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Randall T. Shepard

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LAND USE REGULATION IN THE REHNQUIST COURT: THE FIFTH AMENDMENT AND JUDICIAL INTERVENTION

*The Honorable Randall T. Shepard**

After a few sleepy years on the land use regulation front, the Rehnquist Court has issued a series of decisions perceived as adverse to regulation by local government. Widely decried by state and local officials and environmentalists as a threat to traditional use of the police power, these cases have used the takings clause of the fifth amendment as the principal tool for analyzing claims of government overreaching. Choosing this analytical framework misuses the intent of those who framed the fifth amendment and promotes judicial intervention in areas of government traditionally consigned to the democratic branches. By contrast, the fourteenth amendment's due process clause is a tool crafted specifically for the purpose of regulating state land use activities. Greater reliance on the due process clause would provide a more consistent rule and promote judicial deference in those fields in which courts are not particularly competent to govern.

The first section of this Article assesses the Rehnquist Court's recent flurry of activity in this field, focusing specifically on its abandonment of a former posture of judicial restraint in reaching regulatory takings claims. The second section discusses the origins and historical use of the fifth amendment's just compensation clause, and the third section examines the purposes of the fourteenth amendment's due process clause. The final section of this Article reviews a series of cases involving challenges to regulation of property and suggests that fifth amendment takings analysis is appropriate only for cases involving physical invasion of private property. It advocates the use of the fourteenth amendment's due process clause as a way of analyzing modern, more complex land use regulation problems and argues that due process tests provide a more consistent and properly deferential jurisprudence.

* Chief Justice of Indiana. J.D., Yale University, 1972; A.B., Princeton University, 1969. Chief Justice Shepard is a former chairman of the board of advisors and a present trustee of the National Trust for Historic Preservation.

I. CONSTITUTIONAL INTERPRETATION WITHOUT LITIGATION

The Rehnquist Court's recent series of cases represent a departure from the United States Supreme Court's long-standing position of restraint in takings cases. The policy that such cases could be best heard on appeal on the basis of a full factual record has often led the Court to refuse to issue pronouncements about the takings clause. This reluctance, however, was not evident in the 1987 "takings trilogy" cases.¹ Those opinions suggest that the most significant dispute in the Court concerns the appropriate constitutional framework for analyzing such issues, a conundrum that the Court formerly avoided by disposing of constitutional challenges to land use regulation without reaching the merits.

Previously, lower courts ignored at their peril the Supreme Court's "oft-repeated" admonition that constitutional issues ought not be decided except in a factual setting that makes the decision necessary.² This rule has been particularly important in takings cases because the Court has been unable to develop a clear formula for defining the type of government action that constitutes a taking. Both conservatives and liberals have been quite candid about this inability to develop a "bright line" to define those occasions when government action requires compensation. As then-Justice William Rehnquist stated in 1979:

[T]his Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors — such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action — that have particular significance.³

Justice Thurgood Marshall, speaking from the opposite ideological wing of the Court, has also affirmed the importance of a full factual record: "These 'ad hoc, factual inquiries' must be conducted with respect to specific prop-

1. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

2. See, e.g., *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981) (citing *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 588 (1972); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568-75, 584 (1947); *Alabama State Fed'n of Labor v. McAdory*, 325 U.S. 450, 461 (1945)).

3. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (citing *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

erty, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances.”⁴ In a number of cases in the 1970’s and early 1980’s, the Court ruled takings claims premature because the local administrative agency or trial court had not reached a final decision.⁵ The Court reaffirmed this policy of restraint as late as 1985.⁶

Against this background, *First English Evangelical Lutheran Church v. County of Los Angeles*⁷ seemed to signal that the Rehnquist Court had broken out of this period of judicial restraint on takings matters. The dispute involved a parcel on which First English operated a retreat center called Lutherglen, located on the banks of the Middle Fork of Mill Creek in Angeles National Forest. Middle Fork is the natural drainage channel for the watershed. A forest fire denuded the hill upstream from the land, creating a serious flood hazard. After a heavy rainstorm, the runoff overflowed the banks of the creek. The flooding caused ten deaths and destroyed bridges and buildings, including the buildings in Lutherglen.⁸ In response to this flooding, Los Angeles County adopted an ordinance temporarily prohibiting construction in the flood area.⁹ The church filed a complaint in state court seeking compensation but not invalidation of the ordinance.¹⁰

The trial court struck from the complaint three rhetorical paragraphs, each consisting of one sentence, which alleged that the ordinance “denies First Church all use of Lutherglen.”¹¹ In so doing, it relied on the California Supreme Court decision in *Agins v. City of Tiburon*,¹² which held that a landowner alleging that a zoning ordinance had substantially limited the use of his land may seek invalidation of the ordinance but may not convert a challenge to land use rules into an inverse condemnation action merely by pleading that a taking had occurred.¹³ The *First English* trial court explained that “a careful re-reading of the *Agins* case persuades the [c]ourt that

4. *Hodel*, 452 U.S. at 295.

5. *Id.*; *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

6. *Williamson Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 191 (1985) (takings “cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question”).

7. 482 U.S. 304 (1987).

8. *Id.* at 307; see also *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1357, 258 Cal. Rptr. 893, 895 (1989).

9. *First English*, 482 U.S. at 307.

10. *Id.* at 308.

11. *Id.* at 323 (Stevens, J., dissenting).

12. 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff’d on other grounds*, 447 U.S. 255 (1980).

13. In *Agins*, the Supreme Court of California affirmed the trial court’s decision sustaining the city of Tiburon’s demurrer to a landowner’s claim of inverse condemnation. 24 Cal. 3d at 278, 598 P.2d at 32, 157 Cal. Rptr. at 379. The landowner sought compensation based on a

when an ordinance, even a non-zoning ordinance, deprives a person of the total use of his lands, his challenge to the ordinance is by way of declaratory relief or possibly mandamus."¹⁴ In an unpublished opinion, the California Court of Appeal affirmed the trial court's decision to strike the allegations concerning compensation for denial of "all use."¹⁵ The California Supreme Court denied review.¹⁶

Notwithstanding the preliminary nature of the trial court's action, Chief Justice Rehnquist declared with seeming alacrity that the takings issue was ripe for constitutional decision: "Concerns with finality left us unable to reach the remedial question in the earlier cases where we have been asked to consider the rule of *Agins*."¹⁷ Chief Justice Rehnquist noted that the California Court of Appeal had assumed that the complaint sought damages for the uncompensated taking of the land and affirmed the trial court on the basis of the *Agins* rule that a landowner challenging an ordinance denying all use of property was entitled only to injunctive relief,¹⁸ without reaching the question of whether a taking had occurred. Previous cases touching on *Agins* had not squarely presented the issue of available remedies, Rehnquist

zoning ordinance which he alleged placed such extensive restrictions on the use of his land that the ordinance amounted to a taking. 24 Cal. 3d at 272, 598 P.2d at 28, 157 Cal. Rptr. at 375.

