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"FAIR" COMPENSATION AND THE ACkommodation POWER: ANTIpotes FOR THE TAKING IMPASSE IN LAND USE CONTROVERSES

JOHN J. Costonis*

"Dinah'll miss me very much tonight, I should think." (Dinah was the cat.) . . . "Dinah, my dear! I wish you were down here with me! There are no mice in the air, I'm afraid, but you might catch a bat, and that's very like a mouse, you know. But do cats eat bats, I wonder?" And here Alice began to get rather sleepy, and went on saying to herself, in a dreamy sort of way, "Do cats eat bats? Do cats eat bats?" and sometimes, "Do bats eat cats?" for, you see, as she couldn't answer either question, it didn't much matter which way she put it.

Lewis Carroll1

Present commentary on the taking issue in land use controversies evokes the spectacle of the circus equestrian, feet planted on two charging stallions. Engrossed, the audience ponders what might happen if the stallions abruptly lurch off in opposite directions. Can the rider keep the beasts in tow? Will he tumble to the ground as penalty for his poor horsemanship? Or will he finesse his dilemma by leaping to one or the other of the miscreants?

Like the bedeviled horseman, government stands shakily astride the police and eminent domain powers as it seeks to give direction in land use affairs. Sadly for government, the horseman's treacherous plight is as child's

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For their review and comments on earlier drafts of this article, the author wishes to express his thanks to Dean John Cribbet and Professors Roger Findley, John Nowak and Thomas Morgan—colleagues at the University of Illinois College of Law—to Professors Donald Hagman and Harvey Goldschmid and to Chicago realtor-land economists Jared Shlaes and Robert De Voy. Homage is also due to Messrs. Shlaes and De Voy for their invaluable aid as co-authors in earlier undertakings with the author, see note 168 infra, conceiving of and investigating the feasibility of specific development rights transfer proposals as resource protection tools. The thesis advanced in this article traces to these undertakings and to the patient efforts of Messrs. Shlaes and De Voy to initiate the author into the mysteries of land economics and real estate appraisal. Finally, a special and much-deserved note of thanks is due Diane Zimmerman, Columbia Law Review Articles Editor, for her superb editorial assistance in the preparation of the final version of this article. Errors and distortions in this article, of course, are solely those of the author.

1. L. Carroll, Alice in Wonderland & Through the Looking Glass 4 (Grossett & Dunlap, Inc. ed. 1946).
play compared to its own. The steeds it rides are ill-matched, sharing little sympathy for one another or for their wobbly master. The stakes in mastering them are momentous, reaching ultimately to the very definition of the property concept itself. Yet, despite long-term wrestling with the dilemma, government's legislative and judicial branches seem distant from resolving it. And the commentators too are in discord, one side urging a dramatic leap to the police power and the other to the eminent domain power. They seem able to agree only that something must be done to avoid the otherwise inevitable fall.

Deadlock is the inexorable outcome of the taking issue so portrayed because the legitimate interests of government and of private landowners cannot both be accommodated within this taut framework. The thesis of this article is, therefore, that the framework must be enlarged to introduce a third power, the accommodation power, to fill the void that currently divides the police and eminent domain powers. Within this enlarged framework, the concept of "fair compensation" serves as an intermediary between the police power's absence of compensation and the eminent domain power's requirement of "just compensation."

Fundamental to this thesis is the belief that, by casting the police and eminent domain powers as correlative, the phrase "taking issue" is a misnomer that accords neither with logic, legal doctrine nor sound policy. With rare exception, regulatory measures said to be takings are simply measures which exceed the allowable limits of the police power. Nor does it follow that the cure to this problem lies exclusively in eminent domain, which requires, in most states, that dollar compensation be fixed by a condemnation jury according to a "highest and best use" standard. Instead, government may take one of three paths. Eminent domain is, of course, one solution, but government will seldom opt for it because it is often both fiscally impracticable and too drastic for the modest regulatory purposes at hand. It can retrench to the police power by liberalizing the overly restrictive measure, often at the cost, however, of compromising the measure's intended planning result. Or, under the thesis advanced in this article, it may avoid that result by predicing the measure on the accommodation power and affording the landowner fair compensation. Less demanding than just compensation, fair compensation may be secured by dollars or by some non-dollar but market-worthy alternative; it may bypass the jury trial and other procedural complexities prescribed for eminent domain actions by state statutes and constitutions; and it is not keyed to the restricted parcel's highest and best use.

2. See notes 76-110 and accompanying text, infra, for a discussion of the requirements of "just" compensation.
but to a standard based on a lesser economic return, designated in this article as the Reasonable Beneficial Use standard.

The accommodation power's differences from the two existing powers and its role in public governance generally are best understood not by some abstract definition of its quiddities, but by what it enables government to do better than either of these other powers. From this perspective, I view it as a vehicle for fair compensation, and I advance it only because fair compensation cannot find a predicate in either of the traditional powers, at least as conventionally understood. Were it otherwise, I would have been pleased to avoid the cutting edge of Occam's Razor, which advises against needless multiplication of concepts, and to take the less exposed route of folding fair compensation into one of the existing powers. In fact, an argument can be made that it could find a home in the much enlarged police power of contemporary times. Nonetheless, I have chosen to use the accommodation power label because, in addition to my belief that it is conceptually necessary, it also dramatizes both the inadequacies of current police power/eminent domain doctrine and the fruitlessness of the debate now raging between police power enthusiasts and private market adherents over the future course of land use governance in America.

By breaking the logjam stymying current doctrine and debate, the accommodation power opens the way to a land use system that can effect stringent public governance where necessary while, at the same time, dealing equitably with those landowners who are sharply disadvantaged by that governance. My argument is developed in three sections. The first critiques the viewpoints of commentators who urge undue reliance respectively on either the police or the eminent domain power as the foundation of public land use governance. Extensive consideration is given to both schools in the conviction that their all-or-nothing proclivities best illustrate the underlying tensions that beset compensation jurisprudence today. The second details the unhappy consequences and multiple ironies of that jurisprudence. Singled out for special discussion is the evolution of eminent domain doctrines defining the highest and best use standard as the polestar of just compensation. This development, though intended to protect private rights, has instead all but guaranteed government's recourse to the police power in situations where that power's use not only is unfair but tends overall to defeat the successful implementation of public governance schemes. The third section offers a functional analysis of fair compensation and its accommodation power predicate, addressing both the relationship between that power and the Reasonable Beneficial Use standard and the institutional arrangements that its employment requires.

I. THE POLICE POWER ENTHUSIASTS AND THE PRIVATE MARKeteers: A COMPARISON AND CRITIQUE

A. The Police Power Enthusiasts

"... [A] regulation of the use of land, if reasonably related to a valid public purpose, can never constitute a taking." So write the authors of The Taking Issue in their common drive with other police power enthusiasts to be rid of the irritant of compensation which attends stern land use regulation. The assumption of these authors that any regulation stopping short of actual physical appropriation may be founded exclusively on the police power is a noble sentiment, superficially appealing at a time of widespread despair over the destructive legacy of ill-regulated private development. Regrettably, however, it pays little heed to the fairness or feasibility of achieving sound land management on a wholly uncompensated basis.

The economic consequences of noncompensatory regulation are disdained as a "matter of indifference" or ignored altogether, thereby shunting aside considerations of fairness to private landowners who become forced contributors to the common weal, and to government when its actions create windfalls it cannot recover under existing practices. Positions assumed to be antithetical, moreover, often are not. We are told, for example, that belief in the continued vitality of compensation practice commits one to the "myth" that "the taking clause protects this right of unrestricted land use regardless of its impact on society," or, what may be the same thing, to the view that "ownership of property necessarily implies a government guarantee to profit from it when and as the owner in his sole discretion wishes ... ." Their strawmanship only detracts from the commentators' otherwise thoughtful appreciation of failing governmental leadership in land use affairs and of emerging attitudinal and doctrinal trends that promise to modify the nation's long-standing bias unduly favoring private rights.

Nor do they choose to address the repeated failure of police power-based

4. That less space is devoted in text to a critique of the police power enthusiasts' position than to that of the private marketeers' is not reflective of the writer's assessment of the relative merits of the two positions. Instead, it is explained by his earlier preparation of lengthy critiques of the former, see Costonis, Transferable Development Rights: Perspectives for the Future at 57 passim (ASPO PAS Report No. 304 Mar. 1975); Costonis, Development Rights Transfer: An Exploratory Essay, 83 Yale L.J. 75, 82-85 (1973), as against the absence of an equivalently comprehensive critique by the writer or other commentators of the increasingly influential viewpoint of the private marketeers in land use affairs.
7. TAKING, supra note 5, at 2.
8. Sax, supra note 6, at 169.
9. There is, of course, a range of positions intermediate between those of the police power enthusiasts and of the private marketeers. See generally text accompanying notes 125-30 infra; cf. text accompanying notes 211-29 infra.
controls to tame discordant market forces. The sorry record of the last half-century is plain for those who care to read it. In mockery of well-intentioned police power programs, cherished landmarks fall, prime agricultural land and open space vanish, sprawl compounds, and comprehensive land use plans unravel. Disregarded by police power enthusiasts are stubborn political and administrative obstacles, frequently traceable to market forces, that cannot be dissipated by deft legal argument or by appeal to the intrinsic rightness of proper land management practice.

Wishful thinking also seduces the enthusiasts into overreading land use portents. Much has been written in recent years, for example, about "new moods," "quiet revolutions," and other myth-destroying trends that foretell better days ahead. Only the most obdurate cynic, of course, can doubt that American land use attitudes, institutions and practices are indeed in ferment. But he might properly observe that while the conception of property rights nurtured by William Blackstone, Adam Smith and John Locke is now suspect, no firm consensus has yet crystallized to take its place. The zig-zag fortunes of innovative land use measures in such jurisdictions as New York, Oregon, Vermont and Puerto Rico manifest that the pendulum has not and is not likely to swing over toward a consensus supporting noncompensatory regulation regardless of its economic impacts. Oregon Ex-Governor Tom McCall adverted to the self-defeating tensions that indiscriminate police power programs have generated in these and other jurisdictions when he opined in 1974 that compensatory zoning was the nation's "next great land-related issue."

