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A UNIFYING THEORY FOR THE JUST-COMPENSATION CASES: TAKINGS, REGULATION AND PUBLIC USE

John A. Humbach*

The fifth amendment to the Constitution provides, in simple formulation:

nor shall private property be taken for public use, without just compensation.¹

Reconciling this plain language with the government's² general power to regulate has been a vexing complication of just-compensation law. The activities which may be restricted under the so-called police power³ include the use and enjoyment of property, personal and real.⁴ The complication arises because restrictions on the uses of

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1. U.S. CONST. amend. V. The requirement applies to the states through U.S. CONST. amend. XIV. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980); *Chicago, B. & Q. Ry. v. Chicago*, 166 U.S. 226, 236 (1897). Comparable requirements are, by express language or interpretation, a part of all state constitutions. See 3 P. NICHOLS, *EMINENT DOMAIN* § 8.1[2] (3d ed. 1980).

2. This Article refers to the "government" typically without specifying which level of government (federal, state or subdivisions of the latter) is meant. This usage avoids cluttering the exposition with the obvious but, for present purposes, irrelevant distinctions resulting from federalism. Where the distinction is relevant, it will be specified; otherwise, the references to government apply mutatis mutandis to the level(s) of government obviously appropriate from the context.

3. See *Berman v. Parker*, 348 U.S. 26 (1954).

The definition [of the police power] is essentially the product of legislative determinations addressed to the purposes of government. . . .

Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power. . . . Yet they merely illustrate the scope of the power and do not delimit it.

Id. at 32 (1954); see also *infra* note 124.

Federal regulations generally are traced to constitutionally "enumerated" powers (e.g., to regulate interstate commerce); however, as the distinction between "enumerated" and "police" powers has little bearing on the present discussion (see *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950)), it will be ignored. Cf. *infra* note 24 relative to the federal power to regulate navigation.

4. *Andrus v. Allard*, 444 U.S. 51 (1979) (personal property); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (real property); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (real property). Substantive due process limitations related to the scope of the police power are discussed at text accompanying notes 127-34 *infra*.

land⁵ can hurt the owner's economic position as much as an outright taking in fee.⁶ Yet, by and large, such police power regulations do not constitute compensable "takings" under the just-compensation clause, nor, in general, are such regulations constitutionally infirm merely for their impact on the value of affected lands.⁷

It has frequently been observed that, from a fairness standpoint, the present state of the law is somewhat illogical.⁸ The Supreme Court concedes that it has "no set formula," much less a readily applicable test, for determining when a land-use regulation becomes a taking of private property.⁹ Despite its obvious practical importance, "[t]he principle upon which the cases can be rationalized is yet to be discovered. . . ."¹⁰ Rather, the law of police-power takings is a widely acknowledged hodgepodge, its doctrines a farrago of fumbblings which have suffered too long from a surfeit of deficient theories.¹¹

5. The discussion that follows applies with much the same force to personal property as to real property. The primary focus of inquiry, however, will be land and police-power regulations restricting the uses of land. Accordingly, the kind of property contemplated will be *real* property.

6. *E.g.*, *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 517-19, 370 P.2d 342, 344, 20 Cal. Rptr. 638, 640 (1962), *appeal dismissed*, 371 U.S. 36 (1962) (regulation deprived land of all economic use); *see also* *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (75% loss); *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (over 90% loss); 1 R. ANDERSON, *AMERICAN LAW OF ZONING* 2d § 3.25 (1976); *cf.* *Andrus v. Allard*, 444 U.S. 51, 66 (1979) (personal property).

7. *See supra* note 6. *See generally* Annot., 52 L. Ed. 2d 863 (1978). The presumption of constitutionality (*e.g.*, *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594, 596 (1962)) makes a successful attack on use regulations a generally unlikely prospect.

8. *E.g.*, *Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63 ("a crazy-quilt pattern"); Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964) ("a welter of confusing and apparently incompatible results"); Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1, 2 (1971) ("the decisional law is largely characterized by confusing and incompatible results, often explained in conclusionary [sic] terminology, circular reasoning, and empty rhetoric").

9. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); *accord* *Andrus v. Allard*, 444 U.S. 51, 65 (1979); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

10. Sax, *supra* note 8, at 37. In a 1981 article it was reported that "legal scholars are still in search of a formula or set of rules which will lend precision to [the decision] process." Wright, *Exclusionary Land Use Controls and the Taking Issue*, 8 HASTINGS CONST. L.Q. 545, 575 (1981).

Sax himself proposed a theory, based upon a putative distinction between acts of government as an "enterprise" (compensable) and actions it takes as an "arbiter" of private conflicts (non-compensable). Sax, *supra* note 8, at 61-67. The distinction made by his theory, however, was not always easy to discern. The theory does not account for all the important lines of cases, *id.* at 70, and Sax in any event later felt compelled to "disown" it. *See* Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 150 n.5 (1971).

11.

Attempts have been made to reconcile apparent inconsistencies by classifying cases according to such factors as the regulation's purpose or its burdensome consequences, the relationship between the public interest asserted and the private detriment suffered, and the evil to be cured by the regulation. . . . But these efforts have not provided a means by which judicial action can be predicted. Clearly, if the utility of legal rules in a jurisprudential system can be judged by their predictability, the rules employed to determine where regulation of land use ends and taking of property begins are useless.

The past inability to find a unifying theory for the police-power takings cases seems to be a result of a persistent failure to refine properly the concepts involved. It is argued herein that the operative distinction made by the cases can be adequately described in terms of two suitably defined conceptions which may be inferred from the holdings themselves. By use of these two differentiated conceptions, which together cover a major portion of what are generally understood as property interests, it is possible not merely to reconcile the police-power takings cases with one another, but also to develop a theory unifying those cases with the general law of eminent domain.

The discussion begins with some remarks concerning the concept of property as a general matter. It will then consider briefly an approach to the problem which, though promising and advanced, nevertheless falls short of achieving an internally consistent, unifying theory. Following this introduction, an attempt will be made to specify the two distinctive conceptual components of property interests on whose difference the cases seem to turn, and then to demonstrate the suitability of this conceptual distinction as the foundation for a coherent theory of the law.

I. SOME WORDS ABOUT "PROPERTY"

Although the meaning accorded to the word property is critically related to the scope and import of the just-compensation clause, no definitive conception of the property idea seems possible. The boundaries of the concept in ordinary usage are too vague and unspecifiable to be analytically useful in fixing the limits of the just-compensation requirement. Precise conceptual boundaries can be defined, but they would be inherently artificial, often unconvincing, and infected by any weaknesses in the philosophico moral axioms on which they are based.¹² Neither an ideal nor an ordinary usage definition of property will be attempted here.¹³ Nevertheless, in order to clarify the use of the term in this Article, a few remarks about the meaning or conception of property are in order.

Donaldson, *Regulation of Conduct in Relation to Land—The Need to Purge Natural Law Constraints from the Fourteenth Amendment*, 16 WM. & MARY L. REV. 187, 194 n.48 (1974). See Sax, *supra* note 8, at 46.

12. A highly regarded attempt along these lines is Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); see also Sax, *supra* note 10. For a general as well as favorable discussion of this mode of proceeding, see B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977). For the author's views see Book Review, 39 U. PITT. L. REV. 793 (1978).

13. The necessity to define property will be avoided by looking instead at two usual (and perhaps necessary) conceptual components of property which happen to receive opposite treatments in the outcomes, if not the rationales, of just-compensation cases. See *infra* text accompanying notes 47-76.

First, in standard usage, the word property refers not merely to the things which are subjects of ownership but to the legally recognized and protected ownership interest as well.¹⁴ In this Article the word "property" will refer to this latter conceptual construct—the ownership rather than the things owned.¹⁵

Second, property interests include not merely present possessory estates, but also (without attempting to be exhaustive) future interests, incorporeal interests, powers of disposition, and liens. Certain incorporeal interests—negative easements and like servitudes—will draw our particular attention because of their similarity to land-use regulations.¹⁶ There has been some question whether certain kinds of servitudes, such as real covenants and equitable servitudes, are truly interests in land or even property.¹⁷ This issue seems, however, to be largely one of how inclusively one defines property. On the theory that like interests should be classified alike, such servitudes will be regarded as real property, i.e., as a variety of easements, without addressing the semantic question of whether that term ought to be applied to them. It is their legal characteristics for our purposes, not their taxonomy, which are important.¹⁸

The question incidentally arises as to the extent to which just-compensation cases can shed light on the "true" nature of property or the proper meaning of that term. One writer has suggested, for example,

14. See *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945).

15. The term is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law . . . [but refers to] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *Id.*

This "modern sophisticated" idea of property has made obsolete an earlier view that the just-compensation clause required payments only for physical intrusions. Van Alstyne, *supra* note 8, at 2 n.5; see also *Callender v. Marsh*, 18 Mass. (1 Pick.) 418 (1823); *Monongahela Navigation Co. v. Coons*, 6 Watts & Serg. (Pa.) 101 (1843); Stoebeuck, *Condemnation of Rights the Condemnee Holds in Lands of Another*, 56 IOWA L. REV. 293, 295-97 (1970). There are, however, still anachronistic lines of authority. See *infra* notes 109, 111, 112 and 114 and accompanying text.

Exact boundaries of the ownership concept will not, of course, be defined. See *supra* text accompanying note 13. Rather, the references will be to the relatively more indubitable core of meaning.

16. See *infra* text accompanying notes 30-41 and 115-19. Negative easements is used herein to refer generally to all non-possessory interests in land entitling the holder to certain stipulated forbearances on the servient land. Real covenants (contractual promises touching and concerning land and running with it), and equitable servitudes (promises binding upon purchasers with notice or for no value), are thus included in the collective concept of negative easements.

17. See *supra* note 16; 2 AMERICAN LAW OF PROPERTY §§ 9.1, 9.8, 9.12, 9.24 (A. Casner ed. 1952); Stoebeuck, *supra* note 15, at 303-06. Compare *Sprague v. Kimball*, 213 Mass. 380, 100 N.E. 622 (1913) with *Moses v. Hazen*, 69 F.2d 842 (D.C. Cir. 1934).

18. For just-compensation purposes, it should make no difference whether these interests are considered property or mere contract rights; takings of both are compensable under the Constitution. See *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508-09 (1923).

that the eminent domain cases provide "a fascinating laboratory in which to explore the concept of 'property.'" ¹⁹ This appears unlikely. The Constitution contains many words, e.g., commerce, speech, due process, equal protection, yet one would hardly look to constitutional cases to see what those words mean—except in their constitutional context.

At the other extreme, statements are occasionally found to the effect that private rights or technical title under state law, i.e., property as between the owner and non-governmental others, is not necessarily property within the meaning of the just-compensation clause.²⁰ Archetypical, perhaps, is Justice Jackson's dictum, in relation to certain riparian rights: "[O]nly those economic advantages are 'rights' which have the law back of them. . . . We cannot start the process of [just-compensation] decision by calling such a [riparian] claim as we have here a 'property right'; whether it is a property right is really the question to be answered."²¹

If taken broadly to imply that the federal definition of property for purposes of just compensation may deviate freely from various state law conceptions of the term, such statements are unacceptable. If the just-compensation clause means anything, it means that the federal and state governments are on much the same footing as private persons with respect to the acquisition or destruction of rights that states enforce in respect to things. It is hard to imagine that the framers of the just-compensation clause thought otherwise. To be sure, the constitutional meaning of the word property would not have to be defined in terms of the substantive law, generally state law, that gives force to the legal interests usually comprehended by property.²² But if the correspondence is not close,²³ the just-compensation clause be-

19. Stoebe, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057, 1072 (1980).

20. *E.g.*, *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900) ("a bare technical title"), *quoted with approval in* *Kaiser Aetna v. United States*, 444 U.S. 164, 176-77 (1979); *United States v. Commodore Park*, 324 U.S. 386, 390 (1945).

21. *United States v. Willow River Power Co.*, 324 U.S. 499, 502-03 (1945). Justice Jackson's line of thought has been viewed as echoing Jeremy Bentham's idea that property depends entirely on the law for its existence. *See infra* note 70; Dunham, *supra* note 8, at 80. There is a great difference though. Bentham was making a positivist jurisprudential observation about the origin of the thing-related legal rights that the courts are supposed to enforce. Jackson's statement, as *ratio decidendi*, sounds more like a declaration of judicial sovereignty over principle.

22. *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 279 (1943) ("the meaning of 'property' . . . in the Fifth Amendment is a federal question"), *quoted in* *United States v. Causby*, 328 U.S. 256, 266 (1946); *see also* *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring).

23. In fact the federal definition of property "will normally obtain its content by reference to local law." *United States ex rel. TVA v. Powelson*, 319 U.S. at 279. For "as a general proposition . . . the United States, as opposed to the several States, [is not] possessed of residual authority that enables it to define 'property' in the first instance." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980). *See also* *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (use of Hawaii state and native law); *Armstrong v. United States*, 364 U.S. 40 (1960) (taking of liens

comes, in practice, a kind of never-never land anomaly, detached from the texture and policy of the rest of the law.²⁴

II. "TAKINGS" AS COMPULSORY TRANSFERS:

PROFESSOR STOEBUCK'S THEORY

Despite the Supreme Court's admission of defeat,²⁵ the search to find a unifying theory for the extant cases continues. In a recent

created under state law held compensable); *General Box Co. v. United States*, 351 U.S. 159, 165-67 (1956) (area invaded was subject to the state's "ancient" servitude under state law; held, no compensation); *Fox River Paper Co. v. Railroad Comm.*, 274 U.S. 651, 657 (1927) ("no protection to supposed rights of property which the state courts determine to be non-existent").

In the recent case of *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155 (1980), the Supreme Court applied a federal definition of property instead of the state's where the federal definition was more inclusive (and, hence, more protective) than the state's definition, saying: "a state by *ipse dixit*, may not transform private property into public property without compensation." See *infra* text accompanying notes 211-15. The Supreme Court found its authority for its more inclusive definition of private property in general principles. Of course, the thrust of the text is that the federal definition of property cannot be significantly narrower than the applicable state's definition. It must, however, in some instances be broader if the just-compensation clause is to apply to the states, which it does. See *supra* note 1.

For an interesting discussion of the limits of government authority to redefine property, see concurring opinion of Justice Marshall in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93-94 (1980). See also *infra* text accompanying notes 185-221.

24. Statements such as Jackson's quoted in the text accompanying note 21 *supra* can, of course, simply be written off as more wrong thinking in a hodgepodge field of law. However, such statements are actually not so extreme when read in the context where they are made, i.e., in reference to the subordination of all private riparian rights in navigable waters to the federally entrusted paramount public right of navigation over such waters. *E.g.*, *United States v. Twin City Power Co.*, 350 U.S. 222, 224-25 (1956); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 65-66 (1913). *But cf.* *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (compensation required if navigation easement is extended to previously "fast" lands).

If all that Jackson meant was that property rights as between private persons are not controlling when such private rights conflict with the paramount public easement for navigation, such statements make perfect, if tautological, sense. Private riparian rights in navigable streams and waters are, by definition, a subordinate residuum subtending the public navigation easement. *United States v. Willow River Power Co.*, 324 U.S. 499, 502-03 (1945). Any losses due to changes in such a navigable stream can be said to result "not from a taking of the riparian owner's property . . . but from the lawful exercise of a power to which that property has always been subject." *United States v. Chicago, M., St. P. & P. R.R.*, 312 U.S. 592, 597 (1941). *Accord* *United States v. Rands*, 389 U.S. 121, 123 (1967).

Of course, this argument can be carried too far. Without the just-compensation clause, on the one hand, all private property might be simply regarded as a subordinate residuum subtending the public's public-use easement (an idea inherent in the very words "eminent domain"). See P. NICHOLS, *supra* note 1, §§ 1.12-13. On the other hand, if the just-compensation clause or due process clause prevents such a subordinated status for property generally, why should the treatment of riparian rights in navigable streams be an exception? Perhaps the answer lies in (1) the long history of public navigation rights as a qualification on private rights, going back to the Roman law of *jus publicum*, later held by the King on behalf of his subjects (see for further discussion, Humbach & Gale, *Tidal Title and the Boundaries of the Bay*, 4 FORDHAM URB. L.J. 91, 94-100 (1975)), and (2) the specific treatment given "navigation" in the commerce clause. U.S. CONST. arts. I & VIII. In any case, the public navigation easement is special, and statements made in reference to it are not necessarily applicable in other contexts.

By contrast, the public aviation easement seems to be receiving narrower treatment. Not only are subjacent landowners' rights defined according to state law, see *United States v. Causby*, 328 U.S. 256 (1946), but compensation is allowed for regular overflights within the aviation zone. *Id.*; see also *Griggs v. Allegheny County*, 369 U.S. 84 (1962) and discussion at note 93 *infra*.