The California Supreme Court ruled that, under these circumstances, an action for inverse condemnation would not lie. The court wrote:

[A] landowner alleging that a zoning ordinance has deprived him of substantially all use of his land may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of the Fifth Amendment to the United States Constitution and article I, section 19, of the California Constitution. He may not, however, 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.

24 Cal. 3d at 272-73, 598 P.2d at 28, 157 Cal. Rptr. at 375 (citations omitted). The court viewed the inverse condemnation claim as an unwarranted usurpation of legislative authority. This view confirmed a line of scholarship which concluded that invalidation, rather than compensation through judicial orders to spend public funds, was the more expedient means of remedying legislative excesses. See Note, *Eldridge v. City of Palo Alto: Aberration or New Direction in Land Use Law?*, 28 HASTINGS L.J. 1569, 1597 (1977); Comment, *Inverse Condemnation: Its Availability in Challenging the Validity of a Zoning Ordinance*, 26 STAN. L. REV. 1439, 1450-51 (1974).

14. 482 U.S. at 309.

15. *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1357-58, 258 Cal. Rptr. 893, 896 (1989) (discussing unpublished opinion).

16. *First English*, 482 U.S. at 309.

17. *Id.* at 310-11; see, e.g., *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 633-34 (1981) (Rehnquist, J., concurring) ("If I were satisfied that this appeal was from a 'final judgment or decree' . . . I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan [which argues that temporary takings should be compensated].").

18. *First English*, 482 U.S. at 309.

said, because the Court itself determined that the regulation at issue did not constitute a taking (thus making remedies moot) or because factual disputes remained that could result in a state court determination that no taking occurred (rendering the remedy question premature).¹⁹ Thus, the California court's avoidance of the question of whether a taking occurred made the *Agins* issue ready for review: "The disposition of the case on these grounds," Rehnquist wrote, "isolates the remedial question for our consideration."²⁰

Rehnquist framed the "remedial question" as whether a landowner claiming that his property has been "taken" by a land use regulation could recover damages in the nature of compensation for the period of time preceding a final determination that the regulation constituted a taking,²¹ a question that the majority answered in the affirmative. This formulation of the issue actually resulted in affirmative responses to two questions: whether government activity can effect a taking even though there has not been a condemnation, and whether a temporary taking requires compensation. The Court had answered the first of these questions forty years ago.²² The answer to the second has been virtually hornbook law.²³

Justice John Paul Stevens dissented on both the ripeness issue and on the merits. On behalf of a three-Justice minority, he said that the majority "unnecessarily and imprudently assumes that [the church's] complaint alleges an unconstitutional taking of Lutherglen."²⁴ Justice Stevens asserted that the trial court never decided whether the complaint alleged a taking. Rather, it relied on *Agins*, a case concerning regulation not constituting a taking. "The Court of Appeal," he continued, "affirmed on the authority of *Agins* alone, also without holding that the complaint had alleged a violation of . . . the Federal Constitution. At most, it assumed, *arguendo*, that a constitutional violation had been alleged."²⁵ On the merits, Stevens asserted flatly that "the type of regulatory program at issue here cannot constitute a taking"²⁶ and concluded his argument on this issue by writing, "[a]s far as

19. See *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351-53 (1986) (summarizing cases).

20. *First English*, 482 U.S. at 311. After holding that a temporary taking is compensable, Justice Rehnquist remanded the case to the California courts to determine if indeed there had been a taking. *Id.* at 322.

21. *Id.* at 313.

22. *United States v. Causby*, 328 U.S. 256 (1946).

23. Annotation, *Measure of Owner's Damages for Temporary Appropriation of or Injury to Real Property by Municipality or Other Public Authority*, 87 A.L.R. 1384 (1933); *Zinn v. State*, 112 Wis. 2d 417, 334 N.W.2d 67 (1983); *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978).

24. *First English*, 482 U.S. at 322 (Stevens, J., dissenting).

25. *Id.* at 324 (footnote omitted).

26. *Id.* at 325.

the United States Constitution is concerned, the claim that the ordinance was a taking of Lutherglen should be summarily rejected on its merits."²⁷

First English dealt a blow to the idea that landowners claiming a taking of their property should be required to show that a request for variance or rezoning would be futile. In *Penn Central Transportation Co. v. New York City*,²⁸ the Court noted that, because the owners of Grand Central Terminal had not sought approval for the construction of a structure smaller than the one for which a permit was denied, the reviewing court could not determine whether the owners had been denied any use of the airspace above the station as the petition claimed.²⁹ By comparison, the ordinance in *First English* temporarily prohibited rebuilding, but the church apparently had not even sought permission to do so.³⁰ Indeed, as Justice Stevens pointed out, it was unlikely that the church would immediately rebuild on the land because of the continuing threat of flooding.³¹

The Court decided the merits of the compensation issue in *First English* on the basis of the defendant's preliminary motion to strike three one-sentence paragraphs from the complaint. It was a far cry from earlier declarations that proper adjudication requires a complete record. In any event, the determinations in *First English* concerning ripeness, availability of administrative relief, and the necessity of a full record were supported by five members of the present Court, including Justice Brennan, author of *Penn Central*, and Justice Marshall, author of *Citizens to Preserve Overton Park v. Volpe*,³² two landmark land use decisions in which the regulators prevailed. Their decision to join Rehnquist, White, Powell, and Scalia seems almost a matter of damage control. The presence of Justice O'Connor in the minority, declaring with Stevens and Blackmun that the regulation in question simply could not constitute a taking, suggests that *First English* may be less than it seems.

