, it will strike the regulation and leave the state with the option of either abandoning its project or paying the required compensation.⁴ The application of the takings clause to such reg-

³ See, e.g., *Imb. Constr. art. I, § 21*; *N.Y. Constr. art. I, § 7*; *Or. Constr. art. I, § 18*; *S.C. Constr. art. I, § 13*. The only state whose constitution has no explicit takings clause is North Carolina.

Many state constitutions provide that property shall not be taken or damaged without compensation. See, e.g., *Cal. Constr. art. I, § 14*; *Ga. Constr. art. I, § 3*; *W. Va. Constr. art. III, § 9*. Explicit constitutional safeguards against "damage" to property first appeared in the Illinois Constitution in 1870. *Ill. Constr. of 1870, art. II, § 13* (currently at *Ill. Constr. art. I, § 15*). The introduction of such "damage clauses" was apparently a response to perceived inequities resulting from narrow judicial interpretations of the takings clause at a time of increasing public intrusion on private property. See Note, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. Chi. L. Rev. 854, 866-67 (1973). While state damage clauses may potentially offer greater protection to private property than either the federal clause or traditional state takings clauses, compare *Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540 (1964) (recovery allowed for damages caused by airport noise, without requirement of direct overflight, on basis of "taking or damaging" clause), *cert. denied*, 379 U.S. 989 (1965), with *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962) (no recovery for airport noise damage absent direct overflight), *cert. denied*, 371 U.S. 955 (1963), the basic analytic problem of when a property interest has been impinged upon by government to an extent requiring compensation remains much the same. Compare *Guth v. Par-3 Golf Club, Inc.*, 238 Ga. 43, 231 S.E.2d 55 (1976), with *Western Int'l Hotels v. Tahoe Regional Planning Agency*, 387 F. Supp. 429 (D. Nev. 1975), *modified*, 558 F.2d 928 (9th Cir. 1977); compare *Agricultural Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 546 P.2d 687, 128 Cal. Rptr. 183 (1976), *appeal dismissed sub nom. Pandol & Sons v. Agricultural Labor Relations Bd.*, 429 U.S. 802 (1976), with *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). For a discussion of possible differences in the scope of protection, see 2A P. NICHOLAS, *EMINENT DOMAIN* §§ 6.441-45 (3d ed. 1976).

⁴ Costello, "Fair" Compensation and the Accommodation Power: Antidotes for the Taking Imbaise in Land Use Controversies, 75 *COLUM. L. REV.* 1021, 1034-35 (1975). See *Fred F. French Inv. Co. v. City of New York*, 39 N.Y.2d 587, 594-96, 350 N.E.2d 381, 384-86, 385 N.Y.S.2d 5, 8-9 (1976). In "inverse condemnation" actions, however, if a court finds a taking it will not invalidate the regulation but rather will grant the regulated property holder an award of "just compensation" that the regulator must pay. See, e.g., *Eldridge v. City of Palo Alto*, 57 Cal. App. 3d 613, 129 Cal. Rptr. 575 (1976). See generally, Note, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 *STAN. L. REV.* 1439 (1974).

John R. Banks

ulatory takings requires courts to decide what kinds and degrees of intrusions on property are compensable. In this endeavor courts have not been significantly aided by the words of the clause, which are incapable of being given simple, clear-cut meaning. Nowhere does the clause define which interests ought to be safeguarded as "property" from public intrusion, nor does it distinguish those intrusions properly cognizable as "takings."⁵ Indeed the very phrase "just compensation" suggests that the language of the clause must be informed by changing norms of justice.⁶

Perhaps because the text of the takings clause is opaque, decisional law under the clause has been hopelessly confused. Supreme Court judgments in the area form a "crazy-quilt pattern,"⁷ as the Court has expressly eschewed adopting any general principles, electing instead to consider each case on its particular facts.⁸ Lower courts have differed widely in their frameworks for resolving takings challenges,⁹ often combining two or more separate theories within one opinion.¹⁰ The result, not surprisingly, is to impair renewed efforts to develop a fully

⁵ See B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 6 (1977).

⁶ See *United States v. Fuller*, 409 U.S. 458, 490 (1973); *United States v. Commodities Trading Corp.*, 339 U.S. 121, 124 (1950); *United States v. Cors*, 337 U.S. 335, 332 (1949); *United States v. Dickinson*, 331 U.S. 745, 748 (1947).

⁷ Dunham, *Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 Sup. Ct. Rev. 63, 63.

⁸ See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) ("There is no set formula to determine where regulation ends and taking begins"); *United States v. Calves, Inc.*, 344 U.S. 149, 156 (1952); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

⁹ Even a cursory survey of recent case law reveals the lack of any universally accepted mode of deciding takings challenges. In reaching their respective judgments, courts have variously considered the degree of economic loss imposed by the challenged measure, see, e.g., *Trust of Three v. City of Emeryville*, 430 F. Supp. 833, 840 (N.D. Cal. 1977), a balancing of the measure's public benefits against its private harms, see, e.g., *Western Int'l Hotels v. Tahoe Regional Planning Agency*, 387 F. Supp. 429, 436 (D. Nev. 1975), modified, 538 F.2d 928 (9th Cir. 1977), the character of the conduct prohibited by the regulation and its impact on society, see, e.g., *Pope v. City of Atlanta*, 418 F. Supp. 665, 668 (N.D. Ga. 1976), various formulations of fairness concerns, see, e.g., *County of San Diego v. Miller*, 13 Cal. 3d 684, 691, 533 P.2d 139, 143, 119 Cal. Rptr. 491, 495 (1975), the expectations of the aggrieved property holder, see, e.g., *Hotel Comano Springs, Inc. v. Hernandez Colón*, 426 F. Supp. 664, 672 (D.P.R. 1976), and whether a physical intrusion has occurred, see, e.g., *Department of Pub. Works & Bldgs. v. Wilson & Co.*, 67 Ill. 2d 131, 141, 340 N.E.2d 12, 17 (1975).

¹⁰ See, e.g., *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F. Supp. 1369 (D. Md. 1975) (commingling diminution in value and character of use prohibited); *Grimpel Assocs. v. Cohan*, 51 A.D.2d 799, 380 N.Y.S.2d 279 (1976) (commingling diminution in value and balancing).

comprehensive set of criteria for resolving individual claims for just compensation.¹¹

The prevailing confusion in takings law is particularly unsettling in view of the fundamental role the clause plays in modern land use regulation. Property owners increasingly invoke the takings clause to challenge community efforts to address broad social concerns through land use regulation. Local efforts to protect environmental interests, for example, have repeatedly encountered opposition based on the takings clause. In one such case, *Barlett v. Zoning Commission*,¹² a landowner successfully challenged the town's effort to safeguard the ecological balance of tidal marshland. Although similar restrictions applicable to the owner's land were in effect before his purchase, the court nevertheless found that the challenged amendments so restricted the property holder's uses that they constituted a compensable taking.¹³ Similar takings claims prevented a Virginia community from ameliorating housing shortages for low income persons. In *Board of Supervisors v. DeGroff Enterprises, Inc.*,¹⁴ the Virginia Supreme Court struck down a zoning ordinance which would have required major developers to set aside fifteen percent of their new units for low- and moderate-income persons.¹⁵ The takings clause, moreover, is an uneasy companion not only for communities grappling with social problems, but also for individuals seeking to protect their property holdings. In *Turnpike Realty Co. v. Town of Dedham*,¹⁶ the plaintiff was held to have no takings claim against a community which prohibited all development of his previously valuable land.¹⁷ As these examples suggest, the way in which the takings clause is interpreted by zoning boards and courts is a matter of central concern in areas beyond the narrower purview of land use planning. Moreover, the urgency of the takings clause debate generally and the conflicting fashions in which it has been addressed require students of zoning and land use regulation to consider again the salient issues which the clause ineluctably poses.

¹¹ One commentator has remarked that the passing observation by Justice Holmes that takings problems "cannot be disposed of by general propositions," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922), has been followed by "[h]undreds of judges . . . in a parody of *stare decisis* . . . as a complete substitute for serious thought." B. ACKERMAN, *supra* note 5, at 235.

¹² 161 Conn. 24, 282 A.2d 907 (1971).

¹³ *Id.* at 31, 282 A.2d at 910-11.

¹⁴ 214 Va. 235, 198 S.E.2d 600 (1973).

¹⁵ *Id.* at 238, 198 S.E.2d at 602.

¹⁶ 362 Mass. 221, 284 N.E.2d 891 (1972).

¹⁷ *Id.* at 236-37, 284 N.E.2d at 900.

A. Some General Theories of the Takings Clause

1. *Physical Invasion.*—The first comprehensive effort to define which governmental impacts upon property should be compensable takings was the physical invasion test.¹⁸ This "test" was, in fact, a common label given to two slightly differing rules. The narrower formulation required compensation only when the government occupied or appropriated the claimant's land, thereby actually or constructively acquiring title to it.¹⁹ The broader rule, while still a "physical" standard, mandated compensation not only in cases of actual appropriation, but also when the government directly and systematically intruded upon private landholdings.²⁰ Thus, for example, in *Pumpelly v. Green Bay Co.*,²¹ the Supreme Court found that a taking had occurred when a dam, constructed pursuant to state statute, flooded the plaintiff's land.²² More indirect interferences with ownership, such as loss of access to property during construction of a state project²³ or the loss of income due to the prohibition of a certain

¹⁸ Modern courts generally reject this test. See, e.g., Penn. Cent. Transp. Co. v. City of New York, 98 S. Ct. 2646, 2659 n.25 (1978) (rejecting "the proposition that a 'taking' can never occur unless Government has transferred physical control over . . . a parcel"); Arts. Gloves, Inc. v. United States, 420 F.2d 1386, 1391 (Ct. Cl. 1970); R.J. Wider Co. v. United States, 357 F.2d 688, 993 (Ct. Cl. 1966); Todd v. United States, 292 F.2d 841, 845 (Ct. Cl. 1961); Foss v. Maine Turnpike Auth., 309 A.2d 339, 344 (Me. 1973); Cayan v. City of Chitopee, 360 Mass. 606, 609, 277 N.E.2d 116, 118 (1971). Nonetheless, there have been some fairly recent cases apparently relying on concepts of physical invasion. See, e.g., United States v. Central Eureka Mining Co., 357 U.S. 155, 165-66 (1958) (no taking where War Production Board ordered nonessential gold mines to cease operating, since "the Government did not occupy, use, or in any manner take physical possession of the gold mines"); Department of Pub. Works & Bldgs. v. Wilson & Co., 62 Ill. 2d 131, 141, 340 N.E.2d 12, 17 (1975) (requiring "physical disturbance" of highway access for there to be a taking of that property right); Batten v. United States, 306 F.2d 580, 584 (10th Cir. 1962), cert. denied, 371 U.S. 955 (1963); Laycock v. Kenney, 270 F.2d 580, 592 (9th Cir. 1959), cert. denied, 361 U.S. 933 (1960). Indeed, the authors of an influential study recommending returning to the physical invasion test so as to permit a broader scope for the operation of environmental zoning, F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 253 (1973). The test is thus of more than mere historical interest.

¹⁹ See, e.g., Callendar v. Marsh, 18 Mass. (1 Pick.) 417, 429 (1833) (Massachusetts takings clause "has ever been confined . . . to the case of property actually taken and appropriated by the government"); Coates v. New York, 7 Cow. 584, 605 (N.Y. Sup. Ct. 1827) ("no property has . . . been entered upon or taken").

²⁰ See, e.g., Hooker v. New Haven & Northampton Co., 14 Conn. 146 (1841); Goodell v. City of Milwaukee, 5 Wis. 32 (1856).

²¹ 80 U.S. (13 Wall.) 106 (1871).

²² *Id.* at 181-82.

²³ Transportation Co. v. City of Chicago, 99 U.S. 635 (1878).

use,²⁴ did not require compensation because they did not involve actual intrusions on the land or a breaking of the close.²⁵

Though it has been argued that the physical invasion test informed judicial resolutions of land use conflicts from as early as the eighteenth century,²⁶ it was not until the nineteenth century that the test truly came into its own.²⁷ Only with the development of state-supported commercial enterprises—capable of interfering with private property both directly and indirectly—did the need for any sort of "test" for compensable takings arise.²⁸ As the entrepreneurial functions of government grew, so too did the instances of governmental interference with property as well as the forms in which this interference occurred.²⁹ Courts were

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

²⁵ Thus one contemporary treatise on constitutional law concluded that "[i]t seems settled that to entitle the owner to protection under this clause the property must be taken in the physical sense of the word." T. SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 519-20 (1857).

²⁶ See F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 18, at 82-83; TASK FORCE ON LAND USE AND URBAN GROWTH, THE USE OF LAND 100 (1973).

²⁷ M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 71-74 (1977).

²⁸ *Id.* Few conclusions can be drawn concerning the function and application of the takings clause prior to the early nineteenth century, since few cases were decided under the clause, see *id.* at 63-65, and there is a total lack of legislative history surrounding its inclusion within the Bill of Rights, see B. ACKERMAN, *supra* note 5, at 6-8, 192-94; F. BOSSELMAN, D. CALLIES & J. BANTA, *supra* note 18, at 99. While it has been suggested that the clause was intended to prevent the actual seizure of property without recompense, such as occurred during the Revolution, *id.* at 103-04, it has also been prominently argued that the principle requiring the state to pay for property it actually takes was not established until the early nineteenth century. M. HORWITZ, *supra* note 27, at 63-65. Before this period of developing commerce, courts seldom even had to confront the notion of just compensation, since dominant beliefs in natural law and the sanctity of property, see 2 W. BLACKSTONE, COMMENTARIES *2; J. LOCKE, SECOND TREATISE ON CIVIL GOVERNMENT § 25 (1960), made rare the occasions on which the state intruded meaningfully upon individual property. Even if early courts did apply the takings clause to clear cases of the exercise of eminent domain, this would not have presented difficult problems for courts in discerning takings. Not until the development of commerce did more subtle questions of whether or not a taking had occurred arise, requiring the articulation by courts of some test for recognizing compensable takings.

The growth of commerce not only made it necessary to define some test for compensable takings, but also suggested the very terms of the physical invasion test eventually settled upon. Because it requires compensation solely in those instances in which physical intrusion occurred, this test gave developing enterprises extensive freedom to interfere with existing, so-called "static" property forms without having to pay. See generally M. HORWITZ, *supra* note 27, at 31-62; J.W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES 24 (1956).

²⁹ For examples of the government's increasing entrepreneurial role, see

thus increasingly called upon to discern which interferences would trigger the protections of the fifth amendment. The two branches of the physical invasion test were early judicial responses to the challenge presented.

The physical invasion test—in both of its forms—expresses important and enduring conceptions of the proper allocation of entitlements between private property holders and society. On the one hand, by limiting the range of protectable interests to physical dominion, the test opened a path for public regulation of private land use. On the other hand, by insisting on a clearly defined limit on public intrusions, the theory recognized the need for individuals to be able to rely—at least to some extent—on a region of protectable interests in property.³⁰ Finally, the physical invasion theory implicitly acknowledged the particularly acute injury suffered by individuals as a result of *direct* intrusions upon their property, almost as if such intrusions encroached upon the sanctity of the landholder himself.³¹

Even so, the physical invasion test has substantial shortcomings as a sole criterion for judging claims for just compensation. Its practical usefulness is limited by its anachronistic reliance on precommercial conceptions of property, ones which stressed title and dominion while tending to ignore the less tangible prerogatives of ownership such as use and enjoyment. Such conceptions are perhaps well-suited to a farming society in which conflicts among property uses apart from actual physical incursions would not ordinarily arise. By the time the physical invasion test had come to play an important role in property law, however, the logic of its agrarian foundation was inapposite to the commercial setting in which it was applied. Commercial enterprises impose complicated externalities which are susceptible to interference in ways short of physical intrusion; in failing altogether to protect against these interferences, the physical invasion test revealed essential weaknesses as a theory for just compensation cases. The test is still more inappropriate for a modern society in which intrusions of a nonphysical nature are the rule rather than the exception.

Callendar v. Marsh, 18 Mass. (1 Pick.) 417 (1833) (municipal development and improvement of streets); Charles River Bridge v. Warren Bridge, 24 Mass. (7 Pick.) 344 (1829), *aff'd*, 36 U.S. (11 Pet.) 420 (1837) (chartering new bridge). See generally M. Horwitz, *supra* note 27, at 46-47, 66, 130-39; J.W. Hurst, *supra* note 28, at 27-29; Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, in *LAW IN AMERICAN HISTORY* 329, 377-81 (D. Fleming & B. Bailyn eds. 1971); Note, *supra* note 3, at 859.

³⁰ See generally Reich, *The New Property*, 73 YALE L.J. 733 (1964).

³¹ See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1228 (1967); pp. 1496-97 *infra*.

The physical invasion test is subject to the further criticism that it permits "technicalities of form to dictate consequences of substance."³² The test treats two parties, both of whom may have lost the same amount of value, differently merely because the government "touched" the land of the one but not the other.³³ By compensating only the former property holder, the test ignores the fact that both intrusions leave their victim in the same aggrieved position. This purely formal distinction between "direct" and "indirect" actions has long been abandoned in other areas of the law, in large part because it leads to unfair results.³⁴

Some courts have defended their reliance on the physical invasion test by pointing to the literal language of the takings clause.³⁵ The words of the clause, however, are not only vague, but even applying their commonplace meaning does not inevitably generate a physical invasion test. The government may "take" property when it *builds* a highway over the land, acquiring an easement, but when it *prohibits* a use it also "takes" a servitude or negative easement.³⁶ The physical invasion test, however, recognizes only the former, affirmative encroachment as a taking, not the latter restraint.

2. *Externality Tests*.—A second class of tests designed to distinguish legitimate exercises of the police power from compensable takings focuses on the externalities created by property holdings and uses. Broadly stated, these tests all share a willingness to extend great latitude to the state in regulating uses of property which impose costs on or accord benefits to other property holdings. This class of theories has both a traditional form—the so-called "noxious use" test—as well as more recent versions, principally those of Professor Joseph Sax.³⁷

³² United States v. Central Eureka Mining Co., 357 U.S. 155, 181 (1958) (Harlan, J., dissenting).

³³ *Compare* Batten v. United States, 306 F.2d 580 (10th Cir. 1962) (no taking where damage to homeowner results from flights which do not pass directly over homeowner's property), *cert. denied*, 371 U.S. 955 (1963), *with* Griggs v. Allegheny County, 369 U.S. 84 (1962) (taking where damage caused by direct overflights which physically invade airspace below minimum safe altitude level), *and* United States v. Causby, 328 U.S. 256 (1946) (same). On the airport noise problem, see generally Berger, *Nobody Loves an Airport*, 43 S. CAL. L. REV. 631 (1970); Dunham, *supra* note 7.

³⁴ The law of torts, for example, jettisoned many years ago the distinction common to the writ system between direct and indirect injuries to persons or property. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 29 (4th ed. 1971).

³⁵ See, e.g., *Laycock v. Kenney*, 270 F.2d 580, 592 (9th Cir. 1959) (takings clause "refers only to direct appropriation"), *cert. denied*, 361 U.S. 933 (1960); *Richmond, F. & P. Ry. v. City of Richmond*, 96 U.S. 521, 528-29 (1877).

³⁶ Michelman, *supra* note 31, at 1187 n.45.

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

(a) *Noxious Use*. — Although it developed contemporaneously with the physical invasion test, the noxious use test turned on the nature of the holder's use, rather than on his dominion. If that use was somehow offensive to others — or "noxious" — then no regulation short of actual acquisition of the offending property would be a taking. If, on the other hand, the government regulated property uses that were creating no harmful externalities, the aggrieved landowner was entitled to compensation.³⁸ Thus, as the first Justice Harlan noted, "[t]he exercise of the police power by the destruction of property which is itself a public nuisance . . . is very different from taking property. . . . In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent owner."³⁹

The noxious use test reflects an explicit doctrinal recognition that individual property uses must often be subordinated to overall social needs. To Chief Justice Shaw the test embodied "a settled principle . . . that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the . . . rights of the community."⁴⁰

cited as Sax II; Sax, *Takings, Private Property and Public Rights*, 81 *YALE L.J.* 149 (1971) [hereinafter cited as Sax III].

³⁸ Modern courts often decide takings cases on the basis of a noxious use analysis. See, e.g., *Pope v. City of Atlanta*, 418 F. Supp. 665, 668 (N.D. Ga. 1976) ("Where certain uses of the property are prohibited in a reasonable and non-arbitrary manner by the legislative regulations enacted for the public health, morals and safety, the state is not obligated to compensate the owners."); *Kopetzke v. County of San Mateo Bd. of Supervisors*, 396 F. Supp. 1004, 1007-08, 1010 (N.D. Cal. 1975); *Agricultural Labor Relations Bd. v. Superior Court*, 16 Cal. 3d 392, 404, 546 P.2d 687, 694, 128 Cal. Rptr. 183, 190 (1976), *aff'd dismissed sub nom. Pandol & Sons v. Agricultural Labor Relations Bd.*, 429 U.S. 802 (1976); *Trustees of Tufts College v. Triple R. Ranch, Inc.*, 275 So. 2d 521, 530-31 (Fla. 1973) (dissenting opinion); *City of St. Louis v. Brune*, 515 S.W.2d 471, 474, 476-77 (Mo. 1974) (en banc); *Just v. Marinette County*, 56 Wis. 2d 7, 17, 201 N.W.2d 761, 768 (1972).

³⁹ *Mugler v. Kansas*, 123 U.S. 623, 669 (1887). As the quotation suggests, the noxious use test has close ties to the traditional tort concepts of nuisance. Commentators often speak of the test in nuisance terms, see Berger, *A Policy Analysis of the Taking Problem*, 49 *N.Y.U. L. REV.* 165, 172-75 (1974); Michelman, *supra* note 31, at 1196-98; Sax I, *supra* note 37, at 46-50, and the only difference between nuisance analysis and noxious use takings analysis is that in the latter case a legislative body has made the initial characterization of the use, to be reviewed by the court, while in the former instance the initial determination lies with the judiciary. See Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 *VA. L. REV.* 1399, 1392 n.8 (1977). This difference may well have an impact on decisions, due to judicial deference to legislative determinations. See note 48 *infra*.

⁴⁰ *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84-85 (1851). See also L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SAWY*, 247-54 (1957); Scheiber, *supra* note 29, at 390, 398-400.

At the same time, however, the noxious use test expanded the protective scope of the takings clause. Whereas under the physical invasion test government actions constituted takings only where they intruded upon dominion, the noxious use test mandated compensation for mere regulation of "inoffensive" property uses. Yet courts applying the noxious use test did not abandon judicial commitment to the core of ownership represented by dominion and title, since they continued to require compensation in cases of actual physical intrusion.⁴¹

Nonetheless the noxious use test is not a satisfactory solution to the takings problem. Although it purports to offer a certain amount of protection for property uses, its terms are so manipulable that the protection offered can become largely chimerical.⁴² Land use regulation typically is required not because one competing use is inherently noxious, but rather because of legislative resolution.⁴³ Thus, for example, in *Hadacheck v. Sebastian*,⁴⁴ the Supreme Court denied compensation to the owner of a brick factory when his use was forbidden because of surrounding residential growth;⁴⁵ yet the "noxiousness" of this use derived not from any intrinsic character of brick factories, but rather from the conflict engendered by subsequent urban growth.⁴⁶ "Noxiousness" thus becomes simply a conclusory label

⁴¹ Courts generally hold that physical invasion constitutes a taking, regardless of what test they would apply in the absence of such an invasion. See F. BOSSERMAN, D. CALLIES & J. BANTA, *supra* note 18, at 254-55; Berger, *supra* note 39, at 173; Michelman, *supra* note 31, at 1184.