25. See *supra* text accompanying note 9.

article,²⁶ Professor Stoebuck pointed critically to "the general lack of connection between police-power takings and the larger subject of eminent domain"²⁷ and offered an innovative suggestion for raprochement:

Special study should be made of some fact patterns that are closest to those in which land use regulations may cause takings . . . [viz.] that large group of takings known as "non-trespassory takings," such non-physical invasions of private property as deprivations of street access and condemnations by nuisance.²⁸

Compared with actual physical appropriation, takings of this latter "non-trespassory" sort are factually closer to cases of land-use restrictions imposed under the police power. Therefore, Stoebuck reasoned, they should offer greater insight as to the essential differences between non-compensable regulations and compensable regulatory takings.²⁹

Professor Stoebuck cited three types of situations in which non-trespassory acts of government are held to require just compensation, either because the acts impair an affirmative easement or because they constitute "inverse condemnation"³⁰ of a negative easement.³¹ From such cases, he concludes that the constitutional concept of taking refers in its essence to circumstances of "transfer,"³² a kind of compulsory transfer to the government of the same sorts of property interests (estates, easements, real covenants) which are commonly transferred voluntarily. He argues that this transfer-oriented test of taking is supported by "all cases of trespassory [i.e. physical] or non-trespassory takings with the exception of police power takings. . . ."³³

26. Stoebuck, *supra* note 19.

27. *Id.* at 1081.

28. *Id.*

29. *Id.*

30. *See* United States v. Clarke, 445 U.S. 253 (1980).

[A] landowner's action to recover just compensation for a taking by physical intrusion [on the part of the government] has come to be referred to as "inverse" or "reverse" condemnation. . . . The phrase "inverse condemnation" appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. . . . A condemnation proceeding, by contrast, typically involves an action by the condemnor to effect a taking and acquire title.

Id. at 255-57.

31. The three types of cases cited were:

(a) deprivations of street access enjoyed by abutting owners, comparable to a release of an easement,

(b) extinguishment of a restrictive covenant burdening government-owned land in favor of private land, again comparable to a release of an easement (here a *negative* easement), and

(c) inverse condemnation of a nuisance easement, as in airport overflight cases, which is comparable to a grant of an easement. Stoebuck, *supra* note 19, at 1084-86.

32. *Id.* at 1087-89.

33. *Id.* at 1091. Professor Stoebuck does not contend that compulsory transfer is the sole element of a taking. Additionally, there must be "some activity by an entity having the power of eminent domain," and the effect "must diminish a landowner's property rights," including the "rights of use and enjoyment." *Id.* It is obvious, however, that the element of transfer is the key

Unfortunately, Stoeck's transfer-oriented test of taking does not work well when applied to the police-power regulations cases, the object of his exercise. Specifically, although the adoption of land-use regulations seemingly effects a compulsory transfer to the government of what amounts to a negative easement or servitude over the regulated lands,³⁴ much like those which are commonly transferred voluntarily,³⁵ the land-use regulations which occasion such transfers are almost never regarded as takings.

In order to avoid this incongruity between his transfer-oriented theory and the law, Stoeck argues that negative easements can be regarded as transferred "to the government" only if the land-use regulations in question specially benefit governmentally-owned land.³⁶ Thus, in the usual regulation case, the transfers are not really to the government but rather to other private owners whom the regulations benefit.³⁷ Without such a transfer *to the government*, Stoeck seems to conclude, the government's regulation is not compensable eminent domain.³⁸

The weak point in Stoeck's argument, however, is its assumption that, absent a government-owned dominant tenement, regulatory transfers must not be to the government but instead to other private owners. In terms of enforceable *legal* interests, the facts do not support his theory. It is not other owners who acquire the discretion and power to enforce the regulations by legal action, or to release the restrictions back to the owners of the servient land. It is the government alone which assumes that position and which, therefore, is the transferee of the "negative easements."³⁹ Lacking a dominant tenement of its own, what the government gets is essentially a negative easement in gross.⁴⁰

differentiating factor since these other two elements are concomitants of virtually any governmental act likely to come into controversy under the just-compensation clause.

34. See *supra* note 16.

35. See Stoeck, *supra* note 19, at 1091-92.

36. *Id.* at 1092-93.

37. *Id.* at 1092.

38. See *id.* at 1088-89, 1092. Thus, Stoeck proffers the following test for a police-power taking: "A police power regulation on land use is an eminent domain taking *only when* its effect is specially directed toward benefitting a *governmental entity in the use of land* in which that entity holds incidents of ownership." *Id.* at 1093 (emphasis added).

39. Stoeck in effect switched gears when he looked to who received the benefits of regulations in order to determine who received the legal interest under them. A theory based on transfer of legal interests should consider just that, modifications of legal relationships and positions, not the incidental or intended economic effects which the transfers may have. It does not detract from the government's legal position obtained by means of regulations that it may gain no economic advantage from them. Indeed, it often does not gain economically. *But cf.* *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 656 (1981) ("Because police power regulations must be substantially related to [a public purpose] . . . , it is axiomatic that the public receives a benefit while the offending regulation is in effect.") (Brennan, J., dissenting).

40. Like servitudes in gross generally, private negative easements in gross are not favored in the law, but they are nevertheless recognized proprietary interests. *E.g.*, *Merrionette Manor*

In sum, Stoeck's distinction between valid regulations and regulatory takings, on further analysis, hinges not on whether there is a transfer *to the government*. It turns rather on whether the property interest transferred to the government is a negative easement in gross as distinguished from an appurtenant negative easement, an affirmative easement, a fee simple, or some other recognized type of property. His transfer-oriented test of taking, however, does not account for this distinction, and thus it cannot, alone, supply a basis for differentiating non-compensable regulations from police-power takings.

Moreover, there is another, though perhaps lesser, problem with Professor Stoeck's dominant-tenement criterion for treating certain land-use regulations as takings and not others. In principle, there is no apparent reason why the government always should be disqualified from enjoying the benefits of legitimate police-power zoning, even where the government happens, in a given locale, to be the primary or even sole beneficiary of the zoning regulations.⁴¹

In summary, the lesson which Professor Stoeck draws from the other eminent domain cases, involving trespassory and non-trespassory takings, appears to be a sound one: the common strain of those cases is that takings are typically characterized by compulsory transfers to the government of commonly recognized varieties of property interests. To differentiate police-power takings from non-compensable regulations, however, a distinction must be made which, unhappily, the transfer theory of taking does not address.

III. ECONOMIC INTERESTS/LEGAL INTERESTS

Land has value because the use of land has value. Any event which impairs the usefulness or potential of a piece of land will, almost certainly, impair its value as well. This relationship between useful-

Homes Improvement Ass'n v. Heda, 11 Ill. App. 2d 186, 136 N.E.2d 556 (1956); Pratte v. Balatsos, 99 N.H. 430, 113 A.2d 492 (1955); Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938); 2 AMERICAN LAW OF PROPERTY, *supra* note 17, § 9.32. Moreover, when held by a homeowners' association, for example, they operate and serve almost exactly the same way as their public land-use planning counterparts (e.g., zoning, environmental regulations, architectural controls). "[T]he general good of all within the community requires adherence to some common standards. Everybody's business is no one's business. Hence, the enforcement of such standards had to be centralized and home owners associations came into being." *Merrionette Manor Homes Improvement Ass'n v. Heda*, 11 Ill. App. 2d 186, 189, 136 N.E.2d 556, 558 (1956).

41. One practical concern may be the ineluctable conflict of interest faced by a governmental body which is considering, e.g., restrictive zoning to enhance the value of its own real estate. The height limitations on buildings in Washington, D.C., which allegedly preserve the grandeur of government edifices, may be the nation's most prominent example. D.C. CODE § 5-405. Interestingly, Congress withheld the authority to increase permissible building heights as one of a few exceptions when it conferred home rule status on the District of Columbia. D.C. CODE § 1-147. See *Larrabee v. Bell*, 10 F.2d 986 (D.C. Cir. 1926).

ness and value makes it appear that there is a fundamental inconsistency in the law of just compensation. The law purports to relieve completely against the value losses resulting from certain governmental acts, such as physical intrusions and interferences,⁴² and not at all with respect to others, most particularly, regulations on use.⁴³ Yet all of this is supposed to be consistent with "fairness and justice."⁴⁴

From an economic perspective, it seems inexplicable that the Constitution should require the compensation of losses resulting from impairments of physical possession, but not of comparable losses of value resulting from restrictions on use. On the one hand, it is the owner's economic interest in land—his interest in its value—which is the primary interest compensated by payments of just compensation.⁴⁵ On the other hand, if outcomes are any guide to purpose, it is clearly not the economic interest which the law is directed to protect.⁴⁶ In any event, it does not appear possible to explain variations among case outcomes in terms of variant detrimental effects which different governmental acts have on owners' economic interests. The effect of governmental acts on the owner's economic interest in his land is simply too general a factor to differentiate cases of regulation from cases of taking: it is present—to the owner's detriment—in both.

By contrast, even a superficial comparison of the typical non-police-power takings cases (trespassory and non-trespassory) with land-use regulation cases reveals a striking difference between them in the kinds of *legal* property interests which are allegedly invaded. In takings cases the property interests at stake always include legally actionable *rights* which the owner has in relation to others' behavior, chiefly

42. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) ("the compensation must be a full and perfect equivalent for the property taken"); *see also* *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979); *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979); *United States v. Miller*, 317 U.S. 369, 373 (1943); *Jacobs v. United States*, 290 U.S. 13, 16-18 (1933). The physical intrusions and interferences referred to are no longer limited to ouster or the appropriation of an affirmative easement. *See supra* note 15 and *infra* text accompanying notes 111-13.

43. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Miller v. Schoene*, 276 U.S. 272 (1928); *cf.* *Andrus v. Allard*, 444 U.S. 51 (1979) (regulations prohibiting sale of parts of protected birds held not to be a taking under fifth amendment).

44. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978) (compensation not awarded); *National Bd. of YMCA v. United States*, 395 U.S. 85, 92 (1969) (compensation not awarded); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (compensation awarded).

45. *United States v. Miller*, 317 U.S. 369, 374-75 (1943). It is the owner's loss, not the taker's gain, that is the measure of the value of the property taken. *Id.* at 375. Market value is the normal measure. *Id.* at 374. *See generally* Annot., 60 L. Ed. 2d 1107 (1980) and 19 L. Ed. 2d 1361 (1968).

46. "[T]he decisions . . . uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking'. . . ." *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 131 (1978). *See also* cases cited *supra* note 6; Sax, *supra* note 8, at 51-53 ("if we look to what the Court has done, . . . the Court has not treated protection of values as its primary goal").

rights to others' forbearance from such acts as trespasses, ousters, and nuisances.⁴⁷ In cases of non-compensable regulation, the interest at stake is solely the owner's *freedom* to use and enjoy the land which he owns.⁴⁸

Both of these legal property interests, namely, the *right* to others' forbearance and the *freedom* to use and enjoy, are valuable; both are part of the owner's economic interest in his land. Nevertheless, the two represent different ideas which are conceptually distinguishable in several fundamental ways.⁴⁹ The remainder of this Article will be concerned in considerable part with further exploring the conceptually distinctive characteristics of the two interests and elaborating their differences. The difference which is key to this inquiry, however, is a difference not in their characteristics but rather in their significances: a taking of property under the just-compensation clause is almost always found when government acts impair or destroy legally actionable rights;⁵⁰ conversely, such a taking is almost never found where the government's acts merely affect the freedom to use and enjoy.⁵¹ That is, the distinction between rights as against others

47. *E.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) ("the 'right to exclude' . . . [is one] that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power . . . [to] cause an insubstantial devaluation"). The demonstration and elaboration of the proposition in the text are the crux of this Article—and their statement here, unsupported for the moment, is only for purposes of introduction. See also *infra* text accompanying note 48.

48. *E.g.*, *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962) ("the fact that [an ordinance] deprives the property of its most beneficial use does not render it unconstitutional"); see also *Mugler v. Kansas*, 123 U.S. 623 (1887), *quoted infra* text accompanying note 123.

49. The analysis which follows is by no means the first to distinguish between legally enforceable rights and freedoms, nor are the commentators and judicial opinions in the just-compensation area the first to overlook it. Hobbes criticized Lord Coke for missing its significance (T. HOBBS, *DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* 73 (J. Cropsey ed. 1971)), and Bentham and Salmond, among others, made the distinction. See R. DIAS, *JURISPRUDENCE* 34-35 (4th ed. 1976). However, Hohfeld deserves credit for the first systematic specification of a comprehensive set of jural concepts, of which right and freedom are two. W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* 35-50 (Cook ed. 1919) (also found at 23 *YALE L.J.* 16 (1913)). Hohfeld used the word "privilege" to designate the concept which this author calls a freedom. However, the word "privilege" is too misleading, both as a matter of ordinary and legal usage as well as etymology, to be a suitable name for what is, essentially, a vestige of a pre-legal-intervention state of affairs.

One important embellishment on Hohfeld's scheme is to include the government as one of the actors on the jural scene. Although the government's rights and duties are not the same as those of its subjects, there nevertheless is a possibility and routine practice of measuring the conformity of governmental acts to legal norms to which the government ostensibly submits. See *infra* notes 54, 101, and 103. It is in this light that the government will be treated not merely as an arbiter but also as a jural actor, though one with special prerogatives. Further elaboration on this analytical account of the government's role as actor appears *infra* note 54.

50. The exceptions fall into two categories. First are the remaining vestiges of the now largely abandoned physical intrusion criterion of taking. See *supra* note 15 and *infra* notes 109, 111, 112, and 114. Second are the redistributive takings of rights for other than public use. See *infra* text accompanying notes 184-221.

51. See *infra* text accompanying notes 125-56 where the exceptional cases are reconciled with the theory being presented.

and freedoms to use appears to fix the line between takings and regulation.

Certainly, the rights/freedoms dichotomy has not usually been the ostensible basis for any court's decision. Accordingly, the approach of this Article is rather like that of a chemist, observing phenomena which appear to have their own (perhaps unknowable) "natural" ontological logic, and afterwards positing a coherent explanatory structure for purposes of our own understanding. Unlike the chemist's result, however, the result here is probably less arbitrary than, say, a molecular theory superimposed on nature; for the ontology of a body of law is comprised not of material phenomena, but rather of judicial decisions which have been made in furtherance of policy goals. Though courts may not always consciously articulate the policy distinctions underlying their decisions, it is likely that the analytical distinctions which can explain their decisions will closely parallel the unarticulated operative distinctions.

IV. PROPERTY RIGHTS AND FREEDOMS

The distinction between "rights" and "freedoms" is a distinction between two stipulatively defined concepts, each of which covers a significant, but quite different portion of what is generally understood as property interests. The words selected to designate those concepts are words taken from ordinary usage. It is *solely* to the concepts defined below, however, and not to any other meanings in ordinary usage, that the words "right" and "freedom" will refer in this Article.

The property interest referred to as a right is defined as the legal advantage of having the physical or moral⁵² power of the government invocable by legal action in order to induce the compliance of others or to redress others' non-compliance with some particular set of behavioral requirements.⁵³ In more mundane tones, the holder of a right is one who has a cause of action against those others who are

52. The reference to moral power, in addition to physical power, accounts for legal actions which seek declaratory judgments or nominal damages. More broadly, the realistic threat of an adverse result in a legal action and the common desire to conform and behave in accordance with law are also part of the moral power of the government and, hence, of the legal advantage constituting a right. The potential cause of action, however, is the cornerstone of the conception of "right" as defined herein.

53. The behavioral requirements are subject, of course, to contingencies and these contingencies comprise, in general, all of the operative facts of the cause of action other than the defendant's behavior itself.

Incidentally, behavior requires a somewhat stretched definition where the rights in question relate to certain kinds of causes of action, e.g., breaches of contractual representations and warranties, breaches of promises as to the behavior of others, and claims of strict liability in tort or claims similarly founded on circumstances outside the control of defendants. As these possibilities appear to have little to do with the rights usually associated with property, they were disregarded in selecting the word "behavior" to describe defendants' connection with causes of action.

subject to specified behavioral requirements but who do not, or who sometimes threaten not to comply with them. The behavior-contingent cause of action is the cornerstone of a right as herein defined. The others who are subject to the behavioral requirements, and to enforcement by legal action, may be said to have a *duty* to comply with the particular behavioral requirements. Thus, for purposes of this discussion, the concept of duty is defined in terms of the concept of right.

Upon reflection, it appears that absent special contractual arrangements, the only rights normally comprehended by property interests in land are rights to others' (including, in general, the government's⁵⁴) forbearance from certain kinds of acts. Most prominent is the possessory owner's right to others' forbearance from acts in derogation of his assertion of exclusive control over who has access to his land and the conditions of such access.⁵⁵ This *particular* right to forbearance shall,

54. The idea of a right against the government presents some problems. A right of property, as defined in the text, is primarily government support of one's freedom from others' uninvited interferences. (The word "freedom" is used here with its wider, ordinary meaning, not in the narrower sense defined in the text accompanying *infra* notes 59-75.) Of course, the government can use its power to prevent government interferences, but not in the same sense that it can use its power to prevent others' interferences. Thus, in a way, there can be no rights against the government in the same sense that there are rights as against others.

