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A. Dan Tarlock
IIT Chicago-Kent College of Law

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REGULATORY TAKINGS*

A. DAN TARLOCK**

The subject of this article is the *prima facie* case for judicial invalidation of the exercise of state or local land use authority because it is a taking of private property without due process of law. First, the historical evolution of the constitutional standards for determining whether the application of a zoning ordinance is invalid is traced through four stages from *Village of Euclid v. Ambler Realty Co.*¹ to the present. Second, the influence of academic commentators in defining what is a taking is explained in light of the Supreme Court's inability to develop a coherent taking jurisprudence. Third, two cases—one federal and one state—will be analyzed in depth to show the influence of the tests. The first, naturally, is *Penn Central Transportation Co. v. City of New York*.² *Penn Central* contains all of the conventional judicial wisdom about what constitutes a taking. *Penn Central* is then contrasted with a recent Illinois Supreme Court case, *Harris Trust & Savings Bank v. Duggan*.³ *Duggan* involves almost the same issue as *Penn Central* but reaches the opposite result.

The question “what is a taking?” can be more accurately stated as “when is the exercise of the police power invalid?” Commentators persist in analyzing the issue in traditional real property concepts, but such an effort is too narrow in an era of pervasive government regulation.⁴ All exercises of the police power must be tested by constitutional standards. Until the recent explosion of new constitutional theories of zon-

* This article is an edited version of a talk presented at the land use continuing education program “What you don't know about Zoning can Hurt You!” held at IIT/Chicago-Kent College of Law.

** Professor of Law, IIT/Chicago-Kent College of Law. A.B., L.L.B., Stanford University.

1. 272 U.S. 365 (1926).

2. 438 U.S. 104 (1978), *reh'g denied*, 439 U.S. 883 (1978). The court subsequently decided two other land use cases, but has avoided reaching the merits. See *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980). See also *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, (1980).

3. 105 Ill. App. 3d 839, 435 N.E.2d 130 (1981), *aff'd*, 95 Ill. 2d 516, 449 N.E.2d 69 (1983).

4. A distinction has recently been drawn between invalid exercises of the police power and de facto condemnations for purposes of deciding whether traditional equitable remedies are adequate or whether money damages should be awarded. Professor Freilich has argued that eminent domain “involves the acquisition of possessory or legal rights in property because of its need for the public use while the latter involves the public regulation of property to prevent the use thereof in a manner that is detrimental to the public interest.” Freilich, *Solving the “Taking” Equation: Making the Whole Equal the Sum of Its Parts*, 15 URB. LAW 447, 461 (1983). This is a false distinction, see *infra* note 12, and contributes nothing to the damages versus injunction debate.

ing litigation, the Fifth and Fourteenth Amendments were the most fruitful constitutional challenges to the exercise of the police power. The open-ended standards contained in these clauses allowed the courts to invalidate zoning ordinances for a variety of vague and inconsistent reasons. But, courts were unsuccessful in articulating a coherent theory of constitutional review of zoning ordinances because constitutional challenges to the exercise of the police power force the courts to answer a question that is at the center of modern political discourse—what are the proper and improper purposes of public action?

A. THE EVOLUTION OF JUDICIAL REVIEW OF ZONING FROM *EUCLID* TO THE PRESENT

When zoning was proposed between 1909-1920, the major issue was whether it would be found to be constitutional. The great case of *Village of Euclid v. Ambler Realty Co.*⁵ answered the question: is a comprehensive zoning ordinance constitutional? After reargument, the Court held that “reasonable” comprehensive ordinances are presumptively constitutional.⁶ Two years later, the Supreme Court introduced the second phase of the constitutional law of zoning. *Nectow v. City of Cambridge*⁷ held that a zoning ordinance can be a taking if it is unreasonably applied to a specific tract. Illinois is still basically in the *Nectow* phase. These two phases, *Euclid* and *Nectow*, were the constitutional law of zoning well into the late 60’s and early 70’s. Most state zoning law took its cue from these two cases, and lawyers had to try and decide when one or the other applied.