Also regrettable is the penchant of these advocates for shoehorning the complexities of the compensation question into a single box and then resolving them by sweeping formulae. The Taking Issue quotation that opens this section affords one example. Professor Sax offers another in his proposition that "the only appropriate question in determining whether or not compensation is due is whether an owner is being prohibited from making a use of his land


that has no conflict-creating spill-over effects."\(^{15}\) Despite the finality or elegance of these ukases, they are unlikely to exorcise the taking demon.

Against them must be posed Professor Philbrick's sage observation that "the concept of property never has been, is not, and never can be of definite content."\(^{16}\) Nowhere is this comment more vividly apt than in land use law which is, above all, a law of contexts. Even Procrustes, I suspect, would shrink from confronting with a single measuring rod areas as diverse as growth management resource protection, incentive zoning, aircraft overflight, interim zoning and nonconforming use amortization; and these are only a few of the contexts whose unique features so complicate the compensation question. Nor would he find that yardstick adequate to resolve compensation issues whose outcome in a half-century of litigation has turned upon an entire matrix of variables, each of shifting weight depending upon context and current community values.\(^{17}\)

B. The Private Marketeers

At the opposite pole from the police power advocates are those commentators who repose their faith in the marketplace and not in government as the regulator of land use affairs. As adherents of an economic philosophy associated principally with the University of Chicago, they would compel government to compensate when it regulates all but nuisance-like land uses. But their support for the eminent domain power instead of the police power is only a by-product of their more fundamental conviction that government ought largely to get out of the land use field, a conviction mirrored in Professor Ellickson's argument that "zoning is today out of control and must be severely curtailed if not entirely replaced."\(^{18}\) Building on the work of Bernard Siegan\(^ {19}\) and other private market adherents,\(^ {20}\) Ellickson proposes a substitute founded on the "laissez-faire distribution of property rights," which he defines as "an imaginary legal world where each landowner can choose to pursue any activity within the boundaries of his parcel without fear of liability to his neighbors or governmental sanction."\(^ {21}\) Recognizing that some forms of land use do injure neighboring landowners, he also proposes that these harms be "internalized" to their authors by three devices: first, expanded use of private bargaining

\(^{15}\) Sax, *supra* note 6, at 164.


\(^{20}\) See authorities cited in *Alternatives, supra* note 18, at 682 n.2.

\(^{21}\) Id. at 684.
arrangements in which landowners purchase from their neighbors the right to conduct nuisance uses;\textsuperscript{22} second, revitalization of nuisance law to penalize nuisance-perpetrating freeloaders;\textsuperscript{23} and, third, recognition of a limited role for government in dealing with "pervasive nuisances," (those that are not amenable to resolution by the first two devices).\textsuperscript{24} The pervasive nuisance class is apparently quite limited and includes, in his representative listing, such matters as signs, building heights, overhead utility lines, offstreet parking, and yard, setback and subdivision requirements.\textsuperscript{25} Government’s role would be two-fold. It would administer a system of fines against pervasive nuisances whose degree of "noxiousness" can be objectively plotted.\textsuperscript{26} And it would adopt mandatory regulations akin to conventional zoning measures to bar pervasive nuisances of indeterminate noxiousness.\textsuperscript{27}

The private marketeers’ position is provocative and, in many respects, enlightening. They see clearly what the police power enthusiasts choose to ignore and vice-versa. Foremost among their concerns is public governance’s haphazard economic consequences. Hence, Bernard Siegan’s quote from Mason Gaffney: "When the planning commission and the zoning board flit about sprinkling little golden showers here rather than there, they make millionaires out of some and social reformers of others."\textsuperscript{28} Then too, they highlight the role of compensation in protecting individual liberty\textsuperscript{29} and encouraging rational decision-making by exposing the true costs of collective judgments that impose severe charges on a few or afford benefits unequal to their costs.\textsuperscript{30} Also welcome is their attention to the various private and quasi-private arrangements that contribute to efficient land use patterns while escaping many of zoning’s well-known drawbacks.\textsuperscript{31}

Unfortunately, these valuable insights are all but cancelled out by two grave deficiencies. First is their jaundiced view of the propriety of public governance in appropriate land use contexts. Second—and correlative to the
first—is their indefensibly broad conception of private property rights. These deficiencies are treated in the following two subsections.

1. The Marketplace as a Regulator of Urban Growth. To this observer, the market’s capacity to insure orderly urban growth without a framework of publicly determined goals and incentives is highly problematic. Perhaps the market is superior to zoning in resolving localized conflicts among neighboring landowners. But is it also superior to zoning and other forms of public governance in dealing with larger questions, such as growth management? Professor Ellickson believes so, arguing as follows:

If a particular area becomes too dense, its residents will perceive the disadvantages of this high density and tend to leave; growth controls are thus not needed to protect people from “unlivable” conditions. When conditions are unlivable for many residents, emigration will reduce population densities and tend to establish equilibrium. If California’s attractiveness as a place to live were to diminish because of rapid population growth and the resulting additions to traffic congestion and air pollution, private forces would end net migration to California; population planning is not necessary to accomplish this result.32

But his argument raises more questions than it resolves. Contrary to the assumption that pervades his and Siegan’s work, zoning does not exhaust public governance; it is only one of a variety of planning tools, a point which is implicit in his reference to transportation, pollution and other concomitants of urban growth. Properly framed, the issue shifts to the comparative merits of zoning and other forms of public governance working in conjunction with market forces, versus the unregulated marketplace as the proper determinant of this growth. Again, while zoning is not the whole of public governance, it is certainly more than a nuisance-preventative. True, its field of operation does encompass such matters as compatibility of neighboring uses, yard and setback requirements, building heights and the like. To stop there, however, is to ignore modern zoning potential, either independent of or coordinated with other public governance devices, to deal affirmatively with a broad range of positive concerns that, while hardly categorizable as “nuisances,” do serve health, safety and welfare goals firmly based in evolving community standards.33

These rather obvious facts are passed over because they jibe poorly with a model founding efficient land use control on private bargaining transactions backstopped somewhat—but not too much—by governmental machinery. More than this anachronistic model is needed, however, to deal with urban growth and other non-local planning problems, a point driven home by the California

32. Alternatives, supra note 18, at 769-70.
Supreme Court in recounting the factors that led to the creation of the (Lake) Tahoe Regional Planning Agency.

The water that the Agency is to purify cannot be confined within one county or state; it circulates freely throughout Lake Tahoe. The air which the Agency must preserve from pollution knows no political boundaries. The wildlife which the Agency should protect ranges freely from one local jurisdiction to another. Nor can the population and explosive development which threatens the region be contained by any of the local authorities which govern parts of the Tahoe Basin. Only an agency transcending local boundaries can devise, adopt and put into operation solutions for the problems besetting the region as a whole. Indeed, the fact that the [Tahoe Planning Agency] Compact is the product of the cooperative efforts and mutual agreement of two states is impressive proof that its subject matter and objectives are of regional rather than local concern.34

The court's immediate object was to sustain the Compact against a charge that it invaded the home rule powers of local governments. Where even local governmental arrangements have fallen short of resolving growth problems, however, the hope that private arrangements can do so seems chimerical indeed.

Unsatisfactory too is the glib solution to the overdensity problem advanced by Professor Ellickson—that the community or the state need not be alarmed because "private forces" will produce "equilibrium." However useful the equilibrium concept may be for the economist, when transplanted to the planning context it begs a number of questions vital to basic community values. Why, for example, should the community or state meekly acquiesce in congestion, air pollution and the like when it could strive to anticipate and mitigate these scourges? Suggested by the author are two related responses, both concededly based on his "intuitive estimates of the allocative and distributional impacts of alternative internalization systems."35 First, the market is better able than government to allocate resources efficiently.36 Second, successful management of these problems is beyond the reach of existing public governance techniques and institutions in any event.37

If intuition is to be the guide, the first response surely rings false in its application to the nation's air, water, and land resources. The cutting edge of

35. Alternatives, supra note 18, at 781.
36. Id. passim.
37. As noted in the text accompanying note 42 infra, this point is not systematically addressed through empirical investigation or proof by either Ellickson or Siegan, who rely instead on an enumeration of public governance's abuses—most of which, incidentally, are remediable through judicial processes—and on the tautology that since the market is the best allocator of land resources, public governance is to be avoided whenever possible. For an illustration of Professor Ellickson's skepticism concerning the capabilities of public governance, see Alternatives, supra note 18, at 769 n.291.
the current environmental movement, in fact, was honed by none other than the deplorable failure of the marketplace to allocate these resources efficiently.\(^{38}\)

But my objection to the efficiency argument runs deeper than intuition, reaching to the definition of the term “efficiency” itself. Efficiency is a weasel word which, as used by Professor Ellickson, has all the consistency of quicksilver. Its orthodox signification in economics is the maximization of total benefit from the use of resources through private choice based on calculations of private benefit or utility. When transported to the land use field, on the other hand, it must be expanded to incorporate the variable of community standards as authoritatively expressed in legislation, judicial precedents and other pertinent sources, a point Professor Ellickson explicitly acknowledges when he asserts that nuisance liability should attach to the “host landowner only if [his proposed land use] is perceived as unneighborly according to contemporary community standards.”\(^{39}\)

Expansion of the definition is necessary for at least two reasons. First, the collective determination of efficiency in land use affairs involves value as well as fact judgments, the former encompassing a range of considerations that play little if any role in exclusively private calculations of private benefit. An outcome that might be perceived as “efficient” by a mortgagee and his developer may be quite the opposite if measured against such community objectives as those affording the policy basis for establishing the Tahoe Regional Planning Agency.

Second, a broadened concept of efficiency is required even at the factual level because public agencies may not only be better situated than private landowners to anticipate and assess the pertinent facts, but they may be the only entities in a position to do so. A case in point is the sorry plight of hundreds of purchasers of tract houses in Houston, a city lauded by Bernard Siegan for turning thumbs down on centralized planning and zoning. That city’s unregulated growth has been so rapid in recent years that, to satisfy increased water demands, groundwater has had to be pumped from under these tract houses. The result: their subsidence and destruction.\(^{40}\) That this wasteful outcome would not be anticipated by specific subdividers and their customers is entirely predictable, given the complex planning and civil engineering factors that were unlikely to come to the attention of either—until it was too late.