The separation of powers and diffusion of authority and control among various government organs obfuscate this whole matter considerably—lending force, in effect, to the reality of rights against the government. For now, though, let us ignore these obfuscations and assume a monolithic state, both for brevity and in order to cast the argument for no-rights-against-the-government as strongly as possible.

A response to such an argument might be as follows: Even given that there is no superior force to prevent uninvited interferences from the government, the government may nevertheless *act* as though it is subject to a duty to refrain from uninvited interferences—or to observe any other private rights—just *as though* it were one of the persons whom it regulates. This is exactly the phenomenon which occurs when, and to the extent, the government waives sovereign immunity. See *infra* notes 94 and 101-03. The just-compensation clause is a further example of the government putting itself on somewhat the same footing as others. *Id.*; *supra* text accompanying notes 21-24.

The alleged theoretical difficulty in recognizing rights against the government is that the government, including its constitution-amending organs, cannot irrevocably commit itself, by self-regulation, to observe private rights. What if, for example, the federal and state governments decided to ignore the just-compensation clause? Would it still be binding as a source of constitutional rights? A pragmatist might find such questions an academic bore. Quite apart from practical concerns, however, the absence of irrevocable binding force or commitment is also logically irrelevant to the question of rights against the government.

Property rights, for example, whether against private others or the government (i.e., government support of freedom from uninvited interferences or government self-restraints from uninvited interferences) are equally subject to the government's pleasure on the matter of their recognition and duration. Likewise subject to the government's pleasure, is the right, constitutional or otherwise, not to have such rights modified or withdrawn, e.g., by constitutional amendment. This practical fact of ultimate governmental autonomy does not, however, make just-compensation law, constitutional law, or law in general an unanchored matter of no import. The requirements of the law are still tied ineluctably to generally accepted underlying policy desiderata. The requirements will endure and have force as long as the desiderata remain acceptable. In the final analysis, however, the acceptability of these desiderata is the only claim to life which they have.

55. See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) ("the 'right to exclude' [is] universally held to be a fundamental element of the property right"). The rights in question

for convenience but not limitation of meaning, be designated as the "right of exclusivity." It refers generally to the legal advantage of being able to invoke the government's power to retain or regain actual physical possession, e.g., by actions in ejectment, or to redress or enjoin unlicensed intrusions, e.g., by actions in trespass.

Other property rights may arise in special situations, but they too are rights to others' forbearance. For example, the owner of an easement has a right to the servient owner's and others' forbearance from unreasonable interferences with the use of the servitude.⁵⁶ The owner of land benefited by a restrictive covenant has the right to forbearance from stipulated behavior on the part of the owners of the land burdened by the covenant.⁵⁷ The law of private nuisance confers a general right to others' forbearance from acts on their land which unreasonably and substantially interfere with the use and enjoyment of one's own land.⁵⁸ Thus, to generalize, apart from special contractual arrangements, occasional equitable servitudes, or real covenants which impose affirmative burdens, the rights associated with property in land are largely concerned with others' negative behavior. The event which they contemplate is that uninvited others stay away.

are never as absolute as the brief description in the text may imply. For example, the right to be free from invasions of others may be qualified by privileges, public and private. *E.g.*, *Proctor v. Adams*, 113 Mass. 376 (1873) ("it is a very ancient rule of common law, that an entry upon land to save goods . . . is not a trespass"); *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188 (1908); *see also* *Bowditch v. Boston*, 101 U.S. 16 (1879) (privilege to destroy buildings to prevent spread of fire); *Harrison v. Wisdom*, 7 Tenn. (7 Heisk.) 99 (1872) ("The right to *destroy* property in cases of extreme emergency . . . [is a] right existing at common law, founded on necessity. . ."). A privilege receiving more recent recognition is the state-conferred privilege to freely express oneself and to petition in certain semi-public areas of private property. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

Of course, as an original question, and apart from the text of the Constitution, there is no reason why one of the qualifications of the right cannot be that it is inapplicable against the government. *See* *Case of the King's Prerogative in Saltpeter*, 77 Eng. Rep. 1294 (1607), and *supra* note 24, concerning such subordinate status in relation to the federal navigation easement. It is, however, the broad import of the just-compensation clause to limit this privileged status of the government. *Richards v. Washington Terminal Co.*, 233 U.S. 546, 552-53 (1914). Under the just-compensation clause, the government is not on quite the same footing as private persons because it can *force* a sale, but it nevertheless must, like private persons, respect private property by at least paying compensation. Still, asserting that it is the broad import of the just-compensation clause to impose limitations on the government does not answer or beg the question. The details of those limitations remain an issue, and are, indeed, precisely *the* issue.

56. *E.g.*, *Orange and Rockland Utils., Inc. v. Philwood Estates*, 52 N.Y.2d 253, 266-67, 418 N.E.2d 1310, 1315-16, 437 N.Y.S.2d 291, 297 (1981); *City of Pasadena v. California-Michigan Land and Water Co.*, 17 Cal. 2d 576, 110 P.2d 983 (1941); *see* *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("[T]he government . . . may not, without . . . paying just compensation, require [the owners] to *allow* free access to the dredged pond. . .") (emphasis added). *See generally* 2 AMERICAN LAW OF PROPERTY, *supra* note 17, §§ 8.14, 8.105-8.108.

57. These interests may or may not be proprietary, a point not worth arguing about. *See supra* notes 17-18 and accompanying text.

58. RESTATEMENT OF TORTS §§ 826-831 (1939); 6A AMERICAN LAW OF PROPERTY, *supra* note 17, §§ 28.25-28.28.

The interest referred to as a freedom to use and enjoy is mostly concerned, by contrast, with the owner's own affirmative behavior. A freedom may be defined as the legal advantage which one has when, in reference to particular behavior, others cannot by legal action invoke the physical or moral power of the government in order to redress or induce the behavior on one's own part.⁵⁹ Thus, a person has a freedom to engage in an activity if, or to the extent, the government has not made such activity civilly actionable at the instance of itself or others, or criminally actionable at the instance of the government itself. Phrased differently, a freedom in relation to an activity or its omission is the absence of a duty to observe another's rights. Freedom means not being subject to causes of action.⁶⁰

A freedom is conceptually quite different from a right. The freedom to act in a particular way does not mean that the government's power may be invoked to induce others' compliance or to redress their non-compliance with any particular behavioral requirements. No causes of action are available to realize the freedom to use and enjoy, and the government will not intervene to redress its disappointment. A freedom is exercised by engaging in an act or an activity or omitting to act if the freedom is negative; a right is typically exercised by instituting a lawsuit.

The most prominent of the freedoms associated with property interests are the freedoms to use and enjoy, in either general or particular ways.⁶¹ These freedoms of use and enjoyment can be seen as a part of the larger freedom to engage in any non-proscribed acts, activities, or omissions.⁶² The comparatively wide residual freedom of activities on one's own land, however, a locale as to which others generally have few rights, has the appearance of being rooted in the property interest itself. This appearance, though, is relative. The general duty to avoid activities on others' land,⁶³ and a limitation on the permis-

59. Or, if the freedom is vis-à-vis only certain others, those certain others cannot so invoke the state's power.

60. Cf. *supra* text accompanying notes 52-54.

61. The freedom to use and enjoy is by no means the only freedom associated with property. There is, for example, the freedom to refuse to make a transfer, i.e., exercise a power, except for a consideration. The government's elimination of this freedom of sale is also not compensable. *Andrus v. Allard*, 444 U.S. 51 (1979). Susceptible to like analysis are cases such as *Bowles v. Willingham*, 321 U.S. 503 (1944) (upholding rent and price controls).

62. That is, any acts, activities or omissions which are not actionable by others, because others have no rights in relation thereto, i.e., which are not the subject of any duties. The question may be posed whether it is most accurate to view "every act as permitted unless legally prohibited" or "every act as prohibited unless legally permitted." According to this author's intuition, the first version seems more likely to keep things in the proper historical order, whatever the relevance may be of that. However, this sort of inquiry being not very fruitful in the end, the first and more liberal version is simply assumed, that the government is the annihilator, not the well-spring of freedom.

63. This is the correlative of *their* right of exclusivity.

sible activities on public or state-owned land,⁶⁴ simply leaves one's own land as the only locale where natural liberty remains relatively unimpaired.⁶⁵

The freedom to use and enjoy land is sometimes referred to as the right of use and enjoyment. Within the definition of right as used in this Article, however, there could be no such thing as a right of use and enjoyment.⁶⁶ The only direct legal advantage which the law can confer in relation to one's own activities, such as use and enjoyment, is a freedom from successful legal actions by others, i.e., an immunity from judgments. Enforcing the right to others' forbearance from interfering with one's own activities does, of course, *indirectly* protect the freedom to engage in such activities. Yet such enforcement *directly* protects only the right to forbearance and not, strictly speaking, the freedom, as those two are conceptually distinguished.⁶⁷ By its nature, freedom cannot itself be violated or redressed. Rather, a freedom is a behavioral possibility with which the government will not interfere at all, neither to support nor to obstruct, except to enforce any associated rights.⁶⁸

To summarize and further illuminate the distinction between the concepts which this Article designates as property rights and freedoms as they relate to land, the two may be compared point by point as follows:

1. *Rights* are concerned solely with *others'* activities, primarily their forbearance from interferences (broadly speaking) with the land, but conceivably also forbearance from other interferences (e.g., with the use of an easement) or from other acts (e.g., nuisances, violations of negative easements). Such rights to forbearance may, as a practical matter, be the predicate of use and enjoyment, but they are not a legal guaranty thereof.

Freedoms, by contrast, are concerned with the activities of the person having the freedom, not others' activities, and freedoms contemplate no necessary participation, cooperation or involvement of others for their exercise and, more importantly, guaranty none.

64. In public areas owned by the government (e.g., streets), the limited permission or license idea might be better framed in terms of special regulations applicable to areas which are not owned privately or by the government in a proprietor-like capacity (e.g., the state capitol). The consequences of the distinction appear to be negligible.

65. See *infra* text accompanying notes 71-75 for further elaboration.

66. This statement is limited to the context of the rights/freedoms dichotomy presented by this Article. Statements about rights to use and enjoy in the course of general usage are a semantically different matter. See *infra* text accompanying note 81. Of course, general usage may obscure important conceptual distinctions—precisely the reason for the careful differentiation of certain definitions in this Article.

67. There may be a legal right to enjoy a particular freedom, i.e., it may be a specific tort for others to prevent exercise of the freedom. For example, the general freedom of movement is supported by the tort of false imprisonment. More commonly, though, it is the general personal and property torts which support the wide residuum of freedoms to engage generally in non-proscribed activities. The frequent presence of ad hoc or general rights which support the exercise of freedoms does not make the two the same thing.

68. See *supra* note 67.

2. *Rights* impose, through correlative duties, mandatory behavioral requirements on others, which requirements are enforceable by legal actions for damages, sometimes for specific relief (injunction), and sometimes by the government's power to punish.⁶⁹

Freedoms, by contrast, carry no warrant for government intervention in the event of disappointment in their exercise except *indirectly* where the violation of some right is causally responsible for the disappointment. The concept of "freedom," however, does imply immunity from judgment or lawful action—legal action or self-help—founded upon the disappointments to others which exercise of the freedom may entail.

3. *Rights* are created by the government in the sense that the legal apparatus of the government is what specifies the behavioral requirements to be imposed, identifies the claims to be enforced, and provides the mechanism for legal enforcement.⁷⁰

Freedoms, by contrast, seemingly pre-exist intervention by the government, and are not dependent upon the government for their exercise except insofar as a right to others' forbearance may be a practical predicate for their exercise.

4. *Rights* apply, respectively, only to specific areas of land and are advantageous to the holder only in relation to the specific areas to which they apply.

Freedoms, by contrast, apply more to the person than to specific areas of land; i.e., they benefit the holder wherever he may be, subject to location-contingent regulations applicable to particular places. Restrictions on the freedom to use and enjoy land are frequently location-contingent.⁷¹ Land-use regulations, however, are by no means always location-contingent,⁷² and restrictions of freedom that have little to do with land-use regulation frequently *are* location-contingent.⁷³ Since land is immovable, location-

69. Insofar as a criminal action to punish is treated as an enforcement of private property rights, the government's standing might be viewed properly as vicarious or derivative. The government has, of course, its own interest in faithful observance of its criminal laws.

70. As Jeremy Bentham wrote, with apodictic aplomb: "Property and law are born together, and die together. Before laws were made, there was no property; take away laws and property ceases." J. BENTHAM, *THEORY OF LEGISLATION, PRINCIPLES OF THE CIVIL CODE*, pt. I, 112 (E. Dumont ed. 1864).

This dictum, which rather presupposes the non-legality of such supergovernmental institutions as international law and extra-governmental institutions as customary law, may or may not be regarded as true, depending largely on the definitions which one chooses to supply to the various words comprising it. Certainly, the sudden disappearance of organized government would probably not occasion the immediate or even eventual demise of the institution of property or the behavioral patterns associated with that institution. Nevertheless, legal property (which, by an almost undeniable process of mutual influence, is closely congruent with any possible institution of extra-legal property) could not exist without the familiar supportive legal apparatus. In any event, what the just-compensation clause may mean in a legal system which offers no other legal protection for property expectations is a question that is highly academic.

71. E.g., environmental and historic preservation regulations, and zoning.

72. For example, prohibitions on growing marijuana or producing alcoholic beverages (*Mugler v. Kansas*, 123 U.S. 623 (1887)); mining gold (*United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958)); building unsafe houses and suffering unreasonable hazards to invitees, are all regulations upon freedom and, by extension, are non-location-contingent restrictions on land use.

73. E.g., prohibition of abortions except in hospitals and authorized clinics; prohibition of nudity in areas open to public view; prohibitions on driving over 30 m.p.h. except outside of

contingent restrictions on activities may appear to be deductions from the ownership interest in land rather than deductions from the hypothetical pre-government natural liberty of those who are on it.⁷⁴ By corollary, it may be said that the freedom to use and enjoy is derived from ownership. Nevertheless, it is at least as accurate to say such freedoms exist, and perhaps persist, because they are not impaired as a result of others' ownership.⁷⁵

Of course, both rights and freedoms have economic value, and the holder is properly concerned with preserving both: the pinch can be as hard whether the government impairs a freedom or takes a right. Nevertheless, for better or worse, the just-compensation clause has not been interpreted as a policy to protect economic values,⁷⁶ but as a protection for only those values consisting of rights.

The legal significance of the rights/freedoms dichotomy becomes quite visible when one compares borderline cases such as the factually similar cases of *United States v. Pewee Coal Co.*⁷⁷ and *United States v. Central Eureka Mining Co.*⁷⁸ Both of these cases involved government intervention, as a wartime measure, into mining operations of private companies. In *Pewee*, to avert a nationwide strike, the United States took possession of most of the nation's coal mines, requiring mine officials to act as "agents" of the government, and otherwise exerted dominion and control. A compensable taking was held to result. In contrast, in *Central Eureka*, no compensable taking was found when the government merely prohibited the operation of gold mines in order to conserve equipment and manpower for the mining of more essential ores. In terms of the right/freedom analysis, the distinction is obvious: in *Pewee*, there was an elimination of rights by ouster from possession,⁷⁹ while in *Central Eureka* only freedoms to use were affected. These two cases demonstrate how the substantive difference between rights and freedoms can be legally significant in distinguishing compensable takings from other, non-compensable

cities and villages, and—quite importantly—prohibitions of any unlicensed activity on land belonging to others (as a result of their rights of exclusivity).

74. On reflection, it is rather curious that land-use regulations have become so widely regarded as property rules, having to do with the dimensions of ownership rather than personal freedom. Regulations on the use of particular types of chattels are not similarly viewed. For example, the rules against assault with deadly weapons, though applicable to only certain kinds of chattels, such as guns and knives, are generally not regarded as having to do with the property or dimensions of ownership in such chattels.

75. This includes the government's ownership of government-owned land. See *supra* note 64.

76. See *supra* text accompanying notes 42-46. Whether the policy is for better or worse, or, as Sax says, preposterous, *supra* note 8, at 48, see *infra* text accompanying notes 177-84.

77. 341 U.S. 114 (1951).

78. 357 U.S. 155 (1958).

79. Possession is the traditional factual predicate of actions in trespass or nuisance. See *infra* note 96.

governmental actions that similarly affect economic values. The distinction is not a mere formality barren of substance.⁸⁰

It is perhaps important to make clear what the foregoing distinction between freedoms and rights does not mean to say. First, it does not mean to say that, as a matter of general usage, there is an error or impropriety in utilizing the word right to refer to the concept designated earlier as a freedom. It is common to refer to a right to use and enjoy land, or to recognize that such right of use and enjoyment is part of the bundle of rights that comprise ownership or property.⁸¹ Such usage is simply too widespread and familiar to be wrong or improper, or to be extirpated even if it were. In any case, to further emphasize, the distinction that is important to this discussion is not between meanings of words. The essential distinction is between the stipulatively defined concepts that have been designated rights and freedoms. It is this author's thesis that, distinguishing between these two defined subtypes of property interests carefully, there is not, and cannot be, a right to use and enjoy land, only a freedom to do so.