⁴² The notion of what is noxious or harmful to the public can be expanded by courts or legislatures almost at will. See, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887). The much celebrated case of *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), for example, essentially held that any use of certain legislatively designated land which altered its natural state could be considered a noxious use. *Id.* at 17, 201 N.W.2d at 768. See also pp. 1620-21 *infra*. Plainly, public "harm" is an ambiguous concept, see Comment, *Regulation of Land Use: From Magna Carta to a Just Formulation*, 23 *U.C.L.A. L. REV.* 904, 909-11 (1976), and the noxious use test generally amounts to little more than political value judgments by policymakers and judges, see Plater, *The Takings Issues in a Natural Setting: Floodlines and the Police Power*, 52 *Tex. L. Rev.* 201, 237 (1974).

⁴³ See Penn. Comm. Transp. Co. v. City of New York, 98 S. Ct. 2646, 2664 n.30 (1978); Sax I, *supra* note 37, at 49; Comment, *supra* note 42, at 909.

⁴⁴ 239 U.S. 394 (1915).

⁴⁵ *Id.* at 409-12.

⁴⁶ See Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1 (1966). Coase argues that it is economically inappropriate to assume that the offending party must always absorb the expense of legal liability. He notes that activities which the law might typically characterize as "noxious" really reflect "a problem of a reciprocal nature." *Id.* at 2. Economic efficiency, he argues, demands simply that the "more serious harm" be avoided. *Id.* The classic case of *Miller v. Schoene*, 376 U.S. 272 (1968), neatly captures the property conflict actually at the core of the

reflecting some social consensus about which property uses ought to be preferred.⁴⁷

This problem of manipulability is heightened when the legislature acts not to resolve existing land use conflicts, but rather to advance some social policy which by its terms forbids certain uses. Where a property holder challenges such prohibitions as a taking, the legislation contains its own internal defense insofar as it defines the prohibited uses as "noxious." Courts applying noxious use analysis to such cases can protect the property holder's interests only if they are willing to overturn the legislative value judgments. But it is more likely, and generally appropriate, that the courts will defer to the legislative determinations of social policy,⁴⁸ in which case the application of noxious use analysis essentially undermines the fifth amendment protection against takings.⁴⁹

Even if the concept of "noxiousness" were not so amorphous, the test would nonetheless present an inadequate account of the

noxious use test. In *Miller* the Court upheld a Virginia statute which ordered the destruction without payment of certain cedar trees carrying a fungus fatal to neighboring apple trees. The Court disposed of the case by balancing the economic value of the conflicting property, deciding ultimately that the apple trees were more valuable. Presumably, the Court might have adopted the language of noxious use; the use of balancing in *Miller*, however, plainly underscores the value judgments on which the noxious use test is premised.

⁴⁷ This is not to suggest that society should not prefer some property uses to others and act to advance the preferred uses. Indeed, this very process lies at the heart of zoning and other land use regulation. The use of pejorative labels such as "noxious use," however, not only impedes the social ordering of property conflicts by seeming to demand some a priori characteristic before regulation can proceed, but also short-circuits rational discussion of preferred property uses which would provide guidance for future planning. Moreover, the noxious use test suggests that merely because one use is not the preferred use in a given case of conflict it should be terminated without compensation. Yet the two questions of priority of uses and compensation, although related, should be considered separately. For an intelligent effort to develop priorities of land use, see Freeman, *Give and Take: Distributing Local Environmental Control Through Land-Use Regulation*, 60 MINN. L. REV. 883, 895-99 (1976).

⁴⁸ See *Mugler v. Kansas*, 123 U.S. 623, 660-61 (1887); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 420 (1922) (Brandeis, J., dissenting) (arguing that legislative judgments about the harmfulness of prohibited enterprises should be given great deference).

⁴⁹ Deferential courts will tend to acquiesce in a legislative determination that a given use is noxious whenever that use impacts adversely upon public health, safety, morals, or general welfare. These courts will therefore afford regulated property holders protection only when they can conclude that the prohibition bears no reasonable relation to public health, safety, morals, or general welfare. This is, of course, the threshold police power test, see pp. 1443-44 *supra*, and property holders confronted with a deferential, "noxious use" court are left with only this limited protection, see, e.g., *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

range of social interests deserving of respect when courts determine the permissible scope of individual property rights. The theory underlying the test purports to recognize the overriding concerns of social welfare in relation to individual property holdings.⁵⁰ Yet the terms of the test, as well as its application, only proscribe impacts on property somehow judged to be "offensive." It is difficult, however, to see why an "innocent" use which simply precludes an alternative use of greater social utility should not similarly be considered an impediment to social welfare. Certainly such an "innocent" use imposes appreciable social costs on the general public, and might therefore be regulated without compensation under the theory of the noxious use test. But by seemingly insisting upon "noxiousness" as the prerequisite of noncompensable government regulation, the test tends to divert attention from the full range of concerns relevant to an accurate consideration of the public interest.⁵¹

(b) *Professor Sax's Tests.*—Takings analysis focusing on the control of externalities has received contemporary articulation in two significant essays by Joseph Sax.⁵² Writing first in 1964,⁵³ Professor Sax argued that when government resolves

⁵⁰ See *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84-85 (1851).

⁵¹ Professor Ernst Freund provided an alternative formulation of the noxious use test. Under his model, no compensation is required when the state acts to prevent a harm. When it acts to procure a benefit, however, it must compensate the affected party. See E. FREUND, *THE POLICE POWER* 546-47 (1904). For case law adopting the Freund formulation, see, e.g., *Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n*, 400 F. Supp. 1369, 1382 (D. Md. 1975); *Lect v. Montgomery County*, 264 Md. 606, 613, 287 A.2d 491, 496 (1972); *Just v. Marinette County*, 56 Wis. 2d 7, 16, 201 N.W.2d 761, 767-68 (1972). The gain-benefit/prevent-harm distinction is subject to the criticisms applicable to the noxious use test generally, and is further flawed in that it incorrectly assumes that its two categories are mutually exclusive. See Berger, *supra* note 39, at 174 n.34. Furthermore, this test is slightly misleading, in that it does not seem necessary, in either logic or law, that the government acquire a benefit in order for there to be a taking. Thus, if the Department of Agriculture came upon someone's forest land and cut down all the trees, for no apparent reason, and just left the lumber to rot, the government has acquired no benefit, and yet surely this is a taking. Indeed, Freund would recognize a taking if the government appropriated the lumber; the hypothetical case would seem to follow a fortiori. As the Supreme Court has noted, "the courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945).

⁵² See note 37 *supra*. For examples of judicial application of Sax's tests, see *Hasegawa v. Maui Pineapple Co.*, 52 Hawaii 327, 334, 475 P.2d 679, 684 (1970); *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 128-30, 316 N.E.2d 305, 310-11, 359 N.Y.S.2d 7, 14-15 (1974); *Alco Parking Corp. v. City of Pittsburgh*, 453 Pa. 245, 267-70, 307 A.2d 851, 863-64 (1973), *rev'd*, 417 U.S. 369 (1974).

⁵³ Sax I, *supra* note 37.

competitive conflicts between existing property uses, there is no compensable taking. If, however, the government acts merely to aggrandize its own economic position at the expense of a non-competing property holding, then this entrepreneurial activity requires payment to the holder.⁵⁴ Sax derived these rules from an underlying conception of property as the bundle of value which remains after prior conflicts between competing uses are resolved.⁵⁵ In making the notion of compensable takings turn on the distinction between the government's role as entrepreneurial or arbitral — and thus on whether or not the regulated property was competing with other property — Sax implicitly recognized the role of externalities in resolving the takings question.

Seven years later Professor Sax reformulated his approach to the takings problem,⁵⁶ focusing this time less on the character of the government's role as regulator and more on the character of the property being regulated. Where the property in question creates "spillover" effects on existing public interests, Sax argued, governmental action that merely precludes or maintains such effects contrary to the landholder's desires would not require compensation.⁵⁷ Where, however, the regulated use poses no such externalities — either because the property is usable for one purpose only and has no external impacts or because the property, though usable in various ways, merely forecloses potential, but not existing, uses — any interference with it by the state constitutes a taking.⁵⁸ Sax retained his previous concern about governmental entrepreneurship — action not directed at spillover effects — arguing that state overreaching is best avoided by internalizing its costs through required compensation.⁵⁹ Professor Sax also included an "equal protection" obligation on the state to insure that similarly situated landholders, each of whom was responsible for spillovers, share the burdens of a particular regulation.⁶⁰ In such a fashion, individual property holders might be safeguarded against the arbitrary imposition of unequally onerous costs associated with the otherwise legitimate demands of regulating externalities.

The tests proposed by Professor Sax improve considerably upon the older noxious use test in which they seem to be rooted. Because neither of his models depends upon any characterization of the regulated use in value-laden terms, they permit the state

to regulate property well beyond the narrow confines of ostensibly "noxious" externalities. At the same time, his tests restrain the extent of permissible regulation short of the potentially boundless limits made available by manipulating the notion of "noxiousness." Both of Sax's tests also reflect a canon of fairness requiring the state to spread the costs of controlling externalities across all similarly placed "offenders."⁶¹ In addition, both tests express the important need to compel the regulating authorities to account in their decisions for the costs of particular regulations.

Nonetheless, the tests suggested by Professor Sax do not present an adequate account of the takings dilemma. His first model insists on an asserted distinction between government actions that resolve competitive uses of property (no compensation required) and government actions that merely enhance the position of the state (compensation required). Yet when the government acts in the latter, entrepreneurial capacity, it typically does so on behalf of a legitimately "competing" interest which is merely disaggregated rather than discrete and organized. To insist, as Sax did in his first essay, on compensating in all cases of governmental entrepreneurship is to rest too securely on a distinction of form and not substance.⁶²

Presumably, these shortcomings influenced Professor Sax's later development of a takings test granting the state the power to regulate all "spillovers" without compensation.⁶³ Again, however, the test that emerged falls short of a fully adequate model for government land use regulation. Under Sax's reformulated test, the fact that a given use of land precludes potential alternative uses does not constitute a spillover.⁶⁴ Yet there is nothing in the nature of the concept of "spillover" which so limits its applicability. Thus, for example, where a planned community of single-family homes conflicts with an inchoate need for more low-income housing, the former use can be seen as imposing externalities upon the latter. It is not clear why such externalities should not qualify as spillovers, thereby forestalling takings challenges to low-income housing developments in the community.⁶⁵

⁶¹ See pp. 1493-94 *infra*.

⁶² As a consequence, courts applying Sax's first model often ignored competing interests that were diffusely held but nonetheless legitimate. See, e.g., *Luthern Church in America v. City of New York*, 35 N.Y.2d 121, 128-30, 316 N.E.2d 305, 310-11, 359 N.Y.S.2d 7, 14-15 (1974).

⁶³ Sax II, *supra* note 37.

⁶⁴ See *id.* at 162-66.

⁶⁵ The example used by Sax to demonstrate the limits on his spillover concept also has the same difficulty. Sax argues that farmland which is needed by an airport for expansion ought not to be thought of as imposing noncompensable spil-

⁵⁴ *Id.* at 63.

⁵⁵ *Id.* at 61-62.

⁵⁶ Sax II, *supra* note 37.

⁵⁷ *Id.* at 161-62.

⁵⁸ *Id.*

⁵⁹ *Id.* at 163.

⁶⁰ *Id.* at 169-72; see pp. 1493-94 *infra*.

To be sure, Sax's insistence that compensation be awarded where the spillover consists simply of the preclusion of socially preferred uses has some merit. Where the spillover targeted for state regulation is one about which the property holder knows or should have reason to know, our concerns about protecting his expectations of continued untrammelled use are to a certain extent abated.⁶⁶ If, however, the owner may be subject to uncompensated regulation in every case where his property creates spillovers to *potential* uses, his certainty of ownership is virtually dissolved. It is, after all, difficult to imagine a case in which *some* potential use of greater net value cannot be substituted for the current use of a property holder.

To acknowledge that there is some validity to limiting the spillover concept in this manner does not, however, justify the narrowness of Sax's second takings model. Although a doctrine permitting the rearrangement of property holdings without compensation *whenever* a potential alternative use of greater value is available would plainly be overbroad, the state must, in many instances, have precisely this power. Indeed the very essence of many zoning arrangements is prospective, focused on optimizing future land use patterns rather than merely adjusting existing conflicts.⁶⁷ To compel the state to compensate in all cases where it addresses conflicts that are potential, rather than existing, would drastically restrict planning flexibility and disable many forms of essential — and widely accepted — governmental activity.⁶⁸

3. *Diminution in Value.* — The diminution in value test holds that where state regulation causes too great a decrease in the value of a property, a taking has occurred. Again, however, the farmland does require the airport and possibly the entire society to bear presumably higher costs than they might if the farmland were not absolutely entitled to protection.

⁶⁶ Restricting the spillover concept so as not to include those that merely preclude potential uses of greater social utility means that most noncompensable spillovers will be those readily observable ones that affect existing uses. These will be the spillovers of which the landowner knows or should know. Any unfairness to him is abated in part by this knowledge and in part by the fact that foreseeable regulation can be accounted for in purchase prices. See Berger, *supra* note 39, at 195. Limiting the spillover concept as Sax does enhances not only the protection of economic value as property but also the protection of liberty interests. An individual who can foresee the points of societal impingement upon his personal sphere is free to plan his own destiny within those bounds. Such planning is more difficult when society may intervene at any point. See Dunham, *Property, City Planning, and Liberty*, in LAW AND LAND 28, 39 (C. Haar ed. 1964) ("The problem of liberty or freedom in relation to planning is the inability of a property owner to anticipate the restraints which are to be placed upon him").

⁶⁷ See generally Elickson, *Alternatives to Zoning: Covenants, Nuisance Rules and Fences as Land Use Controls*, 40 U. CHI. L. REV. 681, 692 (1973).

⁶⁸ See pp. 1324, 1340, 1353 *infra*.

market value of a property holding, that regulation constitutes a taking compensable under the fifth amendment.⁶⁹ The test found its classic expression in the opinion of Justice Holmes in *Pennsylvania Coal Co. v. Mahon*.⁷⁰ In *Mahon* the Pennsylvania legislature had enacted a statute prohibiting subsurface mining in regions where it presented a danger of subsidence for homeowners. Most of the homeowners, however, held deeds which expressly bargained away subsurface mining rights and contained clauses abandoning any claims for damage caused by subsurface mining operations. The Mahons sought an injunction preventing the coal company from mining, and the company defended by claiming that the statute on which the injunction was sought deprived it of property without just compensation.

In his opinion for the majority, Justice Holmes held that the challenged statute did in fact constitute a taking of the coal company's property.⁷¹ He noted first that "[f]or practical purposes, the right to coal consists in the right to mine"⁷² and that the Pennsylvania statute, by making it "commercially impracticable to mine certain coal," has essentially "the same effect for constitutional purposes as appropriating or destroying it."⁷³ Although the state is not foreclosed from regulating property pursuant to its police powers, if "regulation goes too far it will be recognized as a taking."⁷⁴ Because the Pennsylvania statute

⁶⁹ Modern courts frequently follow this test, or at least cite diminution in value as a major factor in their considerations. See, e.g., *Figarsky v. Historic Dist. Comm'n*, 171 Conn. 198, 210, 368 A.2d 163, 171 (1976) ("[T]he amount of the owner's loss is the basic criterion for determining whether a purported exercise of the police power is valid, or whether it amounts to a taking . . ."); *Trust of Three v. City of Emeryville*, 430 F. Supp. 833, 840 (N.D. Cal. 1977); *Equitable Bldg. Co. v. City of Royal Oak*, 67 Mich. App. 233, 227, 240 N.W.2d 489, 491 (1976). Modern courts generally hold, however, that diminution in value, while relevant, is never conclusive evidence of a taking. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962); *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 514, 518, 542 P.2d 237, 241, 244, 125 Cal. Rptr. 365, 369, 372 (1975), *cert. denied*, 425 U.S. 904 (1976); *Alsenas v. Brecksville*, 29 Ohio App. 2d 255, 261, 281 N.E.2d 21, 25 (1972) ("[W]hile loss of value is a factor, sometimes a very important factor, it is not sufficient to establish that zoning is unconstitutional . . .").

⁷⁰ 360 U.S. 393 (1972). For a modern case remarkably similar to *Mahon* in its facts, analysis, and result, see Department for Natural Resources & Environmental Protection v. Number 8 Ltd., 528 S.W.2d 684 (Ky. 1975).

⁷¹ 260 U.S. at 416.

⁷² *Id.* at 414.

⁷³ *Id.* at 414-15.

⁷⁴ *Id.* at 415; cf. *Tyson & Brother—United Theatre Ticket Offices, Inc. v. Bantam*, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting) ("property rights may be taken for public purposes without pay if you do not take too much").

precluded the company from exercising any mining rights whatever, the regulation went "too far."⁷⁵

The diminution in value test reflects important shifts in the conception of property and its protections from public intrusions. Although the Court clearly recognized that the state has a continuing need to regulate private uses for the public good,⁷⁶ it was unwilling to permit that regulation to proceed unbounded by a concern for the impact on the individual property holder.⁷⁷ The test thus provided a substantive limit, however inexact, on the reach of state interference—a limit not plainly required by prevailing externality doctrines.⁷⁸ At the same time, the diminution in value test embodied a retreat by the Court from the hollow certainties of earlier theories which had purported to distinguish compensable from noncompensable restrictions on the basis of innate characteristics of the property in question. The *Mahon* Court focused on the economic impact on the landholder rather than, for example, the "noxiousness" of the property use involved. In so doing the Court adopted a takings analysis which implicitly rejected the formalist assumption that property can be neatly sectioned into those varieties immune from uncompensated regulation and those upon which the state may intrude without paying.⁷⁹ Regulation is typically a response to a conflict between otherwise innocent property uses, one of which is preferred pursuant to social value judgments. The diminution in value test, by simultaneously securing regulatory freedom to the state as well as safeguarding a regime of entitlement to property holders, frankly recognized the political clash at the core of private property.⁸⁰

The diminution in value test also departed structurally from traditional takings theory insofar as it rejected restraints grounded in fixed rules in favor of a test governed by an open-ended standard. Reluctant to assert any *a priori* basis for determining the exact limits of property rights, the *Mahon* Court elected instead to establish a vague guideline for deciding takings questions.⁸¹ The consequence of adopting such a standard was to inject added uncertainty into the regulation process, thus requiring self-imposed caution on the regulator's part in deciding

to encroach upon private property holdings.⁸² In addition, because its requirements were inexact, the diminution in value standard diluted the force of takings precedents, and thus demanded case-by-case considerations by the regulating agent. In short, the test announced by Justice Holmes in *Mahon* reflected both structurally and substantively the need to restrict all actors in property disputes and reach realistic compromises not otherwise mandated by previous takings schemes.

The diminution in value test thus treats property conflicts in a bold and sensitive fashion and provides a framework responsive to the competing concerns of individual fairness and public regulation. Even so, closer examination reveals fundamental shortcomings in the basic fabric and overall perspective of the test. First, the test provides little guidance on its central question: diminution in the value of *what*? Because one can always define the right affected narrowly enough so that the regulation completely destroys it, the test theoretically allows a court to find a taking in virtually any case. In *Mahon*, the Court focused on the diminution in the mining rights attached to the property in question.⁸³ Since those rights were wholly vitiated, the majority had no trouble concluding that compensation was due. Yet, as Justice Brandeis observed in dissent, "values are relative For aught that appears the value of the coal kept in place by the restriction may be negligible as compared with the value of the whole property" ⁸⁴ Courts must therefore look elsewhere to decide which incidents of property ownership are distinct for purposes of evaluating their diminution.

The test also fails to specify accurately the universe of value that a court should include when it assesses the original property alleged to have been unduly diminished. The test seems to assume that all legally acquired economic value reflected in the market price of property merits protection. Yet this doctrine has been roundly rejected by both courts and commentators.⁸⁵ "[V]alue alone," the Supreme Court has declared, "does not generate interests protected by the Constitution against diminution by the government" ⁸⁶ For example, in *United States v. Willow River Power Co.*,⁸⁷ Justice Jackson held that where a government-constructed dam deprived a claimant of hydro-

⁷⁵ 260 U.S. at 414-15.

⁷⁶ *Id.* at 413.

⁷⁷ *Id.*

⁷⁸ See pp. 1471-72 *supra*.

⁷⁹ See 260 U.S. at 416 (1922).

⁸⁰ See *id.* at 413, 415; Sax I, *supra* note 37, at 40-41.

⁸¹ For an indication of how vague a guideline the *Mahon* test has proved to be, see p. 1480 *infra*.

⁸² See generally Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976).

⁸³ 260 U.S. at 414-15.

⁸⁴ *Id.* at 419 (Brandeis, J., dissenting).

⁸⁵ See Dunham, *supra* note 7, at 71-81; Sax I, *supra* note 37, at 51-53.

⁸⁶ *Reichelderfer v. Quinn*, 287 U.S. 315, 319 (1932).

⁸⁷ 324 U.S. 499 (1945).

electric generating capacity, no compensable taking occurred.⁸⁸ Justice Jackson reached this result because he viewed the claimant's economic value, derived from the river's level, as wholly subordinate to the navigation servitude.⁸⁹ More recently, in *Penn Central Transportation Co. v. City of New York*,⁹⁰ the New York Court of Appeals held that in determining whether a regulated property holder is receiving a reasonable return on his property, the court need not consider as part of the owner's basis that portion of the value created by the state.⁹¹

Furthermore, the test does not articulate just how far is "too far." By focusing simply on a postulated ratio of diminished value to original value, the test fails to indicate the standard by which the resulting fraction should be judged. Not surprisingly, zoning cases decided pursuant to the diminution in value test reflect the confusion inherent in the model itself.⁹² Ordinances which variously diminished property values from \$1,500,000 to \$275,000,⁹³ \$450,000 to \$50,000,⁹⁴ and \$65,000 to \$5000⁹⁵ have all been upheld. Ordinances which reduced property values from about \$48,750 to about \$11,250⁹⁶ and from \$350,000 to \$100,000⁹⁷ have been struck down. Without some standard for specifying the principle to inform a court's judgment of excess diminution, the test is inherently incapable of producing satisfactory results.⁹⁸

⁸⁸ *Id.* at 511.

⁸⁹ *Id.* at 507. See also *United States v. Fuller*, 409 U.S. 488 (1973) (in awarding just compensation, state need not consider that portion of value attributable to expected continuation of government grazing permits on adjacent land).

⁹⁰ 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 98 S. Ct. 2646 (1978).