Despite his apparent concession that community standards ought to play a key role in controlling nuisance behavior, Professor Ellickson gives short

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38. Economists more concerned with the phenomenon of “market failure” are less sanguine about the market’s capacity to allocate resources efficiently in the environmental realm. See generally P. Barkeley & D. Seckler, Economic Growth and Environmental Decay: The Solution Becomes the Problem (1972); T. Crocke & A. Rogers, Environmental Economics (1971); E. Mishan, The Costs of Economic Growth (1967).

39. Alternatives, supra note 18, at 732 (emphasis added).

shrift in his excerpt both to what these standards are, and to the foregoing
issues of value and fact determination. Land use, environmental quality and
community welfare—each the object of profound deference under contemporary
community standards—are delivered over to the tender mercies of the market-
place with the Panglossian assurance that "equilibrium" will insure an opti-
num outcome. Far better advice, I'm afraid, is afforded in Ada Louise
Huxtable's warning that "if there were no other way than to let sound business
practice take its course, there would be little hope for the urban environment."41
The redwoods, prime agricultural lands, historic landmarks and general well
being of community residents in the buffeted area are not going to reappear
magically when equilibrium sets in. Loss of some of these resources, such as
the redwoods and farmlands, will be total. Prospects for others, such as unique
urban environments that are the work of decades or centuries are little better.
The residents of the area that becomes "unlivable" through overdensity come
off badly as well. Are the psychological and other attachments to the com-
munity of those wealthy enough to leave to be ignored? And what of the
market's legacy of scrambled land use patterns and a deteriorated environment
to those obliged by circumstance to stay behind?

To acknowledge these as serious problems is to recognize the need for
public governance in contexts where private choice deviates markedly from
community standards. Because such intervention is anathema to the marketeers' a
priori dictates, however, these problems are largely ignored. To the extent
that they are perceived, public governance is dismissed as a means of dealing
with them on the formulistic basis that "city planning or public land use con-
trols would only make matters worse from an efficiency standpoint."42 The
"proof" offered for this proposition consists of little more than recitation of
the abuses to which public governance is vulnerable.

This tautological reasoning is especially disappointing because the question
of public governance's capabilities is an important one meriting serious investiga-
tion. For the time being at least, it must be viewed as several steps short of
conclusive. Establishing that public governance is subject to abuse proves
neither that it is inherently unserviceable in its present or an upgraded form
nor that the market alternative is itself free of abuse. Indeed, if the question
is to turn on abuse, the marketeers surely have the worse of the argument!
Only those blind to the market's dismal record as a deterrent to orderly growth
would argue that public governance is its equal in this respect, however mis-
conceived that governance may be. In the absence of persuasive evidence of
public governance's inherent inadequacies, my own inclination is to deal with
its conceded abuses by upgrading that governance. If sound land use manage-

41. Huxtable, What's Best for Business Can Ravage Cities, N.Y. Times, Apr. 6, 1975,
§ 2 (Arts & Leisure), at 1, col. 6.
42. Alternatives, supra note 18, at 683.
mment should in fact be shown to exceed the capabilities of public governance, I
too would fall back on the market. My reasoning, however, would not be that
the market will make things better—a position that, frankly, is absurd in view
of the market’s track record over this century—but rather that public gov­
ernance will only make them worse.

Professor Ellickson's proposed “laissez faire distribution of private property
rights,” all economic expectancies associated with property ownership other
than those of a nuisance-creating variety are the property of the landowner.
Nuisances excepted, government must compensate when its regulation frus­
trates any of these expectancies, and that compensation presumably would be
keyed to the difference between the market values of the parcel before and
after regulation. It is no understatement that, were these prescriptions con­
titutionally compelled, public governance as we know it today would cease
forthwith. This result, of course, would sit well with the marketeers whose
view on the eminent domain question is essentially a stalking horse for their
dogmatic opposition to public interference in private land markets.

While they certainly can’t be faulted for lack of chutzpah in their attempt
to resurrect the property conceptions of Blackstone, Smith and Locke, they
come off less well on social policy grounds. As pointed out in the previous
subsection, once community standards are introduced as a determinant of
efficiency, the field of licit public regulation is necessarily and substantially
enlarged beyond the ambit described by conventional nuisance law. This is
not to endorse The Taking Issue's claim that compensation is never required
for regulatory measures that further community standards, but only to under­
score that entitlement to compensation should be determined by a yardstick
less favorable to the private landowner than the nuisance criterion.

The marketeers' view of property rights is outmoded on another count
in these times of extensive publicly-initiated capital improvements projects
and regulatory programs, namely, in its insistence that the economic expectan­
cies associated with the ownership of land ought always to be regarded as the
"property" of the owner. To test out this proposition, suppose that, in im­
plementing community standards favoring the retention of one sector of a
town in residential use, government zones out motel and commercial uses
there. Then, suppose government also decides to build a highway alongside
this and an adjoining sector. The effect of these decisions is to quadruple the
value of Farmer Brown's 50-acre tract in the latter sector, which he is now
profitably farming. Because of the highway, the market anticipates that Farmer
Brown's tract, if upzoned from its present agricultural-low density residential
classification to a motel-commercial status, will be prized by national motel and
retail chains as a site for their facilities. Should Farmer Brown be deemed to
“own” the economic expectancies that government initiated by its zoning of the residential sector and its decision to build the highway? Stated another way, if commercial-motel uses on Farmer Brown’s tract are not “nuisances,” ought he to be able to prevail in an inverse condemnation action for frustrated economic expectancies if government refuses to upzone his land?

For Professor Ellickson, the answer apparently is a confident “yes.” But is the matter really that simple? If these expectancies are created through no effort of Farmer Brown, why should they be deemed his “property”? Again, if the marketeers are solicitous of landowners disadvantaged by the uneven distributional impact of land use controls, should they be so hasty to endorse a rule that mulcts government for the dubious end of providing Farmer Brown a windfall? And, as a corollary to the second question, if allowing government to recoup some portion of Farmer Brown’s unearned increment would provide it with the resources to deal fairly with those landowners who are disadvantaged by public regulation, is it defensible to bar this outcome by an approach that limits noncompensatory governmental intervention to the narrow sphere of nuisance control? Doctrinaire economic theory diverts the marketeers from paying serious attention to these questions despite intimations in their commentary suggesting less than a negative response to them. For the time being, however, their position must be read to disagree with R. W. G. Bryant’s observation that “there are various and different concepts of government, but it could not reasonably be suggested that it is a proper function of government to take a minority of its citizens for a free ride.”

II. THE POLICE AND EMINENT DOMAIN POWERS: OF CATS AND BATS

Despite their discordant outcomes, contenders in the public governance/private rights debate begin with the common premise that the police and eminent domain powers are correlatives. Responsible for that premise is Justice Holmes’ famous aphorism in Pennsylvania Coal Company v. Mahon that “the general rule at least is, that while property may be regulated to a certain extent [under the police power], if regulation goes too far it will be recognized as a taking.” His aphorism, coupled with both legislative inattention to the compensation problem and a conservative state judiciary’s elaboration of extravagant eminent domain doctrines, has contributed immeasurably to the impasse

43. One illustration of a technique employing this approach is transferable development rights. See text accompanying notes 168-72 infra.
44. For example, Professor Ellickson apparently approves the transferable development rights technique in principle; see text accompanying notes 168-72 infra, and Alternatives, supra note 18, at 703. Professor Dunham approves of a system in which landowners are charged for the increases in the value of their property attributable to public planning schemes and compensated for losses attendant upon such schemes; see Property, City Planning and Liberty in LAW AND LAND 28, 36-37 (Haar ed. 1964).
46. 260 U.S. 393, 415 (1922).
that today stymies the evolution of a rational compensation practice in land use controversies.

The impasse is by no means foreordained. In speaking but a half-truth, the aphorism did not necessarily bar the way to the evolution of rational practice. Reinterpreted in light of settled precedent subsequent to Pennsylvania Coal, Holmes' language offers no objection to the emergence of a power—the accommodation power—which is intermediate between the police and eminent domain powers and which, in providing fair compensation to meritorious claimants, affords government a feasible alternative to the prohibitively expensive "just compensation." Concurrent with and following Pennsylvania Coal, moreover, the federal judiciary not only laid the foundations for a less demanding body of eminent domain rules but for a re-evaluation of property conceptions along lines that mesh fully with the accommodation power and fair compensation theses advanced here.

These theses are treated in the following section. The concerns of this section are, first, a brief explanation of why Holmes' aphorism tells only half of the story; second, an account of the disparate evolution of eminent domain and related doctrines in the state and federal courts; and third, a portrayal of the multiple ironies characterizing compensation law at the present time.

A. "Takings" That Are Not Takings

With the benefit of a half-century's hindsight, furnished principally by land use litigation, the gold and the dross in the Holmes aphorism are readily separated. The gold obviously is its recognition that some, indeed most forms of regulation may be predicated on the police power. The dross is his statement that "... if regulation goes too far it will be recognized as a taking." Both as chief justice of the Massachusetts Supreme Judicial Court and as an associate justice of the U.S. Supreme Court, Holmes was deeply influenced by the laissez-faire property notions of his day, and he was not immune to overstatement in defending those notions. The quoted language is a clear case in point because all that Pennsylvania Coal actually decided was that the statute challenged in that case was an invalid police power measure, and not a literal taking.

Were that statute and the countless zoning measures that have been declared "takings" since Pennsylvania Coal truly exercises of the eminent domain power, a very different result would attend a decision favoring the private litigant. The very enactment of such measures would obligate government to pay just compensation and, in return, government would receive a property interest in the challenger's land or, under the special facts in Pennsylvania Coal, in the challenger's less-than-fee holding. All such litigation, moreover,
would take the form of inverse condemnation actions. In reality, of course, neither courts nor private litigants visualize challenges to regulatory measures in these terms. Instead, the goal of this litigation in conventional land use disputes is simply to preclude application of the measure to the restricted parcel on the basis of its constitutional infirmity. What is achieved, in short, is declaratory relief. The sole exception to this mild outcome occurs where the challenged measure is either intended to eventuate in actual public ownership of the land or has already caused government to encroach on the land with trespassory consequences that are largely irreversible.