Second, and more significantly, it has not been suggested, nor will it be, that the constitutional meaning of property in the just-compensation clause can properly refer only to rights and not freedoms, as those terms are used in this Article or otherwise. The bundle of legal interests comprising ownership or property obviously can be seen to include freedoms as well as rights, not to mention a number of other interests which, according to the usage of Hohfeld,⁸² may be denominated as powers, immunities, disabilities, liabilities, and no-rights. There is no reason a priori why the just-compensation definition of property should include one, or some, but not all of these interests. However, the holdings of Supreme Court cases point unambiguously to the conclusion that the just-compensation clause meaning of property *does not* include freedoms, at least not the freedoms of use and enjoyment. Unlike rights, these freedoms apparently may be taken or destroyed without payment of compensation. Indeed, it turns out that a very good definition of police-power regulation is simply a governmental act which effects such a taking or destruction of freedoms alone.

80. This was alleged by Sax, *supra* note 8, at 47-48. Sax's assertion that *Central Eureka* represents an application of the now obsolete "physical intrusion" requirement for a taking, *see supra* note 15, is similarly beside the mark. The case is perfectly consistent with cases holding that, absent physical invasion, a compensable taking of rights can occur. *See infra* note 114 and accompanying text.

81. *E.g.*, *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945); *see supra* note 15; B. ACKERMAN, *supra* note 12, at 27; Stoebuck, *supra* note 19, at 1091.

82. *See supra* note 49.

V. APPLYING THE RIGHT/FREEDOM ANALYSIS

The value of a legal test depends upon several factors including ease of application, conformity to the existing body of both germane and analogous cases, and suggestiveness of plausible policy underpinnings for the distinctions which it makes. A test of constitutional taking based upon the rights/freedoms dichotomy is at least as easy to apply as the "fairness and justice" factors which are its "no set formula" precursors.⁸³ To show its conformity with the existing body of law, its predictions will be compared with the results of a number of representative holdings, primarily recent Supreme Court decisions.⁸⁴ Following this comparison, attention will be given to possible policy underpinnings of just-compensation law which are suggested by a test employing the rights/freedoms dichotomy.

A. *Physical Intrusion Cases*

Appropriating possession⁸⁵ of privately held land, or making physical use of it as though under an affirmative easement,⁸⁶ both constitute compensable takings of private property. In these situations, there is a limitation or elimination—in effect, a transfer to the government—of both the owner's rights of exclusivity and his freedom to use and enjoy. Taking possessory title eliminates both, and taking an affirmative easement limits both by subjecting the rights to an exception, for the government, and the freedoms to a qualification—forbearing from unreasonably interfering with the government's freedom to use.⁸⁷ The distinction between rights and freedoms does not play a visible role in these cases of physical appropriation or use since, under their facts, the property interests which are taken include both rights and freedoms. The rights/freedoms dichotomy is not, however, inconsistent with such cases.

It is important to note that, in order for a physical intrusion to constitute a compensable taking, the physical intrusion must take a right away—that is, the effect of the intrusion must be to deprive the

83. See *supra* text accompanying notes 9 and 44. It has often been repeated that these determinations can only be decided case-by-case. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). This, of course, is no test at all.

84. The comparison is between the predictions and holdings, or hypothetical holdings mentioned in dicta. The right/freedom dichotomy does not play a prominent role in the stated rationales in such cases, though this is hardly to be expected in light of the wandering past of just-compensation theory.

85. *E.g.*, *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884); *accord* *United States v. Miller*, 317 U.S. 369 (1943) (railroad tracks); *United States v. Lynah*, 188 U.S. 445 (1903) (permanent flooding).

86. *E.g.*, *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946); see additional cases *infra* note 100.

87. See *supra* note 56.

owner of factual predicates, e.g., possession, for one or more causes of action which he might otherwise have had, either immediately or subsequently. When the government merely violates a right,⁸⁸ or indirectly defeats its enforcement,⁸⁹ but does not take the right away, no taking occurs, even though the effect on use and enjoyment may be disastrous.

Under the right/freedom analysis the explanation for these no-takings cases is that acts in derogation of rights are not necessary deprivations of rights. That is, even though an act of the government might, if committed by others, be actionable as a tort,⁹⁰ it will not necessarily constitute a taking. To be a taking, there must be an act which is tortious⁹¹ and which has the further legal effect of depriving an owner of the prior-existing factual predicates for one or more potential causes of action.⁹² Only then would the owner be deprived of rights.⁹³

88. Compare *National Bd. of YMCA v. United States*, 395 U.S. 85 (1969) (temporary intrusion by U.S. troops not compensable) with *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (taking of leasehold is compensable). See generally *Sanguinetti v. United States*, 264 U.S. 146 (1924); *Keokuk & Hamilton Bridge Co. v. United States*, 260 U.S. 125 (1922).

89. E.g., *Mullen Benevolent Co. v. United States*, 290 U.S. 89 (1933); *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923) (requisition of steel which was contractually committed to plaintiff, frustrating plaintiff's contract rights); see *infra* note 90.

90. E.g., trespass or nuisance. Note, however, that government acts in this category are not necessarily tortious in character. For example, in *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), when the government requisitioned steel contractually committed to plaintiff, the effect was to totally frustrate its contract rights. However, acts of a private person that result in comparable frustration of a contract might not be an actionable tort. See *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 129, at 938-42 (4th ed. 1971).

91. The reason why there must be a tortious act by the government or one acting under government auspices is examined *infra* note 93.

92. For example, ouster from possession deprives the owner of the prior-existing factual predicates of standing to maintain a trespass or nuisance action. See discussion *infra* notes 95-96 and accompanying text.

93. Remember that the cause of action is the cornerstone of the right concept, as herein defined. See *supra* text accompanying notes 53-54.

Apparently, the mere elimination of bases for inchoate causes of action is not enough to invoke the just-compensation requirement. See *United States v. Sponenbarger*, 308 U.S. 256, 267-68 (1939). There must also be conduct which occasions such actions, e.g., an entry into possession or a use of somebody's land by government or under its auspices. In the first place, the mere elimination of bases for legal action without conduct occasioning such action, e.g., the mere declaration by Congress of aviation easements, would not likely result in any loss to the owners and, hence, the just amount of compensation would be zero. Cf. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 94 n.39 (1978) (no compensation for new legal limitation of liability for nuclear accidents).

There is more to the matter, however. Consider, for example, a congressional declaration that there is an easement for aviation within bounds prescribed by Federal Aviation Administration regulations, 49 U.S.C. §§ 1301(29), 1304 (1976 & Supp. III 1979). The declaration in itself would not seem to be a basis for compensating anyone. As to high-level aviation, nothing would be taken ("Cujus est solum, ejus est usque ad coelum" was obiter dictum), and low-level aviation (takeoffs and landings) would only be a contingent possibility. Nevertheless, the use of near-earth airspace over specific lands, by the government or under its auspices, may trigger compensation if subjacent owners are injured. *Griggs v. Allegheny County*, 369 U.S. 84 (1962). But cf. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), where extension of navigation easement to

Tortious acts of the government short of a taking of rights may, of course, be actionable if, as to them, sovereign immunity has been waived.⁹⁴ Actionable or not, however, the test of taking would be whether the government acts to detrimentally alter the factual predicates of the affected owner's rights.

A typical right-depriving governmental act would be the ouster of an owner from possession.⁹⁵ Such an ouster would constitute a taking of rights and not a mere violation of rights because the effect of an

previous fast lands was held to require compensation; however, surface intrusions are probably more likely to result ipso facto in injury whereas avigational intrusions are not.

Congress's declaration of the avigation easement resembles a state law that permits counties to build roads and allows automobile speeds of up to 55 m.p.h. "unless otherwise posted." Such a law would not make it any less tortious to drive through my neighbor's yard at 55 m.p.h. without his permission. If the county, however, establishes a street through my neighbor's yard, as was done in *Griggs v. Allegheny County* with a landing approach, compensation could not be denied on the grounds that all drivers were obeying the traffic safety laws. Again, though, a law authorizing the county to put in the street would not trigger a taking until the street was established, and the congressionally declared avigation easement triggers no compensation until it is used to the point of injury cognizable under the just-compensation clause, viz., with such regularity an easement by prescription could, in time, arise. *United States v. Dickinson*, 331 U.S. 745, 748-49 (1947). Note that under *Griggs*, the taker of an easement who is liable to pay compensation is the one whose actions prompted the overflights, not the authorizing government nor the private users acting under the taker's auspices. *Cf. Yearsley v. Ross Constr. Co.*, 309 U.S. 18 (1940).

One may query whether avigation easements will eventually achieve the status of navigation easements, viz., become such longstanding potential qualifications on the right of exclusivity and other forbearances that new burdens incidental to their exercise will be treated as non-compensable. *See supra* note 24. There is a good policy reason for resisting such a denouement. The navigation easement deprives an owner of only a peculiar advantage which he might otherwise enjoy as occupant of specially situated (riparian) lands, a peculiar advantage which he perhaps had no reason ever to expect to enjoy anyway. *Ignorantia legis non excusat*. However, the avigation easement deprives an owner of an ordinary advantage which he has every reason to expect to enjoy since there is no way of knowing in advance that an airport will become his neighbor.

94. "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued. . . .'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980), *rehearing denied*, 446 U.S. 992 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). The Federal Tort Claims Act, 28 U.S.C. §§ 1346, 1402, 1504, 2110, 2402, 2411-2412 and 2671-2680 (1976 & Supp. 1979), and the Tucker Act, 36 Stat. 1093, 28 U.S.C. §§ 1346, 1491 (1976 & Supp. 1979), represent very extensive federal waivers of sovereign immunity. It is the Tucker Act, consenting to suit for claims, inter alia, under the Constitution and on express or implied contracts, which permits actions to enforce the just-compensation clause. *See United States v. Dow*, 357 U.S. 17, 21 (1958). *See generally* 6A P. NICHOLS, *supra* note 1, § 29.1.

Sovereign immunity, in the absence of consent to be sued, is also enjoyed by the states. *See generally* W. PROSSER, *supra* note 90, § 131, at 975-77. Moreover, although the just-compensation clause is applicable to the states through the fourteenth amendment, *Chicago, B. & Q. Ry. v. Chicago*, 166 U.S. 226, 236 (1897), the eleventh amendment precludes federal district court jurisdiction over inverse condemnation actions against the state. *See Beck v. California*, 479 F. Supp. 392 (C.D. Cal. 1979); *cf. Nasrallah v. Barcelo*, 465 F. Supp. 1273 (D.P.R. 1979). Supreme Court review of state court adjudication is not, however, precluded. U.S. CONST. amend. XI. *See generally* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-35, at 130-31 (1978). As to federal jurisdiction in actions against municipalities, see *Maine v. Thiboutot*, 448 U.S. 1, (1980); *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978); *cf. Cabrera v. Bayamon*, 652 F. 2d 91, 99 n.5 (1st Cir. 1977).

95. *See cases cited supra* note 85.

ouster is to deprive the owner of possession, a prior-existing predicate for causes of action.⁹⁶ Another right-depriving governmental act would be a set of repeated trespasses by means of which the government acquires an easement by inverse condemnation.⁹⁷ Such repeated trespasses, unlike isolated trespasses, would deprive the owner of the history of exclusivity which is the factual predicate for legal actions to redress future incursions, analogously to situations where private easements are acquired by prescription. A taking also may occur when legal actions previously available against others than the government are drawn beneath the umbrella of sovereign immunity, as when the government acquires property which was subject to a private lien.⁹⁸

The government's power to invoke sovereign immunity complicates this analysis when applied to takings of affirmative easements by inverse condemnation.⁹⁹ The operative fact of such takings is a course of repeated trespasses by the government¹⁰⁰ resulting in an easement which can, in turn, legitimate subsequent incursions. Because of the government's power to invoke sovereign immunity, however, the owner may never have had any possible causes of action to prevent governmental trespasses in the first place.¹⁰¹ If not, then from the above definition of right it would follow that the owner may not lose any rights at all when the government acquires an affirmative easement by inverse condemnation.¹⁰²

96. Possession is required to bring an action in trespass or nuisance. *E.g.*, *Gillespie v. Dew*, 1 Stew. 229 (Ala. 1827) (trespass); *Klassen v. Central Kan. Coop. Creamery Ass'n*, 160 Kan. 697, 705, 165 P.2d 601, 607 (1946) (nuisance). See generally *W. PROSSER*, *supra* note 90, § 13, at 68-69; § 89, at 593-94.

97. See *infra* notes 100-08 and accompanying text.

98. *Armstrong v. United States*, 364 U.S. 40 (1960) (materialman's lien). The lien became unenforceable by reason of sovereign immunity once the subject property was acquired by the government.

99. See *supra* note 30.

100. See *United States v. Dickinson*, 331 U.S. 745, 749, 751 (1947) (intermittent flooding; analogized to easement by prescription); *Jacobs v. United States*, 290 U.S. 13 (1933) (intermittent flooding); *Portsmouth Co. v. United States*, 260 U.S. 327 (1922) (repeated shooting over private land).

101. There is some support for this view. According to Justice Holmes: "A sovereign is exempt from suit . . . on the logical and practical ground that there can be no legal right against the authority that makes the law on which the right depends." *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907).

However, Holmes's conclusion is compelled by neither logic nor practicality. Logically, a sovereign which specifies behavioral requirements and sanctions for non-observance can do so equally with regard to itself and to its legal subjects. As noted earlier, *supra* note 54, as a purely practical matter the sovereign's self-imposed requirements and consequences are no more and no less at the sovereign's whim than those imposed by the sovereign on others. At best, Holmes's statement reflects the arbitrary definitional limitations on the concept of "law properly so called" which are implicit in Austinian positivism, viz., that law is a command of the sovereign backed up by a sanction. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 11-16, 253-56 (1954). See R. DIAS, *supra* note 49, at 457-80.

102. It is not necessarily the case that, where the government takes an affirmative easement, the right of exclusivity is lost only as against the government. See, e.g., *Kaiser Aetna v. United*

The analytical exit from this circle is to expand slightly upon the definition of "right" in order to specify the relation between rights and sovereign immunity: As against the government, rights are stipulated to include the entitlements to legal recourse which a person would have but for sovereign immunity alone. Phrased differently, sovereign immunity is viewed to mean not that private owners have no rights against the government, but only that, without the government's consent, the courts cannot enforce those rights.¹⁰³ This definition of rights in relation to sovereign immunity is consistent with the decided cases.

Sovereign immunity has been allowed to shelter the government from liability for isolated trespasses.¹⁰⁴ When the government commits repeated trespasses, however, amounting to the enjoyment of an easement-type of interest, the cases have required compensation for such inverse condemnations of affirmative easements.¹⁰⁵ The government's course of action in such cases has not been regarded merely as trespasses, actionable or not, depending on the waiver of sovereign immunity as to torts.¹⁰⁶ Rather, such repeated trespasses are treated

States, 444 U.S. 164 (1979) (extension of public easement for navigation to former private fast lands); *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (public easement of avigation), discussed at length in Dunham, *supra* note 8, at 84-90; *cf.* *United States v. Lee*, 106 U.S. 196 (1882) (ejectment allowed against federal officials who took possession of land without bringing condemnation proceedings).

103. There is also support for this view. First, the very jargon of sovereign immunity ("consent to be sued," "waiver," and the term "immunity" itself) implies that the doctrine stands between the right-holder and his remedy, but not as the annihilator of the right itself. *See United States v. Alabama*, 313 U.S. 274, 281-82 (1941) (liens on property acquired by United States are not enforceable but nevertheless valid); *accord Armstrong v. United States*, 364 U.S. 40 (1960). Similar support is found in the cases which hold that consent-to-suit legislation such as the Tucker Act, *see supra* note 94, creates only jurisdiction and not any substantive rights, implying that the rights pre-exist the waiver of sovereign immunity. *E.g.*, *United States v. Mitchell*, 445 U.S. 535, 538 (1980).

Second, the ancient substantive counterpart of sovereign immunity—that "the King can do no wrong"—does not, by definition, have any apparent application to a government of limited constitutional powers. For example, if the government were to take "private property . . . for public use, without just compensation," the act would have to be considered a legal wrong if the constitutional just-compensation clause has any meaning at all. The wrong may not be compensable because of sovereign immunity, *see supra* note 94, but the absence of a remedy does not ipso facto make the act rightful. *See Hart, The Power of Congress to Limit the Power of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1370-71 (1953).

To be sure, constitutions can be amended and thus, perhaps, in an ultimate sense no government is constitutionally limited and, hence, can do substantive wrong. Nevertheless, until such legitimizing amendments are adopted, American governments are legally constrained by the amendment procedures and the ambient constitutional text, as interpreted. The protections therein promised—whatever Austin or Holmes may say—are properly denominated constitutional law. *See supra* note 101 for references to Austin and Holmes; *see also supra* note 54. Nevertheless, the distinction made here is fairly metaphysical, and the point is best resolved by inference from the decided cases which follow *infra*.