In the 1970’s there was an attempt to constitutionalize radically the law of zoning around the notion that much local zoning discriminated on the basis of race and wealth.⁸ Out of this effort came an attempt to change zoning from a state to a federal law based on theories of expanded application of constitutional scrutiny. This third stage by and large existed more in theory than in practice except in a few mid-Atlantic states. The Supreme Court and lower courts did not enthusiastically accept the invitation to become local zoning bodies and local planning commissions, except where there was proof of intentional racial dis-

5. 272 U.S. 365 (1926).

6. *Id.* The events leading up to the Supreme Court’s decision in *Euclid* are briefly described in Tarlock, *Euclid Revisited*, 34 LAND USE L. & ZONING DIG. 4 (1982). The standard history of the decision is S. TOLL, ZONED AMERICA (1969).

7. 277 U.S. 183 (1928).

8. See R. ELLICKSON & D. TARLOCK, LAND USE CONTROLS 795-835 (1981).

crimination.⁹ Recently, a fourth phase of constitutional zoning law has emerged. This phase has been marked by the application of three different kinds of principles to zoning decisions. First, constitutional principles such as the First Amendment, that were once not thought to be applicable or very applicable, have been applied to local zoning decisions. Second, Section 1983 of the Civil Rights Act of 1871¹⁰ has been applied to the local zoning process. Third, new non-constitutional statutes are applied to the zoning process. The recent application of anti-trust law to zoning is the most striking illustration. The breadth of this last phase can be illustrated by contrasting it to the law of judicial review of zoning ordinances in Illinois. The contrast shows the potentially new lines of attack not available under traditional law.

The Illinois law is a fairly straightforward example of substantive due process administered by the courts. The Illinois courts have always looked to five factors to determine whether a zoning ordinance is constitutional.¹¹ These are: (1) the character of the neighborhood, (2) the use to which nearby property is put, (3) the extent to which property values are diminished by the ordinance, (4) the gain to the public, (5) as compared to the hardship to the individual.¹² The so-called *LaSalle Bank* factors are straight substantive due process because the courts use judicial review of zoning ordinances to second guess the planning and zoning job done by the municipality. Basically, Illinois law allows cities in the early stages of development to have some say in how the city is developed, but as more development occurs it becomes harder to make regulatory decisions that buck the market.

Although Illinois is widely perceived as an anti-regulatory state, a recent statistical analysis of the rate of reversal of Illinois zoning cases compared to those of surrounding states found that "Illinois courts are not invalidating zoning ordinances at an unusually high rate."¹³ Recent appellate cases bear out the impression that the courts are becoming more sympathetic to land use regulation justified by plans or other evidence that the city has some valid land use objective in mind.¹⁴ As the *LaSalle Bank* test softens, the significance of new avenues of chal-

9. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1978).

10. 42 U.S.C. § 1983 (1976).

11. *LaSalle National Bank v. City of Chicago*, 5 Ill. 2d 344, 125 N.E.2d 609 (1955). *See also LaSalle National Bank v. City of Evanston*, 57 Ill. 2d 415, 312 N.E.2d 625 (1974).

12. *Id.* at 613.

13. Goldenberg, *Illinois Courts on Zoning: Today, Are They Really That Different?* (1983) (Unpublished paper on file with the CHI. KENT. L. REV.).

14. *See, e.g.*, *Forstview Homeowners Ass'n. v. County of Cook*, 18 Ill. App. 3d 230, 309 N.E.2d 763 (1974); *First National Bank of Highland Park v. Village of Vernon Hills*, 55 Ill. App.

lence increases. The use of the First Amendment to attack billboard and amenity regulations of Section 1983 to obtain damages as opposed to an injunction voiding the existing zoning, and of the anti-trust laws to allege a municipal-developer conspiracy to use zoning to restrict competition offer opportunities for litigation beyond *LaSalle Bank*.