⁹¹ 42 N.Y.2d at 333, 366 N.E.2d at 1276, 397 N.Y.S.2d at 919. In affirming the New York court's decision, the Supreme Court expressly declined to address this aspect of the state court's reasoning. 98 S. Ct. at 2658 n.23.

⁹² Relevant cases are collected in 1 R. ANDERSON, *AMERICAN LAW OF ZONING* § 3.27 (2d ed. 1976).

⁹³ *Gardner v. Downer*, 61 Misc. 2d 131, 305 N.Y.S.2d 252 (Sup. Ct. 1969), *aff'd*, 35 A.D.2d 1080, 317 N.Y.S.2d 1013 (1970).

⁹⁴ *Wrigley Properties Inc. v. City of Ladue*, 369 S.W.2d 397 (Mo. 1963).

⁹⁵ *Mallison v. Village of Tarrytown*, 14 Misc. 2d 5, 177 N.Y.S.2d 384 (Sup. Ct. 1958).

⁹⁶ *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 167 N.E.2d 406 (1960).

⁹⁷ *Pearce v. Village of Edina*, 263 Minn. 553, 118 N.W.2d 659 (1962).

⁹⁸ Conceivably the *Mahon* facts themselves suggest a workable fairness test to guide courts in discerning the critical point of diminution. Justice Holmes expressly noted that the challenged regulation deprived the coal company of an essential element of its expected property uses. 260 U.S. at 414. In assessing diminution in value, therefore, a court might properly begin by isolating a reasonable core of expectations bound up in the affected property. This would entail a broadening of the court's approach from a simple consideration of value to a

A final difficulty with this test is that it ignores altogether what may often be perfectly good reasons to impose even substantial losses on individual property holders where such losses are outweighed by the gains achieved in social utility and where such losses are widely shared among similarly situated landholders.⁹⁹ Justice Holmes was apparently aware of this consideration in *Mahon*,¹⁰⁰ but subsequent courts which have applied the diminution in value test unqualified by other factors have neglected it.¹⁰¹ As a result, the criterion of justice which underlies takings doctrine has been unduly informed by concerns for individual property holders and insufficiently attuned to the imperatives of social policy.

4. *Balancing Public Benefit and Private Harm.*—Justice Holmes' opinion in *Mahon* contained the seeds of a second analysis distinct from the diminution in value test. This second test purported to weigh the public benefit from a given regulation against the attending private harm, holding that where the latter is on balance more compelling, a compensable taking occurs.¹⁰² In *Mahon* Holmes noted that the coal company would lose a great deal more than the public would gain if the regulation were upheld. On the one hand, Holmes reasoned, the public interest consisted solely in preventing damage to "a single private house," while "[o]n the other hand the extent of the taking is great."¹⁰³ The balancing model thus constructed by the Court incorporates the diminution in value test as the measure of private harm to be weighed against the benefits accruing from the particular regulation.

The balancing test suggested in *Mahon* is useful insofar as it insists on a consideration of public utility in evaluating takings claims and to the extent that it sensitizes boards and courts to

more comprehensive concern with the remaining usefulness of the regulated property relative to the initial expectations of the property holders. See pp. 1494-96 *infra*; note 66 *supra*.

⁹⁹ See pp. 1492-93 *infra*.

¹⁰⁰ 260 U.S. at 413 (1922).

¹⁰¹ See, e.g., *Board of Supervisors v. DeGroot Enterprises, Inc.*, 214 Va. 235, 198 S.E.2d 600 (1973), *noted* p. 1465 *supra*.

¹⁰² 260 U.S. at 413-14. This balancing approach is frequently adopted by contemporary courts confronted with takings challenges. See, e.g., *Guhl v. Par-3 Golf Club, Inc.*, 238 Ga. 44-45, 231 S.E.2d 55, 57 (1976) (quoting *Barrett v. Hamby*, 235 Ga. 262, 266, 219 S.E.2d 399, 402 (1975): "[I]f the zoning regulation results in relatively little gain or benefit to the public while inflicting serious injury or loss on the owner, such regulation is confiscatory and void."); *Western Int'l Hotels v. Tahoe Regional Planning Agency*, 387 F. Supp. 429, 436 (D. Nev. 1975); *Edward Hines Lumber Co. v. Village of Villa Park*, 34 Ill. App. 3d 711, 714, 340 N.E.2d 339, 341 (1976).

¹⁰³ 260 U.S. at 413-14.

the special unfairness imposed on individuals by regulations that are only minimally justified by social needs. Nonetheless, the test presents serious problems for courts attempting to apply it. While the harm to the regulated property holder is fairly tangible and quantifiable,¹⁰⁴ the public benefit to be weighed against this may often prove somewhat elusive.¹⁰⁵ More critically, even if one adequately assesses the public benefit of a measure, the resulting comparison does not answer the question the test purports to address. If the public benefit outweighs the harm to the individual, this merely indicates that the measure is efficient.¹⁰⁶ Yet there is nothing inherent in an efficient regulation of property which necessarily precludes compensation to the owner. Indeed, it is arguable that one of the purposes central to the takings clause is to provide compensation even in cases of efficient regulation.¹⁰⁷ In short, the balancing test suggested by *Mahon*, like the alternative approaches surveyed above, represents an insufficient account of the factors required for a comprehensive consideration of just compensation claims.

¹⁰⁴ In using diminution in value as the measure of private harm, however, courts must still struggle with the problem of determining which incidents of property ownership form the basis for the relevant comparison. See pp. 1479-80 *supra*.

¹⁰⁵ Comment, *supra* note 42, at 914. As an initial matter, the scope of the public benefit may be insufficiently appreciated. Secondly, this public benefit, even if fully discerned, is less easily monetized than is the countervailing private harm. Because of these problems, courts that apply the balancing analysis often slight the public need for particular regulatory measures. As a result, the balancing test frequently becomes little more than the diminution in value test. Indeed, this merging of tests appears to be what happened in *Mahon*. Justice Holmes seemingly limited the public benefit in his analysis to "a single private house," 260 U.S. at 413, yet the legislation at issue clearly had much broader safety and welfare objectives, see *id.* at 404-05, 410-11 (report of argument for the State of Pennsylvania as amicus curiae). To bring vitality to the balancing analysis, courts might assume a greater willingness to recognize the compelling weight of the public concerns behind challenged regulations. See, e.g., F. BOSSELMAN, D. CALLES & J. BARTA, *supra* note 18, at 260-65 (advocating that environmental protection be recognized as "heavyweight public purpose").

¹⁰⁶ Michelman, *supra* note 31, at 1193-94.

¹⁰⁷ As Justice Holmes noted in *Mahon*, "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." 260 U.S. at 416. The protection of individual rights in the face of social efficiency animates not only the takings clause, but also the entire Bill of Rights. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("the Bill of Rights in general [was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize . . . government officials"); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials . . ."); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1-7 (1978).

5. *Professor Michelman's Utility and Fairness Tests.*—Professor Michelman, in a widely-noted essay written in 1967,¹⁰⁸ proposed two comprehensive frameworks, grounded respectively in terms of utility and fairness, within which to decide compensation problems. Michelman first suggested that the availability of compensation might be seen as a means of maximizing overall social utility.¹⁰⁹ Associated with any proposed regulation of property, he noted, there are net efficiency gains, "demoralization" costs, and "settlement" costs.¹¹⁰ Net efficiency gains are measured by the excess of economic benefits over losses flowing from the regulation itself. Demoralization costs consist of the dollars necessary to offset (1) the disutility to the regulated party flowing from his knowledge that full compensation will not be paid, (2) the disutility to others who are made more insecure by the prospect that the same thing might happen to them, and (3) the disutility incurred in the form of lost future production arising from the disutilities in (1) and (2). Finally, settlement costs represent the time, effort, and resources needed to reach compensation settlements sufficient to avoid demoralization costs. Since the regulator is to be guided by the obligations of overall utility, no measure should be pursued where its net efficiency gains are less than both its demoralization costs and its settlement costs.¹¹¹ In addition, where net efficiency gains are weightier—so that the measure is worth pursuing—and the settlement costs are less than the demoralization costs, compensation must be offered.¹¹² Where settlement costs are too expensive relative to the level of overall demoralization, no compensation need be paid.¹¹³

Under this first model, then, compensation is simply a means of minimizing the costs associated with an efficient rearrangement of property. Yet Professor Michelman delineates a second, independent model which views compensation as a payment made to individuals because of basic fairness concerns.¹¹⁴ Under

¹⁰⁸ Michelman, *supra* note 31.

¹⁰⁹ *Id.* at 1208-13.

¹¹⁰ *Id.* at 1214.

¹¹¹ *Id.* at 1215. Where the net efficiency gains are greater than either demoralization costs or settlement costs but not both, the measure may be pursued if the state incurs the lesser of the two costs (*i.e.*, the one which is outweighed by the net efficiency gain).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 1218-24. Michelman's fairness model was derived from an interpretation of three early essays by John Rawls. *Id.* at 1219 & n.104. Rawls' principal effort, *A Theory of Justice*, was not published until 1971, four years after Michelman wrote his article. In *A Theory of Justice*, Rawls makes it clear that the fairness doctrines developed in his earlier essays and elaborated in his book

this view, a denial of compensation "is not unfair so long as the disappointed claimant ought to be able to appreciate how such decisions might fit into a consistent practice which holds forth a lesser longrun risk to people like him than would any consistent practice which is naturally suggested by the opposite decision."¹¹⁵ To the extent that an uncompensated regulation can reasonably be seen by the regulated party as placing him in a position which is worse over the long run than that under alternative land use practices, compensation must be paid.¹¹⁶

Although the two models have some divergent implications,¹¹⁷ they do generate some important common principles for judicial application in takings cases. Thus, where the proposed regulation affords only dubious net utility gains,¹¹⁸ where it impacts severely on the regulated party,¹¹⁹ and where it seems to burden one individual while leaving similarly situated property holders untouched,¹²⁰ both the utility and fairness models tend to argue for compensation. Similarly, where the regulation entails a burden without a reciprocal benefit for the property holder, and where its settlement costs are low, the two models again suggest that compensation is required.¹²¹

Michelman's analysis highlights considerations central to the takings clause debate. His utility model meaningfully expands on previous tests which recognized, in more limited fashions, social claims on private property use. Thus, for example, Michel-

were intended to apply only to the basic structures of a society, and not to subsidiary institutions founded upon these structures. Since it is unlikely that compensation systems are one of the basic structures of society, it may be argued that Michelman's reliance on Rawls' framework is misplaced. Indeed, Michelman seems to recognize that Rawls' theories are most applicable to "fundamental social arrangements," Michelman, *supra* note 31, at 1221, but goes on to note that "justice is a virtue of rules, practices, and specific acts occurring within basic distributional frameworks, as well as of the basic frameworks themselves," *id.* Even so, the problems with applying Rawls' analysis to other than the basic structures of society have become clearer since the publication of his book. See B. ACKERMAN, *supra* note 5, at 228; Note, *Utility, Fairness and History: Three Perspectives on Laird v. Nelms*, 59 VA. L. REV. 1034, 1058-68 (1973).

¹¹⁵ Michelman, *supra* note 31, at 1223.

¹¹⁶ *Id.* at 1221-23.

¹¹⁷ *Id.* at 1223-24. Michelman notes two cases of divergence: first, where fairness would dictate compensation, but the utilitarian administrator is able to suppress publication of the intrusion and thus keep democratization costs low; and second, where the dispassionate and objective individual looked to in the fairness model would accept a measure, but individuals, as realistically appraised under the utilitarian model, would be critically demoralized. *Id.*

¹¹⁸ *Id.* at 1223, 1235.

¹¹⁹ *Id.* at 1223, 1229-34.

¹²⁰ *Id.* at 1223.

¹²¹ *Id.*

man is not content merely to balance a disembodied public gain against individual loss, but rather parses out the utility losses and gains so as to address the compensation question more directly.¹²² Furthermore, he avoids the dependence on legislative fiat characteristic of the noxious use test, and embraces all possible sources of utility without recourse to preconceived notions or manipulable labels.

Michelman's second test sheds light on other aspects of the takings problem not addressed by strict utility models. Like the diminution in value test, the fairness framework focuses on discrete, immediate impacts on the individual; but unlike that earlier test, Michelman's analysis conceptualizes fairness in comprehensive terms. The test recognizes that in an interdependent society, an individual upon whom a regulation imposes immediate burdens is nonetheless treated fairly when the longrun effects of systematic regulations of a similar sort accrue to his net benefit. Just compensation is thus conceived as a means of allaying the concerns naturally arising when an individual is called upon to make a disproportionate sacrifice for the public weal.

While Michelman's models do much to advance the breadth and coherence of the takings clause debate, neither is wholly free from criticism. The utilitarian test typically resists full quantification of its relevant variables and thus poses some difficulties for courts and zoning boards that attempt to apply it.¹²³ The variables of the test are, furthermore, difficult to constrain within clearly demarcated bounds. For example, a court might encounter substantial problems in ascertaining the class of persons whose needs must be considered when accounting for the demoralization costs attending a particular regulatory measure.

Similar problems of application inhere in Michelman's fairness model. It is no small task for courts to place themselves, as the model requires, in the position of the aggrieved yet rational person who must objectively view his status over the long run. And, as Michelman recognizes, "fairness resists being cast into a simple, impersonal, easily stated formula"¹²⁴ of the sort typically suited to judicial methods of dispute resolution. Thus

¹²² *Id.* at 1193-95.

¹²³ Michelman recognizes the problems inherent in trying to quantify the variables in his model, and therefore suggests that his analysis is better suited to legislative and administrative application than to judicial use. *Id.* at 1245-58. Indeed, the difficulty that courts might have with Michelman's models may explain in part the fact that courts have not generally applied Michelman's specific formulations. Although the article is frequently cited by courts, the only case which makes even minor use of Michelman's analysis is *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 521-22, 542 P.2d 237, 246-47, 125 Cal. Rptr. 365, 374-75 (1975).

¹²⁴ Michelman, *supra* note 31, at 1250.

the fairness test presents difficulties of application different in kind, though not in force, from those accompanying the model of social utility.¹²⁵

Finally, neither of Michelman's models suggests any definite classes of property the taking of which necessarily compels compensation. Yet, the Bill of Rights has been frequently viewed as conferring upon individuals a sphere of protection from state intrusion,¹²⁶ and the fifth amendment would thus seem to entail that *some* range of individual interests be safeguarded from uncompensated takings, regardless of the impact on compelling social goals.¹²⁷ Although these safeguarded interests are by no means coextensive with all the property holdings of an individual, they nonetheless cannot lightly be compromised in the service of fluid notions of utility or fairness.

B. A Constrained Utility Model for Just Compensation

Each of the tests surveyed above for determining when property regulation requires just compensation suggests significant considerations for a court faced with a takings claim. By attempting to reduce compensation questions to specific rules, however, these tests fail to delineate fully the conflicting concerns inherent in takings problems generally. Regulatory schemes have become increasingly complex and varied in their impacts upon individual property holders. Some degree of case-by-case analysis is inevitably required.

¹²⁵ Again, Michelman recognizes this problem, *id.* at 1248-53, and suggests that legislatures should take the dominant role in fairness applications, *id.* at 1253-58. See also note 123 *supra*.

¹²⁶ This belief is reflected in numerous legal essays which have condemned judicial balancing of private rights against public needs in the context of adjudicating cases involving Bill of Rights guarantees. See, e.g., Frantz, *Is the First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729 (1963) (opposing balancing in first amendment cases); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977) (balancing tends to erode fourth and fifth amendment protections); Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464 (1977) (balancing is inappropriate for judging privilege claims of individual criminal defendants in light of the fifth and sixth amendments). See also note 107 *supra*.

¹²⁷ Michelman's utility model would make it easier to deny compensation as demoralization costs decline relative to settlement costs. Since demoralization costs decline as the social utility of a measure increases, see p. 1490 *infra*, a property holder, all things being equal, will stand a lower chance of being compensated to the extent that the measure which affects him inspires widespread social agreement. Yet the Bill of Rights was intended in part to protect individuals even where a majority of society would prefer to restrict the rights of those individuals. See note 107 *supra*.

The model offered below reflects an effort to collect the most fruitful aspects of various takings theories—together with their attendant conceptions of property rights—and to construct from these a rather fluid framework for compensation decisions. Although this model, unlike the other tests, does not advance an exclusive, overarching principle of general applicability, it should be more useful because of this very fact. By engaging in a balanced consideration of competing concerns, rather than appealing to the application of more mechanical rules, courts and zoning boards may more satisfactorily address the difficulty of takings challenges to particular zoning measures.

1. *Social Utility: A First Approximation.*—One of the most widely acknowledged ends of modern property law is the maximization of production and the efficient management of property resources.¹²⁸ A compensation system consistent with this efficiency end would be one which provides that measure of security for property holdings necessary to promote production. The utility model developed by Professor Michelman¹²⁹ suggests a basic approach to this calculation.

According to Michelman, no measure should be pursued unless it yields net efficiency gains which outweigh either demoralization costs or settlement costs. A measure that is inefficient under this standard may properly be thought to violate the police power constraint on the exercise of state authority, which requires the state's regulations to be reasonably related to the general welfare.¹³⁰ This threshold requirement is in practice not a formidable one, since courts typically defer to prior legislative determinations of the broad social costs and benefits of regulatory measures.¹³¹ Hence, it falls primarily upon legislative

¹²⁸ See L. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* 57-74 (1977); Michelman, *supra* note 31, at 1208-13. Property law has traditionally reflected this concern with economic efficiency. For example, the doctrine of adverse possession promotes efficiency both by securing the rights of those in possession of property, see, e.g., *Lewis v. Marshall*, 30 U.S. (5 Pet.) 479, 477-78 (1831), as well as by penalizing title holders who leave their property dormant for an extended period of time, see, e.g., *McGee v. Eriksen*, 51 Mich. App. 551, 559, 215 N.W.2d 571, 575 (1974). Similarly, efficiency concerns underlie the antagonism in property law toward restraints upon the alienation of property, which "prevent the improvement . . . or . . . proper use [of property]." *Morse v. Blood*, 68 Minn. 442, 443, 71 N.W. 682, 683 (1897), and toward covenants burdening the land, considered to affect adversely the "social interest in the utilization of land," *RESTATEMENT OF PROPERTY* § 537, Comment a (1944).

¹²⁹ See P. 1483 *supra*.

¹³⁰ See generally pp. 1443-47 *supra*.

¹³¹ See note 48 *supra*.

and administrative bodies to ensure that any government regulation is indeed an efficient one.¹³²

Once it is determined that a regulation is worth instituting, the utility test developed by Professor Michelman requires compensation if and only if the settlement costs of compensation are less than the demoralization costs of failing to compensate. Michelman's compensation principle is based on the assumption that if any compensation is to be awarded, it will cover the full fair market value loss of the regulated party. This is evident from Michelman's definition of settlement costs as those costs which must be incurred in determining, raising, and distributing compensation awards sufficient to reduce demoralization costs to zero. For demoralization costs to be totally eliminated, however, the regulated property holders must be compensated for their entire loss; any lesser level of compensation will still leave them somewhat demoralized.

A rigid requirement of fair market value compensation, however, is not imposed by the utilitarian model itself, but is rather an external legal rule which may not comport with the demands of overall cost minimization. Once this rule is abandoned,¹³³ Michelman's utility framework for compensation decisions must be modified. For any proposed regulation, there is a continuum of compensation awards, ranging in amount from zero to the full fair market value of the property taken. Associated with each possible compensation award is a corresponding settlement cost, consisting of the expenditures necessary to determine, raise, and distribute that particular amount of compensation. Also corresponding to each possible compensation award is a discrete demoralization cost. As the level of compensation increases, demoralization should decrease, since the tangible losses — from which flow the uncertainties and disaffections of the regulated party and his sympathizers — are increasingly offset.¹³⁴

¹³² Although courts will ordinarily have to defer to legislative judgments regarding the utility of pursuing a given measure, they will nonetheless have to consider a measure's overall utility in assessing the fairness of imposing the measure on property holders without compensation. See P. 1494 *infra*. To require courts and zoning boards to account for net social utility is plainly not to impose upon them a wholly unfamiliar task; indeed, much of current judicial practice involves just such a balancing of public benefit and private harm. This process demands that courts and zoning boards appreciate the content of contemporary public policies and weigh these policies against the often more tangible losses associated with land use regulation. See pp. 1481-82 *supra*.

¹³³ The fair market value compensation rule is neither constitutionally compelled nor consistent with takings theory. See pp. 1497-501 *infra*.

¹³⁴ Moreover, it will not necessarily be the case that demoralization decreases at a rate equal to increases in compensation. Once compensation awards are more than trivial, the symbolic value of moderate awards — in assuring all property

Thus for each proposed regulation there are many possible compensation awards, each with a corresponding level of settlement and demoralization costs. The task of a *legislature or administrative body* bound by the dictates of utility is to select that level of compensation with the lowest sum of demoralization and settlement costs. In so doing, the legislature or administrative body should consider all possible compensation schemes, instituting new settlement procedures if necessary.¹³⁵ In all cases, even those in which the legislature has awarded some level of compensation, *courts* could promote the goal of social efficiency within their institutional capacities by comparing any remaining demoralization costs with the settlement costs necessary to eliminate that demoralization. If the settlement costs are indeed lower, a court should declare the regulation a taking. In all other cases, the court should ratify that combination of compensation, settlement costs, and demoralization costs chosen by the regulating agent.

In short, the model proposed by Professor Michelman, which assumes that courts will assess the settlement costs of fair market value compensation — required to eliminate all demoralization costs — is the appropriate one for courts in takings cases. This limited role allows courts to assess efficiency without being compelled to consider an infinite range of flexible compensation schemes, many of which they would be powerless to institute, even if more efficient. Courts are asked under this model not to optimize utility, a goal they could not achieve and which regulatory bodies may more closely approximate, but rather to consider whether full market compensation would be more or less efficient given a regulatory program.

Although it is impossible to estimate precisely the level of demoralization and settlement costs for particular measures,

holders that the state is not oblivious to the plight of individual property holders in its pursuit of socially beneficial regulation — can be expected to decrease demoralization costs at a rate greater than the corresponding increase of compensation.

¹³⁵ This flexible model of compensation plainly departs from Michelman's rule of compensation. Under this model, even if the settlement costs of a compensation award sufficient to decrease demoralization to zero greatly exceeded the level of demoralization, it would still be possible to award some amount of compensation. The only precondition for awarding compensation would be that the marginal cost in settlements not exceed the marginal savings in demoralization costs. Thus, if an inexpensive, mechanical system of compensation were devised which, when applied, decreased demoralization costs to an extent greater than the costs of the system itself, then this modified rule of utilitarian compensation would require compensating the property holder. This would be so despite the fact that a system of compensation sufficient to offset demoralization entirely in this case might greatly exceed the level of demoralization.

courts and zoning boards *can* acquire a workable understanding of the content of these costs. First, demoralization costs will depend in part on the perceived utility gains associated with the zoning action. Where the action is widely recognized as promoting an important social goal, the level of demoralization should correspondingly decrease. The deleterious impact on production decisions will be less because the immediately affected party and others observing his plight will perceive the government's regulation of property as limited to important cases. Indeed, the regulated party may even regard himself as sharing in the social benefits of the regulation. On the other hand, where the zoning measure is seen as making changes of only minimal or dubious advantage, the property holder sacrificed will take small comfort in the social benefits his burden has created. He and other property holders will be demoralized by the recognition that the government is not constrained by any obligation to act only when the net benefits of its actions are clear.