104. *See supra* note 88.

105. *See cases cited supra* notes 86 and 100.

106. Justice Black argued for the restricted viewpoint in his dissent in *United States v. Causby*, 328 U.S. 256, 269-70 (1946). That case involved an inverse condemnation of an

as the operative facts of right deprivations and therefore, compensable takings, irrespective of whether sovereign immunity has been waived as to the tort of trespass itself.¹⁰⁷ Accordingly, to account for the cases, the definition of rights for purposes of the right/freedom analysis should include entitlements to legal recourse which an owner would have but for sovereign immunity alone. Consonant with this definition sovereign immunity merely affects the availability of a remedy for tortious governmental acts in violation of an owner's rights, not the existence of the rights themselves.¹⁰⁸

B. *Servitude Deprivation Cases*

Where the government deprives an owner of an existing affirmative easement over another's land or of access onto a road or street, the owner loses a freedom to use and enjoy the servient land, road, or street and, derivatively, the freedom to use his own land may be curtailed. Such easement and access deprivations are compensated.¹⁰⁹ Under the right/freedom analysis, the basis for such compensation is

avigation easement. Black's position was that the overflights were at best torts and at that time immune from action because of sovereign immunity. The majority, however, did not accept this just trespassing defense where the overflights were frequent, regular, and at low altitudes.

107. The appropriateness of this view is further suggested by the apparent just-compensation clause policy to put the government on approximately the same footing as private persons with respect to the acquisition or destruction of property rights, whatever may be its sovereign immunity with respect to ordinary civil actions. See *supra* text accompanying notes 21-24.

108. From this it should follow that the withdrawal by the government of a waiver of sovereign immunity would not constitute a compensable taking. Cf. *Martinez v. California*, 444 U.S. 277, 281-82 (1980); *Armstrong v. United States*, 364 U.S. 40 (1960) (dissenting opinion) (no compensation for losses which are a consequential incidence of sovereign immunity). A case such as *Armstrong v. United States*, see *supra* note 98 and accompanying text, is, however, distinguishable since there the government was not withdrawing a waiver of sovereign immunity but rather bringing within the immunity's reach a potential cause of action not previously subject to it. The taking may thus be viewed as the act of *subjecting* an existing right to a new limitation (consent of sovereign sued). *Accord Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (extension of navigational servitude to previously fast lands). By contrast, rights against government are always subject to the consent limitation; thus, a withdrawal of its waiver of sovereign immunity does not result in any new limitation on such rights and, hence, no taking. Cf. *supra* note 24 (regarding private losses from exercise of the navigation easement).

109. E.g., *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624 (1961) (took affirmative "flowage" easement); *United States v. Welch*, 217 U.S. 333 (1910) (private easement flooded). For an in-depth discussion of the access deprivation cases, as well as some of the definitional problems which cloud them, see Stoebuck, *The Property Right of Access Versus the Power of Eminent Domain*, 47 TEX. L. REV. 733 (1969).

Where access is lost as a result of a change of street grade, an anomaly rooted in history prevents uniform application of the right/freedom analysis. Lines of authority dating back to the case of *Callender v. Marsh*, 18 Mass. (1 Pick.) 418 (1823) deny compensation in such change-of-grade situations and, as such, represent continued influence within a narrow sphere of the now generally repudiated physical intrusion criterion of taking. See Stoebuck, *supra* note 15, at 314-19, 757-60. Under the change-of-grade cases, neither takings of rights nor takings of freedoms are compensable, but on the obsolete ground that the change-of-grade involves no physical intrusion. Such results are inconsistent with the prediction of the right/freedom analysis, viz., that the taking of rights, which they involve, will be compensable.

not the owner's loss of his freedom to use but his loss of the right to the government's forbearance from interfering with his affirmative easement (right of use) over the neighboring land, road, or street.¹¹⁰ This result may be described as a compulsory transfer or release of such right to the government, typically as servient owner, into whose title the right, and easement, merge. As was the case with takings of possessory title or new affirmative easements, though, the right/freedom dichotomy plays no visible role here since both rights and freedoms are taken.

A similar situation is presented by the cases where the government takes an existing negative easement which someone owns with respect to neighboring land or takes a natural servitude in the nature of a negative easement over neighboring land. In both situations a taking is now generally held to occur.¹¹¹ Likewise, when the government acquires a servitude to burden private land with a nuisance, many cases now require a payment of compensation.¹¹² This might be expected since the duty of a landowner to refrain from nuisances¹¹³ is a kind of natural servitude, in the nature of a negative easement.¹¹⁴ In these situations, the government's act has caused a private owner to lose the right to have the neighboring owner, the government, forbear, either as restricted by the negative easement or as required by the law of natural servitudes or nuisance. The loss of such rights may also be accompanied by an impairment of use and enjoyment, but it is the loss of the rights, not the impaired use, which would be controlling under the right/freedom analysis.

110. See *supra* note 56 and accompanying text.

111. *E.g.*, *Dugan v. Rank*, 372 U.S. 609, 625 (1963) (natural riparian servitude entitling owner to non-interference with continued flow; analogized to taking of affirmative easement); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950) (natural drainage servitude); *Adaman Mut. Water Co. v. United States*, 278 F.2d 842 (9th Cir. 1960) (affirmative servitude to pay assessments); *Town of Stamford v. Vuono*, 108 Conn. 359, 143 A. 245 (1928) (simile); *Allen v. City of Detroit*, 167 Mich. 464, 133 N.W. 317 (1911) (restrictive covenant). See generally 2 P. NICHOLS, *supra* note 1, § 5.73; Stoebuck, *supra* note 15, at 301-10. The only constitutional ground offered by cases contra seems to be that restrictive covenants are not property—a throwback to the obsolete physical-intrusion criterion of taking. See Stoebuck, *supra* note 15 at 301-10, and *supra* note 109.

112. *E.g.*, *Ferguson v. City of Keene*, 108 N.H. 409, 238 A.2d 1 (1968); *Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100 (1962); *Martin v. Port of Seattle*, 64 Wash. 2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1965). But cf. *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914) (private nuisance, but not public nuisance, a compensable taking); *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963) (no taking without either total deprivation of use or physical invasion).

113. I.e., to refrain from acts which substantially and unreasonably interfere with others' use and enjoyment of their land. See *supra* note 58.

114. See cases cited in *supra* note 112. As was the case with respect to takings of negative easements and change-of-grade, there is authority to the contrary. Again, these lines of cases trace back to precedents from the time when the physical test of taking held sway and the only rights which were thought to be compensable were the rights of exclusivity. See *Ferguson v. City of Keene*, 108 N.H. 409, 238 A.2d 1 (1968). As atavistic holdovers from a time when the evident policy of the law was different, these results have an acceptable explanation which does not

C. Regulation Cases—Acquisition of Negative Easements

Finally, this leaves the cases where the government acquires a negative easement that impresses a new servitude on a private owner's land. Such acquisitions may be accomplished compulsorily by condemnation,¹¹⁵ but because negative easements do not involve a physical intrusion by the holder onto the servient land, they cannot be acquired by inverse condemnation as that term is generally understood.¹¹⁶ That is to say, we cannot speak of a requirement that the government pay for carrying on an intrusive activity which would be actionable¹¹⁷ but which is not, as against the government, enjoined.¹¹⁸

Nevertheless, when the government adopts land-use regulations, it acquires, in practical effect, compulsory negative easements in gross over the regulated land.¹¹⁹ Such regulations create new rights in the government to enforce acts or forbearances on the part of landowners, and, correspondingly, may affect the burdened landowner adversely. Thus, the suspicion is raised that such police-power regulations may be, in effect, compensable takings. Under the right/freedom analysis, however, such land-use regulations would not per se be considered compensable takings because, though they reduce the owner's freedoms to use and enjoy by imposing duties on the owner, they do not affect or reduce his rights as such. This prediction of the right/freedom analysis, with reconcilable exceptions,¹²⁰ is in fact the law.

As early as 1887, in *Mugler v. Kansas*,¹²¹ the Supreme Court declared that police-power limitations on land use were simply outside the purview of the just-compensation clause.¹²²

A prohibition simply upon the use of property for purposes that are declared, *by valid legislation*, to be injurious to the health, morals or safety of the community, cannot, in any sense, be deemed a taking or an appropriation of property for the public benefit.¹²³

detract from the framework of theory for modern cases set forth in this Article. See generally *supra* notes 15 and 109.

115. See 3 P. NICHOLS, *supra* note 1, § 9.221[1].

116. See *supra* note 30.

117. It is subject to the consent requirements of sovereign immunity. See *supra* note 94.

118. See *supra* text accompanying notes 90-107. Federal takings by eminent domain cannot be enjoined so long as adequate provision for compensation is made, and the power to sue the compensation in federal courts amounts to such a provision. *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932); *Crozier v. Friederick Krupp A.S.*, 224 U.S. 290, 306 (1912).

119. See *supra* text accompanying notes 34-40.

120. See *infra* text accompanying notes 125-56.

121. 123 U.S. 623 (1887) (upheld prohibition on manufacture and sale of alcoholic beverages, adversely affecting plaintiff's brewery).

122. Concerning the police power, see *supra* note 3 and *infra* text accompanying notes 125-38. For the qualification of this flat declaration for situations where the regulation goes too far, see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), considered at text accompanying *infra* notes 139-44.

123. *Id.* at 668-69 (emphasis added); *accord* *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962). See generally *Donaldson*, *supra* note 11, at 198-201; *Sax*, *supra* note 8, at 38-46; *Van Alstyne*, *supra* note 8, at 3-48.

The Court's language does imply that some external test of injuriousness might be imposed through judicial review. Later holdings, however, make it clear that the police power is not limited to eradicating conditions which are injurious by any narrow definition.¹²⁴ Nevertheless, there are limits on the police power imposition of use, i.e., freedom, restrictions without compensation of affected owners. The explanatory power of the right/freedom analysis depends on its ability to accommodate those limits.

D. *Limits on Police-Power Regulations*

There are historically two distinct kinds of limitations on the regulations which may be imposed under the police power, each having its own distinct policy justifications and separate lines of supporting authorities. In *Agins v. City of Tiburon*,¹²⁵ the United States Supreme Court recently made a combined and somewhat confused reference to the two kinds of limits:

The application of a general zoning law to a particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or [if it] denies an owner economically viable use of his land.¹²⁶

The first type of limit referred to, the one also mentioned in *Mugler*, corresponds essentially to the limits on the scope, albeit extensive, of the police power itself, and is rooted in the due process clauses of the Constitution.¹²⁷ The second, essentially an interpretation of the just-

124. See *infra* notes 125-38 and accompanying text; see also *supra* note 8. For example, in *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935), the Court stated that "the police power embraces regulations designed to promote the public convenience or the general welfare, and not merely those in the interest of public health, safety and morals." *Id.* at 429. In *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962), the Court described the criterion as simply "reasonableness."

125. 447 U.S. 255 (1980) (density restrictions).

126. *Id.* at 260 (citations omitted); *accord* *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978) (citations omitted): "[A] use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, or perhaps if it has an unduly harsh impact upon the owner's use of the property."

127. U.S. CONST. amend. V: "Nor shall any person . . . be deprived of life, liberty or property, without due process of law. . . ." *Accord* U.S. CONST. amend. XIV; see *supra* note 3. "Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities." *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121 (1928). See cases cited *infra* notes 128-31 and 135.

Whether the scope of the police power defines, in part, what is substantive due process, or rather substantive due process delimits the scope of the police power, is a chicken-and-egg question which need not be addressed. See *Donaldson*, *supra* note 11, at 194-97.

The fourteenth amendment requirement of "equal protection of the laws" may also provide a possible limit on the police power in certain cases. See *County Bd. of Arlington County v. Richards*, 434 U.S. 5 (1977) (upholding ordinance which, on its face, rationally promotes legitimate social and environmental objectives). Since a developed case law on the matter as it relates to land use is lacking, and as the analytical "fit" of equal protection is seemingly identical to that of due process, equal protection will not be separately treated in the discussion that follows.

compensation clause, treats freedom regulations as takings if they go "too far."

The first kind of limit on land-use regulations is concerned with whether, on broad balance, public objectives exist which justify the burden that a given regulation may impose on private interests, i.e., whether the restrictions have a "reasonable relationship" to some public purpose.¹²⁸ Thus, as stated in the landmark zoning case, *Village of Euclid v. Ambler Realty Co.*,¹²⁹ a restriction would be unconstitutional if it is "clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals, or general welfare."¹³⁰

Although the reasonable relationship principle has a rather long history,¹³¹ it is well accepted that substantive due process standards do not place particularly stringent limitations on the government's power to act upon or regulate economic interests.¹³² This has not been a consequence of an announced abandonment of principle; rather, it is the result of the increased judicial deference to legislative determinations in economic due process cases since the late 1930's.¹³³ Nevertheless, perhaps influenced by the property protective policy of the just-compensation clause, police-power restrictions on freedom to use property sometime seem to receive somewhat stricter due process scrutiny than do economic interests generally. This is true especially in

128. See *Moore v. City of East Cleveland*, 431 U.S. 494, 499-500 (1977) (regulations must rationally further some legitimate state purpose); see *infra* note 134; cf. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85 (1980) (quoting test of *Nebbia v. New York*, 291 U.S. 502, 525 (1934): "[T]he law shall not be unreasonable, arbitrary or capricious and . . . the means selected shall have a real and substantial relation to the object sought to be attained.") As recited somewhat more elaborately in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962), "To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals." (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894)). Discriminatory regulations in violation of the equal protection clause may also fall into this general rubric. See *County Bd. of Arlington County v. Richards*, 434 U.S. 5 (1977).

129. 272 U.S. 365 (1926). See generally Annot., 52 L. Ed. 2d 863 (1977).

130. 272 U.S. at 395. The reasonable relationship principle was applied two years after *Euclid* to strike down, and not compensate, zoning regulations in *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) and *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). The principle was more recently invoked in the Court's plurality opinion and Justice Steven's concurring opinion in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

131. See *Lawton v. Steele*, 152 U.S. 133, 137 (1894), as quoted by *Goldblatt* in *supra* note 130. The doctrine's more recent history is somewhat checkered. See generally McCloskey, *Economic Due Process: An Exhumation And Reburial*, 1962 SUP. CT. REV. 34.

132. See L. TRIBE, *supra* note 94, § 8-7, at 450-51.

133. In *Euclid* itself, the Court said "[i]f the validity of the legislative classification . . . be fairly debatable, the legislative judgment must be allowed to control." 272 U.S. 365, 388 (1926). This judicial deference has grown to the point that "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954). By 1963, "[t]he doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—[had] long since been discarded." *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). See generally L. TRIBE, *supra* note 94, § 8-7, at 450-55; McCloskey, *supra* note 131, at 36-40.

state courts,¹³⁴ though such stricter scrutiny possibly occurs also at the federal level as reflected by the relatively frequent mention of due process standards in cases of alleged police-power takings.¹³⁵

At first glance, it certainly seems legitimate that the effects on property values of regulations that restrict freedoms might be taken into the calculus of the balancing implicit in substantive due process adjudication. For present purposes, however, the most important feature of reasonable relationship limits on the police power is that they supply a theoretical basis for invalidating land-use regulations which is separate and distinct, in both its textual roots and its policy rationale, from the requirement of just compensation.¹³⁶ Since due process requirements protect liberty as well as property, the reasonable relationship test may thus explain why regulations are sometimes struck down, especially in state courts,¹³⁷ even though only freedoms, not rights, are impaired.¹³⁸

The other important limitation on the government's power to regulate without compensation is the principle that regulations are to be treated as takings when they go "too far." The landmark case recognizing this second type of limitation is *Pennsylvania Coal Co. v. Mahon*.¹³⁹ *Mahon* involved statewide regulation which prohibited the mining of underground coal seams where such mining would deprive the surface owner of necessary subjacent support. The regulation in effect prohibited the plaintiff coal company from making any use whatsoever of the subsurface space and occupying substance

134. For a compendious review of the state court cases, especially California, see Van Alstyne, *supra* note 8. Although Van Alstyne purports in his title to focus on inverse condemnation criteria, he might have better entitled his inquiry a "search for substantive due process criteria," since it is mostly the *validity*, not the *compensability*, of regulations which his cases concern.

135. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), discussed *infra* at text accompanying notes 211-15, where the Court examined the police power justification for a statute and held that it was without "reasonable basis" and an "arbitrary use of governmental power"—"the very kind of thing that the taking clause of the Fifth Amendment was meant to prevent." 449 U.S. at 164.

Other fairly recent Supreme Court examples include *Penn Cent. Transp. Co. v. New York City*, 428 U.S. 104, 127, 133 n.29 (1978), *quoted supra* note 126; *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-95 (1962), where the Court undertook to apply the reasonable relationship standard to a land-use regulation on excavations stating expressly that it was "still valid today." See *supra* note 128.

In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), an ordinance limiting occupancy to "families," narrowly defined, was struck down on due process grounds. Due to the family life implications of the regulation, the case was not limited to purely economic due process factors. The case, however, only emphasizes the close relationship between property freedoms and personal freedoms.