More significant for the purposes of this article is the aphorism's implication that the police and domain powers are corollaries. Under the corollaries model, the police power preempts the "regulatory" sphere as the tool for pursuing community health, safety and welfare goals on a noncompensatory basis; it is constrained only by the constitutional test of "public purpose." The eminent domain power, in its turn, is limited to outright appropriation of private land on a compensated basis; it is subject to the "public use" test which in Holmes' time connoted actual physical use by the public. What could not be done under the police power had to be done under the eminent domain power or not at all.

The position offered in this article disputes the corollaries model on two counts. First, a third power should be recognized, the accommodation power, which furnishes an alternative to the eminent domain power for curing or enacting regulatory measures that cannot be sustained under the police power. Further discussion of this contention is deferred to the article's third section. Second, doctrinal and policy developments since Pennsylvania Coal dictate replacement of the corollaries model with an approach under which the police and eminent domain powers, along with the accommodation power, are perceived as functionally interchangeable tools—subject to constitutional compensation requirements—for achieving government's regulatory goals.


53. Only the triad of the police, accommodation and eminent domain powers is treated
Judicial expansion of "public use" to comport with government's broadened involvement in land use affairs has deprived the correlatives model of whatever validity it may have had at the time *Pennsylvania Coal* was decided. The demise of the narrow use-by-the-public criterion removed the legal objections that purportedly stood in the way of the eminent domain power's employment for any legitimate regulatory purpose. As decisions approving its employment for such varied purposes as historic preservation, zoning, comprehensive planning, and urban renewal signal, the public use limitation now differs little, if at all, from the police power's public purpose test.

Despite these developments, the correlatives model continues to distort understanding of the relationship that the police and eminent domain powers bear to one another and to their common goal of regulation. Perhaps the classic case in point is *Berman v. Parker,* a U.S. Supreme Court opinion authored by Justice Douglas, that definitively confirmed that the Fifth Amendment's public use requirement is as ample as the police power's public purpose test. At issue in *Berman* was whether the District of Columbia's employment of the eminent domain power to achieve various regulatory goals of its urban renewal program comported with the public use criterion. Yet the reader is puzzled to find as the opinion's lead analytical sentence Justice Douglas' proposition that "[w]e deal, in other words, with what traditionally has been known as the police power." Confusion compounds in his reasoning, first, that the eminent domain power is but a subcategory of the police power; second, that aesthetic goals may be achieved as freely under the police power (despite the former's absence of compensation); and, finally, that "[t]he rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."
Taken literally the opinion makes little sense. If the police power—conventionally defined as noncompensatory regulation—possesses the remarkable attributes claimed for it, why was it necessary for Justice Douglas to qualify these claims with the concluding proviso concerning compensation? Again, what does it mean to reduce the eminent domain power to peonage as a subcategory of the police power?

Given the opinion's expansion of the public use concept, a second interpretation of Justice Douglas' reasoning, one that comports with the logic though not the labels of my proposed substitute for the correlatives model, is plausible. Under this interpretation, the Court's use of the phrase "police power" connotes the full range of government's legislative powers, and makes that phrase equivalent to my term "regulation." So conceived, Justice Douglas' treatment of the police power as an umbrella power implementable by various subordinate powers—or, better yet, by tools such as eminent domain—is identical with my use of "regulation" as a genus including among its species the police, accommodation and eminent domain powers. As much is implicit in Justice Douglas' observation that "[o]nce the object [of a challenged legislative program] is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end." 

Despite the functional equivalence of my framework and the one offered in Berman, my nomenclature is employed in this article for several reasons. However the Supreme Court may use those terms, other courts have consistently treated the police and eminent domain powers as co-equal in status; for them, the police power has a narrower meaning—i.e., noncompensatory regulation—than for Justice Douglas. The transition from this settled understanding to the Douglas framework would not be frictionless; this is pointed up by the frequent mis-citation of Berman as a precedent approving the sweeping use of noncompensatory regulation to achieve aesthetic goals, regardless of the costs to private owners. To add further to the confusion, if the Douglas nomenclature were adopted, a new name would then have to be invented for that tool which the state courts currently call the "police power." With the addition by this article of the phrase "accommodation power" and with the ambiguous meaning of "police power," introducing yet another term seems inadvisable.

64. I am indebted to my colleague, John Nowak, for this suggestion.
B. The Eminent Domain Power: An Implausible Tool for Land Use Governance

The Holmes aphorism, coined to bar governmental overreaching, has had precisely the opposite effect. It instead confronts courts with a Hobson’s Choice: they must either sustain a noncompensatory measure that imposes unfair losses on the landowner, or they must invalidate the measure altogether—thereby forcing government to walk the eminent domain plank to secure its desired planning outcome. As the readers of The Taking Issue are well aware, the courts have increasingly opted for the first solution. But it is my judgment that this choice is less the product of the courts’ embrace of a “new mood” in land use law than of sober recognition that acquiescence in the legislative body’s use of the police power is simply the lesser of two evils. Eminent domain, they rightly appreciate, is often neither a realistic nor a fitting corrective for overbroad police power regulation. As even an old-mood court stated with rare candor in upholding a nonconforming use amortization measure:

The effectiveness of eminent domain is restricted by the necessity that the purchase must be for public use, by the complexities of administrative procedures and by the high cost of reimbursing the property owners.68

How did this polarity come about? An excellent clue is found in Mendes Hershman’s plaint that “we have condemnation concepts and procedures which developed in an agrarian society prior to the middle of the 19th Century, which we are trying to fit into an urban society in a vastly different economy.”69 Little need and even less sympathy for stringent land use regulation was to be found in laissez-faire, 19th Century America. Eminent domain’s function then was perceived as compensating landowners for the outright appropriation of their land for the condemnor’s affirmative use; it was not seen as a curative for overly stringent land use controls.70 Because this power was delegated to and often abused by such powerful private condemors as the railroads, moreover, numerous state constitutional and statutory safeguards were adopted to circumscribe its use.71 Elaborate procedural requirements, including mandatory use of juries to ascertain condemnation awards,72 were imposed. And, substantively, the constitutional public use73 and just compensation74 stan-

70. See generally Taking, supra note 5, ch. 7.
71. For an account of this evolution and of the various types of safeguards enacted, see generally 1 L. Orgel, VALUATION UNDER THE LAW OF EMINENT DOMAIN ch. 1, § 6 (2d ed. 1953) [hereinafter cited as Orgel].
72. See examples cited in 1 Orgel, supra note 71, ch. 1, § 8.
73. See text accompanying note 52 supra.
74. See text accompanying notes 77-109 infra.
 standards were jealously construed, both to limit the instances in which the eminent domain power could be employed and to enlarge condemnation awards.

With the leap forward of public land use governance in the 20th Century, a corresponding shift in eminent domain doctrine was necessary to transform condemnation into a feasible tool for mitigating often harsh private impacts of that governance. But legislatures largely ignored the need for change and the state courts modified only the public use concept. Because there was no equivalent easing of eminent domain's procedural strictures and just compensation rules, expanding the public use concept only exacerbated the problem: it was futile to invite government to employ eminent domain to soften stern regulatory measures and then impose conditions on its exercise which placed it beyond government's reach. Little will be said here about its continuing procedural complexities other than to note that the federal judiciary ruled long ago that nothing in the federal constitution requires government to be hamstrung with the jury requirement found in many state constitutions and statutes. Instead, the targets of this discussion are two doctrines, largely judicially evolved, that flesh out the just compensation requirement. The first mandates that compensation be paid in dollars. The second, that it be measured by a highest and best use standard. Of particular concern will be the grudging way that state courts have reformulated that standard to take account of the U.S. Supreme Court's decision in Village of Euclid v. Ambler Realty Company, a decision which dethroned the market-oriented highest and best use standard as the determinant of permissible noncompensatory public intervention into private land markets.

1. Just Compensation as Dollar Compensation. Government has scarce dollar resources to offset the private impact of public regulation. As allocator and, frequently, outright creator of lucrative development opportunities, on the other hand, government has at its disposal a substantial pool of non-dollar but marketworthy compensatory alternatives that could be devoted to this purpose. This possibility is currently overlooked, in part because of the just compensation doctrines discussed below and in part because of a refusal to acknowledge that land regulation's fiscal consequences are as direct and significant as its physical development objects. It has also been stillborn because, to put it bluntly, private enrichment of unscrupulous public officials and favored landowners siphons off much of the wealth that would otherwise be available to equalize the gains and losses that attend public regulation.

Though the fact is widely ignored, the Fifth Amendment's just compensation requirement allows sufficient latitude to legitimize non-dollar compensation in the borderline situation where overly stringent public regulation is

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75. See Bauman v. Ross, 167 U.S. 548, 593 (1897); see generally Blair, Federal Condemnation Proceedings and the Seventh Amendment, 41 Harv. L. Rev. 29 (1927).
76. 272 U.S. 365 (1926).
declared to be a "taking." Since what would be condemned in these borderline
cases if a literal taking were to occur would be a less-than-fee interest in the
burdened parcel, non-dollar compensation in the form of "special benefits"
could be used to offset amounts due the condemnee both for the less-than-fee
interest taken and for any damages to the parcel remaining.77 As to the other
two factors, nothing short of a fundamental transformation of prevailing atti­
dudes will overcome them as obstacles to acceptance of the non-dollar comp­
pensation position advanced here. A measure of the persistence of these fac­
tors is the tenor of the "taking" debate itself, in which the contending sides
pay little heed to resolution through economic trade-offs leveraged on govern­
ment's role as initiator and allocator of development opportunities, but urge
instead the harsh extremes outlined earlier. Until the fiscal side of the public
governance coin enjoys the attention that so far has been monopolized by its
physical development side, the debate will remain barren, and the abuses
cloaked by the present one-dimensional perception of public governance will
continue to fester.78