Furthermore, zoning measures will incur higher demoralization costs to the extent that other property holders can reasonably generalize the impact of the regulation on their own property. When the state's reasons for adopting a measure are easily applicable to future cases—as, for example, when the rationale is the continuing need for transportation facilities—property holders in general will sustain higher demoralization costs than they might if the measure were perceived as flowing from a discrete, limited need. Demoralization costs will also decrease to the extent that property owners can view the regulated holding as somehow unique or distinct from their own holdings.

In addition, legislatures and zoning boards can lower the level of demoralization accompanying a given regulation not only through awards of compensation but also by extending various procedural rights. Procedures which insure affected property holders, as well as others who bear a risk of similar regulation in the future, opportunities to inform responsible officials of their various concerns should diminish the degree of overall demoralization.¹³⁶ To the extent that the immediately affected party can resist the proposed regulation of his property at the zoning board level, or press claims for higher compensation, his sense of gratuitous treatment should correspondingly decline. Furthermore, where other individuals are able to articulate before

¹³⁶ Such procedures range from particular hearing rights granted to immediately affected parties to more general notice and comment proceedings encompassing a broad spectrum of other interested property holders. In many instances of administrative action, due process mandates that at least the immediately affected party be accorded a hearing. See pp. 1515–16 *infra*.

the decisionmaking body the range of their interests, each stands a diminished probability of having similar burdens imposed upon him in the future.

The final factor in the utility analysis consists of the settlement costs necessary to determine, raise, and distribute compensation awards. For zoning boards, settlement costs are a flexible component of the analysis, varying with the amount of compensation chosen to minimize overall total costs. For courts, however, the relevant settlement costs are fixed at that level necessary to raise and distribute fair market value awards, since the scope of judicial review on utility grounds is limited to comparing such costs to the demoralization otherwise incurred. In assessing the weight of settlement costs, courts may be guided by a number of factors. Settlement costs are likely to increase as the impact on the property holder increases, since the task of ascertaining the necessary compensation may become more difficult.¹³⁷ In addition, where the zoning measure is one with diverse and diffuse impact, settlement costs will again rise. The task of uncovering all the individuals who would have to be paid becomes more complex and the process of raising the necessary compensation presents an increasingly expensive prerequisite. Also relevant both to zoning boards considering action and to reviewing courts is the fact that settlement costs, like demoralization costs, may be reduced by procedures that afford interested parties an opportunity to be heard before the regulatory body. Insofar as the procedures facilitate the gathering of evidence relevant to determining compensation, the costs for the factfinder of independent research on this question are reduced.

2. *Constraints on General Utility.*—The foregoing utility model provides only a first approximation of the solution to takings problems because, while it may suggest the proper result in the large majority of cases, it does not exhaust the range of considerations courts must entertain. Utility must often be reconciled with the dictates of fairness. Indeed, in certain cases, utility must be strictly subordinated to these dictates inherent in the takings clause as well as to the precepts of other constitutional provisions.¹³⁸

¹³⁷ Where the measure inflicts large losses, more refined compensation calculations may be needed, since inaccuracies tolerable when total loss is slight will be of greater consequence, even if proportionally identical. Also, where the measure inflicts large losses on a group, those losses are more likely to vary from case to case and thus make impossible the use of fixed compensation schemes with their lower settlement costs.

¹³⁸ Zoning measures that do not constitute a taking of property may nonetheless run afoul of other constitutional mandates, such as the first amendment,

The chief class of constraints on the utility analysis of takings problems is that of individual fairness. Fairness requires that individuals be treated not merely as means to social ends but rather as persons who deserve respect as ends in themselves.¹³⁹ Although fairness standards are necessarily indeterminate, courts faced with particular challenges to zoning measures must nonetheless ask whether those measures exact such a disproportionate sacrifice from individual property holders relative to their peers and to their expectations that the affected individuals may be seen as having been treated solely as a means in a process of social engineering.

The diminution in value test,¹⁴⁰ often used by contemporary courts,¹⁴¹ is at least a crude recognition that there are limits to the sacrifices that can be imposed upon individuals in pursuit of the general welfare.¹⁴² But diminution in value is only one of several indicia of possible unfairness. Unfairness may also inhere in regulations that fail to treat similarly placed property holders in an equal fashion, regulations whose net social utility is minimal or nonexistent, and regulations that upset current property uses or prospective uses the regulating agent itself has encouraged.

One element of unfairness beyond diminution in value consists of unequal treatment of similarly situated property holders.¹⁴³ This edict of equal treatment may be violated where, for example, a zoning ordinance requires one developer out of many in a given area to dedicate a disproportionate amount of land to satisfy that area's needs for parks or school facilities,

see Part V, pp. 1550-68 *infra*, the equal protection clause, see pp. 1666-79 *infra*, and rights of association grounded in substantive due process, see Part VI, pp. 1568-78 *infra*.

¹³⁹ See I. KANT, *GROUNDSWORK OF THE METAPHYSIC OF MORALS* 66-67 (2d ed. H.J. Paton trans. 1964).

¹⁴⁰ See pp. 1476-81 *supra*.

¹⁴¹ See note 69 *supra*.

¹⁴² See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

¹⁴³ Notions of equal treatment currently inform some aspects of zoning law, most notably the "spot zoning" doctrine, see p. 1439 *supra*. Courts generally strike down spot zoning, citing the need to treat similarly situated land in a similar manner. See, e.g., *Schubach v. Silver*, 461 Pa. 366, 387, 336 A.2d 328, 336 (1975).

The equal treatment constraint focuses on the unfairness inherent in singling out individuals for disproportionate burdens. The logic of the constraint is aptly captured by conceptualizing zoning measures along a spectrum, at one end of which are measures in the nature of a broad income tax, and at the other are measures in the nature of a bill of attainder. Where a zoning measure is widely and proportionately distributed among similarly situated parties it takes on the character of a tax. Taxes are seldom successfully assailed on takings grounds. See, e.g., *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369 (1974). Where, however, the regulation is focused on an individual or narrow class, it takes on the character of a bill of attainder. See generally B. ACKERMAN, *supra* note 5, at

rather than spreading that obligation among all developers in proportion to the specific needs created by their enterprises.¹⁴⁴ Similarly, where a zoning board prohibits without cause a given use while permitting identical uses in the immediate vicinity, fairness concerns suggest that courts strictly scrutinize the particular prohibition.¹⁴⁵ In some cases, the unfairness otherwise suggested by special burdens may be mitigated somewhat where the burdens simultaneously benefit the individuals affected in some direct and specific fashion—as, for example, where neighboring property holders are each precluded from certain identical uses that would harm the other.¹⁴⁶ While the burdens are not distributed equally, neither are the reciprocal benefits; hence, no disproportionate sacrifices are incurred.¹⁴⁷

¹⁴⁴ 52-53; Sax I, *supra* note 37, at 64-65. The effect of introducing equal treatment logic to an analysis of the takings clause is that in regulating land use, the government must treat all similarly situated land in a similar manner, or compensate the owners of the parcels it singles out.

¹⁴⁵ See *Frank Anselmi, Inc. v. City of Cranston*, 107 R.I. 63, 264 A.2d 910 (1970) (minimum dedication requirement of seven percent invalid as not related to specific needs attributable to developer); *Collis v. City of Bloomington*, 246 N.W.2d 19 (Minn. 1976) (*dictum*).

¹⁴⁶ *Cf. State ex rel. Killeen Realty Co. v. City of E. Cleveland*, 169 Ohio St. 375, 160 N.E.2d 1 (1959) (taking where variance denied to landholder whose property was "isolated" in area of less restricted uses); *Pure Oil Div. of Union Oil Co. v. City of Brook Park*, 26 Ohio App. 2d 153, 269 N.E.2d 853 (1971) (zoning one corner of busy intersection residential invalid where gas stations on other two corners, shopping center opposite, and many other commercial enterprises in area).

¹⁴⁷ Justice Holmes cited an example of such reciprocal burdens and benefits in *Mahon*, noting that the Court in *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914), upheld a law which required adjacent mining companies to preserve a pillar of coal near their property line. The *Plymouth Coal* Court, Justice Holmes noted, reasoned that "with the pillar on the other side of the line [there] would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415. Such a regulation was justified without compensation because it "secured an average reciprocity of advantage" to the coal companies. *Id.*

¹⁴⁸ The clearest modern examples of the reciprocity notion can be found in so-called subdivision exaction cases, in which municipalities seek to cope with the additional strain on community resources due to new development by imposing certain obligations on developers in return for subdivision approval. Since developers gain the benefit of this municipal approval in the increased value which accrues to their project, it generally seems fair to require them to bear the burdens designed to offset some of the costs associated with their gain. See, e.g., *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 644, 484 P.2d 666, 615, 94 Cal. Rptr. 630, 639 (en banc), *appeal dismissed*, 404 U.S. 878 (1971); *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 160 Conn. 109, 117-19, 273 A.2d 880, 885 (1970). The court in *Board of Supervisors v. DeGroot Enterprises, Inc.*, 214 Va. 235, 198 S.E.2d 600 (1973), noted p. 1465 *supra*, seems to have ignored reciprocity considerations which would have argued for a finding that the requirement of 15% low- or moderate-income units in all new develop-

A further source of unfairness inheres in zoning measures whose net utility is either minimal or nonexistent. Just as such measures generate greater demoralization costs for purposes of the utility analysis,¹⁴⁶ so too they compound the regulated party's sense of unfairness.¹⁴⁹ Because such measures seem gratuitous, the property holder may justly complain of needless sacrifice. In addition, zoning measures whose efficiency gains are great may more likely inure to the personal advantage of the regulated party, and thus diminish somewhat any immediate sense of unfairness he might feel.

A final aspect of unfairness results from the violation of expectations bound up in an individual's use of property. One of the chief purposes commonly ascribed to the institution of property is to safeguard a core of reasonable expectations for individuals.¹⁵⁰ Fairness, of course, does not forbid each and

ments not be considered a taking. This is not to suggest that a taking can never exist where the burdens on a landowner are set off to some extent by reciprocal benefits. See, e.g., *Stybel Plumbing, Inc. v. City of Oak Park*, 40 Mich. App. 108, 113-14, 198 N.W.2d 782, 784-85 (1972).

¹⁴⁸ See P. 1490 *supra*.

¹⁴⁹ Michelman, *supra* note 31, at 1234-35.

¹⁵⁰ See Board of Regents v. Roth, 408 U.S. 564, 577 (1972) ("It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."); L. Tribe, *supra* note 107, § 9-1; Reich, *supra* note 30; note 66 *supra*. But cf. Bishop v. Wood, 426 U.S. 341 (1976) (no property right in expectation of continued public employment without specific statutory or contractual grant); Arnett v. Kennedy, 416 U.S. 134 (1974) (plurality opinion) (scope of procedural guarantees determined by state enactment creating property interest). The protection of expectations has been endorsed by the Supreme Court in the takings context, see *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973), but this protection has been diluted where it can be said that the expectancy has been created and conditioned by the state. Thus, in *United States v. Fuller*, 409 U.S. 488 (1973), decided on the same day as *Almota*, the value added to the condemnee's property by the expectation of continued use of government grazing permits, which were revocable at will, was held to be excludable from an award of just compensation, *id.* at 493. The New York Court of Appeals has expanded upon this principle by ruling that in assessing what constituted a fair return to a regulated owner, society is to be given "credit" for that portion of the owner's value it created. *Penn. Cent. Transp. Co. v. City of New York*, 42 N.Y.2d 324, 333, 366 N.E.2d 1271, 1276, 397 N.Y.S.2d 914, 919 (1977), *aff'd*, 98 S. Ct. 2646 (1978); see Costonis, *The Disparity Issue: A Context for the Grand Central Terminal Decision*, 91 Harv. L. Rev. 403, 415-18 (1977). While this principle does reflect the need to balance individual and societal concerns, government must not be allowed to alter property relations simply by specifying the range of expectations which are "reasonable." See L. Tribe, *supra* note 107, § 9-4, at 465; Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 403, 436-44 (1977); Van Alstyne, *Cracks in "The New Property"*, *Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 86-104 (1976).

every modification of an individual's expected use of his property. Nonetheless, where the modification is sufficiently severe, just compensation may be required. The severity of any measure, in turn, depends not only upon the degree of the intrusiveness of the measure, but also upon the precise nature of the expectation violated.

These expectations vary along a spectrum and are separated by their degree of crystallization. Toward one end are those expectations which inhere in existing uses and which are therefore imbued with the assumption of continuity¹⁵¹—a legitimate assumption, providing that such continuity does not involve the illegal exclusion of alternative property uses.¹⁵² Residents of a housing development, for example, have a strong claim that the essential character of the development not be radically altered by subsequent zoning for large-scale industry. Somewhat less compelling, though still persuasive, is the claim of a property holder whose use, while presently inchoate, was specifically authorized by the very body which now seeks to prohibit it. Courts often sustain challenges to zoning measures that would undermine the reliance interest created by the issuance of building permits.¹⁵³

Where a property holder merely plans to pursue a use currently permitted but not as yet expressly authorized, the state has still greater freedom to limit these expectations without transgressing fairness constraints. Present law makes clear that a person's reasonable expectations in this category are limited to the assurance that *some* reasonable use of the land be secured to him.¹⁵⁴ Though courts have been unable to agree on pre-

Otherwise, the values served by protecting expectations, see note 66 *supra*, would be undermined in the area of state-created value. This would have a particular impact upon zoning, since values and expectancies flowing from the zoning of land can be said to have been created by the state through its passage of zoning laws, and subject to alteration through changes in those laws.

¹⁵¹ Current zoning law reflects to some extent the interest in protecting existing uses, insofar as it generally allows uses forbidden by an ordinance to continue if they antedated the enactment. See P. 1440 & note 81 *supra*.

¹⁵² See PP. 1554-59, 1052-53 *infra*.

¹⁵³ See, e.g., *Hotel Corno Springs, Inc. v. Hernandez Colon*, 426 F. Supp. 664 (D.P.R. 1976); cf. *Michigan Oil Co. v. Natural Resources Comm'n*, 71 Mich. App. 667, 249 N.W.2d 135 (1976) (permit explicitly subject to possible further restrictions).

¹⁵⁴ See, e.g., *C.F. Lytle Co. v. Clark*, 491 F.2d 834, 838 (10th Cir. 1974) ("[S]tate and federal constitutions do not require that zoning ordinances permit a landowner to make the most profitable use of his property. For there to be a taking the landowner must show he has been deprived of all reasonable uses of his land."); *South Terminal Corp. v. Environmental Protection Agency*, 504 F.2d 646, 678 (1st Cir. 1974); *Miller v. City of Albuquerque*, 89 N.M. 503, 505, 554 P.2d 665, 667 (1976). In apparent contravention of this standard, the court in

cisely what constitutes a "reasonable use," they have variously included as factors both the capacity of the individual to earn any return on his property¹⁵⁵ and the suitability of the land for the uses permitted under the ordinance.¹⁵⁶ In addition, the unfairness inherent in restrictions on future uses is abated somewhat where the property holder has made his initial purchase with the knowledge that zoning changes are either imminent or substantially commonplace.¹⁵⁷

A second kind of limitation on the utility model for takings cases may be termed a "personality" constraint. Unlike *fairness* constraints, which require that compensation systems assure individual property holders that their expectations not be unduly sacrificed for social ends, *personality* constraints concern not the relationship of the individual to his society but rather the integrity of the individual as an individual. These constraints require zoning boards and courts to ask whether a particular action impacts upon property holdings or uses so intimately bound up with their owners as to be extensions of the property holders themselves, thereby undermining the very personality of the owner. In these cases, compensation should be awarded regardless of the social utility of the regulatory measure.

An absolute requirement of compensation when government encroaches meaningfully on certain property values is not foreign to takings law. Courts have traditionally mandated compensation in cases of physical invasion,¹⁵⁸ thereby recognizing that

¹⁵⁵ *Turnpike Realty Co. v. Town of Dedham*, 362 Mass. 221, 284 N.E.2d 891 (1972), noted p. 1465 *supra*, upheld a regulation which so severely restricted the owners' property that no reasonable use of it was left.

¹⁵⁶ *Maier v. City of New Orleans*, 371 F. Supp. 653 (E.D. La. 1974), *aff'd*, 376 F.2d 1031 (5th Cir. 1975); *Solow v. City of New York*, 49 A.D.2d 414, 375 N.Y.S.2d 356 (1975).

¹⁵⁷ *Sixth Camden Corp. v. Township of Evesham*, 420 F. Supp. 709 (D.N.J. 1976); *Kirk v. Township of Tyrone*, 398 Mich. 429, 247 N.W.2d 848 (1976); *Equitable Bldg. Co. v. City of Royal Oak*, 67 Mich. App. 223, 240 N.W.2d 489 (1976).

¹⁵⁸ See *HEF, Ltd. v. Superior Court*, 15 Cal. 3d 508, 521, 542 P.2d 237, 246, 125 Cal. Rptr. 363, 374 (1975) (en banc) ("The long settled state of zoning law renders the possibility of change in zoning clearly foreseeable to land speculators and other purchasers of property, who discount their estimate of its value by the probability of such change."); *cert. denied*, 423 U.S. 904 (1976); note 66 *supra*. A fortiori, fairness concerns are minimal when an owner is precluded from developing land by a restriction that was in effect at the time of his purchase. See *Abel v. Zoning Bd. of Appeals*, 172 Conn. 286, 374 A.2d 227 (1977). The court in *Bartlett v. Zoning Comm'n*, 161 Conn. 24, 283 A.2d 907 (1971), noted p. 1465 *supra*, ignored the relevance of these considerations, finding a taking on the basis of excessive restrictions even though plaintiff had purchased the land subject to virtually identical restrictions.

¹⁵⁹ See note 41 *supra*.

such intrusions have a peculiarly personal impact, implicating a core of ownership rights intimately linked with the owner.¹⁵⁹ Furthermore, the personality constraint may also be activated by intrusions that, although not physical invasions, nonetheless amount to an attack on a particularly personal aspect of property, such as private life within the home.¹⁶⁰ Spheres of personality are protected from government interferences by Bill of Rights provisions other than the takings clause,¹⁶¹ and to the extent that an intrusion has the same impact upon values of privacy and autonomy as does a physical invasion, compensation should be required.

This personality constraint, while an absolute bar to uncompensated government action in a limited number of cases, is not likely to affect most instances of land use regulation. A property use that opens the property to the public or thrusts it into contact with persons other than the owner can hardly be claimed to be a personal and private use.¹⁶² Faced with a takings challenge to any regulation of such uses, a court need not be concerned with the personality constraint; in such cases, the court should constrain utility only according to the dictates of fairness, which are more properly addressed to relations between property holders and society than is personality. Thus, the absolute protection against uncompensated physical invasion makes sense insofar as one regards dominion alone as particularly unlikely to constitute a "public" attribute of property and, instead, as particularly likely to reflect the personality values at the core of this constraint on general utility.

C. *The Award of Just Compensation*

1. *The Amount Required.*—Takings clause problems require courts and zoning boards to decide not only when compensation is due but also what amount of compensation is adequate in a given case.¹⁶³ In contrast to the unsettled state of takings law,

¹⁵⁹ *Freeman, supra* note 47, at 928-29; *Michelman, supra* note 31, at 1226-29.

¹⁶⁰ *Freeman, supra* note 47, at 928 n.92.

¹⁶¹ See, e.g., U.S. CONST. amend. IV ("right of the people to be secure in their persons, houses, papers, and effects"); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

¹⁶² Property that ordinarily comes into significant contact with the public loses its claim of intimacy in much the same fashion as so-called public figures lose the full scope of libel protection extended to private persons, *see*, e.g., *Curtis Publishing Co. v. Butts*, 388 U.S. 136 (1967).

¹⁶³ This determination may be made by zoning boards prior to the enactment of a regulatory scheme or by courts faced with takings challenges to particular schemes. The advantage of prior administrative determination is that zoning boards may be able to take advantage of various modes of compensation, *see*

current rules regarding what constitutes just compensation are fairly well established and uniformly applied. Generally, the state must pay the property holder the fair market value of the property taken.¹⁶⁴ As the United States Supreme Court noted in a recent treatment of the issue, "the owner is entitled to the fair market value of his property at the time of the taking. . . . And this value is normally to be ascertained from 'what a willing buyer would pay in cash to a willing seller.'" ¹⁶⁵

In fixing market value, courts and juries consider not simply the value of the property as it is currently used but also the "highest and best use" to which it may legally be put.¹⁶⁶ If a given parcel of property can command a much higher price in the market because of the possibility of changing its present use, that higher price may legitimately be awarded as just compensation. Thus, the Supreme Court has observed that the "highest and most profitable use for which the property is adaptable . . . is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use effects the market value. . . ." ¹⁶⁷

To be sure, this apparently simple doctrine of highest and best use for evaluating required compensation settlements is not without complications. Courts are permitted to consider the

pp. 1500-01 *infra*, while it is unlikely that courts can award anything but monetary damages.

¹⁶⁴ See *United States v. 100 Acres of Land*, 468 F.2d 1261 (9th Cir. 1972), *cert. denied*, 414 U.S. 822 (1973); *State v. Colby*, 321 So. 2d 878 (La. Ct. App. 1975); *UNITED STATES EMINENT DOMAIN CODE* § 1004(a).

¹⁶⁵ *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 474 (1973). In the case of partial takings caused by land use regulation, this standard reduces to the difference between the market value prior to regulation and the market value thereafter. See, e.g., *Martin v. Port of Seattle*, 64 Wash. 2d 309, 319, 391 P.2d 549, 547 (1964) (in an inverse condemnation proceeding, state "must pay the individual the amount he suffers in the diminishment of the value of his land, as reflected in the decrease in the amount he can receive by a sale to a willing buyer"), *cert. denied*, 379 U.S. 989 (1965). It is difficult to discuss the valuation problem in the context of regulatory "takings," since a finding that an attempted exercise of the police power exceeded legitimate bounds so as to constitute a taking most often leads to abandonment of the regulatory scheme rather than an award of compensation. In eminent domain proceedings where a part of a property interest is taken, analogous to regulatory takings, the award has been the difference in market value of the whole before and after the partial taking. *United States v. Wayne*, 202 F.2d 550, 554 (10th Cir. 1953); *United States ex rel. TVA v. Indian Creek Marble Co.*, 40 F. Supp. 811, 818, 819 (E.D. Tenn. 1941).

¹⁶⁶ *United States v. Weyerhaeuser Co.*, 538 F.2d 1363 (9th Cir. 1976); *United States v. Improved Premises Located at Northwest Corner of Irving Place & 16th St.*, 359 F. Supp. 528 (S.D.N.Y. 1973); see *Costonis, supra* note 4, at 1042-43.