Nevertheless, the Court's abandonment of a strict finality requirement as a tool of judicial restraint heralds increased potential for constitutional declarations regarding land use regulation. The Court's new-found enthusiasm for reaching the merits of questions formerly left to the administrative process or state courts lends new importance to resolution of the historically

27. *Id.* at 328. On this point and certain others, Justices Blackmun and O'Connor joined.

28. 438 U.S. 104 (1978).

29. *Id.* at 137.

30. 482 U.S. at 327 (Stevens, J., dissenting).

31. *Id.* at 327-28.

32. 401 U.S. 402, 413 (1971) ("The few green havens that are public parks were not to be lost unless there were truly unusual factors present.").

unsettled question of the appropriate constitutional theory upon which regulatory takings cases should be decided.

Although most analysis during the last two generations has focused on the just compensation clause of the fifth amendment, some recent writing has begun to discover the fourteenth amendment's due process clause.³³ A comparison of these two constitutional provisions suggests reasons why a Supreme Court dedicated to deference to the elected branches of government should choose the latter as its principal and principled vehicle for analyzing land use regulation.

II. THE FIFTH AMENDMENT AND PROPERTY

There can be little doubt that the framers of the fifth amendment's takings clause³⁴ intended that the amendment apply only to physical acquisition or invasion of property by the national government. Its application to state governments is a judicial invention disharmonious with original intent.³⁵

American colonists largely held land by virtue of grants from English kings, grants that the Crown could theoretically revoke at will. Because the grants authorized the development of land on behalf of the sovereign, the idea that the sovereign could direct that part of the land be used for development of public facilities, such as roads, seemed quite natural.³⁶ Moreover, the widely popular republican belief in the power of the common good³⁷ and the trustworthiness of legislatures which prevailed in this country at the time

33. See, e.g., *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

34. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

35. For a well-developed historical argument that the authors of the fifth amendment intended that it apply only to physical takings by the national government, see Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985). This work also discusses the impact of republicanism on property rights. *Id.* at 699-700.

36. Quite a different attitude existed concerning personal property. The early and sweeping Massachusetts Body of Liberties, 1641, provided in part:

No mans Cattel or goods of what kinde soever shall be pressed or taken for any publique use or service, unlesse it be by warrant grounded upon some act of the generall Court, nor without such reasonable prices and hire as the ordinarie rates of the Countrie do afford. And if his Cattle or goods shall perish or suffer damage in such service, the owner shall be sufficiently recompenced.

B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 73 (1971).

37. The republican belief in the common good was embodied in Jefferson's decision to write that the inalienable rights of man included "life, liberty, and the pursuit of happiness." The Declaration of Independence, para. 2 (U.S. 1776). Compare Jefferson's words with the very first resolve of the Continental Congress of 1774: "That they are entitled to life, liberty, & property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent." Declaration and Resolves, Resolved, N.C.D. 1, reprinted in B. SCHWARTZ, *supra* note 36, at 216. At least in intellectual circles, republicanism is enjoying

of the American Revolution led the newly independent states to adopt constitutions granting nearly plenary power to the legislature. None of the first state constitutions contained provisions for just compensation; indeed, only three included clauses regulating government taking of property.³⁸ When colonial draftsmen did perceive the need to restrain the seizure of real property, they thought it adequate simply to require that seizure occur only by act of the legislature.³⁹ It was not until the summer of the Philadelphia constitutional convention that the idea of compensation for taking real property became a part of the national government's political agenda. The Confederation Congress, meeting in New York, placed such a provision in the Northwest Ordinance of 1787.⁴⁰ By this time the excesses of the military⁴¹

something of a revival. See, e.g., Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1493 (1988).

38. See Note, *supra* note 35, at 698 n.15 (the states were Maryland, New York, and North Carolina).

39. George Mason's draft of the Virginia Declaration of Rights, 1776, for example, provided that men could not be "deprived of their property for public uses, without their own consent, or that of their representatives" Original Draft of the Virginia Declaration of Rights, 1776, *reprinted in* B. SCHWARTZ, *supra* note 36, at 242. These provisions are remarkably similar to the idea contained in the Magna Carta, "[N]o freeman shall be . . . disseised . . . except by the lawful judgment of his peers or by the law of the land." Magna Carta art. 39, *reprinted in* B. SCHWARTZ, *supra* note 36, at 12. The Pennsylvania Declaration of Rights, 1776, used the same framework:

VIII. That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man's property can be justly taken from him, or applied to public uses, without his own consent, or that of his legal representatives

A Declaration of Rights of the Inhabitants of the Commonwealth, or State of Pennsylvania, in B. SCHWARTZ, *supra* note 36, at 265.

40. Article 2 of the Northwest Ordinance read:

No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed.

Northwest Ordinance of 1787, art. 2, *reprinted in* 1 P. KURLAND & R. LERNER, *THE FOUNDER'S CONSTITUTION* 28 (1987).

41. The Revolutionary War was underway but two years when prominent citizens began to complain about seizure of property. John Jay submitted a complaint to the New York legislature about "the Practice of impressing Horses, Teams, and Carriages by the military, without the Intervention of a civil Magistrate, and without any Authority from the Law of the Land." John Jay, A Freeholder, A Hint to the Legislature of the State of New York, Winter 1778, *reprinted in* 5 P. KURLAND & R. LERNER, *supra* note 40, at 312.

fomented a discontent that eventually led to the adoption of the fifth amendment's takings clause.⁴²

James Madison, generally recognized as a principal author of both the Bill of Rights and the Constitution, proposed a section on property that clearly related to government acquisition of tangible property: "No person shall be . . . obliged to relinquish his property, where it may be necessary for public use, without a just compensation."⁴³ His decision to suggest language restraining only acquisition of property was probably not inadvertent. Madison recognized a difference between government actually seizing a person's land and actions that harmed the value of a landowner's property in other ways.⁴⁴ Madison's proposal that the fifth amendment apply only to the national government was consistent with the rest of his plan for the Bill of Rights. He suggested but a single restriction against the states, one that assured freedom of the press, freedom of conscience, and trial by jury. The Senate rejected even this modest imposition on the states.⁴⁵ Madison intended and anticipated that the courts would interpret and enforce the Bill of Rights.⁴⁶ In 1833, the Supreme Court reaffirmed Madison's intent that the takings clause serve as a restraint on physical takings only by the national government.⁴⁷ John Barron argued in the Supreme Court that the city of Baltimore had violated his rights under the fifth amendment by diverting runoff in paving its streets so that a wharf and deep harbor area owned by Barron became silted and shallow, rendering it unusable as a commercial wharf. Chief Justice Marshall was not impressed: "The question thus presented is, we think, of great importance, but not of much difficulty."⁴⁸ The Court held that the fifth amendment's takings clause was in-

42. The shift in sentiment among propertied classes who wrote the Constitution and the Bill of Rights is fully described in Note, *supra* note 35, at 704-05.