Current Supreme Court doctrine attempts to isolate those instances where government regulation places excessive burdens on an individual's enjoyment of his property. The court currently distinguishes between physical and non-physical regulatory invasions. *Loretto v. Teleprompter Manhattan CATV Corp.*¹⁵ invalidated an administrative decision taken pursuant to a New York statute that required apartment owners to permit the installation of CATV wires in return for a \$1.00 fee fixed by a state commission. The New York Court of Appeals upheld the constitutionality of the "easement" fee, relying on *Fred F. French Investing Co., Inc. v. City of New York*¹⁶ and *Penn Central Transportation Co. v. City of New York*.¹⁷ The Supreme Court reversed in a 6-3 decision. A permanent physical occupation is a taking regardless of an offsetting public interest.¹⁸ Although the Court now applies a *per se* rule for physical invasions, an *ad hoc* balancing test applies to "regulatory" takings.

For "regulatory" takings the basic allegation is that the zoning deprives one of the ability to use profitably his property and, therefore, violates the Fifth and Fourteenth Amendments of the federal constitutional and analogous state constitutional amendments. This straightforward challenge has two advantages, one procedural and one substantive. In Illinois it has a major procedural advantage because Illinois is one of the few states that has a well-developed requirement of exhaustion of administrative remedies, and in many cases an allega-

3d 985, 371 N.E.2d 659 (1977); and *Wilson v. County of McHenry*, 92 Ill. App. 3d 997, 416 N.E.2d 426 (1981).

15. 102 S. Ct. 3164 (1982). See *Morgan, Recent Supreme Court Decisions: Implications for the Taking Issue*, 35 LAND USE L. ZONING DIG. 4 (1983). *Loretto* has been criticized by Professor Costonis because it gives undue weight to one factor in deciding whether there has been a taking. Costonis, *Presumptive and Per Se Takings: A Decisional Model For the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983). Professor Stoebuck has recently argued that the cases where non-trespassory takings have been found can be explained as the forced transfers of either affirmative or negative easements. Stoebuck, *Police Power, Takings, and Due Process*, 37 WASH. & LEE L. REV. 1057 (1980). Since all police power regulations can be characterized as the public's acquisition of a property interest, Professor Stoebuck's line between taking and regulation does not hold. See Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUT. L. REV. 243, 250-251 (1982).

16. 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

17. 438 U.S. 104 (1978).

18. 102 S. Ct. 3164 (1982).

tion that a zoning ordinance is unconstitutional in its entirety will allow one to avoid exhaustion.¹⁹ The substantive advantage of the allegation is that it allows in a great deal of evidence that permits the court to second-guess the decision that was made by planners and the local zoning authorities. The *prima facie* taking case alleges that no matter how wonderful, how thoughtful, how elegant the zoning is as applied to a specific piece of property, it is unconstitutional because it shrinks too much value from the property and thus substantive due process requires relief to the landowner. Traditionally, relief was restricted to an injunction that often allowed the city to play games by responding with minor changes in the invalid ordinance.²⁰ Today, the possibilities of the damages and specific relief require more sophisticated municipal responses to an invalidation.

What does it mean to say that too much value is shrunk from the property? There is no general answer to this question except to litigate it parcel by parcel and see what a court holds. There are at least three definitions of too much, and these are the definitions around which the evidence of taking is always organized. The first is that a zoning ordinance is unconstitutional because it does not allow the highest and best use of property as defined by appraisers.²¹ The second definition mixes, as most zoning cases do, substantive due process with equal protection claims.²² This approach compares the use allowed for a particular property under the zoning ordinance with the use allowed from similarly situated properties and argues that the similarity with the nearby properties represents an irrational allocation of uses in the area. A third definition, which is applicable to many down zoning cases, is a "before and after" comparison. Cities only used to zone up but now cities are revising their expectations downward, as is everyone else, and are engaging in down zoning, which tends to reduce the development potential of affected property.

If the numbers and visuals are good on any of these three allegations, the land owner will have made a strong case for judicial relief unless the city can interpose an equally strong defense of the zoning ordinance. A city basically has two rejoinders to the *prima facie* case. The first is "we only stubbed your toe as opposed to cut it off." That is, you're not as bad off as you claim because under the existing zoning

19. *Northwestern Univ. v. City of Evanston*, 74 Ill. 2d 80, 383 N.E.2d 964 (1978); and *Bright v. City of Evanston*, 10 Ill. 2d 178, 139 N.E.2d 270 (1956).