The issue of whether or not just compensation must be paid in dollars
has been ventilated most frequently in the partial taking context adverted to
above. If the parcel remaining increases in value as a result of the public
improvement that necessitated the taking, may government deduct this incre­
ment from the compensation otherwise payable for the portion taken? This
question arose in 1897 in Bauman v. Ross,79 the leading U.S. Supreme Court
opinion on partial takings. In Bauman, a federal statute that authorized such
a set-off had been invalidated below on the ground, inter alia, that it "at­
ttempted to pay for [the parcel taken] partly in future and contingent benefits,
and failed to provide for the just compensation required by the Constitution
to be made."80 Reversing the lower court decision, the Supreme Court an­
nounced that "[t]he Constitution of the United States contains no express
prohibition against considering benefits in estimating the just compensation
to be paid for private property taken for the public use; and . . . no such
prohibition can be implied."81 The Court carefully emphasized that to qualify
for set-off, the benefits conferred must be "capable of present estimate and

77. See text accompanying notes 84-88 infra.
78. This thought is replicated in R. W. G. Bryant's comment that:
. . . some arrangement [must be made] whereby public authorities can decide the use of this or that piece of land, from high-rise offices to greenbelt, without having to worry about financial consequences either to the owner or the public purse.
79. 167 U.S. 548 (1897).
80. Id. at 562.
81. Id. at 584 (emphasis added).
reasonable computation,"\textsuperscript{82} since its reason for sustaining non-dollar compensation was that the property owner should be no worse off after condemnation than he was before. In \textit{Bauman}, the Court approved the set-off of "special benefits"—those enjoyed principally by the condemnee—against the parcel taken. Twenty-one years later, the Court enlarged the \textit{Bauman} principle by holding that "general benefits"—described by the Court as "common to all property in the vicinity"—may also be set off.\textsuperscript{83}

State courts, in contrast, have generally taken a much harder line on the set-off issue.\textsuperscript{84} In some states, benefits cannot be set off at all.\textsuperscript{85} In most, special, but not general, benefits may be set off.\textsuperscript{86} Special benefits, moreover, typically cannot be set off against land of the condemnee not physically contiguous to the parcel taken.\textsuperscript{87} And in many jurisdictions, they may not be set off against the compensation payable for the parcel taken—even though their value clearly exceeds damages to the remainder.\textsuperscript{88} Not surprisingly, state courts have also proclaimed equally strong prohibitions against non-dollar compensation in other eminent domain contexts—for example, where government attempted to compensate in bonds\textsuperscript{89} or with substitute land.\textsuperscript{90}

The state court opinions, most of which are of 19th or early 20th Century vintage, evidence that period's bias toward private rights. They express the judiciary's unwillingness to permit government to recoup the increase in land values that it creates through its public projects—despite the obvious windfalls that accrue thereby to private landowners. They are suffused, moreover, with the fear that non-dollar compensation will prove illusory or will be exaggerated by condemnation juries anxious to keep awards low. Yet, benefit assessment programs for such public improvements as streets, sewers, and the like are universally sustained.\textsuperscript{91} Surely it is no easier to compute increased land values in the benefit assessment context than in the partial taking context. And contrary to the courts' apprehension about the niggardliness of

\textsuperscript{82} Id.

\textsuperscript{83} McCoy v. Union Elevated R.R. Co., 247 U.S. 354 (1918). No partial taking had occurred in McCoy, which dealt instead with the issue of whether dollar compensation was due abutting landowners whose property had allegedly been damaged by the construction of an elevated railway.


\textsuperscript{85} See, e.g., Finley v. Board of County Comm'rs, 291 P.2d 333 (Okla. 1955).


\textsuperscript{89} See, e.g., Gardiner v. Henderson, 103 Ariz. 420, 443 P.2d 416 (1968).


\textsuperscript{91} See P. Nichols, \textit{1 The Law of Eminent Domain} § 8.6209 (Sackman ed. 1973).
condemnation juries, their disposition unquestionably has been to favor their fellow citizens with inflated awards, not to mulct them.92

2. Just Compensation and the Highest and Best Use Standard. The divergent attitudes of the federal and state courts are also reflected in their quite different regard for the highest and best use standard as the measure of just compensation. Defined as the price a willing buyer would pay to a willing seller in the private market, that standard invites serious problems where market forces and public regulation are deeply entwined. Refusing to make a "fetish . . . of market value,"93 the U.S. Supreme Court has repeatedly questioned the adequacy of that standard in such instances.94 In United States v. Commodities Trading Corp.,95 for example, the question posed was whether the just compensation requirement precluded the federal government from paying an Office of Price Administration "ceiling price" rather than an allegedly higher market price for a quantity of pepper requisitioned by the War Department in 1944. Noting the complexities introduced by public regulation, the Court commented:

This Court has never attempted to prescribe a rigid rule for determining what is "just compensation" under all circumstances and in all cases. Fair market value has normally been accepted as a just standard. But when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public, courts have fashioned and applied other standards. Since the market value standard was developed in the context of a market largely free from governmental controls, prices rigidly fixed by law raise questions concerning whether a "market value" so fixed can be a measure of "just compensation."96

Prior to the Supreme Court's 1926 decision of Euclid v. Ambler Realty Co.,97 state courts rarely encountered similar complexities in applying the highest and best use standard when government condemned land. Because private land values in those days were seldom the subject of deliberate augmentation or diminution by public regulation, government wore only one hat—that of condemnor—and the fiction of analogizing it to a private buyer paying a market price made tolerable sense. But Euclid bestowed a second hat on government—that of land value regulator—by expanding governmental power in two fundamental respects. First it permitted government, within broad constitutional limits, to allocate development potential to private lands based on community goals as reflected in public governance measures.98

92. See 2 ORGEL, supra note 71, at § 247.
94. See, e.g., United States v. Commodities Trading Corp., 339 U.S. 121 (1950);
96. Id. at 123.
97. 272 U.S. 365.
98. Id. at 389, 390.
second, it ruled that the resulting dollar value of land so regulated need not approximate—and indeed may fall drastically below—its value in an unregulated market. From that time on, condemned private land has not differed from the War Department's requisitioned pepper with respect to its valuation for eminent domain purposes.

This seeming anomaly has caused the state courts no end of trouble. They have yet to grasp Euclid's full implications—in large measure because they, like eminent domain commentators, continue to view zoning and other forms of public governance as alien intrusions into the realm of land value appraisal. Appreciation of the anomaly's roots could have provided the courts with a basis for transforming the eminent domain power into a realistic tool for dealing with overly stringent regulation. Given the Bauman holding and the recognition in Euclid that within ample constitutional limits government may legitimately regulate private land's development potential and therefore its "market" value, the courts might have reformulated eminent domain doctrine in two respects. In place of the highest and best use standard, they might have allowed as compensation only that value increment necessary to cure the taking objection. And they might have broadened acceptable means of compensation to include, in addition to dollars, marketworthy development opportunities.

Shortsighted concern for private rights has not only barred this outcome but has insured that Euclid's erosion of the highest and best use standard would be narrowly interpreted. True, state courts today do give weight to the impact of public governance on private land value. But they have countered with two exceptions that undo much of Euclid's force. First, the valuation formula now applied takes as its measure the condemned parcel's "highest and best use under existing or reasonably probable land use controls." As construed, the italicized phrase undercuts public governance as a valuation constraint because it requires that the award include both the land's value under existing land use restrictions and the premium that the market places on it in anticipation of future zoning changes that will increase its value.

99. According to Professor Ellickson's calculations, the zoning restrictions in Euclid reduced the value of the plaintiff's property from $870,000 to $540,000. See Alternatives, supra note 18, at 700 n.68.

100. It is startling, for example, to find in the index of Orgel's two-volume eminent domain treatise, Orgel, supra note 71, only four references to zoning, two of which refer to footnotes in the main work and two to textual passages of less than a paragraph's duration.


That this premium, which is solely the product of public action, should be deemed an increment of the "private" land's value is a throwback to earlier times. The exception on which it is founded, moreover, offers a field day for inventive counsel, for sympathetic condemnation jurors, and for judges who, in the words of one of their number, see themselves as "Hector[s] at the bridge . . . defending the individual from the onslaughts of society." Further, the exception is not even symmetrically applied: under it, the condemnee receives a windfall for prospective upzoning, but his award is not discounted when, instead, downzoning is imminent.

Second, courts frequently ignore land use controls in determining value when these controls are imposed prior to condemnation of the fee or of a lesser interest in the parcel. This result is unobjectionable if the condemning authority intended all along to appropriate the land for its own use and imposed the restriction merely as a sham to depress the condemnation award. But this is not the pattern that, I believe, will occur with increasing frequency in resource protection and related contexts. That pattern is likely to include two and, possibly, three elements. First, government severely downzones land because market pressures, stimulated by the land's presently generous zoning, threaten a resource, such as an urban landmark or an ecological preserve. Then, to mitigate the downzoning's economic impact, and in return for proper assurances safeguarding the resource, government extends

103. For rare judicial acknowledgment of this reality, see City of Miami Beach v. Hogan, 63 So. 2d 493 (Fla.), cert. denied, 346 U.S. 819 (1953), in which the court rejected a collateral attack on the low density zoning applicable to the condemnee's parcel, observing that, were the attack to succeed, "the city will be compelled to pay the increased value brought about by rezoning . . . ." Id. at 495. Cf. United States v. Miller, 317 U.S. 369 (1943) (refusing to include in a condemnation award value increments resulting from the public improvement necessitating the condemnation on the ground that "[t]he owners ought not to gain by speculating on probable increase in value due to the Government's activities." Id. at 377).


107. See text accompanying notes 168-210, 216-22 infra.
to the landowner a compensatory supplement which—though worth less than the drop in the land’s value as a result of downzoning—does afford him a reasonable return when considered in conjunction with the return he enjoys from the land’s present use. Finally, instead of dollars, the supplement might be in kind, including, for example, a governmentally protected, limited-use monopoly\(^{108}\) or, perhaps, an authorization to transfer the regulated land’s development rights to non-sensitive locations elsewhere.\(^{109}\)

This approach could backfire in light of eminent domain’s doctrinal bars against non-dollar compensation and prior downzoning. Indeed, the conscientious regulatory authority virtually invites this Catch-22 result because, in extending the compensatory supplement, it effectively acknowledges the implausibility of the police power as the sole basis for its program. Mesmerized by the correlatives model, the courts might well force the authority to the eminent domain extreme,\(^{110}\) with its requirement of dollar compensation figured on the parcel’s highest and best use under the prior generous zoning plus such additional zoning increments as are deemed “reasonably probable.” Is it any wonder that public officials—alarmed by this vicious legal version of Russian Roulette—have little incentive to try to meet injured landowners half-way, but choose instead either not to regulate at all or to camouflage the measure in police power trappings and take their chances in court?