136. The distinction was explicitly recognized in the dissenting opinion, concurred in by four justices, in *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 656 n.23 (1981). See also *Webb's Fabulous Pharmacies v. Beckwith*, *quoted supra* note 135.

137. See *supra* note 134 and accompanying text.

138. See *infra* notes 145-56 and accompanying text.

139. 260 U.S. 393 (1922).

which it owned. In holding that such regulations of activities went "too far" and constituted a taking of property, Justice Holmes, for the Court, wrote:

To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. . . . [W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . this is a question of degree. . . .¹⁴⁰

Although the Court's decision in *Mahon* was that the Pennsylvania regulation effected a taking under the fifth and fourteenth amendments, no payment of just compensation was exacted. Rather the Court declared the regulation invalid through the implicit application of another substantive due process principle: to take property for public use without compensation is not due process of law.¹⁴¹

In terms of the right/freedom analysis, the rationale of *Mahon* and similar cases¹⁴² is this: when a regulation of freedom leaves a landowner with no practical use of his land, the result is to render his right of exclusivity, though technically unimpaired, actually nugatory. To uphold such a regulation without compensation on the grounds that the owner's rights are not impaired is to ride an empty hoax. The rights in such circumstances would have no more significance to the owner than title to a square on the surface of the sun. By contrast, if the regulation leaves the landowner with the possibility of substantial use of his land, his rights of exclusivity are not a mere hollow shell, but a matter of substance, albeit of reduced value as a result of the regulation. In sum, activity restrictions which technically take only freedoms and not rights can so drastically undermine the purpose for which rights are sought and conferred as to be the functional equivalent of a taking of the rights themselves. How much is too much is, of course, not susceptible of exact formulation.¹⁴³ It would not be appropriate, however, for the concept of functional equivalency, as an escape valve exception to a general principle, to be limited by fixed parameters.¹⁴⁴

140. *Id.* at 414-16; see also *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) (a regulation can "be so onerous as to constitute a taking which constitutionally requires compensation"); *Bartlett v. Zoning Comm'n*, 161 Conn. 24, 31, 282 A.2d 907, 910 (1971) ("the plaintiff's use of his property is nonexistent unless he happens to own a boat"); *State v. Johnson*, 265 A.2d 711, 715 (Me. 1970); *Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 232, 15 N.E.2d 587, 591 (1938). The *Mahon* principle was reiterated with approval in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *quoted supra* text accompanying note 126, and ostensibly applied in *Kaiser Aetna v. United States*, 444 U.S. 164, 178 (1979).

141. *Chicago, B. & Q. Ry. v. Chicago*, 166 U.S. 226, 236 (1897), *reaffirmed in Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 160 (1980).

142. See cases cited *supra* note 140; cf. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

143. Cases have evinced some variability in the judicial conception of how far is "too far." The Supreme Court has upheld regulations which reduced property values by 75% to 90%. See *supra* note 6.

144. Although the right/freedom analysis does not provide a more precise formulation of the too far principle, it at least explains how the extent of police-power restrictions on use becomes

It has been argued that the holdings of cases such as *Mahon*,¹⁴⁵ which find a taking where the value or usability of land is reduced "too much," are actually based on the substantive due process requirement of a reasonable relationship to public objectives and do not really present just-compensation issues at all.¹⁴⁶ There is some plausibility in the argument since regulations which are, for example, unduly oppressive on individuals,¹⁴⁷ are theoretically subject to that substantive due process criticism. Recognition of an active substantive due process basis for striking down such regulations is not, however, without objection. To invoke substantive due process in these cases would create an enclave in the unmistakably contrary current policy of relaxed judicial scrutiny where government regulations affect only economic interests.¹⁴⁸ Although, as previously suggested,¹⁴⁹ such an enclave may be appropriate in view of the policy of the just-compensation clause, it is by no means necessary to explain cases like *Mahon*. Conversely, though, statements such as that of the Court in *Agins v. City of Tiburon*,¹⁵⁰ that regulations which overreach the police power result in a taking, seem to miss the mark. What the *stated* operative facts of such overreachings really involve¹⁵¹ is not a taking of property

relevant. Formerly, the entitlements to use and enjoyment have been lumped together with other property interests, so that the question posed has been: How much property interest can be taken before there is a taking of "property"? With the question thus put, the logical but authoritatively incorrect answer would be none. Hence, the traditional analysis has failed to explain the too far rationale.

By clarifying the dichotomy between property interest deprivations made in the police-power and just-compensation cases, the right/freedom analysis reveals the authoritatively operative frame of reference for adjudging what goes too far. A taking of freedom goes too far when it leaves no substantial purpose to be served by one or more rights.

The methodological advance of providing such a frame of reference should contribute to the comprehensibility, and hence, uniformity and predictability of results.

145. See *supra* note 140.

146. E.g., *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 593-94, 350 N.E.2d 381, 384-85, 385 N.Y.S.2d 5, 8-9 (1976) (taking as a metaphor for due process); Stoebe, *supra* note 19, at 1097-99. In the four justice dissent in *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 649 n.14 (1981), this interpretation of *Mahon* was said not merely to tamper "with the express language of the opinion . . . [but to ignore] the coal company's repeated claim . . . that the . . . statute took its property without just compensation."

147. E.g., *Lawton v. Steele*, 152 U.S. 133 (1894), *quoted supra* note 128.

148. See *supra* quotations in note 133.

149. See *supra* text accompanying notes 133-34.

150. See *supra* text accompanying note 126; see also passage from *Penn Cent. Transp. Co. v. New York City*, *quoted supra* note 126.

151. The stated operative facts of these overreachings include no reasonable necessity, or lack of substantial public purpose, or undue oppression of private persons. Professor Van Alstyne's article, *supra* note 8, provides an excellent breakdown of the application of these factors at the state court level.

The idea of unduly harsh or unduly oppressive in *Lawton v. Steele*, and *Penn Central*, is not synonymous with too far. The idea of unduly implies a lack of a reasonable relationship between the governmental act and a public purpose. The idea of too far could have that reference but, as noted earlier, can also refer to freedoms-takings which are the functional equivalent of rights-takings. See *supra* text accompanying notes 142-44.

without just compensation¹⁵² but, rather, a deprivation of property without the reasonable relationship to public objectives required by substantive due process of law.¹⁵³

The substantive due process requirements of a reasonable relationship and of just compensation,¹⁵⁴ though related in terms of constitutional philosophy, are nevertheless distinguishable. The just-compensation clause addresses the question of whether a particular valid government act has resulted in a taking which requires compensation; the more general substantive due process question is whether the act is a valid exercise of government power at all, irrespective of whether any property is taken or only freedom (liberty) is affected.¹⁵⁵ Confusion of the two serves no purpose and suggests that the government may exceed its constitutional powers as long as it pays a price to those who would complain.¹⁵⁶

152. They may also involve such a taking. See *infra* text accompanying notes 157-69.

153. See Stoebuck, *supra* note 19, at 1081-82, for a further discussion of this point. This author disagrees with Stoebuck's conclusion that *Mahon* is really a substantive due process rather than a takings case. *Id.* at 1097-98; see *supra* note 146 and *infra* text accompanying notes 157-69.

154. See *supra* text accompanying note 141.

155. Some governmental acts may exceed the scope of government authority even though any takings of property are compensated or no taking is involved at all, e.g., condemning my vintage Rolls-Royce to give it to my covetous neighbor, the city councilman; promoting a particular religious denomination. But cf. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), discussed at text accompanying notes 211-15 *infra*, where property was taken for public use yet "no police power justification [was] offered for the deprivation." Other governmental acts, although otherwise legitimate exercises of the police power, nonetheless require that just compensation be paid to owners of affected private property, e.g., acquiring land to build an elementary school. Compensation upon the legitimate exercise of the government's taking power should be distinguished from damages for a wrongful governmental act. See *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 656 n.23 (1981) (Brennan, J., dissenting):

[W]here a police power regulation is not enacted in furtherance of the public health, safety, morals or the general welfare so that there may be no "public use" . . . the government entity may not be forced to pay just compensation under the Fifth Amendment, [but] the landowner may nevertheless have a damage cause of action under 42 U.S.C. § 1983 for a Fourteenth Amendment violation.

See *supra* text at notes 98-108 for a discussion of sovereign immunity.

156. That the government can exceed its powers for a price appears to be the clear import, though almost certainly not the intent, of the Supreme Court's alternatively phrased language quoted at *supra* note 126 and accompanying text. But see *Thompson v. Consolidated Gas Co.*, 300 U.S. 55, 80 (1937): "[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."

There is yet another reason to avoid confusing the two limitations. Because the substantive due process standard of reasonable relationship is based upon different policy considerations than is the *Mahon* "too far" test, it may countenance freedoms-takings which are sometimes more and sometimes less extensive than permitted by *Mahon*. Indeed, substantive due process may allow for outright confiscations, not to mention imprisonment and the death penalty, at least in cases to which *Mahon* does not apply. Examples of valid confiscation include forfeiture for crime and the circumstances discussed *infra* text accompanying notes 185-221.

Obviously, *Mahon* applies to the kinds of governmental acts at issue under its facts, i.e., regulations limiting activities in general and limiting land-use activities in particular. Therefore, its test would seem to work as a kind of outer limit on the validity of uncompensated regulatory takings, a limit which would sometimes be more restrictive on the government than the reasonable relationship principles. There are some state court decisions which appear to belie this

E. *Some Implications for Remedies*

The question of remedies for invalid regulations is one of considerable current interest.¹⁵⁷ Moreover, it is a question which can be addressed from a clear perspective only if we do not confuse the distinction between the requirements of just compensation for takings and of the reasonable relationship test for regulatory validity.

In *Agins v. City of Tiburon*,¹⁵⁸ the California Supreme Court held that only mandamus or declaratory relief, but not monetary compensation, would be available to landowners adversely affected by exercises of police powers beyond constitutional limits:¹⁵⁹ "[A] landowner . . . may not . . . elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain must be paid."¹⁶⁰

The United States Supreme Court did not reach the remedies issue in its review of *Agins* nor in the more recent case of *San Diego Gas & Electric Co. v. San Diego*.¹⁶¹ In *San Diego*, however, four dissenting justices with the apparent concurrence of a fifth, were of the view that the California court's opinion in *Agins* "fails to recognize the essential similarity of regulatory 'takings' and other 'takings,'" and that unconstitutional regulatory takings, even if temporary, should be compensated.¹⁶²

Under the right/freedom analysis, these views can be reconciled, and both would seem to be correct, strictly speaking, as long as the "reasonable relationship" and "too far" tests are not confused. The four *San Diego* justices who dissented are correct that compensation should be paid when, absent such compensation, a regulation would be unconstitutional as a taking because it goes too far—an equivalent to a taking of rights.¹⁶³ The California Supreme Court, however, is seemingly also correct that an excessive exercise of the police power,

conclusion, e.g., *Consolidated Rock Prods. Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962), *appeal dismissed*, 371 U.S. 36 (1962) (regulation deprived land of all economic use), and in doing so look upon drastic use restriction as though the reasonable relationship test, subject to very relaxed scrutiny, were the only limitation on police-power regulations. For better or for worse, this does not seem to result from any deliberate rejection of the *Mahon* principle, but merely from the court's confounding it with the more general conceptions of substantive due process.

157. The Supreme Court nearly faced this issue twice during the past year. In neither case, however, was the question of remedies considered to be ripe for constitutional adjudication. See *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25 (1979), *aff'd*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621 (1981).

158. 24 Cal. 3d 266, 598 P.2d 25 (1979), *aff'd*, 447 U.S. 255 (1980).

159. *Id.* at 273, 598 P.2d at 28.

160. *Id.*

161. 450 U.S. 621 (1981).

162. *Id.* at 651; *see also* *Keystone Assoc. v. Moerdler*, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966).

163. *See supra* text accompanying notes 139-44.

an act beyond its scope, without a justifying reasonable relationship, is not ipso facto such a taking.¹⁶⁴ The right/freedom analysis takes no position on whether such an excessive exercise regulation should require compensation at all,¹⁶⁵ only that the just-compensation clause would not be the basis for such a remedy if the regulation does not go too far and only freedoms are affected.

The availability of a monetary remedy in cases like *Agins* and *San Diego* should thus ultimately depend on (1) whether the regulation of freedom went "too far" under the *Mahon* test, or (2) if the regulation did not go too far but is nevertheless unconstitutional, whether such unconstitutional regulations are compensable apart from the just-compensation clause. Assuming that unconstitutional freedom impairments are not compensable, it becomes especially important to clarify whether a particular loss-inflicting governmental act is merely ultra vires,¹⁶⁶ is ultra vires and a taking or its equivalent,¹⁶⁷ or is merely a taking or equivalent.¹⁶⁸ The three appropriate remedies would be, respectively, (a) declaratory/mandamus relief only, (b) declaratory/mandamus relief plus compensation for the interim taking, and (c) compensation for taking only. In any event, to emphasize, consistency of treatment would require compensation whenever, by governmental act, rights are taken for public use or freedoms are impaired to such a degree as to evacuate the substance of a right. This compensation is constitutionally required independently of whether lesser freedom impairments, not within *Mahon*, may be compensable on some other basis. Confusing the "too far" test of taking and the "reasonable relationship" test of validity¹⁶⁹ would be a most unsound basis for denying such compensation.

164. 24 Cal. 3d at 272, 598 P.2d at 28; see *supra* text accompanying notes 128-38 and 154-56. Unfortunately, though the California Supreme Court's view is, strictly speaking, correct as far as it goes, that court is rather clearly confusing the "too far" test with the "reasonable relationship" test and thus would deny compensation where, under the former, it is constitutionally required. See *Agins v. City of Tiburon*, 24 Cal. 3d at 274, 598 P.2d at 29; *supra* notes 146 and 156 and accompanying text.

165. The four dissenters in *San Diego* suggested that such compensation may be required under 42 U.S.C. § 1983 (1976). 450 U.S. at 656 n.23; see *supra* quotation in note 155.

166. E.g., the invalid zoning regulations in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928); *Nectow v. Cambridge*, 277 U.S. 183 (1928).

167. For example, where the government requisitions my vintage Rolls-Royce to give it to the covetous city councilman. See *Keystone Assoc. v. Moerdler*, 19 N.Y.2d 78, 224 N.E.2d 700, 28 N.Y.S.2d 185 (1966) (temporary use prohibition without public purpose).

168. E.g., in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), where the extension to previous fast lands of the navigation servitude would be valid if compensation were paid. *Accord Delaware, Lackawanna & W.R.R. v. Morristown*, 276 U.S. 182, 193 (1928).

169. This may be occurring in California. See *supra* note 164.

F. Affirmative Duty Impositions

In the past, two types of cases have proved to be particularly intractable to commentators on police-power takings:¹⁷⁰ railroad grade-crossing cases¹⁷¹ and utility relocation cases.¹⁷² Both concern regulations requiring private interests to bear the costs of accommodating their installations, tracks or utility conduits, to public thoroughfares or improvements, viz., by modifying or eliminating grade crossings or by relocating conduits.

Under the right/freedom analysis, no takings should be found in these cases as they do not involve any reductions of rights but merely impositions of affirmative duties. Such requirements still might be invalidated on a substantive due process or, perhaps, equal protection basis,¹⁷³ and prior to the 1937-1940 shift in judicial review philosophy this had occurred.¹⁷⁴ In general, though, such requirements have typically been treated as an affirmative version of freedom restrictions. Instead of imposing a duty to forbear from particular behavior, as does a typical land-use freedom restriction, they impose affirmative duties—to act.¹⁷⁵ Whether affirmative or negative, however, duty impositions do not in and of themselves involve any taking of rights and thus, under the right/freedom analysis, one would expect that both affirmative and negative duties may be imposed without compensating the persons affected. Land-use regulations may, of course, involve affirmative duties as well as negative duties,¹⁷⁶ though our focus has been on the latter.

170. E.g., Dunham, *supra* note 8, at 73-75; Sax, *supra* note 8, at 70; Stoeck, *supra* note 15, at 298-301; Van Alstyne, *supra* note 8, at 48-56.

171. E.g., Atchison, T. & S.F. Ry. v. Public Utils. Comm'n, 346 U.S. 346 (1953) (requirement valid); Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935) (requirement could be invalid); Erie R.R. v. Board of Pub. Utils. Comm'rs, 254 U.S. 394 (1921) (requirement valid); Chicago, M. & St. P. Ry. v. City of Minneapolis, 232 U.S. 430 (1914) (requirement valid).

172. E.g., Panhandle E. Pipe Line Co. v. State Highway Comm'n, 294 U.S. 613 (1935) (requirement invalid); Passaic Water Co. v. Board of Pub. Utils. Comm'rs, 254 U.S. 394 (1921) (requirement valid).

173. They also would presumably be subject to limitations under the principle of *Pennsylvania Coal Co. v. Mahon*. See *supra* text accompanying notes 139-44.