43. Speech Proposing the Bill of Rights (June 8, 1789), 1 ANNALS OF CONG. 451-52 (J. Gales ed. 1834). The change to the present language was apparently engineered in the Committee of Eleven, appointed to review Madison's proposals. Madison himself was a member of the Committee. B. SCHWARTZ, *supra* note 36, at 1050 (Ed. note).

44. In his "Speech Opposing Paper Money" before the Virginia Assembly, Madison argued against the effective depreciation of specie by comparing it to changing the nature of a land contract. Paper money, he said, "affects Rights of property as much as taking away equal value in land: illustrd. by case of land pd. for down & to be conveyd. in future, & of a law permitting conveyance to be satisfied by conveying a part only or other land of inferior quality." 9 THE PAPERS OF JAMES MADISON 158-59 (R. Rutland ed. 1975).

45. B. SCHWARTZ, *supra* note 36, at 1053 (Ed. note).

46. "[I]ndependent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights." 1 ANNALS OF CONG. 439 (J. Gales ed. 1834).

47. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

48. *Id.* at 247.

tended solely as a limitation on the exercise of power by the federal government and was not applicable to the activities of states.⁴⁹

Indeed, even after adoption of the Civil War amendments, the Court did not deem the states bound by the Bill of Rights. The Supreme Court held that due process of law under the fourteenth amendment simply required that a state's law be applied to everyone equally. In the familiar *Slaughter-House Cases*,⁵⁰ the Supreme Court declared that the fourteenth amendment did not amplify the rights, privileges, or immunities of the citizens of the several states. As late as 1884, the Court declared, in *Hurtado v. California*, that "[d]ue process of law" in the fourteenth amendment referred to the "law of the land in each State, which derives its authority from the inherent and reserved powers of the State"⁵¹ The Civil War and the amendments following that conflict did little to change the view held before the war, when support for the idea that due process and legislative process were viewed as so similar that Professor Edward S. Corwin was led to describe them as nearly synonymous.⁵²

This jurisprudence changed in *Chicago, Burlington and Quincy Railroad Co. v. Chicago*.⁵³ There, the city of Chicago commenced condemnation proceedings to permit extension of a street across particular railroad tracks. A jury awarded damages of one dollar to the railroad. Rejecting the rule of *Hurtado* that federal due process simply requires obedience to the general law of the state, Justice Harlan explained that the fourteenth amendment did require states to pay just compensation for taking property:

the 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. Notice to the owner to appear in some judicial tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public.⁵⁴

49. *Id.* at 249-51. State courts had already acknowledged this fact. See, e.g., *Bradshaw v. Rogers*, 20 Johns. 103 (N.Y. 1822).

50. 83 U.S. (16 Wall.) 36 (1873).

51. 110 U.S. 516, 535 (1884).

52. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 460 (1911).

53. 166 U.S. 226 (1897).

54. *Id.* at 236.

The Court concluded that as a matter of fourteenth amendment law, a state does not afford due process when it takes property for public use without paying for it.

One searches in vain for any declaration in *Chicago, Burlington and Quincy* that the fifth amendment applies to the states. Justice Harlan described the issue on appeal as whether the trial court disregarded "that part of the Fourteenth Amendment declaring that no State shall deprive any person of his property without due process of law, or deny the equal protection of the laws to any person within its jurisdiction."⁵⁵ Nevertheless, the modern Court routinely cites the case for the proposition that the fourteenth amendment due process clause makes the fifth amendment "applicable to the states" or "incorporated."⁵⁶ Justice Harlan's use of fourteenth amendment due process in a state condemnation proceeding was historically and legally appropriate, but did not amount to a wholesale importation of the fifth amendment into the fourteenth amendment.

III. THE FOURTEENTH AMENDMENT

While the legislative history of the fourteenth amendment offers little insight on several issues,⁵⁷ it is apparent that limiting state actions concerning private ownership of property was among the purposes of its enactment. The fourteenth amendment provided solutions to a variety of problems confronted in the year after the Civil War,⁵⁸ but the central function of its first section was to provide a firm constitutional foundation for the decision reached by Congress just weeks earlier in enacting the Civil Rights Act of 1866. The leading architect of what became section one of the fourteenth amendment was Representative John A. Bingham, an Ohio Republican, whose original proposal provided that foundation in a very straightforward way. It read:

55. *Id.* at 228.

56. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978). The author saw the need to acknowledge the indirectness of the precedent by using the signal "see." Occasionally, the Court has treated this legal principle of "incorporation" as so basic that it does not require citation to authority. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 827 (1987).

57. In *Brown v. Board of Educ.*, 347 U.S. 483 (1954), counsel conducted an exhaustive review of the available sources to determine whether those who wrote or ratified the fourteenth amendment intended that it abolish segregation in public schools. The results of their examination led the Court to conclude: "At best, they are inconclusive." *Id.* at 489.

58. Sections 2, 3, and 4 of the amendment were closely related to readmission of the former Confederate States and their representation in Congress. Section 2 restructured representation in the House. Section 3 prohibited participation in government by former officeholders under the Constitution of the United States who later engaged in the rebellion. Section 4 repudiated confederate debt.

The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States, and to all persons in the several States equal protection in the rights of life, liberty and property.⁵⁹

One of Bingham's primary purposes in drafting this section was to protect Southern unionists from revenge by former rebels acting through state governments. In support of his proposal, he told Congress: "I should say that it is proposed as well to protect the . . . hundreds of thousands of loyal white citizens of the United States whose property, by State legislation, has been wrested from them under confiscation"⁶⁰ He also pled his case by characterizing the opposition this way: "Gentlemen who oppose this amendment simply declare to these rebel States, go on with your confiscation statutes"⁶¹

Proposing to grant Congress the sort of authority it purported to exercise in adopting the Civil Rights Act was an excellent way of insulating the Act from constitutional challenge, but it also turned out to be a chief point of attack for opponents. They argued that this sweeping grant to Congress was a serious invasion of state sovereignty and an alteration of the existing balance of authority in the federal system.⁶² They also criticized it on the grounds that it gave Congress the right to define the liberties of citizens according to its will.⁶³ These complaints led to a final version of section one

59. CONG. GLOBE, 39th Cong., 1st Sess. 1083 (1866).

60. *Id.* at 1065.