C. The No-Win Outcome of the Police Power/Eminent Domain Deadlock

Were the Man from Mars to swoop over the cratered battlefield of land use, what he might need most to appreciate the struggle is not legal acuity, but a strong sense of irony. For it is a struggle in which victories are pyrrhic and losers count themselves winners. It swirls in a void where public governance systems, because they pay little heed to their private impacts, win a battle or two, and then are undone. In their plight, these regulatory systems resemble the description Buckminster Fuller once gave of the world: an octopus constantly stepping on itself.\(^{111}\) The void in which they swirl is perhaps American land use law’s most characteristic feature; it is certainly its most self-defeating one.

1. The Real Estate Community and the Environmentalists. The real estate community, heartened by the pervasive bias of eminent domain doctrine for private rights, ritualistically proclaims that formal eminent domain proceedings alone are an acceptable curative for stringent land use controls.

108. See text accompanying notes 155-67 infra.
109. See text accompanying notes 168-72 infra.
It seems unable to understand that its hard-line position virtually guarantees the very result it wishes to avoid—untoward expansion of the police power. The interests of that community and of rational land use practice generally would be better served if its members continued their drumfire against unfair uses of the police power but, at the same time, lent their support to a search for intermediate compensatory formats. In doing so, they would discover that they are not a monolithic bloc. The interests of developers often conflict with those of landowners. Windfalls accruing to the latter are translated into the often exorbitant prices that developers must pay for land, driving up their enterprise and financing costs and, ultimately, the price to their customers. Some heavy intramural jostling is long overdue about this indefensible outcome.¹¹²

Imbalance also flaws the rhetoric of supporters of strong resource protection programs. Mistakenly, in my judgment, they view as an unmixed blessing the sweeping expansion of the police power recorded in occasional judicial decisions.¹¹³ But the lasting impact of these decisions is threatened by the fierce political backlash they actuate among such formidable private groups as the real estate community.¹¹⁴ This reaction, it must be underlined, is not wholly devoid of ethical or policy merit.¹¹⁵ Moreover, it is one thing

¹¹² Some movement in this direction has already occurred. Over 15 years ago, HousE AND Home, the trade organ of the house builders industry, strongly endorsed windfall recoupment by government, recognizing that it would lower the price that developers must pay for land, thereby lowering the price of housing for the ultimate customer. See 18 House AND Home, Aug. 1960 passim. Unfortunately, the industry has not since systematically urged this hopeful initiative.

¹¹³ See, e.g., Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972); Candlestick Properties, Inc. v. San Francisco Bay Conserv. & Dev. Comm'n, 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1970); Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

¹¹⁴ The opposition of real estate and financial interests, for example, has been influential in blocking Congressional efforts since 1972 to adopt national land use legislation. For an account of the demise of the most recent (1975) national land use bill, see N.Y. Times, July 16, 1975, at 15, col. 4.

¹¹⁵ For instance, Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972), a celebrated favorite of the police power enthusiasts, is something less than a paragon of fair public governance, as revealed by Professor Delogu's scathing attack on the follow-up decision to Steel Hill, abstracted in 27 Land Use AND ZONING DIGEST 1 (No. 1, 1974) (barring on res judicata grounds the same developer's challenge to the town's land use regime). See Delogu, Steel Hill Development Incorporated v. Town of Sanbornton, 27 Land Use & Zoning Digest 6-7 (No. 3, 1975). Among the abuses sheltered by that decision's perception of the police power, Professor Delogu details the following:

Aside from the injustice to plaintiff, who has now been rebuffed three times in his effort to develop land which he owns in the town of Sanbornton, the real mischief of the present holding is its capacity to encourage continued and wider misuse of the police power. Towns and environmental extremists will be led to believe that unwanted development can be frozen out indefinitely by legislating large lot size requirements [the town, which occupies 25 square miles, had zoned itself almost entirely for 3- and 6-acre minimum lot sizes, supposedly for environmental protection reasons]; that presumptions of validity are impenetrable barriers—a substitute for comprehensive planning; that exclusions are perhaps tolerable if it is only trailers [called for in the developer's amended rezoning request] and second homes [called for in his initial development application] that are excluded and the town votes for it; that interim or stop-gap measures can be
to score occasional dramatic victories in the courts; it is another to implement resource protection programs that are sufficiently responsive to the legitimate concerns of all affected groups to serve as a durable foundation for successful public governance. Enough has been said earlier\textsuperscript{116} to raise grave doubts as to whether the police power, unaided by reasonable compensatory alternatives, can provide this foundation.

2. The Courts. Sympathy coupled with a sense of irony is appropriate in assessing the performance of the courts, upon which the brunt of the public governance/private rights struggle has improperly fallen. They now suffer from an advanced case of doctrinal schizophrenia. When presiding over eminent domain proceedings, they brim with confidence, comfortable in their role as guardians of constitutional rights and as interpreters (if not authors) of the rules that govern these rights. But when they are called upon to adjudicate the constitutionality of stringent land use measures, confidence evaporates and erratic opinions lacking in cogent or consistent reasoning abound. St. George was an odds-on favorite in his battle compared to the courts, with few resources of their own to handle the economic-appraisal issues that complicate these legal challenges, with scant guidance from the legislatures, and without a secure societal consensus about which economic expectancies are the landowner's and which the government's.

Doctrinal schizophrenia shows up in the courts' willingness to permit eminent domain doctrines to ossify in order to protect private rights, while simultaneously widening the police power to effectuate the public interest in resource protection. Logically, one would have assumed that economic expectancies in land merit the same degree of protection whether threatened by government's exercise of its eminent domain or of its police power. In fact, the courts have employed a double standard. Exemplifying their desire to have it both ways are two recent Wisconsin Supreme Court opinions. The first, \textit{Just v. Marinette County},\textsuperscript{117} sustained as a proper exercise of the police power a "Shorelands Conservancy District" designation that essentially precluded Mr. Just from improving his lakeside site, even for personal use. No amateur in doctrinal sleight-of-hand, the court rested its result on the oracular pronouncement that "it is not an unreasonable exercise of [the police] power to prevent harm to public rights by limiting the use of private property to its natural uses."\textsuperscript{118} Yet two years before, in \textit{Luber v. Milwaukee County},\textsuperscript{119} the same court invalidated a Wisconsin eminent domain statute that denied extended indefinitely by procedural devices which foreclose reexamination of initial, tentative, or inconclusive findings.

\textit{Id.} at 7.

For a different view of another favorite of the enthusiasts, \textit{Just v. Marinette County}, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), see text accompanying notes 117-120 \textit{infra}.

\textsuperscript{116} See text accompanying notes 10-14 \textit{supra}.

\textsuperscript{117} 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

\textsuperscript{118} \textit{Id.} at 17, 201 N.W.2d at 768.

\textsuperscript{119} 47 Wis. 2d 271, 177 N.W.2d 380 (1970).
compensation for rental losses suffered by the condemneree a year or more before the taking. Overruling its own precedents and departing from the great majority of its sister state courts, the Wisconsin court further enlarged private rights in the context of eminent domain by declaring as a constitutional necessity that compensation awards must include an increment both for consequential damages, such as the rental losses in Luber, and for the condemned property's fair market value. With Just and Luber in the books, one cannot help but wonder how the Wisconsin court would define the compensation a public agency would have to pay if it condemned an ecologically sensitive site which was also ideally situated for development as a regional shopping center.

What is especially ironic about the contradictory evolution of eminent domain and police power doctrine is that judicial excesses in one make inevitable off-setting distortions in the other. As noted earlier, the courts appreciate that financially pressed government cannot found public governance on the eminent domain power, and they are properly solicitous of the need for strong controls in resource protection and similar contexts. Having painted themselves—and government planning authorities—into a corner by sponsoring harsh eminent domain rules, they have little choice but to sanction the police power's lopsided expansion when resource protection schemes are challenged as takings.

3. The Legislatures. Properly skeptical of the courts' ability alone to master the compensation problem, other commentators have rightly counseled a more active role for the legislatures. But the legislatures have not been listening. They have done little to revise eminent domain doctrines to meet modern needs. They have enacted ambitious regulatory programs that either ignore the programs' economic impacts or, equally futilely, ordain recourse to formal eminent domain proceedings to save the programs if they are deemed confiscatory on judicial examination. With a few striking exceptions noted below, they have not devised intermediate compensatory formats. Most distressingly, they do not appreciate that theirs is the institution best fitted to address the compensation problem in a balanced and thorough manner. However unwisely, the National Association of Homebuilders can be expected to push 19th Century nostrums and the Conservation Foundation broad police power solutions; one does not denigrate either group in observing that they are, after all, special pleaders for particular interests. The courts have prob-

120. Id. at 283, 177 N.W.2d at 386.
121. See, e.g., Michelman, supra note 17, at 1248-57; Sax, supra note 6, at 175.
123. See, e.g., MASS. GEN. LAWS ch. 130, § 105 (1972); N.H. REV. STAT. § 483-A (1975).
ably done about as well as could be expected, but they obviously cannot handle
the task by themselves. In the last analysis, it is the job of legislatures to
hear the claims of competing groups and to accommodate their legitimate
interests as fully as possible within a normative framework understandable
both to these groups and to reviewing courts. Ultimately, it is their job to
take the leading role in forging a value consensus concerning the entitlements
of land ownership in 20th Century America. Their failure to get on with the
job is the root cause of the nation's taking quandary.

III. The Accommodation Power

Express recognition of the accommodation power could prove a potent
aid in untangling the compensation conundrum. The power would join with,
but not displace, the police and eminent domain powers as a regulatory tool.
Hence, accommodation would be unnecessary where government's pursuit of
health, safety and general welfare goals does not unfairly impinge on prop­
erty owners. Nor is it appropriate when government acquires private land
outright.125 But accommodation ought to be government's responsibility in the
borderline cases, exemplified by the facts in Just, where fair compensation
for burdened landowners would seem an ethical imperative.