174. Panhandle E. Pipe Line Co. v. State Highway Comm'n, 294 U.S. 613 (1935); see also Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405, 429 (1935) (no "reasonable relation"); cf. the post-1937 case of Atchison, T. & S.F. Ry. v. Public Utils. Comm'n, 346 U.S. 346 (1953) (similar requirement upheld). Outcomes of cases since 1937-1940, mostly in state courts, can probably be understood entirely in terms of the courts' attitudes toward substantive due process standards. For a review of the cases, see Stoeck, *supra* note 15, at 298-301; Van Alstyne, *supra* note 8, at 48-56.

175. Affirmative duty impositions are restrictions on the freedom to omit certain behavior.

176. E.g., in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978), the historic preservation legislation there approved by the Court required the owner to preserve his building as a landmark at his own expense; see also *Curtin v. Benson*, 222 U.S. 78 (1911), where the court assumed that the government could constitutionally require an owner to erect fences or otherwise prevent his cattle from straying, but could not prohibit grazing altogether (in anticipation of *Mahon*?).

To recapitulate the application of the right/freedom analysis to the cases, we have seen the following: First, the right/freedom analysis correctly predicts that the standard non-police-power cases of eminent domain, trespassory and non-trespassory, do require compensation;¹⁷⁷ however, since both rights and freedoms are generally lost in such cases, the basic right/freedom distinction often does not play a visible role in them. Second, the right/freedom analysis correctly predicts that, in general, government regulations affecting land use will not constitute compensable takings because such regulations take only freedoms and not rights. The right/freedom analysis readily accommodates, however, two kinds of limits on the police power to regulate land use, even though both involve takings only of freedoms and not rights. The two kinds of limits are that: (a) such regulations may go “too far” and, if they do, they will be treated as the equivalent of a taking of rights, and (b) the validity of such government regulations still depends in theory on consistency with substantive due process limitations on the ways government may regulate. Why these general rules should be as they are, and some of the analytical implications of the rationale, will be next considered.

G. A Possible Policy Explanation

The right/freedom dichotomy is purely descriptive of the outcomes of decided cases and therefore contains no axiological rationale in itself. Nevertheless, by clarifying a distinction which the cases in fact make, the right/freedom analysis facilitates informed speculation as to policy rationales. Why should takings of land-related rights be compensable while takings of land-related freedoms should not?

One answer may be borne of practical necessity. Police-power restrictions on land use are by definition takings only of freedoms.¹⁷⁸

177. The only important exceptions are some state court and lower federal court holdings which deny compensation for certain non-trespassory takings, and these may be viewed as vestiges of a now obsolete understanding of property. See *supra* notes 15, 109, 111, 112, and 114.

178. Restrictions on new activity cannot directly affect property rights in land because none of these rights are predicated on any required activity by the holder.

Two technical objections can be made to the statements of the preceding paragraph, but do not, on analysis, present genuine qualifications.

First, it might be objected that possession is a kind of activity and is the predicate of the right of exclusivity, enforceable by actions of trespass or ejectment. A governmental prohibition of possession, however, is not a mere use restriction but is identical to a taking of the right of exclusivity itself—taking the freedom to possess and taking the right to exclude are the same thing—and is treated as such. See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); cases cited *supra* note 85.

The second possible objection concerns the activity of bringing lawsuits. Regulations that limit or proscribe this activity—by limiting or eliminating causes of action or access to the courts—are in real effect right-depriving, and not merely freedom-affecting; such regulations should probably amount to compensable takings. See *Armstrong v. United States*, 364 U.S. 40 (1960), discussed *supra* note 108. To speak precisely, however, the cause of action aspect of a “right”

Freedom reductions, directed at land use or otherwise, will almost always affect the usability of owned objects. Yet, the government could not undertake to compensate all such freedom takings and use-impairments without practically paralyzing itself in its regulatory function.¹⁷⁹ Of course, a given freedom reduction may affect the use of some objects of property more than others—imprisonment, by analogy, may affect the use of one's automobile more than the use of one's wristwatch.¹⁸⁰ Considerations of substantive due process¹⁸¹ may limit the extent to which such use-impairment burdens, or any other burdens, may be visited upon private persons by government.¹⁸² It nevertheless remains that governmental acts which merely limit freedoms of activities, even though property values are affected, could never be regular bases for compensation without an intolerable burden upon the law-making process itself.

In contrast, when the government selectively and adventitiously withdraws the landowner's rights of exclusivity, or other rights to the forbearance of others, which rights the government routinely confers to persons generally, there is not merely a practical possibility of treating such withdrawals as regular bases for compensation, there are positive and longstanding policy reasons for doing so.¹⁸³ Thus, the policy duality which results is that takings of land-related rights are compensated because it is desirable to do so and can be done, but

presupposes not merely the freedom to sue, but the standing to bring *successful* lawsuits under certain contingencies. It is the law's provision for success which is the key to the concept of right, and this provision for success is not, as viewed from the right-holder's perspective, a rule which concerns his freedom of activities. Nonetheless, a provision for success, under the contingencies defined by the right, would be almost nugatory, except to justify self-help, if there were no freedom to bring suit in the first place. See *Armstrong v. United States*, 364 U.S. 40 (1960); cf. *supra* text accompanying notes 100-08 for a discussion of the analytical significance of sovereign immunity on the concept of rights as used herein.

179. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). "To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*." *Andrus v. Allard*, 444 U.S. 51, 65 (1979) (emphasis supplied).

180. Freedom restrictions are not transmuted into property takings merely because they happen to affect the usefulness of certain property. See *supra* discussion at text accompanying notes 71-75.

181. Or, possibly, equal protection. See *County Bd. of Arlington County v. Richards*, 434 U.S. 5, *rehearing denied*, 434 U.S. 937 (1977).

182. See *supra* text accompanying notes 127-38.

183. The fifth amendment:

prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893).

Similarly, the object of the just-compensation clause is "to redistribute certain economic losses . . . so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945); accord *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

takings of land-related freedoms are not compensated because, whether or not it is desirable to do so, they cannot be.¹⁸⁴

VI. TAKING RIGHTS WITHOUT COMPENSATION: THE "PUBLIC USE" PROVISOR

There are occasions where governmental acts actually do take rights in property but nevertheless are not deemed compensable takings. Before concluding, it is necessary to give an analytical account of such non-compensable takings. An example of a non-compensable taking is legislation removing ancient encumbrances or limitations on land titles,¹⁸⁵ destroying the rights of those who formerly held those interests. Similar effects can result from statutory or judicial modifications of the estate system¹⁸⁶ and legislation which is deregulatory in effect.¹⁸⁷ This consideration is best introduced by examining the relationship between freedom restrictions and rights.

The imposition of restrictions on activities typically occurs in connection with the *conferring* of rights,¹⁸⁸ e.g., when securities legislation expands upon the common law definition of fraud,¹⁸⁹ or when a regime of private property is instituted in the first place by creating actions such as trespass and ejectment.¹⁹⁰ However, with rare and

184. The policy reasons set forth in the preceding text are offered only as suggestions. In fact, the rationale offered by the text tends to unravel a bit at the edges: For example, there may sometimes be sound policy reasons to expropriate rights en masse, where compensation would be all but impossible, e.g., by enactment of a marketable title statute extinguishing old but possibly not forgotten rights of title. *See infra* text accompanying notes 185-222. Indeed, such government takings are generally non-compensable though the right/freedom analysis can accommodate such results. *Id.* In contrast, in some instances, takings of freedoms may be administratively quite easy to compensate, e.g., where a few landmark buildings are designated for historic preservation, such as in *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

185. E.g., marketable title statutes. *See infra* note 198.

186. E.g., eliminating the destructibility of contingent remainders or expanding the cy pres limitations on the rule against perpetuities. *See, e.g.,* N.Y. EST., POWERS & TRUSTS LAW §§ 6-5.10, 6-5.11 (McKinney 1981) (preserving contingent remainders); *see also* *Estate of Ye Hop*, 52 Hawaii 40, 469 P.2d 183 (1970) (cy pres); *Berry v. Union Nat'l Bank*, 262 S.E.2d 766 (W. Va. 1980).

187. Deregulation will be used to refer to any withdrawal of state-enforced restrictions on freedom, though often these withdrawals may sometimes look more like regulation than deregulation. *See infra* note 199.

188. If the government's enforcement prerogatives are counted as legal actions, so that behavioral violations actionable by the government are treated as the subject of government's rights, then enforceable activity restrictions may always be said to confer rights.

From the way in which *right* has been defined, this inclusion appears legitimate, though the emphasis in the textual discussion is that new regulations on freedom are often imposed in connection with the creation of new private and not governmental rights.

189. E.g., Securities Exchange Act of 1934, § 10, 15 U.S.C. 78j (1976) and rule 10b-5 thereunder (17 C.F.R. § 240.10b-5 (1981)), which makes mere non-disclosure actionable.

190. The extension of the writ of *ejectione firmæ* (ejectment) to leasehold tenants during the late 15th century allowed them to recover possession when wrongfully ousted, and may be seen as the point at which the modern concept of leases as property was crystallized. 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 213-17 (5th ed. 1942).

arguable exceptions,¹⁹¹ new activity restrictions can never *reduce* the rights of private citizens, as that concept is defined herein.

Interestingly, although new regulations of activities per se do not generally occasion losses of rights, *deregulation* has precisely that effect by reducing previously existing potential causes of action.¹⁹² Any governmental acts which modify or dismantle portions of the system of torts¹⁹³ and contract actions,¹⁹⁴ may be seen as deregulatory. Historical examples of deregulation include the abolition of actions for seduction and criminal conversation,¹⁹⁵ of *seisin jure uxoris*¹⁹⁶ under the married women's acts,¹⁹⁷ or of certain real property interests under marketable title statutes.¹⁹⁸ A drastic example would be the abolition of all property.¹⁹⁹

191. E.g., prohibitions on the activity of possession or on the institution of lawsuits. *See supra* note 178.

192. *See supra* text accompanying notes 53-54 where the cause of action is described as the cornerstone of a right.

193. Enactment of guest statutes, *Silver v. Silver*, 280 U.S. 117 (1929), or workmen's compensation, *New York Cent. R.R. v. White*, 243 U.S. 188 (1917). *See also* *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978), which denied compensation for a new law which limits liability for nuclear accidents, though the rationale was that the affected landowners would still have an action against the federal government, under the Tucker Act, in the event of a nuclear disaster. *Id.* at 94 n.39.

194. *Wellenkamp v. Bank of America*, 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978) (invalidating due-on-sale covenants in mortgages).

195. N.Y. CIV. RIGHTS L. § 80-a (McKinney 1976).

196. *Seisin jure uxoris* is the husband's common law right to possess freehold lands belonging to his wife.

197. *See, e.g.*, N.Y. GEN. OBLIG. L. § 3-301 (McKinney 1978). In *Kirchberg v. Feenstra*, 447 U.S. 903 (1981), the Supreme Court held that such a taking of rights was not only permitted but mandated by the fourteenth amendment. Specifically, the Court invalidated the former Louisiana Civil Code provision that the husband, as "head and master," had the power, acting alone, to dispose of community property. This equal protection holding was reached without discussing whether the attendant reallocation of rights disrupting the "bedrock of Louisiana's community property system," effected any takings, compensable or not. 447 U.S. at 432. Since the ruling was not retroactive, the failure to discuss the taking issue cannot be dismissed on glib grounds such as that the Court only "declared" what had, under the equal protection clause, been the law since 1868. Either way, the new holding would involve a taking of property without compensation, though the losers may not be husbands, but wives whose husbands' transactions were not retroactively affected.

As precedent for *Kirchberg v. Feenstra*, one may cite *Shelley v. Kraemer*, 334 U.S. 1 (1948), which similarly involved an apparent collision of constitutional principles.

198. E.g., FLA. STAT. ANN. § 689.18 (1969); ILL. REV. STAT. ch. 30, § 37e (1969); KY. REV. STAT. ANN. chs. 381.219, 381.221 (Baldwin 1979); MASS. GEN. LAWS ch. 184, § 3 (West 1970); NEB. REV. STAT. §§ 76-101, 76-102 (1976); N.Y. REAL PROP. ACTS. LAW § 1951 (McKinney 1979); N.Y. REAL PROP. LAW § 345 (McKinney 1968). State courts have both upheld and invalidated such statutes. E.g., *Trustees v. Batdorf*, 6 Ill. 2d 486, 130 N.E.2d 111 (1955) (upheld); *Cline v. Board of Educ.*, 548 S.W.2d 507 (Ky. 1977) (upheld); *Hiddleston v. Nebraska Jewish Educ. Soc'y*, 186 Neb. 786 (1971) (upheld). *But cf.* *Biltmore Village v. Royal*, 71 So. 2d 727 (Fla. 1954) (cancellation of reverter provision a violation of contracts clause); *Board of Educ. v. Miles*, 15 N.Y.2d 364, 207 N.E.2d 181 (1965) (unconstitutional as applied retroactively to existing interests). *See Aigler, Constitutionality of Marketable Title Acts*, 50 MICH. L. REV. 185 (1951); Note, *Retroactive Termination of Burdens on Land Use*, 65 COLUM. L. REV. 1272 (1965); Annot., 87 A.L.R.3d 1011 (1978).

199. A limited version of an abolition of property—in favor of enhancing personal freedoms—is found in the Civil Rights Act of 1964, 78 Stat. 241, 42 U.S.C. § 1971 (1976). Under it,

It appears to be a fair assumption that, within the police power to regulate, there is included a power to deregulate on which the only general limitations are those of substantive due process and equal protection.²⁰⁰ Indeed, it has been held that the government must be able to take rights without compensation by modifying its regulatory pattern.²⁰¹ We thus reach the somewhat ironic conclusion that police-power deregulation, not regulation, is the governmental act which has the potential for uncompensated takings of rights in private property. The question is how to distinguish non-compensable instances of deregulatory right-taking from compensable takings of rights within the right/freedom analysis.²⁰²

The answer to this question is suggested by a distinction made in the text of the Constitution itself. To recite, in pertinent part:

nor shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.²⁰³

The first part of this text implies that, subject to due process limitations, the government is free to take property, liberty, or even life

innkeepers lost some of their right of exclusivity, enforceable by trespass actions, and others gained freedoms when the government deregulated access to places of public accommodation. The rights-deprivation involved was not a compensable taking. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). Note that, under the Act, the deregulation was accompanied by a new regulation limiting the innkeepers' freedom to exclude as well. This new freedom restriction would also, of course, not be in se compensable.

A similar limited abolition of property rights in favor of personal freedoms was upheld in *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). There, owners of a private shopping center were deprived by the state of their right of exclusivity as against those who wished to exercise freedoms of speech and petition on the owners' land. The case is discussed further *infra* note 220. See also *Loretto v. Teleprompter Manhattan CATV*, 53 N.Y.2d 124, 423 N.E.2d 320, 440 N.Y.S.2d 843 (1981) (upheld statute which authorizes compulsory easements for CATV conduits over landlords' property).

200. See *Martinez v. California*, 444 U.S. 277, 282 (1980) ("the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizens from state action that is wholly arbitrary or irrational"); see also cases cited in preceding footnote; *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 92-95 (1980) (Marshall, J. concurring); Annot., 65 L. Ed. 2d 1219, 1230-31 (1981).

Miscellaneous constitutional limitations such as the commerce and establishment clauses, are disregarded as having no special significance to the discussion.

201. E.g., *Martinez v. California*, 444 U.S. 277, 282 (1980); *Demorest v. City Bank Farmer's Trust Co.*, 321 U.S. 36, 48 (1944) ("The whole cluster of vexatious problems arising from uses and trusts, mortmain, the rule against perpetuities, and testamentary directions for accumulations or for suspensions of the power of alienation, is one whose history admonishes against unnecessary rigidity."); see also *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93 (1980) (Marshall, J. concurring) ("[if] common law rights were . . . immune from revision . . . [it] would freeze the common law as it has been constructed by the courts, perhaps at its 19th-century state of development"); *Great N. Ry. v. Sunburst Oil Ref. Co.*, 287 U.S. 358 (1932); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924); *Munn v. Illinois*, 94 U.S. 113 (1877).

202. Remember that the elimination of causes of action and, hence, rights is exactly what the government does when it engages in the typical trespassory and non-trespassory exercises of eminent domain. See *supra* text accompanying notes 85-114.

203. U.S. CONST. amend. V.

itself. When property is taken for public use, however, the remainder of the text imposes the familiar just-compensation requirement. In contradistinction, no requirement of compensation appears for deprivations of life or liberty,²⁰⁴ nor for deprivations of property for *other than* public use.²⁰⁵ Hence, it may be argued, in terms of the right/freedom dichotomy, that deregulatory takings of rights²⁰⁶ are not compensable because such takings are not for public use. It is the public use proviso which excludes deregulatory takings from the just-compensation clause.