20. See R. ELICKSON & D. TARLOCK, *LAND USE CONTROLS*, 151-152 (1981).

21. *Id.* at 134.

22. *Id.* at 100-107.

ordinance the property can be profitably developed. The second defense is "so we did cut off your toe, we had a right to do this in the greater public interest." The first defense is simply a battle of appraisers, and the court must decide whose appraisers are better. The second issue is the most difficult issue because the city concedes that the value of the property was lowered compared to the value that can be obtained through development, but it claims that that impairment was privileged.

B. THE ACADEMIC DEBATE OVER WHAT CONSTITUTES A TAKING

Ultimately deciding what constitutes a privileged impairment of property takes one to the core of political theory that attempts to rationalize the modern state with the notion of individual dignity. There are three basic propositions that help in some small way to define and limit this judicial task. Proposition one is that there is no law of what constitutes taking.²³ The Supreme Court admitted this vacuum in *Penn Central*. Justice Brennan, writing for the majority, said that the Supreme Court had been unable to develop any "set formula" for determining when justice and fairness requires that economic injuries caused by public action be compensated by the Government. . .,"²⁴ and his opinion proves the point. Proposition two is that over the years various academic commentators have attempted to do what the Supreme Court has been unable to do. They have tried to develop, if not a set formula, standards for distinguishing between good and bad regulations. These theories are not only of academic interest; the courts have been forced to turn to academic commentators because of the intellectual bankruptcy of the judicial doctrines used by the courts, although the results reached by the cases are often rational and defensible. These theories now control the taking debate. The third proposition is that taking doctrine has evolved through four stages and only recently has the issue become important as the scope of land use regulation has intensified. The relatively recent emergence of the taking issues as an important constitutional law problem further explains the inadequacies of the Court's several attempts to develop coherent doctrine.

In the early stages of our country, takings were not an issue. There was too little government activity, too much land for anybody to worry

23. See Girard, *Constitutional Takings Clauses and the Regulation of Private Property: Part I*, 34 LAND USE L. ZONING DIG. 4, 607 (1982).

24. 438 U.S. at 124.

about government acquisition, and thus there were few cases litigating the issue.²⁵ The second phase, which some people like and others do not, developed a very simple theory of a taking. If the government impaired your title or occupied your land, they took something. For example, a reservoir that flooded your land without your permission imposed an easement over your fee title and thus was a taking. The title theory was applied in *Mugler v. Kansas*.²⁶ Kansas was one of the first states to enact prohibition, and it shut down a brewery. The brewery argued that its property had been taken. In effect, the Supreme Court said “you still own the brewery, you just can’t use it to manufacture beer.” Thus, there was no taking, merely a regulation of use. The third stage is Justice Holmes’ opinion in *Pennsylvania Coal Co. v. Mahon*²⁷ which introduced two core concepts that are still very much with us today and that people are still trying to figure out how to apply. First, Holmes rejected the *Mugler* distinction between a taking as an interference with title and an exercise of the police power. He collapsed the distinction and held that regulation alone could constitute a taking if it went too far. This is the law today. If regulation shrinks too much value, it may be a taking even though there is no title interference. Justice Holmes also introduced and sanctioned balancing the loss to the individual against the public gain from the ordinance. Courts are addicted to balancing, especially in Illinois.²⁸ The last stage, *Penn Central*, grew out of an attempt by the New York City landmark commission to block the development of an office tower over Grand Central Station because the station was a landmark and the proposed designs would be inconsistent with the preservation of the visual impact of the landmark. The case attempts to restate the law of taking by going somewhat beyond the balancing test and recasting it in terms of the various tests that academic commentators had suggested.

All the academic tests have the one common feature. They try to avoid an “either/or” impasse by looking at the purposes of the regulation and drawing distinctions between permissible and impermissible purposes.