61. *Id.* at 1090-91.

62. Representative Hale disliked the construction of the amendment and argued: [I]s it not . . . introducing a power never before intended to be conferred upon Congress? . . . [P]robably every State in this Union fails to give equal protection to all persons within its borders in the rights of life, liberty, and property. It may be a fault in the States that they do not do it. A reformation may be desirable, but by the doctrines of the school of politics in which I have been brought up . . . reforms of this character should come from the States, and not be forced upon them by the centralized power of the Federal Government.

Id. at 1064. Later he added: "And here we come to the very thing for which I denounce this proposition, that it takes away from these States the right to determine for themselves what their institutions shall be." *Id.* at 1065.

63. Representative Thomas Treadwell Davis said:

An amendment which gives in terms to Congress the power to make all laws to secure to every citizen in the several States equal protection to life, liberty, and property, is a grant for original legislation by Congress. If Congress may give equal protection to all as to property, it is itself the judge of the measure of that protection. Its legislation may be universal. It may enlarge protection, it may circumscribe it and limit it, if only it make it equal.

Under such a power the constitutional functions of State Legislatures are impaired, and Congress may arrogate those powers of legislation which are the peculiar muni-

which makes a general declaration of constitutional principle ("No State shall make or enforce any law which . . .") and adds congressional authority "to enforce by appropriate legislation, the provisions of this article."⁶⁴

Recalling the military excesses that set the stage for adoption of the fifth amendment, congressional debate concerning the need for federal constitutional protection of property was colored by competing claims on lands seized by order of General Sherman during the War.⁶⁵ Some doubted the viability of the right of occupancy given to former slaves by the Freedman's Bureau⁶⁶ and sought to protect that occupancy under the amendment.⁶⁷ Others believed that the language concerning protection of property might assist those from whom General Sherman seized property in reclaiming their land.⁶⁸ The resulting political accommodation was a study in ambiguity.

In any event, it is important to note that when debate on the amendment returned to the Joint Committee of Fifteen on Reconstruction, Representative Bingham moved to add language that said: "[N]or shall any state deny to any person within its jurisdiction the equal protection of the laws, nor take private property for public use without just compensation."⁶⁹ His proposal was defeated.⁷⁰

Because the framers of the fourteenth amendment specifically decided against limiting state action with language similar to the takings clause of the fifth amendment, even modest adherence to the original intent suggests

ments of State organizations, and which cannot be taken from the States without a radical and fatal change in their relations.

I will, sir, consent to no centralization of power in Congress in derogation of constitutional limitations, nor will I lodge there to-day any grant of power which may in other times, and under control of unprincipled political aspirants or demagogues, be exercised in contravention of the rights and liberties of my countrymen.

Id. at 1087.

64. U.S. CONST., amend. XIV, § 1.

65. Some details about Gen. Sherman's order appear in a congressional debate about the Freedman's Bureau. See CONG. GLOBE, 39th Cong., 1st Sess. 2807-08 (1866).

66. When discussing the Freedman's Bureau, Rep. Hendricks mused: "I am not prepared to say whether the sales were valid or not If they were so irregular as to be void, ought Congress to undertake to confirm them?" *Id.* at 3410. He further expressed the view that: "General Sherman's order was a military order. I believe no Senator has pretended that General Sherman's order was sufficient to pass the title. It gave the right of occupancy during the command of the officer who made the order; It was a military order ceasing to have force at the termination of the war, so that that order conferred no title; and it is simply now a question of possession and the right of possession." *Id.*

67. See Maltz, *The Fourteenth Amendment as Political Compromise — Section One in the Joint Committee on Reconstruction*, 45 OHIO ST. L.J. 933, 935 (1984).

68. *Id.* at 959.

69. B. KENDRICK, *THE JOURNAL OF THE COMMITTEE OF FIFTEEN ON RECONSTRUCTION* 85 (1969), cited in Maltz, *supra* note 67, at 958-59.

70. *Id.*

that courts should use fourteenth amendment due process analysis when considering a claim against state land use regulation. More importantly, the kinds of tests the courts have generated for fourteenth amendment due process suppress judicial activity in this field and provide a ready basis for local and state governments to act without fear of the new jurisprudence of "regulatory takings."

IV. TOWARD USE OF FOURTEENTH AMENDMENT DUE PROCESS

Using the concept of takings under the rubric of the fifth amendment to test the validity of state action affecting property is attractive because of its deceptive simplicity. Taking requires compensation; no taking means no compensation. This form of analysis well suits the traditional acquisitions of private property for public use. The simple concept of takings, however, does not adapt well to complex regulation of commercial activity in a post-industrial society.

The few modern situations in which the takings concept is helpful are those involving physical invasion of property. In *Loretto v. Teleprompter Manhattan CATV Corp.*,⁷¹ for example, a landlord challenged a New York State law prohibiting interference with installation of wires and other equipment by cable television companies. Noting that there was no reason to doubt the trial court's determination that the statute served a legitimate public purpose, Justice Marshall set forth the traditional factors examined in determining whether the ordinance effected a taking: the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action.⁷² When the government permanently and physically occupies land, he said, the character of the governmental action is so severe that the Court considers it a taking.⁷³ Justice Marshall wrote, "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."⁷⁴

Physical invasions have become the quintessential example of cases easily resolved by resort to the fifth amendment's takings language. When the government expropriates land by taking title or engages in an activity making

71. 458 U.S. 419 (1982).

72. Even these relatively traditional factors are difficult for courts to gauge. *Andrus v. Allard*, 444 U.S. 51, 66 (1979) ("Prediction of profitability is essentially a reasoned speculation that courts are not especially competent to perform.").

73. *Loretto*, 458 U.S. at 421.