¹⁶⁷ *United States v. Toronto, H. & B. Navigation Co.*, 338 U.S. 396, 405-06 (1949); see *Olson v. United States*, 292 U.S. 246, 255 (1934).

probability that zoning law changes will allow certain more valuable future uses of the particular property.¹⁶⁸ Further, in assessing the market value to be used, courts cannot simply rely on the price paid by the property holder.¹⁶⁹ In addition, courts addressing compensation questions may ignore that quantum of market value derived from government-created actions.¹⁷⁰ All of these qualifications muddle the evaluation of the required amount of compensation.

Yet current just compensation law suffers from a more fundamental weakness: there appears to be no theoretical justification for insisting on highest and best use awards. Even under current conceptions of what constitutes a taking, the doctrine of highest and best use is seemingly a non sequitur. If, for example, under the diminution in value test a regulation goes "too far," it is hard to see why compensation need be greater than the amount necessary to leave the property holder above the "too far" point.¹⁷¹ Not only is highest and best use compensation inconsistent with the theory of takings generally, but it is also a substantial strain on governmental resources. As a result, important regulatory projects must often be abandoned or, on the other hand, police power notions so expanded as to foreclose the possibility of compensation altogether.¹⁷² Neither consequence has much to commend it, particularly in view of the meager foundations of the highest and best use doctrine.

The standard for compensation must therefore be reformulated so as to be consistent with the underlying test for takings in general. Legal doctrine does not preclude such an endeavor since, as the Supreme Court has observed, the highest and best use doctrine is more one of practical convenience than one of constitutional necessity.¹⁷³ Indeed there have been a number of

¹⁶⁸ *United States v. Meadow Brook Club*, 259 F.2d 41 (2d Cir.), *cert. denied*, 358 U.S. 921 (1958); see *Costonis, supra* note 4, at 1043; *Sackman, The Impact of Zoning and Eminent Domain Upon Each Other in Southwestern Legal FOUNDATION, PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN* 107 (1971); *Zipser, Zoning Classification and Eminent Domain*, 1 URB. LAW. 89 (1969).

¹⁶⁹ *United States ex rel. TVA v. Powelson*, 319 U.S. 266 (1943); *Town of E. Haven v. Eastern Airlines, Inc.*, 470 F.2d 148 (2d Cir. 1972), *cert. denied*, 411 U.S. 965 (1973).

¹⁷⁰ *United States v. Fuller*, 409 U.S. 488 (1973); *Penn. Cent. Transp. Co. v. City of New York*, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914, (1977), *aff'd*, 98 S. Ct. 2646 (1978).

¹⁷¹ See *Costonis, supra* note 4, at 1045-49; *Costonis, supra* note 150, at 406, 411-12.

¹⁷² See *Costonis, supra* note 4, at 1045-49.

¹⁷³ *United States v. Cors*, 337 U.S. 325, 332 (1949) ("The Court . . . has been careful not to reduce the concept of 'just compensation' to a formula")

departures from the market value rule, where either the lack of a market¹⁷⁴ or considerations of justice¹⁷⁵ required such departures. The very terms of the fifth amendment, furthermore, are sufficiently flexible to accommodate changing notions of what compensation is "just."¹⁷⁶

The constrained utility model for takings clause problems indicates a range of factors which could conceivably give rise to just compensation awards. If compensation is awarded by a zoning board for utility reasons, it should equal that amount necessary to effect a minimization of the sum of settlement and demoralization costs. If the award is required because of an undue diminution in value, then compensation should bring the property holder to a point where the diminution is no longer actionable. If the award is required because one property holder has been made to bear a disproportionate impact relative to other similarly situated holders, then compensation should place him in a position where his loss is equivalent to that of others. If the award is required because the reasonable expectations of the property holder have been unduly violated, then compensation should equal the return he would make on the use he could reasonably have expected to pursue. Where a regulation infringes upon personality values, however, full market value compensation seems the appropriate means of redress.

2. *The Form of Compensation.*—Once the amount of compensation has been determined, a zoning board must consider the form that the compensation award should take. Traditionally, compensation awards have consisted of cash transfers. Yet the financial difficulties of municipalities continue to make monetary payments a particularly costly mode of compensation. Even were courts to abandon the doctrine of highest and best use for determining the amount of compensation, municipalities might still be unable to fund the takings necessary to achieve vital land use goals.

The takings clause, however, does not require that compensation take the form of cash payments. As the Supreme Court has

[T]he Amendment does not contain any definite standards of fairness by which the measure of 'just compensation' is to be determined.; see *State v. Crow*, 386 So. 2d 353 (La. 1973).

¹⁷⁴ See, e.g., *United States v. 564.54 Acres of Land*, 506 F.2d 796 (3d Cir. 1974).

¹⁷⁵ See, e.g., *Lord Mfg. Co. v. United States*, 84 F. Supp. 748 (Ct. Cl. 1949) (where market value of goods appropriated for war effort was based on virtual monopoly plus shortages, just compensation was not market value but cost plus 10%); *cert. denied*, 339 U.S. 956 (1950).

¹⁷⁶ *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950); *City of Tucson v. Rickles*, 15 Ariz. App. 244, 247, 488 P.2d 180, 183 (1971).

held, "consideration other than cash . . . may be counted in the determination of just compensation."¹⁷⁷ Thus, courts and commentators have begun the analytical process of designing alternative methods of satisfying takings judgments. The major proposal of this sort has been to award so-called transferable development rights (TDR's) to regulated property holders with valid takings claims.¹⁷⁸ TDR's consist of rights granted to the regulated party to develop property—other than that which the regulation has "taken"—to an extent beyond that permitted by current zoning laws. The regulated party may then develop that property himself or sell the development rights to another property holder. The payment received in the transaction, or, alternatively, the development rights themselves, should equal the cash transfer amount that the regulated party should have otherwise been granted.

Although specific grants of TDR's may be found to constitute inadequate compensation in given cases,¹⁷⁹ the legitimacy of TDR's as a form of compensation has recently received judicial approval. In *Penn Central Transportation Co. v. City of New York*,¹⁸⁰ the New York Court of Appeals upheld a refusal by the New York City Landmarks Commission to permit development that would have destroyed Grand Central Station as an architectural landmark.¹⁸¹ In so doing, Chief Judge Breitel, speaking for the Court, specifically relied on the fact that the Commission had awarded the owner compensation in the form of TDR's.¹⁸² Although the legality of TDR's awaits final disposition,¹⁸³ they would seem to be an ideal method of reconciling the requirements of individual fairness with the equally undeniable imperatives of social policy.

¹⁷⁷ Regional Rail Reorganization Act Cases, 419 U.S. 102, 151 (1974). The Court characterized as dicta previous statements to the effect that compensation must be the "full monetary equivalent of the property taken," *id.* at 150-51.

¹⁷⁸ See J. COSTONS, *SPACE ADRIAT (1974)*; COSTONS, *supra* note 4, at 1061-70; COSTONS, *supra* note 150, at 418-26; Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101 (1975).

¹⁷⁹ See, e.g., *Fred F. French Inv. Co. v. City of New York*, 39 N.Y.2d 587, 597-98, 350 N.E.2d 381, 387-88, 385 N.Y.S.2d 5, 11-12, *appeal dismissed*, 429 U.S. 990 (1976), *discussed in* Comment, *Urban Park Preservation Through Transferable Development Rights*, 90 HARV. L. REV. 637 (1977).

¹⁸⁰ 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 98 S. Ct. 2646 (1978), *discussed in* COSTONS, *supra* note 150.

¹⁸¹ 42 N.Y.2d at 328-29, 366 N.E.2d at 1273-74, 397 N.Y.S.2d at 916-17.

¹⁸² *Id.* at 327, 366 N.E.2d at 1273, 397 N.Y.S.2d at 916.

¹⁸³ Affirming Chief Judge Breitel's decision, the Supreme Court decided that no taking had occurred and explicitly declined to determine whether the TDR's given would have constituted "just compensation" in the event of a taking. 98 S. Ct. at 2658-59. The Court did note that TDR's "are to be taken into account in considering the impact of regulation." *Id.* at 2666.

Capital Briefs

★ George Bush supporters in New Hampshire are not pleased with the President's laissez-faire attitude toward the state. GOP National Committeeman **Hugh Gregg**, a former governor and father of current Gov. Judd Gregg, has pleaded for Bush to visit the state. "We felt he should have started a campaign before there was any opposition," Gregg said in reference to **Pat Buchanan**.

★ "A lot of people are unhappy," Gregg said of the New Hampshire electorate in an interview with the *Washington Times*. "They're out of work, banks are stopping credit, all kind of bad things are going on, and there are a lot of unhappy Republicans who need to be stroked."

★ The "Tonight Show's" **Jay Leno**: "I was in Washington, doing a show there, and at 8:30 in the morning I get a call from President Bush at the hotel. At first I thought it was somebody doing an impression of President Bush and I said to him, 'I don't mean to be rude, Mr. President, but if you're really President Bush, tell me about your economic plan.' And when he didn't say anything, I knew it was him."

★ Pennsylvania Democratic Lt. Gov. **Mark Singel** is running for the U.S. Senate—but without the support of his Democratic governor, **Bob Casey**. Reason: Singel has abandoned a pro-life position to adopt the pro-abortion stance of incumbent Republican **Arten Specter**. Pro-life voters still have a candidate, however: State Sen. **Steve Freind**, who is opposing Specter in the GOP primary.

★ Cuomo blamed recalcitrant Republicans in the State Senate for his decision. By refusing to compromise on new deficit-reduction measures (read: higher taxes), Cuomo said, they were prolonging the state's budget crisis and forcing him to stay home.

★ Cuomo, far better known than any of the Democrats' six declared candidates, held a comfortable lead in polls of Democratic voters across the country. At home, however, Cuomo's approval rating has sunk to an all-time low of 44 per cent. That is down from 75 per cent in January 1988.

★ President Bush may have earned the ire of conservatives on such issues as taxes and affirmative action, but in at least one area—the selection of federal judges—he continues the Reagan Revolution. Justice Department sources reported last week that Bush has tapped Deputy Solicitor General **John Roberts, Jr.**, a brilliant 36-year-old conservative, to succeed **Clarence Thomas** on the crucial U.S. Court of Appeals for the District of Columbia.

★ With Senate Minority Leader **Bob Dole** (R-Kan.) recuperating from prostate surgery—and chances slim for the GOP to make major Senate gains next fall—speculation is rife that he might not run for re-election. Among those GOP senators interested in the top leadership position, if Dole steps down, is Texas' **Phil Gramm**.

★ Columnists **Evans** and **Novak** reported last

★ Democratic activists who were waiting for Cuomo to announce are likely now to join up with Sen. **Bob Kerrey** (D-Neb.). Says top Democratic consultant **David Doak**, who would have produced Cuomo's media: "Kerrey is a lot more logically a Northeast candidate than Arkansas Gov. **Bill Clinton**. This will free a lot of Cuomo's money to go to Kerrey."

★ Doak's partner, **Bob Shrum**, told the *New York Post*: "The race will be boiling down to Kerrey-Clinton. Kerrey gets helped [by Cuomo's staying out]... It's going to get Kerrey more money and more attention."

★ Clinton has picked up his biggest endorsement—from Sen. **Sam Nunn** (D-Ga.). In an announcement directed to Democratic conservatives and centrists, Nunn said that Clinton's "message is unlike anything else you will hear from the other Democratic candidates."

★ Georgia Democrats have moved up their primary from March 10 to March 3. With **Nunn** and Gov. **Zell Miller** behind Clinton, the Arkansas governor looms as a strong favorite in the Peach State. A victory there could help offset any defeat two weeks earlier in New Hampshire.

★ California Gov. **Jerry Brown** likes to brag that he will accept no PAC money in his race for the Democratic presidential nomination. What he doesn't say is that PACs put little money into the

nominating process. At this point four years ago, for instance, **Michael Dukakis** had raised \$8.1 million, of which the grand total of \$3,150 came from PACs. Of the seven Democratic candidates, only **Richard Gephardt** had raised more than \$76,000 from PACs. And the \$166,763 which they gave him amounted to only 6% of his \$3.5-million

① Jim Mills
② Joshua Mills
pro

Minority interests may also be protected by means which do not impinge upon the majority's rights of expression.⁷² The state may, for example, require corporations to pay a special dividend to shareholders who object to corporate political expenditures.⁷³ The state may also permit only those corporate political expenditures financed by voluntary shareholder contributions. State authorization of corporately administered political funds supported by voluntary contributions may be sufficient to vindicate individual speech and associational rights. Segregated, voluntary political funds allow members of the corporate family to speak and associate while permitting dissenting shareholders to decline support of the association's political expression.⁷⁴ Corporate political expenditure bans qualified by the availability of such political action committees achieve a balanced accommodation of the rights and interests of majority and minority shareholders and should withstand constitutional challenge.⁷⁵

3. *Media Right of Access.*—Many of the Supreme Court's recent decisions defining the content and scope of first amendment protection have involved not the soapbox orator or the lonely pamphleteer, but rather representatives of the established

corporate political expression depends, in part, on one's confidence in the ability of the normal channels of corporate democracy to resolve political and business policy differences between corporate managers and majority shareholders. State regulation of corporate government processes and the availability of judicial remedies to curb unauthorized acts may be sufficient to protect the state and shareholder interest in representative corporate political expression.

⁷² See 98 S. Ct. at 1426; *United States v. UAW*, 352 U.S. 567, 596 (1957) (Douglas, J., dissenting); *United States v. CIO*, 335 U.S. 106, 149-50 (1948) (Rutledge, J., concurring). The Court suggested the use of judicial remedies to protect the interests of minority shareholders. 98 S. Ct. at 1426; see *Cort v. Ash*, 422 U.S. 66, 84 (1975). Actions to remedy ultra vires acts and the breach of fiduciary duty, however, can afford only partial protection for shareholders. Many corporate political expenditures to which shareholders object will be authorized by the corporate charter.

⁷³ See *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 237-42 (1977); *Brotherhood of Ry. & S.S. Clerks v. Allen*, 373 U.S. 113, 120-24 (1963); *International Ass'n of Machinists v. Street*, 367 U.S. 740, 755 (1961). One commentator has suggested that the free rider problem may make this system unfeasible. See Comment, *supra* note 58, at 158-59.

⁷⁴ Federal legislation permitting the formation and operation of such funds, 2 U.S.C. § 441b (1976), is described in Comment, *Corporate Political Action Committees: Effect of the Federal Election Campaign Act Amendments of 1976*, 26 CATH. U.L. REV. 756 (1977). Note, *supra* note 26, at 299-301.

⁷⁵ This analysis suggests that the Federal Corrupt Practices Act provision regulating corporate and union political expenditures, 2 U.S.C. § 441b (1976), is constitutional. Note, *supra* note 26, at 303-14.

news media.¹ Such cases present not only general issues involving freedom of speech but also questions of the particular role of the press in the constitutional scheme. Last Term both types of issues were raised when a broadcasting company challenged restrictions on access to a California prison. Although the Supreme Court had earlier ruled that members of the media "have no constitutional right of access to prisons or inmates beyond that afforded the general public,"² it did not make clear whether this "equal access" rule applied to all cases or only those in which the public already had adequate access.³ In *Houchins v. KQED, Inc.*,⁴ the Court once again announced that the press enjoyed no special right of access beyond that of the public,⁵ but did nothing to clarify what right, if any, the public had.

Broadcasting company KQED had sought permission to enter and photograph an area of the Alameda County jail at Santa Rita known as "Little Greystone," an infamous detention area and the scene of a recent inmate suicide.⁶ Sheriff Houchins informed the company that it was prison policy not to allow such access, and KQED sued for preliminary and permanent injunctive relief, claiming that the prison's policy violated its first amendment rights. After the commencement of litigation, Houchins announced a program of monthly prison tours open to the public, including members of the media. The tours did not include Little Greystone, and no cameras or recording devices were permitted.⁷ Holding these measures to be inadequate, the district court issued a preliminary injunction prohibiting the sheriff from denying responsible media representatives reasonable access, with cameras and recorders, to all portions of the jail, including Little Greystone.⁸ This action was upheld by the Ninth Circuit.⁹

¹ See, e.g., *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973). See also Stewart, "Of the Press," 26 *HASTINGS L.J.* 631, 632 (1975).

² *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (newsmen have no right to interview specific prison inmates); see *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (same).

³ See *Houchins v. KQED, Inc.*, 429 U.S. 1341, 1344 (1977) (Grant of stay) (Rehnquist, Circuit Justice).

⁴ 98 S. Ct. 2588 (1978).

⁵ *Id.* at 2597.

⁶ See *id.* at 2591. See also *Brenneman v. Madigan*, 343 F. Supp. 128, 133 (N.D. Cal. 1972).

⁷ The tour program is described in the Court's opinion. See 98 S. Ct. at 2591-92.

⁸ *KQED, Inc. v. Houchins*, 18 *CRAK L. REV.* (BNA) 2252, 2253-54 (N.D. Cal. 1975).

⁹ *KQED, Inc. v. Houchins*, 546 F.2d 284 (9th Cir. 1976).

John Roberts

The Supreme Court reversed in a 4-3 decision.¹⁰ Chief Justice Burger, who wrote a plurality opinion joined by two other Justices, concluded that the media has no special right of access beyond that enjoyed by the general public.¹¹ Though acknowledging the Supreme Court's observation in *Branzburg v. Hayes*¹² that "news gathering is not without its First Amendment protections,"¹³ the Chief Justice argued that nothing in that case supported the view that the press had a special right of access to sources of the news. Indeed, the Court in *Branzburg* explicitly stated that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."¹⁴ Furthermore, in *Pell v. Procunier*¹⁵ and *Saxbe v. Washington Post Co.*,¹⁶ the Court relied on *Branzburg* to deny the existence of a press right to interview specific inmates, concluding that the Constitution does not require government officials "to make available to journalists sources of information not available to members of the public generally."¹⁷ Chief Justice Burger believed that the broadcaster's claim in the present case was precisely for the same special privilege of access, and accordingly voted to reverse on the basis of *Pell* and *Saxbe*.¹⁸

Justice Stewart concurred in the judgment of reversal because he agreed that the lower court injunction was overbroad in granting the press access to areas not open to the public,¹⁹ but he disagreed that "equal access" meant that no distinctions could be drawn between the press and public.²⁰ Noting the "critical role" of the press in American society and its special mention in the Constitution, Justice Stewart argued that the press must not only be admitted to the same areas as the public, but also be ad-

¹⁰ Chief Justice Burger's plurality opinion was joined by Justices White and Rehnquist. Justice Stewart filed a separate opinion concurring in the judgment, while Justices Brennan and Powell joined in the dissent authored by Justice Stevens. Justices Marshall and Blackmun did not participate in the case.

¹¹ 98 S. Ct. at 2597.

¹² 408 U.S. 665 (1972) (newsmen denied testimonial privilege not to disclose confidential sources to grand jury).

¹³ 98 S. Ct. at 2595 (quoting *Branzburg v. Hayes*, 408 U.S. at 707).

¹⁴ 408 U.S. at 684; see 98 S. Ct. at 2595.

¹⁵ 417 U.S. 817 (1974).

¹⁶ 417 U.S. 843 (1974).

¹⁷ *Pell v. Procunier*, 417 U.S. at 834; see *Saxbe v. Washington Post Co.*, 417 U.S. at 850.

¹⁸ 98 S. Ct. at 2597.

¹⁹ *Id.* at 2598-99 (Stewart, J., concurring). See also *Pell v. Procunier*, 417 U.S. at 833-34 (Stewart, J.).

²⁰ 98 S. Ct. at 2598 (Stewart, J., concurring).

mitted in such a manner as to allow effective reporting.²¹ Justice Stewart would have upheld an injunction granting the press access "on a more flexible and frequent basis" than the monthly public tours, and permitting journalists to use cameras and recording equipment, even though these were denied the public. He specifically kept open the possibility of this relief to *KQED* on remand.²²

Justice Stewart's argument is similar to that advanced in some court opinions²³ and commentary²⁴ to the effect that the press should enjoy a privileged status not because of its own right but as a vehicle for effecting the public's right.²⁵ The Chief Justice found no support for the proposition that the press is entitled to special constitutional protection to vindicate the public's right to information.²⁶ On the contrary, the press has traditionally been viewed as an independent institution not subject to any particular obligation to the public.²⁷ Moreover, Chief Justice Burger disagreed with Justice Stewart's assumption that the press is best qualified to implement the public right.²⁸ This line of argument would make asserted press rights depend upon an evaluation of press performance. Such an evaluation, however, would conflict with established notions of a press free from government scrutiny. Yet this evaluation would seem to follow from claims

²¹ *Id.* ("[T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.")

²² *Id.* at 2598-99.

²³ See, e.g., *Pell v. Procunier*, 417 U.S. at 840 (Douglas, J., dissenting) (quoting *Branzburg v. Hayes*, 408 U.S. at 721 (Douglas, J., dissenting)) ("The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know."); *KQED, Inc. v. Houchins*, 546 F.2d at 294 (Dunaway, J., concurring).

²⁴ See, e.g., Note, *The Public's Right to Know: Pell v. Procunier and Saxbe v. Washington Post Co.*, 2 *Hastings Const. L.Q.* 829 (1975); Note, *Bans on Interviews of Prisoners: Prisoner and Press Rights After Pell and Saxbe*, 9 *U.S.F.L. Rev.* 718, 730-35 (1975); Note, *The Rights of the Public and the Press to Gather Information*, 87 *Hart, L. Rev.* 1505, 1509-10, 1522 (1974). See also Brief of National Newspaper Ass'n as Amicus Curiae, *Houchins v. KQED, Inc.*, 98 S. Ct. 2588 (1978).

²⁵ See 98 S. Ct. at 2598 (Stewart, J., concurring) (a journalist's purpose is "to gather information to be passed on to others, and his mission is protected by the Constitution").

²⁶ 98 S. Ct. at 2596.

²⁷ See *Chicago Joint Bd. Amalgamated Clothing Workers of America v. Chicago Tribune Co.*, 435 F.2d 470, 474 (7th Cir. 1970), cert. denied, 402 U.S. 973 (1971); *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 134-35 (9th Cir. 1971).

²⁸ 98 S. Ct. at 2596-97.

grounding special press rights in the media's supposed ability to vindicate public rights. If the press fails to vindicate the public right, then, under Justice Stewart's theory, it might forfeit its claim to special protection.

While Justice Stewart sought to draw a distinction between granting the press greater rights of access and granting it more effective and flexible access to the same areas open to the public,²⁹ this distinction seems difficult to grasp. The injunction Justice Stewart indicated he would uphold would grant the press rights of access not available to the public generally: the right to enter the prison at "reasonable times and hours," the right to photograph prison facilities, and the right to use recording equipment.³⁰ Whether one calls these greater rights than are available to the public or more flexible implementation of the same rights seems largely a matter of semantics.