Commentators have proposed four basic tests. The first two describe Supreme Court results, but the second two try to articulate more

25. See F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE 105-123 (1973). In the nineteenth century the chief users of eminent domain were private transportation companies. See Freyer, *Reassessing the Impact of Eminent Domain in Early American Economic Development*, 1981 WIS. L. REV. 1263.

26. 123 U.S. 623 (1887).

27. 260 U.S. 393 (1922).

28. See *LaSalle National Bank v. City of Chicago*, 5 Ill. 2d 344, 125 N.E.2d 609 (1955).

general philosophical principles. The first test is the physical invasion test.²⁹ This test antedates the Federal Tort Claims Act.³⁰ The Court had to find a theory to allow suits against the government for those injured by physical invasions, such as flooding, and nearby government activities that amounted to a common law nuisance. Not every physical invasion is a fully compensable taking, as the navigation servitude cases illustrate.³¹

The second and broader test, a balancing test, compares the loss to the individual against the gain to the government. This test is unfair, as many have pointed out, because public welfare must be void of any individual losses.³² Any test that allows individual losses to be discounted will result in a distorted welfare calculus. Efforts to build better mousetraps have centered around two related tests.

The third test, which I call the "Chicago test," distinguishes between regulation where there is and is not an expectation of compensation. A basic distinction between harm prevention and public benefits extraction is drawn. The test was first formulated by the first great law professor of municipal government law, Ernest Freund³³ and was refined by Professor Allison Dunham in the late 50's and by Professor Robert Ellickson in the 1970's. Courts are asked to distinguish between public action directed at nuisance prevention and that directed toward the affirmative provision of benefits for the public.³⁴ The theory is that it is proper for a city to regulate land uses to prevent nuisances because the common law has long put people on notice that no one has a right to maintain a nuisance. However, it is not proper to require someone to dedicate his property to the general welfare of the community. In *Penn Central*, Justice Brennan acknowledged this test at two points. First, he characterized the purpose of the taking doctrine as the invalidation of regulations that unfairly require one individual to bear burdens that are usually financed through taxation or other general revenue-raising measures. Second, Justice Brennan stated that "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to

29. *Washington Market Enterprises Inc., v. City of Trenton*, 58 N.J. 107, 343 A.2d 408 (1975).

30. 28 U.S.C. §§ 2671-2680 and widely scattered sections.

31. *See, e.g., United States v. Rands*, 389 U.S. 121 (1967).

32. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

33. E. FREUND, *THE POLICE POWER* 546-547 (1904).

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

constitute 'takings'."³⁵

Professor Dunham's harm-benefit test was subsequently refined by Professor Joseph Sax to distinguish between the arbitration and enterprise functions of government.³⁶ Professor Sax argued that when a government arbitrates among landowners to try to prevent one from harming the other it performs a common law – based function and no compensation is due. A landowner is on notice of this government function. In contrast, when government acts in an entrepreneurial capacity to acquire resources for the public generally, there is a risk that government will act arbitrarily against isolated individuals. Both the harm-benefit and arbitration-enterprise tests are premised on the distinction between nuisance prevention and welfare promotion. Professor Ellickson again recast the harm-benefit test in 1977.³⁷ He argued that meaning can be given to the harm-benefit distinction because it reflects ordinary landowner expectations about the scope of permitted uses of their property. Thus, a regulation that would be ordinarily characterized as a benefit extraction is presumptively unconstitutional:

A legal doctrine that compels a government to compensate those injured by one of its programs can perform two useful functions. First, it can prevent the cost of a public program from being arbitrarily imposed on one group of individuals but not on another, ethically indistinguishable group. Here the function of the doctrine is horizontal equity — treating like people alike. Second, the doctrine may serve the very different purpose of deterring legislatures from enacting inefficient programs. When municipal officials are able to deflect the costs of a public measure to those who lack the right to vote in municipal elections (or who are vastly outnumbered at the polls), a rule requiring compensation, by shifting the costs back to the electoral majority, may help induce these officials to weigh more accurately the costs and benefits of alternative measures.