How might legislatures define the borderline case when considering the
adoption of strict regulatory programs, and how might courts define it when
called upon to review private challenges to them? The lesson of a half-century
of judicial wrestling with this problem is that it admits to no simple answer.
Prior experience does teach, however, that it has both a substantive dimension
—at what point do regulatory incursions on private land's development poten­
tial "go too far" to be sustained under the police power?—and an institutional
dimension—what are the respective roles of legislatures, courts and admin­
istrative bodies in fixing that point and in assuring fair compensation when
it is exceeded? Implicit in past experience also is embryonic judicial and
legislative recognition of the accommodation power. Each of these topics is
addressed in the paragraphs that follow.

A. The Spectrum of Land Use Intensity: A Framework for Analysis

One way to define the accommodation power's scope is to establish a
framework that fixes the varying levels of a private parcel's development po-

125. While the eminent domain rules alluded to in text ought, in my judgment, to be
reformulated to reflect a sounder balance between private property rights and public
governance interests, more secure protection than the accommodation power affords is
warranted when government directly expropriates private land. It should, perhaps, also
be stressed that it is not the purpose of this article to assail all eminent domain rules as
biased toward private rights, but only those rules singled out in text. As Professor Michel­
man convincingly argues, other eminent domain rules, such as those barring compensa­
tion for relocation expenses, unduly favor the government as condemnor, and warrant
liberalization through legislative action. See Michelman, supra note 17, passim.
potential in terms of familiar land use and eminent domain categories. Recasting the facts in Just, for example, a spectrum of these intensities for a parcel within the Shorelands Conservancy District might appear as follows:

SPECTRUM OF LAND USE INTENSITY

<table>
<thead>
<tr>
<th>INTENSITY INDEX</th>
<th>USE</th>
<th>VALUE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Highest and Best Use Unrestricted by Public Regulation</td>
<td>Hotel</td>
<td>$4,000,000</td>
</tr>
<tr>
<td>Allowable Use</td>
<td>Single Family Housing, 10 Dwelling Units/Acre</td>
<td>$1,000,000</td>
</tr>
<tr>
<td>Reasonable Beneficial Use</td>
<td>Single Family Housing, 2 Dwelling Units/Acre</td>
<td>$200,000</td>
</tr>
<tr>
<td>Resource Protection Use</td>
<td>Shorelands Conservancy (Aquacultural Uses Only)</td>
<td>$-75,000</td>
</tr>
<tr>
<td>Zero Intensity Use</td>
<td>None</td>
<td>$-50,000</td>
</tr>
</tbody>
</table>

The first and last categories, Highest and Best Use Unrestricted by Public Regulation and Zero Intensity Use, need little explanation. The former, reminiscent of the pre- Euclid highest and best use standard, is simply the use promising the greatest dollar return from an unregulated parcel. The latter allows no use at all and is represented above as having a negative return because the owner must nevertheless pay real estate tax and other carrying costs that are incident to land ownership. No one today, except perhaps the private marketers, seriously urges that landowners enjoy a legal entitlement to the first category. And, excluding some difficult-to-conceive situations in which all possible uses of a private parcel would result in proscribable harms, only the most rabid of police power enthusiasts would insist that government is free to deprive a property owner of the entire development potential of his land without affording him some compensatory relief.

The Resource Protection Use category is exemplified by the Shorelands Conservancy designation in Just—that is, tight land use controls, typically adopted to protect natural and man-made environmental amenities. But two qualifications are necessary here. First, this category is plotted below the Reasonable Beneficial Use category on the foregoing chart only for illustrative purposes; in some circumstances, resource protection control could permit a greater economic return than that possible under Reasonable Beneficial Use controls. A negative value is assigned to the Resource Protection Use category on the chart to reflect not only the private land's carrying costs but
also possible additional costs that might have to be absorbed to adapt the land for the uses permitted under the Conservancy designation. Second, this category may apply to measures serving such ends as growth management, nonconforming use amortization or airport zoning, which are environmental only in the broadest sense.

The Allowable Use category denotes a level of development potential that is substantially more liberal than necessary to prevail against a confiscation challenge. It is, in fact, the category under which the vast majority of private land is zoned in America today. Accordingly, it usually corresponds to what, in eminent domain terminology, is the standard of "highest and best use under existing land use controls." If, in addition, the condemnee succeeds in demonstrating that liberalization of land use controls affecting his parcel is "reasonably probable," the further increment of development potential will fall somewhere between the Allowable Use and the Highest and Best Use Unrestricted by Public Regulation categories.

Though last discussed, the Reasonable Beneficial Use category ranks first in importance because it defines the borderline between measures that are sustainable under the police power and those which must be predicated on the accommodation power. As such, this category refers to an intensity of development potential which affords a sufficient economic return on private land to escape invalidation on confiscation grounds. It is premised on the only generalization that can be confidently extrapolated from the welter of confiscation precedents: namely, that land use controls can bar a parcel's most profitable use or even uses of lesser profitability without being confiscatory if they allow the landowner a reasonable economic return or, under the label used here, a Reasonable Beneficial Use.

Land use controls may be enacted under the police power if they permit an intensity of use that equals or is greater than that prescribed by the Rea-

126. The "negative value" concept has been expressly recognized by the Wisconsin Supreme Court, author of the Just opinion, which, in Kmiec v. Town of Spider Lake, 60 Wis. 2d 640, 211 N.W.2d 471 (1973), invalidated as confiscatory the designation of a landowner's parcel as Agricultural on the ground, inter alia, that the parcel would have a "negative value" if the landowner were forced to absorb the costs of adapting it for agricultural uses. See id. at 652, 211 N.W.2d at 477.

127. Readers familiar with English planning and compensation law will note the similarity between the Reasonable Beneficial Use category used in text and the criterion of capability of "reasonably beneficial use" found in England's Town and Country Planning Act of 1971, ch. 78, § 180. For a discussion of that criterion's function in English planning and compensation practice, see TAKING, supra note 5, at 268-75.

128. With few, if any, exceptions, none of the numerous cases labeled as "new mood" opinions in The Taking Issue support the proposition that "a regulation of the use of land, if reasonably related to a valid public purpose, can never constitute a taking." TAKING, supra note 5, at 238. What they do support is the generalization that the economic return possible under public governance may deviate substantially from that possible in an unregulated market, provided that the former return does not fall below a Reasonable Beneficial Use standard. Even Just, which illustrates the outer range of the new mood opinions, does not reject that standard as the determinant of confiscation, but instead offers a novel interpretation of it—namely, that it may be calculated on the basis of an ecologically sensitive parcel's natural rather than improved uses.
sonable Beneficial Use level. If the permitted intensity is less than this, government must then employ the accommodation power. Accordingly, as the chart above is structured, the accommodation power—rather than the police power—would be the proper tool in the Resource Protection category because the economic return possible under it falls below that plotted for the parcel's Reasonable Beneficial Use. When such discrepancies occur, government would have two options. If it lacks the wherewithal to provide fair compensation, it must liberalize the challenged restriction. But, in doing so, it need allocate only enough additional density to satisfy the Reasonable Beneficial Use Standard. If it possesses the resources and wishes to save the defective measure, it must provide fair compensation.

Fair compensation under the accommodation power differs from the eminent domain power's just compensation in three basic respects. First, its measure is the difference between the parcel's economic return under the challenged restriction and under the Reasonable Beneficial Use standard; for just compensation, the relevant measure would be the difference between the return under the regulation and the return possible under the Allowable Use category or—through manipulation of the "reasonable probability" exception—under an even higher level. Second, fair compensation may take the form of any marketworthy alternative, whether or not monetary; just compensation, on the other hand, would probably have to be in dollars. Finally, procedures for the award of fair compensation can be streamlined by eliminating such features as the condemnation jury and the bifurcated system, currently existing, that requires an initial declaratory action to determine whether a regulatory measure is a "taking" and then a formal eminent domain proceeding to fix the requisite compensation.

So far, nothing has been said about how the Reasonable Beneficial Use standard is to be fixed in specific instances. What is a constitutional rate of return, for example, on an urban landmark building in a booming or depressed construction market or on prime agricultural land or an ecologically sensitive site in the path of or remote from imminent urbanization? The omission is deliberate. This article's goal is to clarify the currently misconceived treatment of the "taking issue" so-called, not to prescribe concrete rules for determining when, in specific cases, regulation deprives a landowner of a Reasonable Beneficial Use return.

129. For examples of statutes expressly incorporating this bifurcation, see note 123 supra.

130. The distinctions between "fair" and "just" compensation demonstrate that statutes authorizing local governments to zone through the eminent domain power, see text accompanying note 56 supra, are pure instances of eminent domain, not, as Kansas City v. Kindle, 446 S.W.2d 807, 813 (Mo. 1969) states, a "blending of the two powers (eminent domain and police power) in the same legislative enactment." The compensation mandated by these statutes must accord with the procedural and substantive requirements of the eminent domain power rather than with those identified in text as pertaining to the accommodation power. Confusion on this point is simply another illustration of the misidentification of "regulation" with the "police power." See text accompanying notes 52-67 supra.
It is my belief that, up to now, we have behaved regarding the taking question very much like Lewis Carroll’s dreamy Alice who, when faced with the question whether cats eat bats or, for that matter, whether bats eat cats, mistakenly concluded that “as she couldn’t answer either question, it didn’t much matter which way she put it.” More important than seeking to “answer” the taking question at this stage is determining whether the right question is being asked. Because, in my judgment, we have been asking the wrong question, we still have little idea what a constitutional rate of return should be in the cases posed above. Devising fair responses will be the work of legislatures, courts and, to an increasing degree, administrative agencies which must begin by getting the question right; and they must be prepared to revise whatever responses seem appropriate for one period in light of shifting community values later.

Poaching somewhat on their territory, I would venture five preliminary suggestions. First, the tasks are principally legislative or administrative, with the courts playing an essentially supporting role. Their job will be to decide whether legislative standards or their application in specific cases comport with what Justice Douglas has called “the political ethics reflected in the Fifth Amendment.” Contrary to the fear that this approach will encroach on the proper role of the courts, it is my guess that the judiciary will welcome being freed from the frustrating task of setting fair rates of return with little or no help from these other institutions.