Although it may be argued that specific mention of the press in the first amendment entitles it to special rights,³¹ the press clause probably was intended not to afford the media any greater protection, but rather to ensure that the general freedom of expression guaranteed by the first amendment would not be forfeited by the act of publication.³² The assertion that the press has special rights as vindicator of the public right carries with it the danger that concomitant responsibilities might be recognized, responsibilities that would endanger a free press far more than the denial of privileged status as the public's representative.³³ The privilege of using the airwaves granted to broadcast media has been cited as the justification for imposing duties of fair reporting and rights of reply.³⁴ Recognizing a special privilege of access for the media might well provide the justification for imposing similar duties on journalists who avail themselves of special ac-

²⁹ *Id.* at 2598-99 (Stewart, J., concurring).

³⁰ *Id.*

³¹ See *id.* at 2598; Saxbe v. Washington Post Co., 417 U.S. at 863 (Powell, J., dissenting); Nimmer, *Introduction—Is Freedom of the Press a Redundancy? What Does It Add to Freedom of Speech?*, 26 HARVARD L.J. 639, 639-40 (1975); Stewart, *supra* note 1, at 633.

³² See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-19, at 675 n.5 (1978); Van Alstyne, *Comment: The Hazards to the Press of Claiming a "Preferred Position"*, 28 HARVARD L.J. 761, 769 n.16 (1977). In any event, it seems that nothing definite can be said of the Framers' intent since they themselves "had no very clear idea as to what they meant by 'the freedom of speech or of the press.'" Chafee, *Book Review*, 62 HARV. L. REV. 891, 898 (1949). See also L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 221, 224-25, 236-38 (1960).

³³ See L. TRIBE, *supra* note 32, § 12-19, at 675 n.5; Van Alstyne, *supra* note 32, at 764-69.

³⁴ See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

cess.³⁵ Finally, according to the press special rights presents the insolvable problem of determining who qualifies as "the press." Any meaningful definition of the press would involve the state in choosing among media representatives in a potentially unconstitutional manner.³⁶

While Chief Justice Burger and Justice Stewart felt that the case turned on the issue of what rights the press had beyond those of the public, the dissenting Justices took a substantially different view of the case. Even granting the proposition that the press should have no special rights, Justice Stevens, writing for the dissent, felt the question still remained whether or not the *pub-*

³⁵ In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Supreme Court struck down a Florida statute granting rights of reply to political candidates who were criticized in a newspaper editorial. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), however, the Court upheld rulings and regulations by the FCC which imposed similar rights of reply on broadcast media. The only apparent distinction between the two cases is that "[u]nlike broadcasting, the publication of a newspaper is not a government conferred privilege." *Associates & Aldrich Co. v. Times Mirror Co.*, 440 F.2d 133, 136 (9th Cir. 1971). According to this logic, granting special access to the press might justify governmental regulation of the sort permitted in *Red Lion*, at least over the reporting derived from such access. A special right of access based on the press' asserted role as vindicator of the public right might thus carry with it a fiduciary obligation.

³⁶ See *Branzburg v. Hayes*, 408 U.S. at 704 (if special press rights were recognized, it would "be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods"); *Lovell v. City of Griffin*, 303 U.S. 444, 453 (1938) (freedom of the press protects "every sort of publication which affords a vehicle of information and opinion"). The problem of government selection among media representatives has arisen most frequently in the context of the issuance of press passes. In such cases, first amendment concerns may be implicated in the process of selection, even if there is no first amendment right to the access in question. See, e.g., *Dayton Newspapers, Inc. v. Startek*, 345 F.2d 677 (6th Cir. 1965) (cause of action was stated in complaint alleging violation of first amendment rights when the police denied a particular reporter access to an area open to other members of the press); *Forcade v. Knight*, 416 F. Supp. 1025, 1038 (D.D.C. 1976) ("denial of White House access to differing viewpoints of the press deprives the public of the uninhibited, robust debate which is at the heart of the First Amendment"), *modified sub nom. Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977); *Borrea v. Fasi*, 369 F. Supp. 906, 909-10 (D. Hawaii 1974); *Quad-City Community News Serv., Inc. v. Jebens*, 334 F. Supp. 8, 14 (S.D. Iowa 1971).

In the present case, the lower court injunction directed the sheriff to allow access to "responsible" representatives of the media, see *KOEB, Inc. v. Houchins*, 18 CALM L. REP. (BNA) at 2253. Allowing first amendment rights to turn on the interpretation of such vague and subjective guidelines by government officials presents serious first amendment problems, see *Forcade v. Knight*, 416 F. Supp. at 1035; *Quad-City Community News Serv., Inc. v. Jebens*, 334 F. Supp. at 17.

lic's right was infringed by Sheriff Houchins' denial of access. The plurality dealt with this issue only tangentially, and in the limited context of deciding that the press had no special rights. Chief Justice Burger interpreted precedent stressing the importance of informed public opinion and free public discussion³⁷ as guaranteeing only the right to communicate,³⁸ not the right of access to information in the government's control.³⁹ *Pell* and *Saxbe*, according to the Chief Justice, "assumed that there is no constitutional right of access."⁴⁰ *Zemel v. Rusk*,⁴¹ which held that no first amendment right was violated by the government ban on travel to Cuba, was also cited for the proposition that "[t]he right to speak does not carry with it the unrestrained right to gather information."⁴² Since the Chief Justice did not distinguish in his analysis between a special press right and the general public right of access, it is unclear whether his discussion was intended to preclude a general public right as well as a special press right. Nonetheless, Chief Justice Burger broadly concluded that the opening of governmental institutions to the public was a task for legislative resolution through political processes, rather than for the Court.⁴³

The dissenters argued that a constitutional right of public access, available to all including the press, followed inevitably from the system of self-governance contemplated by the Framers.⁴⁴ One purpose of the first amendment was to ensure "the existence of an informed citizenry"⁴⁵ able to make responsible decisions.⁴⁶ Such a goal could not be achieved if there were no

³⁷ *Grosjean v. American Press Co.*, 297 U.S. 233, 249-50 (1936); *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

³⁸ This right was reaffirmed last Term in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). In that case, Virginia had sought to impose criminal penalties on a newspaper for publishing information concerning the proceedings of a commission reviewing possible judicial misconduct. Such publication violated a state statute making it a crime for anyone to divulge information concerning the proceedings. The Court held that at least as applied to a non-participant in the proceedings who divulges truthful information obtained by lawful means, the statute violated the first amendment.

³⁹ 98 S. Ct. at 2594-95.
⁴⁰ *Id.* at 2595.
⁴¹ 381 U.S. 1, 16-17 (1965).
⁴² 98 S. Ct. at 2595 (quoting *Zemel v. Rusk*, 381 U.S. at 17).
⁴³ 98 S. Ct. at 2596.
⁴⁴ *Id.* at 2605-06 (Stevens, J., dissenting).
⁴⁵ *Id.* at 2605.

⁴⁶ *Id.* See also *Saxbe v. Washington Post Co.*, 417 U.S. at 863 (Powell, J., dissenting); *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505, 1505-06

protection for the acquisition of information, as well as for its communication once acquired.⁴⁷ Justice Stevens further argued that access to prisons particularly merited protection, since concealment might undermine public confidence in the criminal justice system or endanger the constitutional guarantee of freedom from cruel and unusual punishment.⁴⁸

The dissenting Justices disagreed with Chief Justice Burger's interpretation of the relevant precedent. In their view, *Zemel v. Rusk* denied only the "unrestrained right to gather information,"⁴⁹ and *Branzburg* did recognize some right to gather news.⁵⁰ Finally, although *Pell* and *Saxbe* seemed to deny rights of access, (1974). In his opinion for the Court in the recent case of *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978), see note 38 *supra*, Chief Justice Burger wrote that the first amendment was adopted to protect vital interests "in public scrutiny and discussion of governmental affairs," 435 U.S. at 839. While these same interests would seem to support a first amendment right of access, however limited, to sources of information within government control, the Chief Justice was careful to note that *Landmark* involved no question of "any constitutionally compelled right of access for the press," *id.* at 837.

⁴⁷ 98 S. Ct. at 2606 (Stevens, J., dissenting).

⁴⁸ *Id.* at 2608-09. The Chief Justice himself has recognized the importance of public awareness about prison conditions, asserting that we cannot "continue to brush under the rug the problems of those who are found guilty and subject to criminal sentence," Burger, *Our Options Are Limited*, 18 VILL. L. REV. 165, 167 (1972), and that a "visit to most prisons will make you a zealot for prison reform." Address by Chief Justice Burger, Centennial Convocation of the Association of the Bar of the City of New York, Feb. 17, 1970, 25 REC. A.B. CITY NEW YORK 14, 20-21 (Supp. Mar. 1970). For additional judicial expressions of the public interest in scrutinizing the prison system, see *Saxbe v. Washington Post Co.*, 417 U.S. at 861 (Powell, J., dissenting); *Morales v. Schmidt*, 489 F.2d 1335, 1346 & n.8 (7th Cir. 1973) (Stevens, J., dissenting); *Nolan v. Fitzpatrick*, 451 F.2d 545, 547-48 (1st Cir. 1971); *Cullen v. Grove Press, Inc.*, 276 F. Supp. 727, 728-30 (S.D.N.Y. 1967).

⁴⁹ 98 S. Ct. at 2603 n.15 (Stevens, J., dissenting) (quoting *Zemel v. Rusk*, 381 U.S. at 17) (emphasis added by Stevens, J.). In addition, *Zemel* can be distinguished as turning on the dubious distinction between "action" and "speech"; see *Saxbe v. Washington Post Co.*, 417 U.S. at 858 (Powell, J., dissenting), or as involving "judicial unwillingness to interfere with congressional and executive control over foreign affairs." Note, *supra* note 46, at 1520.

⁵⁰ 98 S. Ct. at 2603 n.15 (Stevens, J., dissenting); see *Branzburg v. Hayes*, 408 U.S. at 709 (Powell, J., concurring); *Saxbe v. Washington Post Co.*, 417 U.S. at 859 (Powell, J., dissenting); Note, *supra* note 46, at 1531-32. Justice Powell's concurrence was necessary to sustain the Court's judgment in *Branzburg*, and some state and lower federal courts have interpreted *Branzburg* along the lines suggested in the concurrence, viewing it not as denying the existence of a first amendment right to gather information, but rather as engaging in a balancing process that implies the existence of such a right. See, e.g., *Baker v. F. & F. Inv.*, 470 F.2d 778, 783 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973); *Bursey v. United States*, 466 F.2d 1059, 1083, 1091 (9th Cir. 1972); *State v. Peter*, 132 Vt. 266, 268-70, 315 A.2d 254, 255 (1974). See also Goodale, *Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen*, 26 HASTINGS L.J. 709 (1973); *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 145-46 (1972).

it was important in those cases that significant alternative means of access existed, and that the denials in question were "not part of an attempt by the state to conceal the conditions in its prisons."⁵¹ *Pell* and *Saxbe* need not be taken to mean that broad and consistent denials of access, of a sort not present on their records, entail no constitutional problem.⁵²

While the dissent correctly reached the fundamental issue of whether or not there is a *public* right of access, which would include any right of the press, it gave little guidance for determining the scope of this right. A right of access based on grand but indeterminate notions such as self-governance, without other limits, could be used to justify access in virtually every case where it is sought. It is precisely this indeterminacy which led the plurality to reject a first amendment right of access on the grounds that it would permit "hundreds of judges . . . to fashion ad hoc standards . . . according to their own ideas of what seems 'desirable' or 'expedient.'"⁵³ Yet, contrary to the plurality view, the prior development of first amendment doctrine does provide standards for limiting the right of access within workable bounds.

Any right of access, like other first amendment rights, would be subject to limitation in the face of countervailing government or private interests.⁵⁴ Here the state has a legitimate interest in maintaining prison security and discipline, protecting the privacy of inmates, and promoting the penological goals of incarceration.⁵⁵ The recognition of rights of access should not interfere with the proper functioning of a prison system. As Justice Black noted, "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated."⁵⁶ Asserted rights of access

⁵¹ 98 S. Ct. at 2604 (Stevens, J., dissenting) (quoting *Pell v. Procunier*, 417 U.S. at 830).

⁵² 98 S. Ct. at 2604 (Stevens, J., dissenting).

⁵³ 98 S. Ct. at 2597.

⁵⁴ See *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest . . . can justify incidental limitations on First Amendment freedoms"); *Quaker Action Group v. Morton*, 516 F.2d 717, 725-26 (D.C. Cir. 1975); *Garcia v. Gray*, 507 F.2d 539, 543 (10th Cir. 1974), *cert. denied*, 421 U.S. 971 (1975).

⁵⁵ See 98 S. Ct. at 2592 n.2; *Procunier v. Martinez*, 416 U.S. 396, 404 (1974).

⁵⁶ *Adderley v. Florida*, 385 U.S. 39, 47 (1966). In *Adderley*, the Court upheld the convictions of students under a Florida trespass statute. The students had gathered on the county jail curtilage to protest the jailing of fellow students. Despite broad language in the opinion to the effect that the state can control its property for its proper uses, *id.* at 47-48, the case is not dispositive of the present case. *Adderley* involved protests interfering with prison functions, and considered the right to use the jail as a forum for protest. *Id.* See also *Brown v. Louisiana*, 383 U.S. 131, 166 (1966) (Black, J., dissenting). The claim in *Houchins v. KQED*,

must somehow be reconciled with these state interests. One approach, that suggested by Sheriff Houchins, would have the Court defer to the expertise of prison officials rather than embroil the judiciary in the complex tasks of prison administration.⁵⁷

The usual constitutional approach when first amendment rights conflict with valid government interests is not, however, one of general deference to the government authority but rather a balancing of the competing rights and interests.⁵⁸ A government interest incidentally infringing on a first amendment right will be upheld "if the incidental restriction . . . is no greater than is essential to the furtherance of that interest."⁵⁹ This "least restrictive alternative" test entails a balancing of the benefits in additional "speech" against any costs to the prison system associated with proposed alternatives, since no alternative is likely to serve the government interest in precisely the same fashion.⁶⁰ However one would strike the balance in accommodating a public right of access with valid prison objectives, it seems clear that the sheriff's prelitigation policy of a blanket exclusion of all would be overbroad.⁶¹

Perhaps the main reason the plurality did not reach this conclusion was that it did not consider general public rights to be at issue, but only special rights of the press beyond those of the public.⁶² General pronouncements in the plurality opinion that

Inc. was not for general access to stage protests, as it was in *Adderley*, but rather for limited access, appropriately tailored so as not to interfere with prison functions, for the purpose of gathering information. See generally *The Supreme Court*, 1966 Term, 81 HARV. L. REV. 110, 140-41 (1967).

⁵⁷ Brief for Petitioner at 21-22. See also 98 S. Ct. at 2594 ("the courts . . . are ill-equipped to deal with problems of prison administration"); *Procunier v. Martinez*, 416 U.S. 396, 405 (1974) (prison problems "require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches").

⁵⁸ On the inappropriateness of total deference, see *Procunier v. Martinez*, 416 U.S. 396, 405 (1974); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978) (Burger, C.J.) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. . . . Were it otherwise . . . the function of the First Amendment as a check on legislative power would be nullified."). A policy of deference would seem particularly dangerous when first amendment questions of access are involved. Without public access to scrutinize the performance of the prison authorities, it would be impossible to determine if the deference to the expertise of the officials were justified.

⁵⁹ *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

⁶⁰ See Ely, *Flag Deceleration: A Case Study in the Rules of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482, 1484-86 (1975).

⁶¹ This is particularly true since the policy of several prisons around Santa Rita has been one of more open access, without any deleterious consequences. See Brief for Respondents at 10-15, 53.

⁶² See 98 S. Ct. at 2596 ("The issue is a claim [of] special privilege of access which the Court rejected in *Pell* and *Saxbe* . . .").

seem to deny any public right clearly should be read in context as denying anyone *special* rights, since only this latter issue was argued and analyzed,⁶³ and the district court's order granted injunctive relief only to representatives of the media.⁶⁴ The cases relied on by KQED and the dissent do "not remotely imply a constitutional right guaranteeing anyone access to government information beyond that open to the public generally,"⁶⁵ but this does not dispose of the more fundamental issue of what must be open to the public generally. *Pell* and *Saxbe* are seen as standing for the proposition "that there is no constitutional right of access" because of their holding that the media have "no constitutional right of access beyond that afforded the general public,"⁶⁶ when this holding would be perfectly consistent with a wide range of public access rights.⁶⁷

Indeed, far from rejecting any first amendment right of public access, certain characteristics of the plurality opinion seem to imply the existence of such a right. The Chief Justice went to considerable lengths, as Justice Stewart had gone in the majority opinions of *Pell*⁶⁸ and *Saxbe*,⁶⁹ to list the range of alternative means of access to information about prisons available to the public.⁷⁰ Such a listing of alternatives would have been irrelevant if there were indeed no right of access, and the sheriff could

⁶³ KQED's argument was based on "the right of the public to receive the information, and the right of the press to seek it out," Brief for Respondents at 24; see *id.* at 17. No argument was made for a *public* right to seek out the information, a right the press could have shared in. See Petition for Certiorari at 5 ("KQED did not allege, and the District Court did not find, that the access to the inmates and facilities afforded the members of the public at large was in any way inadequate.").

⁶⁴ KQED, Inc. v. Houchins, 18 CIRM. L. REP. (BNA) at 2253-54.

⁶⁵ 98 S. Ct. at 2595.

⁶⁶ *Id.*

⁶⁷ This same confusion of the issues was evident in the *Pell* case: since the challenged regulation "does not deny the press access to sources of information available to members of the general public, we hold that it does not abridge the protections that the First and Fourteenth Amendments guarantee," 417 U.S. at 835. As Justice Powell noted in his dissent to *Pell* and *Saxbe*, "[f]rom all that appears in the Court's opinion, one would think that any governmental restriction on access to information, no matter how severe, would be constitutionally acceptable to the majority so long as it does not single out the media for special disabilities not applicable to the public at large," 417 U.S. at 857 (Powell, J., dissenting).

⁶⁸ 417 U.S. at 833.

⁶⁹ 417 U.S. at 849.

⁷⁰ Some of the Court's suggested alternatives were the availability of reports from visiting committees, task forces, grand juries, and other inspection boards, as well as various means of obtaining information from present or former inmates. See 98 S. Ct. at 2596-97. Petitioner's argument stressed the availability of such alternatives. Brief for Petitioner at 5-12; see Petition for Certiorari at 5-10.

have completely sealed off the prison from the public. Alternatives for "speech" are highly relevant, however, in balancing a first amendment right against conflicting state or private interests.⁷¹ Chief Justice Burger's listing of alternatives thus suggests the existence of a first amendment right of access to be balanced against the legitimate government concerns of prison security and discipline. Furthermore, Sheriff Houchins actually began admitting the public to certain areas of the prison after litigation commenced, a point noted by the Chief Justice,⁷² and this may have been considered adequate to satisfy any first amendment right of access. In any event, Sheriff Houchins himself recognized that there was a first amendment right of public access. His argument was not that no such right existed, but rather that, balancing the right against the various prison administration interests, his present practice represented a proper accommodation.⁷³

Houchins v. KQED, Inc., therefore, should not be considered as standing for the proposition that there is no first amendment right of public access to government-controlled institutions such as prisons.⁷⁴ The only ruling tested by argument and analyzed by the plurality was that the press enjoys no first amendment right of access beyond that accorded the public, a proposition seemingly settled by previous cases. The determination of the extent of the first amendment right of access held in common by the public and press must await future consideration by the Court.

4. *Attorney Solicitation.*—The Court's 1977 decision in *Bates v. State Bar*,¹ limiting the states' authority to prohibit truthful advertising of legal services, explicitly left open the question of whether in-person solicitation of clients would be accorded an equal measure of first amendment protection.² In two cases decided last Term, the Court returned to that question and considered first amendment challenges by attorneys who had been disciplined for violating state regulations prohibiting solicitation by members of the bar. In its tandem consideration of the vastly different cases, the Court established a dual standard of

⁷¹ See, e.g., *Greer v. Spock*, 424 U.S. 828, 839 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972).

⁷² 98 S. Ct. at 2591-92.

⁷³ See Brief for Petitioner at 12, 20-26.

⁷⁴ The delicate alignment of the Court reinforces this. Indeed, four of the justices—the three dissenters and Justice Stewart—would have upheld a more narrowly drawn injunction against the sheriff.

¹ 433 U.S. 350 (1977).

² *Id.* at 366.

ANALYSIS

2/26/90

New Rules and Old Pose Stumbling Blocks In High Court Cases

You can't be too careful in prosecuting or rebuffing a Supreme Court petition. Here, experienced litigators expose the traps awaiting the wary and unwary alike.

**BY E. BARRETT PRETTYMAN JR.
AND JOHN ROBERTS JR.**

Practice before the Supreme Court of — though it may not actually be received by

John Roberts

Practice before the Supreme Court of the United States can be bewildering for first-timers, and even for those who have made several trips to our highest court. Mistakes are legion. Some errors, however, are more persistent than others. We have attempted here, with the help of the Clerk's Office, to compile a list of those that continue to confound practitioners and that often cause filings to be rejected long before they reach the justices. Though these examples range from the picayune to the momentous, responsible counsel will regard any glitch in a Supreme Court filing as a serious matter—as no doubt will their clients.

Recent amendments to the Supreme Court Rules—which went into effect Jan. 1, 1990—removed several of these traps for the unwary. Most prominently, the five-day workweek has at last come to the Clerk's Office. Under old Rule 34(1), the office was open on Saturday—with a skeletal crew, to be sure, but open—and a filing due on Saturday had to be filed by Saturday. The most common reason petitions for certiorari (and other filings) were filed out of time was that attorneys assumed a petition due on Saturday was, in fact, not due until the next Monday, as is the rule in most courts. Under new Rule 30.1, that is now the case before the Supreme Court.

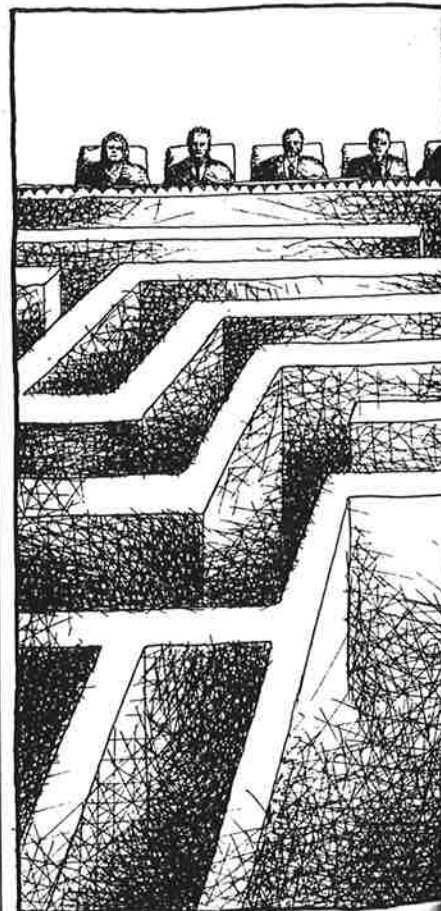
Supporting the U.S. Mail

The new guidelines also cleared up some ambiguity in the "mailbox" rule, which had regularly resulted in untimely filings. A not-infrequent problem arose when practitioners assumed that a private carrier such as Federal Express—a quicker and often more reliable service than the U.S. mail—was the preferable way to file and serve Supreme Court papers. But Rule 29.2, permitting filing by mail, specifies that the U.S. Postal Service must be used. If a petition is due on Monday and is sent that day to the Court by Federal Express or another private courier, it will be considered filed when received the next day—out of time. If the same petition is sent by first-class, postage-paid U.S. mail on Monday, it will be considered timely filed on Monday, even

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though it may not actually be received by the clerk until the end of the week or later. New Rule 29.2 expressly warns the bar that "[a] document forwarded through a private delivery or courier service must be received by the Clerk within the time permitted for filing."