The doctrines just proposed have been designed to promote the goals of both horizontal equity and efficiency. The intuitive appeal of the traditional harm-benefit test for takings springs from its protection of horizontal equity. When a legislature enacts a standard of conduct that forces some individuals to confer benefits, it is holding them to a standard that most other persons are not only not forced to meet but are known to fall below.³⁸

35. 438 U.S. at 128.

36. Sax, *Takings and the Police Power*, 74 YALE L. J. 36 (1964). The distinction between arbitration and enterprise functions potentially invalidates a great deal of environmental regulation. Professor Sax seems to have abandoned this distinction in favor of one that validates much more use of the police power. Sax, *Takings, Private Property and Public Rights*, 81 YALE L. J. 149 (1971).

37. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L. J. 385, 418-424 (1977).

38. *Id.* at 420.

The hard question, of course, is whether the distinction is valid. If the purpose of land use regulation is to promote the efficient allocation of resources, what is the difference between preventing harm and compelling a benefit? Both functions are undertaken for the same end. Both equally benefit and prevent harm. As *Penn Central* illustrates, it is often difficult to apply the tests which suggests that the tests are empty or so susceptible to abuse as to be useless. One could describe the purpose of the New York ordinance as the compulsory dedication of a building for the enjoyment of the public generally. Is there a difference between a landmark designation and an ordinance that zones 100 acres of private wood as a public park? The latter is a classic example of the harm prevention-benefit extraction or the arbitration enterprise line between valid and invalid regulation. This example suggests, as Professor Ellickson has argued, that the line between harm and benefit is defensible because it is grounded in widely shared expectations about the risks that a landowner faces from public regulation of his use choices. Justice Rehnquist in his dissent in *Penn Central* made the harm-benefit test the basis of his disagreement with the majority:

Where a relatively few individual buildings, all separated from one another, are singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial—in this case, several million dollars—with no comparable reciprocal benefits. And the cost associated with landmark legislation is likely to be of a completely different order of magnitude than that which results from the imposition of normal zoning restrictions. Unlike the regime affected by the latter, the landowner is not simply prohibited from using his property for certain purposes, while allowed to use it for all other purposes. Under the historic landmark preservation scheme adopted by New York, the property owner is under an affirmative duty to *preserve* his property *as a landmark* at his own expense. To suggest that because traditional zoning results in some limitation of use of the property zoned, the New York City landmark preservation scheme should likewise be upheld, represents the ultimate in treating as alike things which are different.³⁹

The fourth test is a refinement of the traditional diminution in value test. This test was more influential at the state rather than federal level until it was recast in 1975 by Professor John Costonis. He argued that a landowner is constitutionally entitled only to the reasonable beneficial uses of his land.⁴⁰ This test is, in effect, largely a restatement of

39. 438 U.S. at 140.

40. Costonis, *Fair Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021 (1975). The most far reaching, but

the harm-benefit test and is difficult to apply. However, it has considerable appeal because it reflects a public utility approach to regulation that permits all regulations that allowed reasonable return on the landowner's investment. Further, it enables courts to distinguish between past and speculative investments and to protect only the former.

C. FEDERAL AND ILLINOIS LAW CONTRASTED

Penn Central adds an important doctrinal refinement to the balancing test. The first prong of the *prima facie* case is the landowner's allegation of diminution in value-loss. In the majority opinion, Justice Brennan said that the Constitution protects only "distinct investment-backed expectations." This questionable distinction influenced by the Costonis public utility theory, allows a court to distinguish between developed and undeveloped property. The theory must be that speculators are not "real" investors. Why? Apparently because speculators take greater risks compared to those who sink capital in property that existing regulations will be changed. Further, speculators can more easily absorb these losses compared to investors.