74. *Id.* at 426.

the land virtually useless,⁷⁵ one can readily identify a taking that requires compensation. It is even easy to see a taking when the government insists that others be allowed to walk across one's land. In this sense, one of the 1987 takings trilogy cases can be seen as a simple physical invasion case. In *Nollan v. California Coastal Commission*,⁷⁶ beachfront property owners sought a permit to demolish their small bungalow and replace it with a three-bedroom house. The California Coastal Commission granted the permit subject to the condition that the public be allowed to pass across a portion of the property to gain access to a public beach. Speaking for a majority of five,⁷⁷ Justice Scalia noted that "one of the most essential sticks in the bundle of rights that are commonly characterized as property" is "the right to exclude others," quoting *Kaiser Aetna v. United States*⁷⁸ in language reiterated in *Loretto*.⁷⁹ This echo from *Loretto* was altogether appropriate. The challenged state action was the same: a government mandate to admit strangers to one's property indefinitely. In the absence of some kind of physical invasion, however, applying the fifth amendment's takings language to the complexities of modern land use regulation fails. It satisfies neither landowners nor regulators.

Landowners who seek to challenge government regulation of property by proving that land use restrictions constitute a taking almost never win. Except in cases involving a physical occupation, there is seldom a majority in favor of landowners on the Supreme Court. The landowners prevailed in *First English* and *Nollan*, cases in which a complete deprivation of use or a physical occupation was assumed⁸⁰ or proven.⁸¹ In the third case in the 1987 trilogy, *Keystone Bituminous Coal Association v. DeBenedictis*,⁸² the landowners could marshal only four votes, including Justice Powell, even in the face of seemingly dispositive precedent.⁸³

Although the Court has self-consciously declined to embrace "the proposition that a 'taking' can never occur unless government has transferred physical control over a portion of a parcel,"⁸⁴ the majority opinion in *Key-*

75. *United States v. Causby*, 328 U.S. 256 (1946) (chicken farm "taken" by constant overflight of military aircraft just 63 feet above the barn).

76. 483 U.S. 825 (1987).

77. Chief Justice Rehnquist, Justices White and O'Connor, former Justice Powell and himself.

78. 444 U.S. 164, 176 (1979).

79. 458 U.S. 419, 433 (1982).

80. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 310 (1987).

81. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 828 (1987).

82. 480 U.S. 470 (1987).

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

84. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 n.25 (1978).

stone demonstrated that it is nearly impossible to justify finding a taking without such a transfer. In *Keystone*, the Court upheld a Pennsylvania statute that required mining companies to leave in the ground an amount of coal necessary to provide adequate support for various surface activities. The dissenters asserted with some justification that a similar statute, Pennsylvania's Kohler Act, had been declared unconstitutional in *Pennsylvania Coal Co. v. Mahon*⁸⁵ and characterized the majority opinion, in a neat turn of phrase, as an effort to "undermine the authority of Justice Holmes' opinion,"⁸⁶ one which has been periodically praised as an act of genius.⁸⁷ In *Pennsylvania Coal*, Holmes crafted possibly the most famous phrase concerning what have come to be called regulatory takings: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."⁸⁸ In truth, the majority opinion in *Keystone* illustrates that modern land use regulation proceeds on a basis qualitatively more sophisticated than the statute that Holmes declared unconstitutional sixty-five years ago in *Pennsylvania Coal*. Holmes assumed that the Kohler Act rendered the mining of certain coal commercially impractical. Acknowledging that such a regulation would be constitutional if it were enacted for the benefit of employees in the mine,⁸⁹ Holmes observed that no such justification was apparent for the Kohler Act. Indeed, he said, the homeowner plaintiffs had specifically bargained away their rights to surface support and the Act seemed designed only to set aside the bargain. It did not regulate land on which the surface and the coal were owned by the same person.

The statute upheld in *Keystone* provided answers to the very defects cited by Holmes. The Pennsylvania legislature enunciated at some length the general public objective of the Act in terms that were independent of the benefit to individual property owners: conservation of surface land for protection of public safety, preservation of surface water drainage and public water supplies, enhancement of land value for taxation purposes, and improvement of "the use and enjoyment of such lands."⁹⁰ The Act did not single out for exemption the coal surface owners⁹¹ and thus did not seem like legislation designed largely to set aside previously negotiated private contracts.

During the 1970's and 1980's, those defending private property rights against public regulation have lost regularly on takings claims unless they

85. 260 U.S. 393 (1922).

86. 480 U.S. at 507 (Rehnquist, C.J., dissenting).

87. Strong, *On Placing Property Due Process Center Stage in Takings Jurisprudence*, 49 OHIO ST. L.J. 591, 591 (1988).

88. 260 U.S. at 415.

89. *Id.* (citing *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914)).

90. *Keystone Coal*, 480 U.S. at 485-86.

91. *Id.* at 486.

could show physical invasion. To be sure, state action such as rezoning a private park to make it open to the entire world is still recognized as a taking.⁹² Where the state action merely restricts use in some way, however, there is no taking.⁹³ Both state and federal courts have rejected landowners' takings claims in a wide variety of regulatory settings, from sign controls⁹⁴ to building limitations intended to promote the view of mountains.⁹⁵ Courts have insisted that landowners who plan to renovate historic structures seek permission to make any changes from the historic preservation commission,⁹⁶ and have affirmed preservation commission orders to replace deteriorating architectural features rather than remove them.⁹⁷

Indeed, even after the 1987 trilogy, courts have continued to uphold land use regulations against takings claims. Landowners who challenge disapproval of development plans,⁹⁸ denial of demolition requests in historic districts,⁹⁹ and refusal to approve modifications to historic structures¹⁰⁰ continue to lose. Even those who present fourteenth amendment claims based on freedom of speech¹⁰¹ and equal protection¹⁰² do not prevail. Finally, the First English Evangelical Lutheran Church itself lost; the California Court of Appeal held on remand that the temporary building

92. *Fred F. French Investing Co. v. City of New York*, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *cert. denied*, 429 U.S. 990 (1976). This park really would have been open to the world; it was part of Tudor City, across the street from the United Nations.