Timing problems also arose under the old rules because of confusion about when time starts to run for filing an appeal or a petition for certiorari. Indeed, the question is currently before the Court in the school desegregation case *Missouri v. Jenkins*, No. 88-1150 (argued Oct. 30, 1989). The old rules specify that the time runs from the date of judgment or from the date of the denial of a timely petition for rehearing (filed by *any* party). This tolling provision does not apply to a suggestion for rehearing *en banc*. If a party asks only for rehearing *en banc*, the time for seeking certiorari runs from the original judgment date—which can, of course, create serious difficulties if the *en banc* motion is still pending when the petition for certiorari is due. The moral is clear: If you might seek



Supreme Court review and want to seek *en banc* review, always file for rehearing by the panel as well as by the full court. In new Rule 13.4, the tolling provision for petitions for rehearing is retained, but an express warning is added that "[a] suggestion made to a United States Court of Appeals for a rehearing in banc . . . is not a petition for rehearing within the meaning of this Rule."

New Rule 34 puts the nail in the coffin for legal-size paper. It conforms Supreme Court practice to that of the lower courts—8½ x 11 inch paper—which will likely reduce the number of filings attempted on paper of the wrong size.

Pitfalls for the Unwary

The new rules, however, do not address all the problems the clerk regularly encounters, and the following will probably continue to arise:

Questions Presented. Beginning at the very beginning, one of the most common reasons that the clerk rejects petitions for certiorari is that the "Questions Presented" do not appear on the first page after the cover. Perhaps not unreasonably, many attorneys (and many printers) start with a table of contents, a table of authorities, and other preliminary material. Such a petition will not be accepted for filing. The justices want a succinct statement of the questions right off the bat. Indeed, new Rule 14.1(a) mandates that "no other information" appear on the first page after the cover.

Case Captions. The style of a case is often different in the Supreme Court than it was below. A case in a U.S. Court of Appeals bears the same caption it bore in the District Court, regardless of which party is appealing, under Fed. R. App. P. 12. Not so in the Supreme Court. Under Rule 33.2(a)(4), those petitioning the Court are listed first in the caption.

Who's Who. Surprisingly, the Clerk's Office has noted that about one out of 15 petitions never specifically identifies by name *who* is seeking review of *what* judgment. Your case may well present a profound legal issue that you are anxious to discuss, but it is first and foremost *a case*, and the justices need to know who struck whom and what the lower courts actually decided. A clear statement of these basic facts—along with the exact dates the pertinent orders were entered—is critical at the beginning of the petition. (If you are relying on Rule 12.2, which per-

mits review of multiple judgments *from the same court* in a single petition, you should expressly cite the rule and identify petitioners for each judgment.)

Printing Problems. Fully 50 percent of petitions rejected by the Clerk's Office are turned away because of printing problems. Rule 33 is quite precise in setting forth the applicable standards. Printed slip opinions issued by many circuits (e.g., the D.C. Circuit) satisfy the requirements and may be photocopied in the appendix to the petition. The material that appears in F.2d or the regional reporters does *not* and must be reset by your printer or retyped in house. Make certain that the copy of the lower-court opinion lists the panel members, as well as the date the opinion was filed and the lower-court case number.

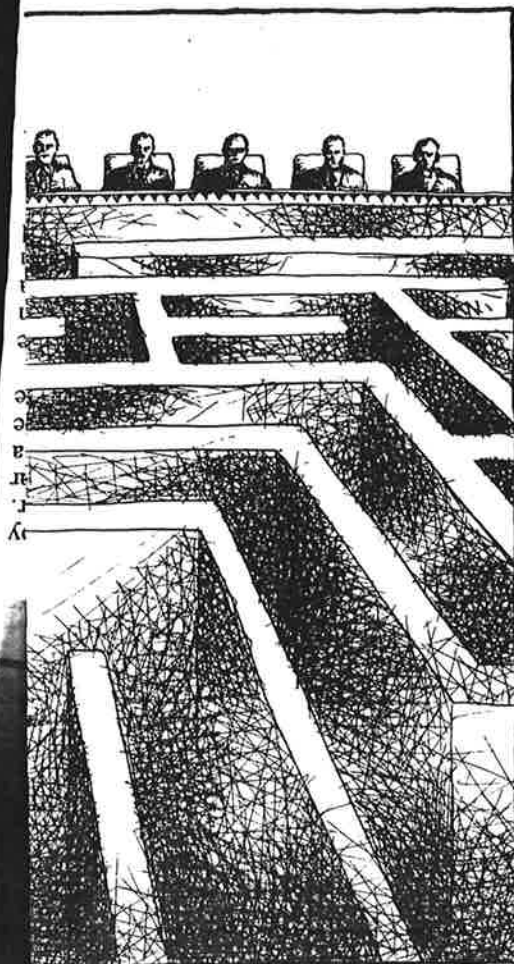
Serving Papers. Service mistakes also occur with some frequency. Rule 29.5 sets forth the special form for a Supreme Court certificate of service: It should appear on a separate sheet of paper accompanying the printed brief or petition. If your case involves the United States, you must serve the solicitor general; it is courteous but insufficient to serve the lawyer who handled the case for the government in the lower courts. The time for the government's response starts running only upon service of the solicitor general. In the case of a state, the office responsible for handling Supreme Court cases should be served, be it the state attorney general, the district attorney, or the special assistant attorney general for the case in question. And you must always name the *individual* served, not simply his or her office, and the proper address.

There is some confusion about who must be served when a case arises out of a decision by a hybrid federal agency, like the Federal Reserve Board. The safe course is to serve *both* the solicitor general *and* the general counsel of the agency, and let them figure out who will represent the governmental entity before the Supreme Court.

Corporate Disclosures. Every filing with the Court on behalf of a corporation must contain a Rule 29.1 listing of parents and non-wholly owned subsidiaries (or a cross-reference to such a listing in a printed document previously filed in the Court *in that case*). The purpose of the rule is to identify publicly traded entities in which one of the justices may have an interest. Therefore, those entities not publicly traded need not be listed.

Object or Waive. If a question pre-

dates the petition critical at the beginning of the petition. (If you are relying on Rule 12.2, which per-



MICHAEL CIBBS

interest. Therefore, those publicly traded need not be listed.

Object or Waive. If a question presented in the petition was not raised below or is otherwise not properly presented, the brief in opposition must object, or at least some of the justices will consider the problem waived. New Rule 15.1 expressly states that "[a]ny defect of this sort in the proceedings below that does not go to jurisdiction may be deemed waived if not called to the attention of the Court by the respondent in the brief in opposition." Feel free to rephrase the questions presented if they have been misstated or distorted by the petitioner. It is important to address *all* issues legitimately raised in the petition.

R.S.V.P. Timing problems often arise with reply briefs. At the certiorari stage, the clerk circulates the petition and opposition promptly upon receipt of the opposition, so any reply—to be effective—must be filed without delay. In addition, under Rule 25.3, which governs reply briefs in cases accepted for argument, the reply brief must be either filed within 30 days after receipt of the respondent's brief or actually received one week before oral argument, whichever is earlier. The latter proviso is an exception to the usual rule permitting deadlines to be met by mailing.

Amicus Curiae. Amicus briefs at the petition stage are due when the brief in opposition is due; if the respondent receives an extension of time, an amicus's

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time is automatically extended. In cases accepted for argument, an amicus brief is due at the same time as the brief for the side the amicus supports. If the amicus supports a middle ground, it must file topside.

Who May Sign. Every attorney knows, of course, that when a document is filed in the Supreme Court, it must be accompanied by a certificate of service. What many do not know is that, according to Rule 29.5, unless the certificate is filed under oath in affidavit form, it *must* be signed by a member of the Supreme Court Bar, not simply a partner or associate who

Clients assume that since they are paying for the show, they should get a front-row seat.

has worked on the case and whose name appears on the filing. Moreover, the certificate must state that the signer is a Supreme Court Bar member and that all parties required to be served have been served.

Seat of Honor. Clients are often miffed because they are not allowed to sit at the counsel table during the argument of their case. They assume, with some justification, that since it is their interests that are at stake, they should be right up there looking the justices in the eye. Or perhaps they feel that since they are paying for the show, they at least should get a front-row seat. Counsel should forewarn their clients that, unless they are members of the Supreme Court Bar, they will have to stare at the justices from outside the railing.

Arguing Over Argument. There has been uncertainty and some bitterness on the subject of divided argument, particularly where parties supposedly on the same side of a case do not agree on strategy or substance. The Court does not like divided arguments (unless, for example, it has invited or agreed to hear the views of the solicitor general), and a divided-argument motion by a private party is rarely granted. If one is filed, however, Rule 28.4 says that it must be submitted within 15 days of the filing of the opening brief, regardless of which side is seeking divided argument. If the motion is denied, the parties—not the Court and not the clerk—must decide who will handle the case, no matter how badly splintered their views may be. (The Court recently made an apparent exception to this rule, granting a motion for designation of counsel and denying a competing

motion. But that case is an exception that proves the rule.) Rationality leaves some lawyers when a chance to argue before the Court is at stake, and many such disputes end up being resolved by a coin toss.

Seeking Stays. The most common mistake made in connection with a motion for a stay relates to exhaustion of a comparable remedy in the court below. The movant must at least have attempted to obtain a stay below; only if the stay has been denied or the lower court has refused to act at all may the movant seek a stay in the Supreme Court. Such a motion, parenthetically, should have attached to it copies of *all* relevant orders below, including the one denying the stay. If time is crucial, service should be made by hand delivery on opposing counsel. The clerk will not look kindly upon an application claiming a need for emergency action if the service copy is simply deposited in the mail.

Extensions. Another mistake in multi-party cases is the assumption that an extension of time to seek certiorari granted to one party automatically applies to all. That is not the case; an extension only benefits the party or parties that requested it.

Counting the Days. With rare exceptions, time begins to run in federal and state court cases from the date of the judgment and *not* from the date (if it comes later) when a mandate issues or the judgment becomes final. State laws should be consulted in state cases. In most federal circuits, the judgment is entered the day the opinion is issued—although only when the opinion is mailed to counsel several weeks later is the judgment certified and does it function as the mandate. (Some National Labor Relations Board cases are an exception, when the U.S. Court of Appeals in its opinion directs the parties to submit a proposed judgment for approval.) Many petitions are filed out of time because counsel mistakenly rely upon the date the judgment was certified as the mandate.

No End Runs. Some attorneys attempt end runs around Rule 33 by filing one typewritten copy of their petition for certiorari on the due date and then following up with the required printed copies on a later date. While the clerk may not reject these single copies out of hand, lawyers should know that such non-compliance will be reported to the Court, and it is not without significance that people in the Clerk's Office cannot recall when one of these petitions by a private party was ever granted. Even more to the point, in *Fallin v. Cunningham*, 58 U.S.L.W. 3467 (Jan. 22, 1990), the Court denied a motion for leave to file 39 printed copies one day out of time after only one printed copy had been timely filed. The petition was then not accepted.

Following the admonitions above will not guarantee you a hearing. They will, however, increase the chances that your filing will at least reach the justices' chambers. □

to combat the crisis was unfortunate⁵⁷ in that it provided no clue as to how to assess the relative importance of the state's interest.

By requiring a court to assess the closeness of the "fit" between the state's purpose and the means used to accomplish it,⁵⁸ the second part of the test closely resembles the intermediate level of scrutiny increasingly applied in equal protection analysis.⁵⁹ Had the *Baldwin* Court declared nonresidents a suspect class, future courts might have been tempted to invoke the full panoply of the two-tiered construct of the equal protection clause and apply strict scrutiny to all discriminations against nonresidents.⁶⁰ This would have led to the invalidation of discriminatory treatment in cases like *Baldwin*—since elk conservation is not a compelling state interest—but would unnecessarily slight the interest of the state as a separate, sovereign government. Moreover, by rejecting an analysis involving some sort of intermediate review, the Court avoided the theoretical problems of justifying the approach it has taken in other cases.⁶¹ The privileges and immunities clause requires no such struggle and deals specifically with classifications based upon residency. When read together, *Baldwin* and *Hicklin* allow a court to apply an intermediate level of review to one of the few areas of discriminatory treatment specifically mentioned in the Constitution.

C. Contract Clause

Legislative Alteration of Private Pension Agreements.—In *United States Trust Co. v. New Jersey*,¹ decided the Term before last, the Court "dust[ed] off"² the dormant contract clause³ to strike down a New Jersey statute repealing a bondholders' covenant that precluded the Port Authority of New York and New

⁵⁷ See *id.* at 2485-86. The severity of Alaska's unemployment problem was not mentioned.

⁵⁸ The importance of the individual's interest relative to that of the state also determines the closeness of the fit required. Compare *Austin v. New Hampshire*, 420 U.S. 656, 663-63 (1975) (very close fit required for taxes), with *Canadian N.R.R. v. Eggen*, 252 U.S. 553, 562 (1920) (more latitude allowed in regulating access to courts).

⁵⁹ See *Foley v. Connelie*, 435 U.S. 291 (1978); *Gunter, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972); *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 70, 177-88 (1977).

⁶⁰ See note 2 *supra*.

⁶¹ See *The Supreme Court, 1976 Term*, *supra* note 59, at 177-88.

¹ 431 U.S. 1 (1977).

² *Id.* at 44 (Brennan, J., dissenting).

³ "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." U.S. CONST. art. I, § 10.

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Jersey from investing in mass transit projects.⁴ It was the first time in nearly four decades that the Court had invalidated social and economic legislation on the basis of the contract clause,⁵ and the dissenting Justices hoped that it would "prove a rare phenomenon."⁶ Last Term, however, in *Allied Structural Steel Co. v. Spannaus*,⁷ the Court relied again on the contract clause, this time to overturn a Minnesota law altering the pension agreement between an employer and its employees. *Allied Steel* reinforced the teaching of *United States Trust* that "the Contract Clause remains a part of our written Constitution,"⁸ and continued the process begun in that case of expanding the reach of the clause.

Under *Allied's* pension plan for salaried employees, pension rights vested when an employee met any of the following conditions: (i) he was sixty-five or older when he retired; (ii) he was at least sixty and had worked fifteen years for the company; (iii) he was at least fifty-five and the sum of his age and years of service was at least seventy-five; or (iv) he was less than fifty-five and the sum of his age and years of service was at least eighty.⁹ *Allied* contributed to a pension trust fund on the basis of actuarial predictions of future demands under its plan.¹⁰ In 1974, Minnesota enacted the Private Pension Benefits Protection Act,¹¹ which provided for the assessment of a "pension funding charge" against a company terminating its pension plan or closing its Minnesota

⁴ 431 U.S. at 32.

⁵ *Id.* at 60 (Brennan, J., dissenting). The last such case was *Wood v. Lovett*, 313 U.S. 362 (1941).

⁶ 431 U.S. at 60 (Brennan, J., dissenting).

⁷ 98 S. Ct. 2716 (1978). The Court's opinion was written by Justice Stewart, who had not participated in the decision of the *United States Trust* case. A dissent filed by Justice Brennan was joined by Justices Marshall and White. The same three had dissented in *United States Trust*. Justice Powell, who had not participated in *United States Trust*, joined the *Allied Steel* majority. Justice Blackmun, in the *United States Trust* majority, took no part in the present case. *Allied Steel*, then, at least indicates that two more Justices—Stewart and Powell—in addition to those in *United States Trust* have shown a willingness to revive the contract clause.

⁸ 431 U.S. at 16; see 98 S. Ct. at 2721 ("[T]he Contract Clause remains a part of the Constitution. It is not a dead letter.")

⁹ 98 S. Ct. at 2718-19.

¹⁰ *Id.* at 2719.

¹¹ MINN. STAT. §§ 181B.01-17 (1976). The Act only applied to those private companies with one hundred or more employees, at least one of whom was a Minnesota resident, which provided pension plans qualified under § 401 of the Internal Revenue Code. See 98 S. Ct. at 2719. *Allied* was covered by the Act. See *id.* at 2718, 2720. Since the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1381 (1976), expressly preempted state legislation, see *id.* § 1144(a), the Minnesota Act was in effect for less than nine months. 98 S. Ct. at 2725 n.21.

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office if existing pension funds were inadequate to secure full pensions for all employees who had worked for more than ten years with the company.¹² The charge was assessed to satisfy the insufficiency in the old fund caused either by improper funding in the past or by the additional pension claims generated by the statute.

Allied had been planning to close its Minnesota office prior to the enactment of the statute, and did so shortly thereafter.¹³ Since some of its former employees did not have vested pension rights under the plan, but had worked more than ten years for the company, the state demanded payment of an appropriate pension funding charge.¹⁴ Allied sought an injunction and declaration that the Act unconstitutionally impaired its contractual relations with the employees.¹⁵ A three-judge district court heard the cause and unanimously determined that the Act was "reasonably adapted to and necessary for the accomplishment of . . . vital interests,"¹⁶ and that the duties imposed on Allied were "not so significantly beyond the parties' initial expectations that the Act should be declared unconstitutional."¹⁷ The company appealed directly to the Supreme Court.¹⁸

In deciding that "Minnesota could not constitutionally do what it tried to do to the company,"¹⁹ Justice Stewart, writing for the majority, found the Act "substantially modified" important contractual terms on which the company had heavily relied.²⁰ Since this action was "totally unanticipated," it violated the company's "legitimate contractual expectation in calculating its annual contributions to the pension fund."²¹ Justice Stewart distinguished the present case from prior cases which had upheld legislation altering important contractual obligations, reasoning that the Act here was not one of general applicability "appropriately tailored" to protect "a broad societal interest,"²² but rather had "an extremely narrow focus" and seemed to benefit only a

¹² MINN. STAT. § 181B.04 (1976).

¹³ 98 S. Ct. at 2720.

¹⁴ The amount Allied owed under the Act was stipulated to be between \$14,171.93 and \$185,751.00. See *Fleck v. Spannaus*, 449 F. Supp. 644, 646 (D. Minn. 1977) (three-judge court), *rev'd sub nom. Allied Structural Steel Co. v. Spannaus*, 98 S. Ct. 2716 (1978).

¹⁵ 98 S. Ct. at 2720.

¹⁶ *Fleck v. Spannaus*, 449 F. Supp. 644, 651 (D. Minn. 1977) (three-judge court).

¹⁷ *Id.* at 649.

¹⁸ Jurisdiction in the Supreme Court was based on 28 U.S.C. § 1253 (1976).

¹⁹ 98 S. Ct. at 2726.

²⁰ *Id.* at 2723-24.

²¹ *Id.* at 2725, 2723.

²² *Id.* at 2721-23, 2725.

narrow class.²³ In addition, the imposed conditions here were neither "reasonable" nor "limited in duration" but instead worked a severe and permanent change in the contractual relationships.²⁴

Justice Brennan in dissent took an entirely different view of the contract clause, arguing that it was not even relevant to the case. According to Justice Brennan, the contract clause was only intended to prevent the states from relieving parties of their contractual obligations; it was not designed to preclude the imposition of additional duties on persons merely because they happened to be parties to a contract involving the subject matter of the additional duties.²⁵ Justice Brennan criticized the majority's extension of an "exacting scrutiny" to laws imposing additional duties on contracting parties, on the ground that the "extreme malleability" of the majority's criteria would simply "vest judges with broad subjective discretion to protect property interests that happen to appeal to them."²⁶ Emphasizing the similarity between expectations based on contract and those based on general property law, Justice Brennan could see no justification for affording contractually based expectations a high degree of protection when property-based ones, according to him, can be severely impaired by laws only reasonably related to the general welfare.²⁷ The only way to avoid this anomaly, Justice Brennan argued, was to construe the contract clause as "inapplicable to laws which create new duties."²⁸ Therefore, "the only relevant constitutional constraint" was the due process clause, which Justice Brennan found not to be violated by the Minnesota Act.²⁹

Justice Brennan's dissent presents the threshold question of whether the contract clause applies at all to this case. His argument that the clause prohibits relieving a party of contractual obligations but does not forbid the imposition of additional burdens on contracting parties requires clarification. In many contractual situations, the imposition of additional burdens on one party effectively diminishes the obligations of the other party.³⁰

²³ *Id.* at 2724-26.

²⁴ *Id.* at 2722, 2726.

²⁵ *Id.* at 2729-30 (Brennan, J., dissenting).

²⁶ *Id.* at 2731.

²⁷ *Id.* at 2731-32. Justice Brennan cited *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (no "taking" when local ordinance prohibiting manufacture of bricks diminished value of plaintiff's brickyard by 90%), and *Miller v. Schoene*, 276 U.S. 272 (1928) (no "taking" when state required cedar trees to be cut down to prevent spread of cedar rust to nearby apple orchards), for the proposition that property values can be substantially impaired by legislation reasonably related to the general welfare.

²⁸ 98 S. Ct. at 2732 (Brennan, J., dissenting).

²⁹ *Id.* at 2733.

³⁰ For example, if A and B had a contract whereby A promised to give B a

The distinction Justice Brennan drew between imposing additional duties and relieving obligations appears to apply only to those situations in which the party on whom additional duties are imposed is obligated only upon prior performance by the other party.³¹ The present case is such a situation, since Allied was not obligated to award pensions until employees had satisfied the conditions for vesting.

While Justice Brennan's distinction can technically be drawn in some cases, it is not clear whether there is any justification for applying it to contract clause analysis. Justice Brennan's argument for applying it relied on the history surrounding the clause's enactment, its wording, and precedent. He argued that "the sole evil at which the Contract Clause was directed was the theretofore rampant state legislative interference with the ability of creditors to obtain the payment or security provided for by contract."³² While the major state interference with contract prior to the adoption of the clause did consist of relieving debtors of

cow in exchange for B's promise to give him \$10, a law requiring B to give A \$15 for the same cow can be seen as imposing an additional duty on B, or it can be seen as impairing A's obligation. Prior to the new law, A would have been required to deliver the cow to B upon receipt of \$10, and B would have had a cause of action against A if he failed to do so. After the passage of the law, A's original obligation is impaired, since he is no longer required to turn over the cow upon receipt of \$10, and B could not pay A \$10 and successfully sue for the value of the cow. See Hale, *The Supreme Court and the Contract Clause*, 57 HARV. L. REV. 512, 516 n.24 (1944). The majority hinted at this sort of argument, noting that "in any bilateral contract the diminution of duties on one side effectively increases the duties on the other," 98 S. Ct. at 2723 n.16, but this formulation does not actually respond to Justice Brennan's position, since Justice Brennan concedes that the contract clause covers those laws diminishing the duties of one party to a contract.