If loss is based on distinct investment-backed expectations, what must one lose? Federal law is fairly clear that a city may constitutionally deprive a landowner of the highest and best use of his property.⁴¹ Beyond this baseline, the line between regulation and taking is erratic. *Penn Central's* wrinkle to the "no right to highest and best use rule" is to recast (apparently) the loss rule as a public utility based fair rate of return problem. In the case there is a very important footnote, 34, which states that *Penn Central* conceded that it could obtain a reasonable return from the existing terminal. A showing of no profitable use for the property is the strongest *prima facie* case, and the court had an easy out to the taking claim by saying to *Penn Central* "you didn't suffer a sufficient loss." Beyond this narrow reading of the case, the opinion suggests that the Court may be moving toward a public utility theory where the inquiry is the reasonableness of the rate of return.

The Court's treatment of an interesting but unresolved aspect of the case—the off-setting compensation issue—also suggests adherence to this theory. The city had offered *Penn Central* transferable development rights (TDR's). TDR's allow property owners to sever some of

ultimately unsuccessful, attempt at a general theory of takings is B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977). See also Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971).

41. *Consolidated Rock Products Co. v. City of Los Angeles*, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962).

the development potential site allowable under existing zoning for a site and to transfer them to nearby property. The opinion does not directly decide whether TDR's make an otherwise unconstitutional regulation constitutional. All the Court held was that Penn Central's getting something "was relevant" to the question of what they lost.⁴²

If off-setting benefits are relevant, the question becomes how much? In *Penn Central*, Justice Rehnquist's dissenting opinion argued that the statute was unconstitutional because it imposed a duty on the landowner to benefit the public generally through the preservation of a landmark.⁴³ Justice Brennan responded to this normal application of the harm-benefit test with the incredible statement that not only is there a public benefit to the city of New York from Penn Central maintaining the station, but "we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law."⁴⁴ The fiction of off-setting benefits is indefensible. If taken at face value, it allows any statement of public benefit to count and renders any balancing totally meaningless.

Penn Central is full of incompletely worked out new directions to the taking issue. On the basis of the result and dicta, the case has widely been seen as an almost complete victory for public regulation. Ironically, the case has ended serious interest in transferrable development rights because TDR's are unnecessary for landmark and environmental protection programs after *Penn Central*. However, it is important to understand that there are two relatively narrow explanations of the result. The first is that, despite all the talk about conclusive presumptions of public benefit, the case is a simple no substantial loss case. Penn Central's admission of a reasonable rate of return coupled with the possibility of partial recoupment of the site's value through the sale of TDR's just did not add up to the first prong of the *prima facie* case. Second, there is a procedural explanation. Almost every major Supreme Court taking case turned on a lack of ripeness. From *Euclid* to *San Diego Gas & Electric*, the Court has avoided a detailed analysis of the taking issue by finding that the issue was not ripe for review.

Illinois law uses a more conventional harm-benefit test. The difference is illustrated by *Harris Trust*, which is a replay of *Penn Central*. The case involved an unsuccessful attempt to preserve the three Kellogg mansions in the block of 2900 North Lake Shore Drive. They are

42. 438 U.S. at 137.

43. 438 U.S. at 139-141.

44. 438 U.S. at 134-135.

one of the very last rows of mansions from the era when the elite of Chicago first turned north after their initial southward settlement pattern. The property was zoned R8 in 1961 and down-zoned to R5 in 1979. The estate initially asked for a writ of mandamus for a demolition permit and for a money judgment. The city agreed to issue the demolition permit if the estate dropped the money judgment claim. After this settlement, the case became politicized. Independent alderman Martin Oberman, in whose district the mansions were located, attempted to intervene after a final judgment had been entered.⁴⁵ Shortly after the attempted intervention the city designated the mansion as a landmark.

Ultimately, the issue came down to the constitutionality of the designation. The court concluded that too much value was shrunk from the property. At the trial, a planner testified that the highest and best use of the property was for the previous R8 zoning because of the city's general policy to encourage high density development along the lakefront. The property would yield \$3,200,000 under the R8 versus \$1,780,000 under the R5, although there was the usual contrary evidence that the R5 development would be economically feasible. The Illinois Supreme Court upheld the trial and appellate opinions.⁴⁶ As is often the case, the real basis for the opinion is equal protection because the city intervened too late to protect the mansions.⁴⁷ They were an island of low density in an area of previously allowed high density development. Benefit promotion versus harm prevention results are often equal protection cases because there is no harm to the area from the last increment of higher intensity development. There might be great benefit to the public generally of having a little island of open space there, but that is exactly the type of benefit promotion for which the city should pay.