In theory, substantive due process standards require that all government regulations have a public purpose, however loosely those standards are applied.²⁰⁷ The presence of a validating public purpose for a rights deprivation does not, however, necessarily mean that the rights are taken for public use. Hence, the question arises: Can rights-taking legislation have a validating public purpose and still not require compensation for the rights taken, on the grounds that the taking is not for public use? Or, reducing the problem to its essence, there is a question of whether the expression "public use" in the just-compensation clause and the public purpose requirement of substantive due process refer to two different ideas.²⁰⁸

204. The fact that there is no just-compensation requirement for takings of liberty buttresses the argument that courts properly compensate only takings of rights, as defined herein, and not regulatory deprivations of freedoms. The use of the words liberty and property in the same phrase of the Constitution is evidence that the framers thought the two words referred to different ideas and intended them to be treated differently. In the alternative it could be argued, however, that property-related freedoms, such as use and enjoyment, are encompassed in the concept called property, and that the word liberty refers to freedoms which are and those which are not related to property. At any rate, the question is entirely one of interpretation. Though the gloss of the just-compensation clause cases in fact seems to support the first interpretation above (liberty and property are different), it must be admitted that the constitutional text only permits and does not compel this result.

205. The application of the federal just-compensation requirement to the states is by the fourteenth amendment due process clause, *see supra* note 1, and that clause does not make the textual distinction under discussion, nor for that matter does it make any reference at all to takings for public use. The public use proviso was, however, expressly referred to in the case which extended the federal just-compensation requirement to the states. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 236 (1897) (the state "legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation"). It seems fair to say that the fourteenth amendment requirement of just-compensation applies the terms of the fifth amendment clause to the states.

206. Except, perhaps, "deregulation" eliminating rights against the government, i.e., removal by the government of freedom restrictions which the government previously committed itself to observe. *Compare supra* note 54 with *infra* text accompanying notes 223-34;

207. *See supra* text accompanying notes 128-38.

208. In the discussion that follows the expression public use has been reserved for references to the just-compensation clause proviso and the expression public purpose for references to the substantive due process standard. This does not imply that there is any particular authority for such a usage differentiation or that there is any particular legal significance to the somewhat different meanings which the two expressions may have in ordinary understanding.

The argument posited in the text is that there are two different conceptions to refer to, and that the difference between the two has legal significance. This argument must stand or fall on its supporting analysis, not nomenclature.

The notion that public use refers to the same thing as the substantive due process public purpose requirement finds arguable support in *Berman v. Parker*.²⁰⁹ The Court held in *Berman* that the government could constitutionally condemn private property for retransfer to private developers. The rationale was that such condemnations were for public use because they occurred in the pursuit of a legislatively determined public purpose. Thus, the meaning of public use was in effect identified with the scope of the police power.²¹⁰

At the same time, however, there have been indications that the question of whether a taking is for public use, requiring compensation, is quite separate from the question of whether there are possible validating public purposes for the government's program.²¹¹ The distinction appears clearly in *Webb's Fabulous Pharmacies v. Beckwith*.²¹² In *Webb's*, the Court held that a state statute authorizing state courts to retain interest earned on money deposited with them was a taking of property without compensation in violation of the just-compensation clause.²¹³ The Court stated that retention of the interest under the statute "has not merely 'adjusted the benefits and burdens of economic life to promote the common good'. . . . Rather,

209. 348 U.S. 26 (1954).

210. *Id.* at 32-33. In the opinion, Justice Douglas provided a fairly detailed exegesis on the extent of the police power, with the apparent aim of supporting the conclusion that the takings involved were for public use. Thus, the inference arises that public use means "use for a public purpose, whether the actual user happens to be governmental or private." *Id.* at 33-34. However, Douglas' reasoning does not compel the conclusion that taking for a public purpose necessarily means taking for a public use. My conclusion is that it does not.

211. For example, in *Hughes v. Washington*, 389 U.S. 290 (1967), the Supreme Court overturned a state court decision which had established the seaward boundaries of littoral lands further inland than where they had previously been understood to be. Since, under local law, lands seaward of the boundaries belonged to the state, the redefinition of the boundary location arguably effected a wholesale uncompensated expropriation, in favor of the state, of private shoreline property. Though the holding was on non-constitutional grounds, Justice Stewart remarked in a concurring opinion: "[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Id.* at 296-97. The defeat presumably referred to by Stewart was that the state would, by its own redefinition, acquire land for itself without any payment. Stewart's remarks were approved by the Court in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 325 (1973), *rehearing denied*, 434 U.S. 1090 (1978), *overruled on other grounds*, *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

Earlier, in *United States v. Caltex*, 344 U.S. 149 (1952), the Court held that the destruction of terminal facilities by the United States Army to prevent their falling into enemy hands was not compensable because, inter alia, such destruction was not an appropriation for subsequent use. The implication was thus that there may be a public purpose for a taking without a public use—though the further implication that public use refers to only subsequent public use is questionable. Overall, the more satisfying rationale of the case is something on the order of a proximate cause-cum-emergency doctrine: "[I]n wartime many losses must be attributed solely to the fortunes of war, and not to the sovereign." *Id.* at 155.

212. 449 U.S. 155 (1980).

213. As earlier observed, the Court did not merely hold that property was taken, but it decided, contrary to the state's definition, what the term private property meant for purposes of the case. See *supra* note 23.

the exaction is a forced contribution to general governmental revenues. . . ."²¹⁴ The taking in *Webb's* clearly was for public use, indeed, the public use objective of the taking was the rationale of the case:

The county's *appropriation of the beneficial use* of the fund is analogous to the *appropriation of the use* of private property in *United States v. Causby* . . . [where the government acquired an affirmative easement by overflights]. . . . "*Causby* emphasized that Government had not 'merely destroyed property [but was] using a part of it. . . .' " [However, such "arbitrary use of governmental power" to effect acquisitions is the] very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.²¹⁵

Hence, it appears clear that a taking may be for public use without there being a justifying public purpose for the taking albeit there is a public purpose for the use. The two concepts are different.

In light of the numerous circumstances where states have constitutionally modified private rights among private persons,²¹⁶ a line must exist between such non-compensable takings and the compensable takings under the fifth amendment. The criterion of public use in the just-compensation clause would provide such a line. The distinction would be essentially between acquisitions of rights by the government in its corporate capacity²¹⁷ and modifications of the rights enjoyed by private persons *inter sese*, subjecting the latter only to the very broad limitations of substantive due process and equal protection.²¹⁸ Nevertheless, the line is one which is difficult to state. A fair approximation might be as follows: when the government in its corporate capacity acquires or exercises dispositive control over property, for retransfer in some public program or otherwise,²¹⁹ compensation is required for any rights taken. Conversely, when the government redistributes rights among private persons albeit for a public purpose, such government acts like many others, such as taking freedoms, levying taxes, or exacting fines and forfeitures, would be outside the ambit of the

214. 449 U.S. at 163.

215. 449 U.S. at 163-64 (emphasis supplied and citations omitted). The import of the takings cases generally is that the mere presence of a public purpose does not justify an uncompensated taking for public use. *E.g.*, *Berman v. Parker*, 348 U.S. 26, 36 (1954) ("The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking.")

216. *See supra* notes 193-201.

217. Sax uses the term "enterprise capacity" in describing acts of the government which ought to be compensable. *See Sax, supra* note 10, at 151. The concept of corporate capacity here is broader, referring generally to the legal personality of the government and, in particular, to its capacity as an entity to institute legal actions and, hence, to have rights. *See supra* text accompanying notes 52-59. The government typically would hold negative easements created by regulation in its corporate capacity, but not in Sax's "enterprise capacity."

218. *See supra* note 200.

219. It is clear that the public use proviso of the just-compensation clause does not require that the government retain the property which it acquires, nor that it use the property itself or directly. *Berman v. Parker*, 348 U.S. 26 (1954).

just-compensation clause.²²⁰ In the case of such intra-private sector redistributions, the just-compensation clause does not apply since the clause expressly limits its reach to takings of property for public use.²²¹

VII. COMPENSABLE FREEDOM IMPAIRMENT:

APPURTENANT NEGATIVE EASEMENTS BY REGULATION

Finally, the clarification provided by the rights/freedoms dichotomy may help to resolve the apparent inconsistency which troubled Professor Stoebuck's transfer-oriented test of takings.²²² His test, consistently applied, would find a taking in transfers to the government of negative easements appurtenant to benefited government land, but would find no taking in transfers to the government of negative easements in gross.²²³ In both instances, negative easements may be created by regulation; both amount to transfers to the government, as

220. In this regard, it may be observed that the "too far" principle of *Pennsylvania Coal Co. v. Mahon*, see *supra* text accompanying notes 139-45, has no apparent application to deregulatory takings of rights. Indeed, to serve the public purpose of such legislation it is often deemed necessary to eliminate property rights entirely, e.g., in the case of marketable title statutes. See *supra* note 198. But cf. *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). In *PruneYard*, the Supreme Court used a *Mahon*-type rationale in upholding a state requirement that shopping center owners permit free expression and petitioning on their premises. The Court supported its holding with the observation that the owners had "failed to demonstrate that the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitations of it amounted to a 'taking.'" *Id.* at 84.

It seems clearly established, however, that in a proper case the government could withdraw a property right, constitutionally and without compensation, even though such withdrawal of the right had the effect of totally destroying "the use or economic value of the property." See cases cited *supra* notes 186, 193-94, 197-201. Thus the *Mahon* test cannot consistently account for the general run of right-depriving cases like *PruneYard*. It is only by coincidence that the facts in *PruneYard* happened to satisfy the *Mahon* "too far" test. Therefore, it is submitted, *PruneYard* can be better understood as a case where no compensation was required because the state did not, in its corporate capacity, acquire any rights for public use.

221. Cf. *United States v. Caltex*, 344 U.S. 149 (1952) discussed *supra* note 211.

It might be observed that it is not politically necessary for the just-compensation clause to apply to deregulatory takings of rights because, absent a governmental "appropriation of the beneficial use," there is less incentive for or likelihood of "the arbitrary use of governmental power" which "the Taking Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. at 164 quoted *supra* text accompanying notes 214-15. By contrast, the obvious potential public and political benefits of land-use restrictions offer a much greater incentive to impose restrictions which affect a few drastically, and most people favorably or not at all. Hence, a policy reason appears for the rule of *Pennsylvania Coal Co. v. Mahon* in relation to use regulation situations that is less applicable where that rule does not apply. By the same token, in cases where the government takes for public use as in the *Webb's* case, *supra* text accompanying notes 212-16, it is arguable that the public purpose could never justify such a taking without compensation, no matter how little the interference with rights or freedoms. See *supra* note 215 and *infra* text accompanying notes 223-34. For cases where the government merely redistributes rights for other than public use but with a drastic effect on a few (e.g., requisitions my vintage Rolls-Royce to give it to the councilman's daughter), the limitations of reasonable relationship and equal protection and on the taxing power, such as they are, would seem to provide any necessary protection. See *supra* note 155.

222. See *supra* text accompanying notes 25-41.

223. *Id.*

Stoebuck seems to use that word; and both are for public use. The transfer-oriented test does not, however, satisfactorily differentiate between them.²²⁴ Specifically, Stoebuck's theory does not explain why a transfer which is "specially directed toward benefiting a governmental entity" in land use, should be compensable while negative easement takings for other public purposes concededly should not.

The rights/freedoms analysis suggests an answer. When a government regulation restricts a private owner in the use of his land for the special benefit of nearby government land, the result, even though it takes only freedoms, is too similar to a compulsory version of a private transfer of rights.²²⁵ If the government uses or abuses its regulatory power to acquire rights as a landowner for public use at the direct, selective, and adventitious expense of a private owner who "happens to lie in the path of the project,"²²⁶ this would be exactly the kind of occurrence for which the policy of the just-compensation clause would require compensation.²²⁷ In contrast, when the government enacts a regulation which imposes land-use restrictions in gross, the resulting freedom impairments do not comparably enhance, at private property's expense, the government's position of ownership as a taker for public use. True, the validity of such regulations is theoretically subject to a substantive due process requirement of public purpose;²²⁸ but, where no government land benefits, such freedom restrictions lack the intimate connection with the acquisition or exercise of rights to property, in a corporate capacity, that seems to be contemplated by the just-compensation requirement.²²⁹

In this connection, the right/freedom analysis also avoids another analytical oddity of the transfer-oriented test of takings. When applied evenly to negative easements appurtenant and negative easements in gross, the transfer test makes regulatory transfers of easements in gross to the government the exceptional case. By corollary, the whole police power to regulate land use becomes an exception to the just-compensation clause. In contrast, the right/freedom analysis regards the police power as occupying an essentially different domain

224. *Id.*; see also Stoebuck, *supra* note 19, at 1091-93.

225. See quoted language from *Webb's Fabulous Pharmacies v. Beckwith* at *supra* text accompanying notes 214-15.

226. *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945).

227. See *supra* note 226; cf. *Vernon Park Realty v. City of Mount Vernon*, 307 N.Y. 493, 121 N.E.2d 517 (1959) (ordinance limiting use of a lot to off-street parking purposes only, held invalid; ordinance benefited the government's neighboring streets by reducing congestion on the street); see also *Sneed v. County of Riverside*, 218 Cal. App. 2d 205, 32 Cal. Rptr. 318 (1963) (building height restrictions in the vicinity of an airport are really takings of aviation easements) and other cases cited at Van Alstyne, *supra* note 8, at 25-26 n.120.

228. See *supra* text accompanying notes 127-30, 207.

229. See *supra* text accompanying notes 219-21.

from the just-compensation clause.²³⁰ The police power is concerned with restrictions on freedoms whereas the just-compensation clause focuses upon the taking of rights. Thus, under the right/freedom analysis, it is the compensation requirement for takings of appurtenant negative easements which is an exception to the general rule, viz., that only takings of rights are compensable. The too-much-like-a-taking policy explanation offered above for the exception is not wholly satisfying, though neither perhaps, at the fringes, is the policy rationale suggested earlier²³¹ for the rights/freedom dichotomy which the holdings in fact create. At any rate, it may be argued that the exceptional compensability of appurtenant negative easements should not exist at all. The government, as a landowner, ought to be as eligible as anyone else to enjoy the benefits of zoning and environmental regulations.²³² Only the fear of abuse of power would seem to suggest a presumption against such eligibility.²³³

VIII. SUMMARY AND CONCLUSION

The law of eminent domain does not provide even remotely consistent protection for private economic interests, but neither is it an erratic accretion of irreconcilables. Rather, it appears that the law's underpinning is a set of principles which are both coherent and relatively defensible from a policy standpoint. While judicial opinions have not comprehensively articulated these principles, and especially their interplay, aspects of their application are repeatedly mentioned²³⁴ and their force is almost uniformly felt in the courts' holdings.²³⁵

The central principle which appears to control the cases of alleged police-power takings is that, in general, compensation is not constitutionally required for regulations of land use that merely impair freedoms to use and enjoy. Instead the just-compensation clause appears to be primarily concerned with governmental acts which take or impair owners' legally enforceable rights of property. The concepts referred to by the words right and freedom in this context have been stipulatively defined to reflect and illuminate a distinction which is in fact made by the cases. As so defined, right and freedom together

230. *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) ("[T]he present case must be governed by principles that do not involve the power of eminent domain. . . .").

231. See *supra* text accompanying notes 178-84.

232. See *supra* text accompanying note 41.

233. See *supra* notes 41 and 227.

234. See, e.g., quotations *supra* note 123, and *supra* notes 126, 140, 214-15 and accompanying text.

235. This uniformity is particularly evident in holdings of the United States Supreme Court, though some deviation is found in some state court cases, especially those influenced by the now obsolete physical intrusion criterion of taking. See *supra* notes 15, 109, 112 and 114.

seem to cover a major portion of what is generally understood as property interests. Distinguishing between them provides a basis for explaining (but not necessarily justifying) almost all of the cases of alleged police-power takings and for unifying such cases with the law of eminent domain.

There are three secondary principles which also affect the outcomes of alleged police-power takings cases. First, an impairment of freedoms may so far restrict the use and enjoyment of a parcel of land as to render the owner's legally enforceable rights nugatory. Such undermining of the purpose for which the rights are sought and conferred would amount to the functional equivalent of a taking and is treated as such. Second, an impairment of freedom may be constitutionally invalid apart from any just-compensation clause considerations, most prominently by failing to meet the substantive due process requirement of a reasonable relationship to some justifying public purpose. Freedom regulations of this sort are struck down but not compensated as takings. Third, a governmental redistribution of rights among private persons, through modifying the available set of potential causes of action, would fall outside the just-compensation clause because such takings are not for public use, albeit they are for some justifying public purpose. Such takings are neither invalid nor compensable.

To be sure, the basis suggested in this Article for understanding the law of eminent domain is highly conceptual or formalistic. The analysis presented would at least, however, supply an observed and settled distinction as the basis for future determinations of "justice and fairness."²³⁶ This may not be the ultimate way to wage the "battle of conflicting interests,"²³⁷ but for courts of law it is at least a legal way to do so. This, in itself, makes it preferable to reliance on an array of fuzzy philosophisms that offer neither clear cut specific guidance nor any assured criterion of what, as a general matter, is just.

236. See *supra* note 44.

237. Sax, *supra* note 8, at 41.