93. *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

94. *Major Media of the Southeast, Inc. v. City of Raleigh*, 792 F.2d 1269 (4th Cir. 1986) (requiring billboard removal five and one-half years after adoption of ordinance upheld even absent proof that investment could be recovered), *cert. denied*, 479 U.S. 1102 (1987). *See also* *Corey Outdoor Advertising, Inc. v. Board of Zoning Adjustments*, 254 Ga. 221, 327 S.E.2d 178 (permit wrongly issued in violation of preservation ordinance may be withdrawn without causing a taking), *appeal dismissed*, 474 U.S. 802 (1985).

95. *Landmark Land Co. v. City of Denver*, 728 P.2d 1281, 1287 (Colo. 1986) ("it must be shown that the 'ordinance precludes use of [the] property for any reasonable purpose.'"), *appeal dismissed sub nom. Harsh Inv. Corp. v. City of Denver*, 483 U.S. 1001 (1987).

96. *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 496 N.E.2d 183, 505 N.Y.S.2d 24, *cert. denied*, 479 U.S. 985 (1986).

97. *Buttnick v. City of Seattle*, 105 Wash. 2d 857, 719 P.2d 93 (1986).

98. *Herrington v. Sonoma County*, 834 F.2d 1488 (9th Cir. 1988).

99. *Lubelle v. Rochester Preservation Bd.*, No. 3481/85 (N.Y. Sup. Ct. Monroe County June 14, 1988), *aff'd sub nom. Lubelle v. City of Rochester*, 145 A.D.2d 954, 536 N.Y.S.2d 325 (App. Div. 1988).

100. *Parker v. Beacon Hill Architectural Comm'n*, No. 80370 (N.Y. Sup. Ct. Suffolk County June 21, 1988).

101. *Students Against Apartheid v. O'Neil*, 671 F. Supp. 1105 (W.D. Va. 1987), *aff'd*, 838 F.2d 735 (4th Cir. 1988).

102. *First Nat'l Bank of Highland Park v. Village of Schaumburg*, 6 P.L.R. 3048, 1987 U.S. Dist. LEXIS 8643 (N.D. Ill. 1987).

moratorium imposed by Los Angeles County did not constitute a taking.¹⁰³ Analyzing cases such as these under the concept of takings leaves landowners who cannot demonstrate physical invasion of their property without recourse against overreaching government regulation.

While land use regulators enjoy a good track record in the courts, their work suffers because courts have been unable to develop a reliable definition of a taking, a quest sometimes called the lawyer's equivalent of the physicist's hunt for the quark.¹⁰⁴ Planners' efforts to forge new solutions for the problems of modern society proceed in fear that a court will at some later date declare the regulation to be a taking.¹⁰⁵ One study showed that most land use planners would be reluctant to close a sand and gravel mine that threatened public health and safety because of the risk the municipality would have to pay compensation, even though the courts had previously ruled that such action did not constitute a taking.¹⁰⁶

The interesting means-ends nexus test formulated by Justice Scalia in *Nollan*¹⁰⁷ offers little comfort to either landowners or regulators. Justice Scalia began by stating a rather traditional test: "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land'"¹⁰⁸ Instead of focusing on the second part of the test as the Court has usually done, however, Justice Scalia resolved the case largely by declaring unacceptable the state government's judgment that its regulation advanced the interest it was attempting to advance. A judiciary willing to set aside such judgments effects a direct reduction in the ability of the people's elected representatives to exercise discretion in governing.¹⁰⁹ Inasmuch as Scalia went on to list several legitimate state interests, such as

103. *First English Evangelical Church v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1371, 258 Cal. Rptr. 893, 907 (1989).

104. C. HAAR, *LAND-USE PLANNING* 766 (3d ed. 1976), *quoted in* *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 n.17 (1985).

105. *The Supreme Court 1986 Term — Leading Cases*, 101 HARV. L. REV. 119, 246 (1987).

106. Sallet, *The Problem of Municipal Liability for Zoning and Land-Use Regulations*, 31 CATH. U.L. REV. 465, 478 (1982).

107. 483 U.S. 825, 834-35 (1987).

108. *Id.* at 834 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

109. One commentator wrote:

The *Nollan* decision . . . indicates that all regulations will now be subjected to a level of scrutiny far higher than the Court previously has used in assessing claims of regulatory takings. Since the landmark case of *Pennsylvania Coal Co. v. Mahon*, the Court's analysis of whether a regulation constitutes a taking has centered on the extent to which the regulation diminishes the value of property rights. The *Nollan* Court shifted the focus of that analysis from diminution of value to the relationship between the regulation and its goal.

scenic zoning, landmark preservation, and residential zoning, it is clear that the *Nollan* majority faulted only the state's judgment concerning the effectiveness of the remedy chosen by the democratic branches of the government. It seems unlikely that this level of scrutiny can achieve a working majority in a conservative Court committed to deference to the political branches of government.¹¹⁰ Had the state decided to condemn the same access across the Nollans' land and pay for it, it is difficult to imagine the present Court setting aside California's judgment that its actions were insufficiently tailored to advance "substantially" a legitimate state interest.

The basis for some light at the end of this judicial tunnel may be found in the agreement between Justices Scalia and Brennan on the idea that takings and due process challenges are inherently different. In a footnote, Justice Scalia stated:

[T]here is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal

The Supreme Court 1986 Term — Leading Cases, *supra* note 105, at 247-48 (footnotes omitted). Two other commentators noted:

[Justice Scalia] implies that the Court, in the future, will more carefully scrutinize governmental conditions, particularly where they require a landowner to provide property for the use of the public.

This analysis is reminiscent of the strict judicial scrutiny doctrine developed by the Warren Court in its application of the equal protection clause to strike down governmental regulations and laws which were racially suspect or which imposed limitations on a citizen's ability to vote.

Falik & Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359, 390-91 (1988) (footnotes omitted).

110. The more representative view was announced for a unanimous Court by Justice O'Connor:

The "public use" requirement is . . . coterminous with the scope of a sovereign's police powers.

There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. . . . [However,] the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use "unless the use be palpably without reasonable foundation."

Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 240-41 (1984) (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)). She continued, "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts." *Id.* at 242-43.

protection challenges, and First Amendment challenges are identical.¹¹¹

Justice Brennan agreed with Justice Scalia's observation that challenges founded on specific constitutional provisions required the application of different standards.¹¹² On the other hand, he assaulted Justice Scalia's test for analyzing the rationality of state action: "Such a narrow conception of rationality . . . has long since been discredited as a judicial arrogation of legislative authority."¹¹³

Justice Brennan offered a different view of the standard: "It is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State '*could rationally have decided*' that the measure adopted might achieve the State's objective."¹¹⁴ Although the case Justice Brennan relied on for this standard, *Minnesota v. Clover Leaf Creamery Co.*,¹¹⁵ was an equal protection case, he also offered *Goldblatt v. Hempstead*¹¹⁶ and two other due process cases¹¹⁷ in support of a more deferential review of the threshold issue of rationality.

Justice Scalia's use of a stringent "rationality-plus" test led to a proper result in *Nollan*, but the test stood on chronically weak ground. The continued effort to rely chiefly on fifth amendment takings language as the analytical framework for challenges to government regulation is a losing battle to push a square peg into a round hole. The inadequacy of the historical foundation for such an endeavor and the difficulty of establishing a bright line leave the Court open to the criticism that its real objective is the exaltation of private property rights.¹¹⁸ Use of the takings clause as a way of challenging

111. *Nollan*, 483 U.S. at 835 n.3.

112. *Id.* at 843-44 n.1 (Brennan, J., dissenting).

113. *Id.* at 846.

114. *Id.* at 843 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)).

115. 449 U.S. 456 (1981).

116. 369 U.S. 590 (1962).

117. Justice Brennan directed the reader to these cases and the language that follows: *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it"); *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952) ("Our recent decisions make it plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. . . . [S]tate legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare").

Nollan, 483 U.S. at 843 n.1 (Brennan, J., dissenting).

118. Fiss & Krauthammer, *The Rehnquist Court*, THE NEW REPUBLIC, Mar. 10, 1982, at 14, 21. Some do not see this as a basis for criticism. Editorial, *Surf's Up for Property Rights*, Wall St. J., July 3, 1987, at 12, col. 1.

government regulation that does not involve physical occupation has almost never been successful¹¹⁹ and should simply be abandoned. The Court should instead focus on the precedents available in due process jurisprudence. These long-standing rules recognize that "it is not only the right but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends" ¹²⁰ On the other hand, it also holds that such legislation or regulation violates the property or liberty rights of private parties when it is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."¹²¹ The Court reaffirmed this definition of the due process right against oppressive regulation as recently as 1988.¹²² Even these relatively modest fourteenth amendment due process standards that the Court has adopted may offer a more hospitable set of rules for those who challenge land use restrictions. The availability of the Civil Rights Act,¹²³ whose protection after all was the constitutional purpose of the fourteenth amendment, offers landowners a wide range of remedies.¹²⁴

More important to the common good, use of fourteenth amendment due process leaves decisions about regulation of the local environment largely in the hands of officials elected for this purpose and deters judicial intervention. Judges are not particularly adept at environmental regulation, although they do have some expertise in assuring fundamental fairness. Justice Stevens described this division of responsibility well:

The Due Process Clause of the Fourteenth Amendment requires a State to employ fair procedures in the administration and enforcement of all kinds of regulations. It does not, however, impose the utopian requirement that enforcement action may not impose any cost upon the citizen unless the government's position is completely vindicated. We must presume that regulatory bodies such as zoning boards, school boards, and health boards, generally make

119. The list that Justice Stevens provided in *Keystone* is compelling. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 489 n.18 (1987).

120. *New York v. Miln*, 36 U.S. (11 Pet.) 102, 139 (1837).

121. *Nebbia v. New York*, 291 U.S. 502, 539 (1934).

122. *Pennell v. San Jose*, 485 U.S. 1 (1988).

123. 42 U.S.C. § 1983 (1982).

124. Since 1978, litigants have had the authority to use 42 U.S.C. § 1983 to sue local governments. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978). Property owners previously forced to rely on the incorporated fifth amendment should now seek compensation for a due process violation under the fourteenth amendment. See Carlisle, *The Section 1983 Land Use Case: Justice Stevens and the Hunt for the Taking Quark*, 16 STETSON L. REV. 565 (1987).

a good-faith effort to advance the public interest when they are performing their official duties. . . . [A]s long as fair procedures are followed, I do not believe there is any basis in the Constitution for characterizing the inevitable by-product of every such dispute as a "taking" of private property.¹²⁵

This division of responsibility and the judicial deference inherent in it is an affirmation of the decision reached by the framers of both the fifth and the fourteenth amendments. Justice Louis Brandeis described this division as one of the goals of federalism:

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles.¹²⁶

State courts have already shown the way toward a more coherent jurisprudence than the ad hoc labelling involved in the quest to define a taking. This jurisprudence is based on due process and centers around the concept of "deprivations" of property,¹²⁷ a term which may in fact offer landowners a somewhat wider zone of protection than the one provided by uncertain attempts to prove a "taking." This analytical effort continues even after the 1987 trilogy, in highly elegant and sophisticated ways.¹²⁸ Revisiting due process on the federal level would stand on the same foundation that Justice Harlan envisioned in the seminal case, *Chicago, Burlington & Quincy Railroad Co. v. Chicago*.¹²⁹ When the state condemns a citizen's land, he said, then it deprives him of property without due process unless it pays him for the value of it. That conclusion was consistent with Justice Harlan's conclusion ten years earlier in *Mugler v. Kansas* that the fourteenth amendment provides a different test for mere regulation:

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 just sense, be deemed a taking or an appropriation of property for the public

125. *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 205 (1988) (Stevens, J., concurring).

126. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting).

127. *See 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, *cert. denied*, 429 U.S. 990 (1976); *see also Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

128. *See, e.g., Orion Corp. v. State*, 109 Wash. 2d 621, 747 P.2d 1062 (1987), *cert. denied*, 108 S. Ct. 1996 (1988).

129. 166 U.S. 226 (1897).

benefit Nor can legislation of that character come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law.¹³⁰

This separate set of standards for condemnation of land and economic regulation became the precedential foundation for Supreme Court directives concerning state action in this field. It is still the best jurisprudence available.

After spending most of this century trying to define a taking, and failing, the Court would benefit one and all by turning its attention to due process. Landowners might actually prevail more often over unwarranted restrictions on land use. State and local governments might feel freer to regulate the orderly growth of modern society, and judges might face less often the temptation to assume the same duties. It would be a fine agenda for a conservative court.

130. *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887).