Although Illinois has a reputation as a pro-developer, anti-municipi-

45. *Harris Trust* also is an important contribution to the law of intervention. The appellate court held that neither an association of apartment owners who reside in an apartment building 18 feet from the property nor the ward's alderman could intervene. The association failed to allege that the value of the apartment building would be decreased and that any of its members would derive a benefit from the preservation of mansions different from the public generally. *Sierra Club v. Morton*, 405 U.S. 727 (1972), was cited. Alderman Oberman likewise could not intervene because he failed to establish a personal interest, *Harris*, 105 Ill. App. 3d at 843-844, 435 N.E.2d at 136. His argument that he lost a right as a member of the City Council Finance Committee to hear appeals from the denial of demolition permits for landmarks also was rejected because the city in effect complied with procedures for Council participation in the permit process. The Supreme Court affirmed. 95 Ill. 2d 516, 449 N.E.2d 69 (1983).

46. 105 Ill. App. 3d 839, 435 N.E.2d 139 (1981), *aff'd*, 95 Ill. 2d 516, 449 N.E.2d 69 (1983).

47. The court relied in part on *Amdur v. City of Chicago*, 638 F.2d 37 (7th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).

pality state, Illinois courts have become much more hospitable to zoning tied to comprehensive plans. *Harris Trust* suggests that cities have some flexibility to implement more rational zoning plans. Plans provide better evidence of the need for and rationality of the zoning compared with conclusionary statements of local officials that are often post hoc. In *Harris Trust*, the rationale for the zoning was not tied to a plan:

Jerry Jacobson, Deputy Commissioner of Zoning, testified for defendants that the 1979 amendment resulted from a decision by the city, in response to community and aldermanic concern, to downzone various parcels of property within the area in order to reduce density. Rather than adopt a comprehensive zoning amendment, the city downzoned parcels in a piecemeal fashion. The only properties downzoned were those not yet developed to the maximum density permitted by the existing ordinance. Left intact were parcels already developed to the maximum use allowed. Jacobson estimated that nearly 90% of the land in the area had been downzoned in this piecemeal fashion. Stating that his definition of highest and best use was 'one that best serves the needs of the community, and the City itself,' he gave his opinion that the highest and best use of the subject property was R5.⁴⁸

Thus, it was easy for the appellate court to conclude:

the trial court found that the hardship to plaintiff was not justified by any benefit to the public. The downzoning not only precluded plaintiff from a sale of the land but it also substantially reduced the value of its property. While diminution in value alone does not suffice to invalidate an ordinance, it must be shown that the public welfare does not require the restrictions and resulting loss. . . . Testimony as to public benefit was contradictory in the present case. Evidence offered by plaintiff demonstrated that the policy of encouraging R8 development on lake-front property benefited the public. Defendants' evidence revealed that lower density would benefit plaintiff's neighbors. The trial court's determination that the hardship to plaintiff outweighed benefit to the public was not manifestly against the weight of the evidence.⁴⁹

The Supreme Court affirmed, applying the *LaSalle National Bank* test and stressed that, unlike other recent Supreme Court and Seventh Circuit cases, "[t]he down-zoning precluded the negotiated land sale, substantially reduced the value of the property, and impedes (*sic*) Harris' fiduciary responsibilities as to its charitable obligations."⁵⁰

CONCLUSION

No simple formula can fully capture all of the complex distribu-

48. 105 Ill. App. 3d at 848, 435 N.E.2d at 138.

49. *Id.* at 850, 435 N.E.2d at 139.

50. 95 Ill. 2d 516, 449 N.E.2d 69 (1983).

tion issues that arise in taking cases. However, at the present time the harm-benefit test offers the best hope, despite all the difficulties of its application, of making sense out of the cases.