³¹ This situation arises with unilateral contracts. For example, if B promised to give A \$10 if A gave him a cow, and a law were enacted requiring B to pay \$15 for any cows received, this law would impose additional burdens on B but in no way impairs any obligation of A, since A was never obligated to turn over his cow. If A had already delivered his cow, compelling B to pay an additional \$5 does not impair any obligation of A's. The situation may also arise with some bilateral contracts. For example, if A promised to paint B's house in exchange for B's promise to give him \$10 upon completion of the job, a law requiring B to pay \$15 for the work imposes an additional burden on B but does not impair A's obligation. See Hale, *supra* note 30, at 516 n.24.

³² 98 S. Ct. at 2729 (Brennan, J., dissenting). While the general historical circumstances surrounding the enactment of the contract clause may be somewhat instructive, if not determinative, "the debates in the Constitutional Convention are of little aid," *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427 (1934). See also B. WRIGHT, *THE CONTRACT CLAUSE OF THE CONSTITUTION* 3-16 (1938); I. T. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 554-56 (8th ed. 1927).

obligations to their creditors,³³ it does not follow that the Framers intended the clause to be limited to this specific problem.³⁴ The Framers' intent was probably a broader concern to "inspire a general prudence and industry, and give a regular course to the business of society."³⁵ Such a concern would entail protecting parties not only from laws relieving contractual obligations, but also from laws imposing duties beyond those contracted for.

Justice Brennan argued that the literal wording of the contract clause — "Laws impairing the obligation of Contracts" — identified the evil to be avoided "with admirable precision," and that it was "nothing less than an abuse of the English language to interpret, as does the Court, the term 'impairing' as including laws which create new duties."³⁶ Constitutional protections, however, should not depend merely on a strict construction that may allow "technicalities of form to dictate consequences of substance."³⁷ As the Court remarked in the leading contract clause case of this century, "where constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause."³⁸ Furthermore, the Framers could hardly have been expected to identify the problem of state imposition of additional duties with "admirable precision" when the

³³ See 98 S. Ct. at 2728-29; *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427, 439 (1934); *id.* at 454-59 (Sutherland, J., dissenting); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 204 (1819).

³⁴ "The principle was the inviolability of contracts. This principle was to be protected in whatsoever form it might be assailed." *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 200 (1819). Indeed, as Justice Brennan recognizes, it is well established that the protection of the contract clause extends beyond the narrow problem of debtor relief. See 98 S. Ct. at 2723 n.16; *id.* at 2729 n.5 (Brennan, J., dissenting).

³⁵ *The Federalist* No. 44 (J. Madison). See *United States Trust Co. v. New Jersey*, 431 U.S. at 15; *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 427 (1934). Early judicial interpretations of what constituted a contract meriting protection under the clause were quite expansive, and this suggests that the intent behind the clause should be broadly conceived. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) (contract clause protects legislative land grant); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (same for college charter); *Piqua Branch of the State Bank v. Knapp*, 57 U.S. (16 How.) 369 (1853) (same for exemption from tax). See also L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 244 (1973).

³⁶ 98 S. Ct. at 2729 (Brennan, J., dissenting).

³⁷ *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 181 (1958) (Harlan, J., dissenting) (interpreting the "takings" clause).

³⁸ *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934). But cf. *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 198 (1819) (Marshall, C.J.) (discussing the contract clause) ("The words of the constitution, then, are express and incapable of being misunderstood. They admit of no variety of construction . . .").

problems of state interference through the imposition of such duties was far in the future. "The great clauses of the Constitution are to be considered in the light of our whole experience, and not merely as they would be interpreted by its Framers in the conditions and with the outlook of their time."³⁹

While the Court has indicated that it must apply the contract clause "with due respect for its purpose and the prior decisions of this Court,"⁴⁰ the value of precedent in this area is uncertain. The relevant cases are all considerably dated, and there was a substantial gap in the process of developing case law prior to *United States Trust*.⁴¹ To the extent that precedent is relevant, however, it provides little support for the dissent's position. Justice Brennan relied on *Satterlee v. Matthewson*,⁴² which held that it was not a violation of the contract clause for a legislature to give validity to a contract previously held invalid because "it surely cannot be contended, that to create a contract, and to destroy or impair one, mean the same thing."⁴³ Therefore, Justice Brennan reasoned, the creation of an additional duty is not an impairment of the contract. Although *Satterlee* has never been expressly overruled, later cases have explicitly held that "the impairment of a contract may consist in increasing its burdens as well as in diminishing its efficiency."⁴⁴

Finally, there appears to be no substantive reason for applying the distinction Justice Brennan draws between relieving obligations and imposing additional duties. This distinction would protect expectations based purely on another's contractual promise but not those based more generally on the reciprocal relationship.

³⁹ *United States Trust Co. v. New Jersey*, 431 U.S. at 15-16. See also *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442-43 (1934).

⁴⁰ *United States Trust Co. v. New Jersey*, 431 U.S. at 16.

⁴¹ 98 S. Ct. at 2721.

⁴² 27 U.S. (2 Pet.) 380 (1829).

⁴³ *Id.* at 412-13.

⁴⁴ *Columbia Ry. v. Gas & Elec. Co. v. South Carolina*, 261 U.S. 236, 251 (1923); *accord*, *Georgia Ry. & Power Co. v. Decatur*, 262 U.S. 432, 439 (1923). See generally *Hale*, *supra* note 30, at 514-16. The Court has implicitly followed this view, even in those cases upholding legislation which imposed additional duties on contracting parties. Such cases have been decided on various grounds, but not on the ground that the contract clause is inapplicable to laws imposing additional duties. See, e.g., *Stockholders of the Peoples Banking Co. v. Sterling*, 300 U.S. 175, 183 (1937); *Henley v. Myers*, 215 U.S. 373, 385 (1910). Justice Brennan sought to avoid the weight of this body of precedent by arguing that the opinions reflected a philosophy of economic due process that has since been rejected, 98 S. Ct. at 2730 n.7 (Brennan, J., dissenting). This argument ignores cases like *Sterling* and *Henley* which did not strike down laws but upheld them, without ruling that the contract clause did not cover laws imposing additional duties. Whatever the force of Justice Brennan's response, it would seem to apply equally to the precedent he relied on.

Yet the role contract plays in modern society suggests that protection should not be limited solely to those expectations based on another's promise.⁴⁵ As the majority noted, "[c]ontracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them."⁴⁶ The view that all contractually based expectations merit some protection from state interference is supported by the doctrine of consideration. This doctrine indicates that a contract is a reciprocal relationship based not simply on promise but on an exchange,⁴⁷ and the notion of exchange suggests that expectations about what has been bargained away should be protected as well as expectations about what one has been promised. Thus, to view Allied's duty to pay a pension apart from the condition of required years of service ignores the purpose of Allied's offer in the first place. Even in those contractual clause cases upholding laws which relieved parties of contractual obligations, the Court often looked beyond the particular promises involved to determine if the basic reciprocal relationship was impaired.⁴⁸

Given the weakness of the arguments Justice Brennan advanced for his position, it appears that his main reason for dissenting was his fear that the majority's interpretation of the contract clause "threatens to undermine the jurisprudence of property rights developed over the last 40 years."⁴⁹ This concern raises the fundamental issue, not discussed by the majority, of how the revived contractual clause relates to the established body of law governing judicial review of social and economic legislation. Both in *Allied Steel* and in *United States Trust* the Court stressed that the revived contract clause would not become the significant bar to social legislation it once was.⁵⁰ The inquiry into a possible

⁴⁵ Indeed, Justice Brennan did not advance any positive support for the distinction, but merely argued that any anomalies caused by it were no more unsettling than the many anomalies he saw surrounding the contract clause, 98 S. Ct. at 2728 (Brennan, J., dissenting).

⁴⁶ 98 S. Ct. at 2723.

⁴⁷ See I. W. JAEGER, WILLISTON ON CONTRACTS § 99 (3d ed. 1957); I. A. CORBIN, CONTRACTS § 110 (1963).

⁴⁸ See, e.g., *City of El Paso v. Simmons*, 379 U.S. 497, 515 (1965) ("Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract"); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934) ("The statute does not impair the integrity of the mortgage indebtedness.");

⁴⁹ 98 S. Ct. at 2730 (Brennan, J., dissenting).

⁵⁰ See 98 S. Ct. at 2721 (contract clause "does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal,

violation begins with the severity of impairment, and "[m]inimal alteration of contractual obligations may end the inquiry at its first stage."⁵¹ To measure the impairment, a court must not look simply to the extent of the loss inflicted; it must also consider the degree to which this loss violated legitimate expectations based on reasonable reliance on the terms of the contract.⁵²

A finding of severe impairment does not establish a violation of the contract clause, but merely pushes "the inquiry to a careful examination of the nature and purpose of the state legislation."⁵³ Even severe alterations of contractual terms would survive constitutional challenge if the alterations were "reasonable and necessary" to promote an important public purpose.⁵⁴ While courts customarily defer to legislative determinations of reasonableness and necessity in the area of social and economic legisla-

or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected"); 431 U.S. at 22 ("The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result").

⁵¹ 98 S. Ct. at 2723. See also *United States Trust Co. v. New Jersey*, 431 U.S. at 21 ("a finding that there has been a technical impairment is merely a preliminary step in resolving the more difficult question whether that impairment is permitted under the Constitution"); *City of El Paso v. Simmons*, 379 U.S. 497, 506-07 (1965); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 428 (1934).

⁵² See 98 S. Ct. at 2723-24. Cases finding no violation of the contract clause have often involved minimal alterations or provisions that were not important when the contract was entered into. See, e.g., *City of El Paso v. Simmons*, 379 U.S. 497, 514, 516-17 (1965); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 425 (1934). See also *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 62 (1935). The loss in *Allied Steel* was characterized by the Court as "potentially disabling," 98 S. Ct. at 2724. It was also relevant to the Court that the pension area was one which the state of Minnesota had not previously regulated; *id.* at 2725, so the company could claim that the alteration in contract terms was unforeseen and sudden, *id.* at 2725-26; *Cf. Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 32, 38 (1940) (no contract clause violation where petitioner had "purchased into an enterprise already regulated in the particular manner to which he now objects"). On the other hand, the publicity surrounding the federal efforts at pension reform which culminated in ERISA suggests that the Court's finding that the burden imposed was "totally unanticipated" is somewhat questionable.

In *United States Trust*, the amount of the loss was largely speculative, 431 U.S. at 19, but the Court did consider the provision repeated "an important security provision," *id.* See *Hurst, Municipal Bonds and the Contract Clause: Looking Beyond United States Trust Company v. New Jersey*, 5 HARV. CONST. L.Q. 25, 36-37 (1978).

⁵³ 98 S. Ct. at 2723. As Justice Johnson noted in the famous case of *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 291 (1827), "[i]t is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts."

⁵⁴ See 98 S. Ct. at 2722-23, 2724. See also *United States Trust Co. v. New Jersey*, 431 U.S. at 25; *The Supreme Court*, 1976 Term, 91 HARV. L. REV. 70, 86-87 (1977).

tion,⁵⁵ *United States Trust* held that such deference was not appropriate when the state's financial self-interest was at stake.⁵⁶ In *Allied Steel*, there was no similar element of state self-interest, but the Court indicated that the customary deference would not stand when the legislation appeared to aid "a narrow class"⁵⁷ and there was no showing on the record that it was necessary to advance important public goals.⁵⁸

While the exact parameters of the "reasonable and necessary" test were unclear in *United States Trust*,⁵⁹ *Allied Steel* indicates that the Court contemplates a flexible balancing approach to contract clause claims. Whether a legislative interference with contract is reasonable and necessary depends on the degree of harm inflicted and the importance of the legislation. As the Court remarked, "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear."⁶⁰ Such a balancing process can only take place if the court has before it a state interest to weigh against the individual impairment. In *Allied Steel*, the Court noted that "there is no showing on the record before us that this severe disruption of contractual expectations was necessary to meet an important general social problem";⁶¹ in fact "the only indication of legislative intent in the record" was a stray comment by the district court suggesting that the closing of one large plant prompted the Minnesota Legislature to enact the measure.⁶² It is certainly possible to imagine a legislative purpose that the Minnesota Act would promote without being unduly narrow in its reach or unnecessarily burdensome on private contracts. For example, the purpose of the legislation could have been to protect employee expectations to pensions when these expectations, grounded on existing plans, are thwarted by unforeseen events.⁶³ The Court, however, declined to engage "in mere spec-

⁵⁵ *United States Trust Co. v. New Jersey*, 431 U.S. at 22-23.
⁵⁶ *Id.* at 25-26.

⁵⁷ 98 S. Ct. at 2724-25; *cf. Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 445 (1934) (legislation upheld as "not for the mere advantage of particular individuals but for the protection of a basic interest of society").

⁵⁸ 98 S. Ct. at 2724.

⁵⁹ See *United States Trust Co. v. New Jersey*, 431 U.S. at 59-60 (Brennan, J., dissenting); *The Supreme Court*, 1976 Term, note 54, at 87-88.

⁶⁰ 98 S. Ct. at 2723.

⁶¹ *Id.* at 2724.

⁶² *Id.*

⁶³ The Act only applied to existing plans, since without the plans there would be no expectations, and only applied to a company closing its plant or terminating its plan, since such events are the major unforeseen circumstances likely to jeopardize pension plans. See *id.* at 2726-28 (Brennan, J., dissenting). While it is easy to imagine this legitimate purpose, it is also easy to imagine others, both not legitimate and legitimate but not as important. See *Brief of the Chamber of Commerce of the United States as Amicus Curiae* at 25 ("If one is

ulation as to the state legislature's purpose,"⁶⁴ and as a result the balancing came out, almost by default, in the company's favor.

Part of the Court's customary deference when reviewing social and economic legislation has been its willingness to hypothesize possible state purposes that would support challenged legislation, and to uphold the legislation on the basis of this speculation, regardless of any indication of the state's actual motive or design on the record.⁶⁵ While this tradition of speculating as to state purpose is not as established in cases specifically involving the contract clause, this is primarily because there have been so few of these cases since the demise of *Lochner v. New York*,⁶⁶ and those that have arisen have involved substantial showing of the legislative purpose on the record.⁶⁷ The Court's refusal to speculate as to state purpose in *Allied Steel* raises the broad constitutional question of whether or not this refusal will spread to review of social and economic legislation in general.

Evidence of the Court's discomfort with traditional categories and standards of judicial review suggests that the *Allied Steel* standard may spread. In the area of equal protection, for example, the Court has frequently departed from established "two-tier" analysis to engage in "middle-tier scrutiny," demanding that the means chosen be "substantially" related to "important" objectives stated in the record.⁶⁸ At the same time, the gap between judicial protection of property interests under minimum rationality re-

left to assume what the Minnesota legislature had in mind (as we must here because the legislature did not state its purpose), it is far more reasonable to assume that the legislature was enacting private legislation, tailored simply to provide pensions to a few residents . . .").

⁶⁴ 98 S. Ct. at 2724 n.19.

⁶⁵ See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."); *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809 (1966) ("Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them"); *Olsen v. Nebraska*, 313 U.S. 236, 246 (1941); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

⁶⁶ 198 U.S. 45 (1905); see 98 S. Ct. at 2721.

⁶⁷ See, e.g., *City of El Paso v. Simmons*, 379 U.S. 497, 511-14 (1965); *East New York Sav. Bank v. Hahn*, 326 U.S. 230, 233-34 (1945); *Veix v. Sixth Ward Bldg. & Loan Ass'n*, 310 U.S. 33, 37 (1940).

⁶⁸ See, e.g., *Trimble v. Gordon*, 430 U.S. 762 (1977); *Craig v. Boren*, 429 U.S. 190 (1976); *Vlandis v. Kline*, 412 U.S. 441 (1973); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Reed v. Reed*, 404 U.S. 71 (1971). See also L. Tribe, *AMERICAN CONSTITUTIONAL LAW* § 16-30 (1978); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 17-37 (1972).

view and of liberty interests under strict scrutiny shows signs of narrowing, as the Court has begun to recognize that property interests can involve personal concerns as vital as any of the so-called "preferred rights" protected by strict scrutiny.⁶⁹ The contract clause provides an ideal vehicle to begin carrying disaffection with excessively deferential review into the area of social and economic legislation. Since the precedent is not as established in contract clause cases, the abandonment of deferential review is less disturbing than it would have been in an economic due process case. Moreover, the specific constitutional protection of contract, in contrast to vague notions of economic due process, provides impetus for more exacting review.

It remains to be seen whether the Court will extend this higher scrutiny to economic due process challenges generally. An argument for stricter scrutiny in contract clause cases than in economic due process cases can be made, based on the specific mention in the Constitution and on the notion that contract, as a means of ordering personal affairs, deserves special protection from unwarranted state interference in a polity founded on personal autonomy and self-governance.⁷⁰ On the other hand, most social and economic legislation can be expected to have some impact on existing contractual relations, so a revived contract clause with higher scrutiny may effectively carry this scrutiny over into the economic due process area. Even if the Court extends this mode of scrutiny to review social and economic enactments generally, it does not seem necessary to wave the bloody shirt of *Lochnerism*. The Court is simply requiring articulation of the state interest involved, so that it can justify the often severe harm inflicted in pursuit of it. There is no reason to believe that the Court will not be deferential to legislative policy judgments when the grounds for such deference appear on the record.⁷¹ Excessive deference and specula-

⁶⁹ See, e.g., *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized"); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976) (alien ineligible for certain civil service jobs "is of sufficient significance to be characterized as a deprivation of an interest in liberty"); See also Gunther, *supra* note 68, at 37-40; McCloskey, *Economic Due Process and the Supreme Court: An Examination and Reburial*, 1962 Sup. Ct. Rev. 34, 54-59.

⁷⁰ See 98 S. Ct. at 2723. See generally Reich, *The New Property*, 73 VALE L.J. 733 (1964).

⁷¹ See, e.g., *Tennessee Valley Auth. v. Hill*, 98 S. Ct. 2279, 2302 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute"); *Exxon Corp. v. Governor of Md.*, 98 S. Ct. 2207, 2213 (1978) ("The Due Process Clause does not empower the judiciary 'to sit as a 'superlegislature

tion as to state purpose have led to some dubious results in the post-*Lochner* period,⁷² results which could be avoided by more careful judicial inquiry but without returning to the excesses of the *Lochner* era.

Indeed, the mode of analysis employed by the Court in *Allied Steel* appears to be similar to that currently used to assess takings claims under the fifth amendment,⁷³ and no one has suggested that takings clause analysis threatens to revive the days of *Lochner*. Justice Brennan's assertion that the majority anomalously distinguishes between expectations based on property and those based on contract is not entirely correct, since the Court does protect property under the takings clause. In both takings cases and *Allied Steel*, the analysis is a fairly ad hoc balancing one, with a focus on factors such as the degree of harm inflicted, the importance of the state policy, and the scope of the applicability of the legislation.⁷⁴ The Court's effort in both areas has been one of accommodating individual rights with social needs. Justice Stewart's statement that the contract clause "must be understood to impose some limits" on the state⁷⁵ echoes the sentiment of to weigh the wisdom of legislation". . . .') (quoting *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)).

⁷² See, e.g., *Flemming v. Nestor*, 363 U.S. 603, 621 (1960) (upholding termination of social security benefits to alien deported because of political activities since "we cannot with confidence reject all those alternatives which imaginativeness can bring to mind, save that one which might require the invalidation of the statute"); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487, 490 (1955) (upholding law requiring prescriptions from an optometrist before an optician can even replace broken frames, since "the legislature might have concluded" it was necessary for various health reasons); *Goesart v. Cleary*, 335 U.S. 464, 466-67 (1948) (upholding law forbidding women to work as bartenders unless they were the wife or daughter of a male owner, since the legislature "evidently" felt the oversight of the related male owner would protect the female from hazards, and "we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling"); *overruled*, *Craig v. Boren*, 429 U.S. 190, 210 n.23 (1976); *Kotch v. Board of River Port Pilot Comm'rs*, 330 U.S. 552, 563 (1947) (upholding apprenticeship law which sustained practice of nepotism in certification of river pilots, since various legitimate factors "might have prompted the legislature to permit Louisiana pilot officers to select those with whom they would serve").

⁷³ "[P]rivate property [shall not] be taken for public use, without just compensation." U.S. CONST. amend. V.

⁷⁴ See generally *Penn Cent. Transp. Co. v. City of New York*, 98 S. Ct. 2666, 2659-62 (1978) (reviewing current state of takings law); *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1462-86 (1978) (same). *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), and *Miller v. Schoene*, 276 U.S. 272 (1928), the two takings cases cited by Justice Brennan, are quite extreme departures from the more traditional balancing approach. See L. BECKER, *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* 129 n.14 (1977); *Developments in the Law—Zoning*, 54 HARV. L. REV. 1471-72.

⁷⁵ 98 S. Ct. at 2721.

Justice Holmes in the leading takings clause case that the police power "must have its limits or the contract and due process clauses are gone."⁷⁶ *Allied Steel* represents an effort to delineate these limits, obscure since the demise of *Lochner*, in a manner sensitive to modern needs and conditions.

D. Criminal Law

1. *Death Penalty*.—In the words of Justice Rehnquist, *Lockett v. Ohio*,¹ decided last Term, may represent either the "seminal case" in the application of the eighth amendment to capital punishment or "the third false start in . . . the past six years."² In *Furman v. Georgia*,³ the Court struck down the death penalty as then applied on the ground that its arbitrary imposition was unconstitutional.⁴ Four years later, the Court held for the first time that a state could inflict the death penalty without violating the eighth amendment's prohibition on cruel and unusual punishments.⁵ A controlling plurality of the Justices⁶ approved death penalty statutes that in their view narrowed the class of crimes for which the death penalty could be imposed and guided the discretion of the sentence.⁷ In its latest encounter with capital sentencing, the Court has recast the balance between statutory control and the discretion of the sentence, holding that death penalty statutes, with rare exceptions, must permit the sentence to consider any pertinent mitigating factor offered by the defend-

⁷⁶ *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

¹ 98 S. Ct. 2954 (1978).

² *Id.* at 2975 (Rehnquist, J., concurring in part and dissenting in part).

³ 408 U.S. 238 (1972).

⁴ Nine separate opinions accompanied the 5-4 decision in *Furman*. Justices Brennan and Marshall found the death penalty unconstitutional under all circumstances. Justices Douglas, Stewart, and White condemned the death penalty because it had been applied discriminatorily, *id.* at 245 (Douglas, J., concurring), *freakishly*, *id.* at 310 (Stewart, J., concurring), and so infrequently that it did not serve any public purpose, *id.* at 313 (White, J., concurring). Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissented.

⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976).

⁶ Four decisions accompanied *Gregg v. Georgia*, 428 U.S. 153 (1976). Chief Justice Burger and Justices White, Blackmun, and Rehnquist were willing to uphold all five challenged statutes. Justices Brennan and Marshall would have ruled all five unconstitutional. The controlling votes in each case were cast by Justices Stewart, Powell, and Stevens (hereinafter "the plurality"). They found constitutional the discretionary death penalty statutes in three states, *Jurk v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976), but joined Justices Brennan and Marshall in overturning two mandatory death penalty laws, *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

⁷ See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 196-98 (1976).

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