Second, legislative standards should be contextually derived. Precise quantitative formulae may be fitting in some cases—as the analogies in the rent control and public utility rate-setting fields suggest—while broader qualitative standards, which perhaps merely codify the criteria that recur in land use decisions, may be the best or most appropriate standards that can be offered in others.

Third, despite the apparent quantitative cast of the Spectrum of Land Use Intensity, I envisage a determination of Reasonable Beneficial Use rates that will be heavily interlaced with value judgments rooted in community standards. These determinations, in other words, will rest as much on cultural as on narrower appraisal or technical grounds.

132. The New York City landmarks ordinance exemplifies a precise quantitative standard measuring the Reasonable Beneficial Use level. That ordinance authorizes outright denial of a permit for alteration or demolition of landmark buildings which yield a “reasonable return”—defined as a six per cent return on the assessed valuation of the property. See N.Y.C. Admin. Code Ann. ch. 8-A, §§ 207-1.0, 207-8.0 (Cum. Supp. 1974-1975). The constitutionality of this provision has not yet been tested.
133. For a similar suggestion, see Van Alstyne, Statutory Modification of Inverse Condemnation Criteria: The Scope of Legislative Power, 19 Stan. L. Rev. 727, 737-8 (1967). This approach is illustrated in a resource protection plan developed by the writer and Robert De Voy for use in Puerto Rico. See Puerto Rico Plan, supra note 13, at 14-16.
134. For all the uneasiness that it may cause in some quarters, the significance of the cultural element as a determinant of the legal entitlements associated with land ownership cannot be overemphasized. See generally R. W. G. Bryant, Land: Private Property
Fourth, use of the accommodation power should increase only modestly the instances in which compensation is required as a complement to regulation. It is not that power's mission to displace the police power or to freeze its evolution for all time, but merely to prevent it from serving as a cloak for governmental overreaching. With its less exacting procedural and compensatory features, the accommodation power should lessen government's understandable temptation to employ the police power where a compensatory approach is compelled by fairness, but is rendered economically unfeasible by the requirements of eminent domain.

Finally, the accommodation power may prove useful in overcoming equal protection objections that are often presented as confiscation problems. Despite their use of taking language, courts invalidate many measures, not because they drive the economic return of affected parcels below the Reasonable Beneficial Use standard, but because they do not grant to some landowners the economic benefits that they afford to others who are similarly situated. Richard Babcock's example of the upzoning of one quadrant of a highway intersection for commercial uses comes to mind, as does the selective zoning of land into alternate bands of high and low density development to achieve phased development or an orderly distribution of kinds of uses. Confiscation is not the objection of the disappointed owners of land in the other three quadrants or within the areas designated for low density development, re-

PUBLIC CONTROL (1972). It is fruitless to attempt to answer in a cultural vacuum the question—Which economic expectancies in “private” land are the state's and which the landowner's? This question could be confidently resolved in a manner favoring private rights in the United States through at least the early part of this century because of a larger societal consensus that viewed land as an object of private commercial exploitation. While this consensus is now breaking down, it has by no means disappeared entirely. Because the expectation of some degree of economic return remains vital in the functioning of the American economic system and in American attitudes towards land generally, in my judgment it is as improper as it is futile to urge as a replacement for that consensus a view that wholly disdains private economic expectations. Hence, my disagreement with THE TAKING ISSUE’s jurisprudence or, if you will, anthropology. It is possible that the future may bring a shift in prevailing community standards as they bear both on priorities for regulatory goals and on the fairness of allowing the losses which their achievement under the police power portends to fall disproportionately on some in the private sector. Perhaps the nation will move to a situation akin to that in England where, according to R. W. G. Bryant, "purely speculative profit-making in land is ... regarded as being not quite respectable," id. at 325, and owners of land in greenbelt areas who are virtually barred from developing at all "must simply accept this as one of the facts of life, whatever their financial loss." Id. at 127. If it does, a corresponding shift of the Reasonable Beneficial Use standard on the Spectrum of Land Use Intensity would be in order. There is no logical conflict, in short, between holding an essentially relativistic conception of property rights, such as that presented by Professor Philbrick, see text accompanying note 16 supra, and insisting that, in a given society at a given time, this conception nonetheless requires recognition of a residuum of private rights which the state may not invade without compensation.

135. This point is further developed at text accompanying notes 224-28 infra.

136. R. BABCOCK, THE ZONING GAME 169-70 (1966). In the hypothetical portrayed in THE ZONING GAME, Richard Babcock suggests that a true confiscation objection might also lie because the low density of the non-upzoned land in the three quadrants may amount to "permanent dedication of . . . open space without compensation." Id. at 169.

137. See Fairfax County v. Allman, 211 S.E.2d 48 (1975).
spectively, as long as the zoning applicable to these owners meets the Reasonable Beneficial Use test. Rather, it is that government has bestowed economic benefits on some landowners whose physical situation may differ imperceptibly from that of the unlucky plaintiffs.\textsuperscript{138}

The possible unfairness to these disappointed landowners can be remedied in one of three ways: by compensating them;\textsuperscript{139} by requiring the favored landowners to pay for the upzoning;\textsuperscript{140} or by combining these alternatives, and using the payments of the favored owners to compensate the disfavored.\textsuperscript{141} Whichever route is taken, the accommodation power should prove helpful in fixing both the medium and the extent of compensation—or recoupment—that are appropriate in specific instances. Although it is impossible to do more here than broach this suggestion, it could well occur that, in the long run, the accommodation power's contribution to the resolution of this problem will give a greater boost to rational land management than its aid in solving the confiscation dilemma.

B. The Accommodation Power: Implicit Judicial and Legislative Recognition

Judicial and legislative recognition of the accommodation power is nascent at best. Both institutions are backing into recognition rather than arriving at it through deliberate reflection and articulate choice. Emergent awareness, moreover, is encrusted with traditional conceptions, many of which deny the very tendencies that the power seeks to nurture. Despite or even because of these uncertainties and masked conflicts, examples of the tensions attending the power's emergence may aid in its further delineation. Selected for consideration from the judicial side is the well-known New York Court of Appeals decision, \textit{Golden v. Planning Board (Ramapo)},\textsuperscript{142} which approved the Town of Ramapo's controversial growth management plan. Although \textit{Ramapo} is celebrated—or reviled—for its treatment of exclusionary zoning, our concern will be with \textit{Ramapo}'s other dimension—its holding that a regulatory measure that barred the subdivision of private land for up to 18 years was not a "taking." Culled from the legislative side is a resource protection technique called transferable development rights (TDR), which has attracted widespread attention. TDR compensates owners for restrictions on the development of

\textsuperscript{138} \textit{Id.} The \textit{Allman} court conceded that the plaintiff's parcel could have been developed "without loss" under the existing zoning, but observed that the parcel would increase in value by almost $2.5 million if upzoned to a density equivalent to that which the county had permitted for proximate parcels. \textit{Id.} The court's basic concern, however, was that the selective upzoning of these latter parcels was unfair to property owners, such as the plaintiff, whose land was retained in its low density classification, in order to achieve the county's planning objective of phased development. \textit{Id.} at 52-55.

\textsuperscript{139} See R. Babcock, \textit{The Zoning Game} 178 (1966).


\textsuperscript{141} See generally Hagman, \textit{A New Deal: Windfalls for Wipeouts}, 40 \textit{Planning} 9 (No. 8, 1974); \textit{cf.} text accompanying notes 168-72 infra.

their land, not with dollars, but with the entitlement to transfer their unused development rights to parcels elsewhere. Examined first is the question of whether TDR should be predicated on the police or the accommodation power; and, second is a 1974 New York trial court decision, Fred F. French Investing Company v. City of New York (Tudor Parks), which, in striking down a TDR program, illustrates the pitfalls that await programs based on the accommodation power if they are assessed using ill-fitting police or eminent domain power standards.

1. The Courts: Ramapo's "Other Dimension." Ramapo is properly regarded as heralding the unprecedented power of local governments to manage community growth. But Ramapo's treatment of the taking problem, largely ignored in commentary, is no less dramatic. One searches the reports in vain for prior judicial sanction of regulatory measures which restrain the development of private land for nearly a generation. What are found are opinions that grouse over development moratoria of a few years or less, or that go so far as to declare that official map reservations of school or park lands for only one year are literal takings.

The Ramapo court was not unaware that it was sanctioning extraordinary restraints. Though dissenting from the majority view on the plan's exclusionary aspects, Judge Breitel intimated his concurrence that the plan was not confiscatory. Observing that the taking problem is not "insuperable," he set forth the text for which this article is exegesis by commenting that "[t]here is little doubt that the compulsion of current interests and conflicts will require a re-examination of much legal and judicial thinking in this area." Despite the absence of explicit recognition of the accommodation power, both the majority and, derivatively, the dissenting opinions effectively validated it in sustaining the 18-year restriction. What saved the plan from being confiscatory was, in their view, its deliberate inclusion of factors that mitigated its otherwise draconian impact and thereby satisfied fundamental considerations of fairness. Among the factors which elevated the economic return on affected lands from what was surely a negative value to what the majority found to be a Reasonable Beneficial Use return were: a residual right to construct a single family residence on plattable land; an interim reduction in real estate taxes keyed to the depreciation caused by the restrictions; an option afforded to the landowner to accelerate the construction date by providing the requisite

143. See authorities cited in note 168 infra.
148. Id. at 381-83, 285 N.E.2d at 304-05, 334 N.Y.S.2d at 154-56.
public facilities; the right to proceed with development in accordance with
the town’s capital improvements timetable, whether or not the town met that
timetable; the present vesting and assignability of the future right to develop;
the benefit of substantial incremental values that would accrue in time to the
restricted land as a consequence of the phased installation of public facilities
pursuant to a carefully elaborated comprehensive plan; and the “temporary”
nature of the restrictions, which were imposed, not to enhance the town’s
resource position, but to coordinate private advantage with public facilities
and needs.

It is not my purpose to argue that the court was correct in its conclusion
that these features in fact afforded the plaintiffs a Reasonable Beneficial Use
return. Indeed, one of the curiosities of the plaintiffs’ presentation was their
apparent failure to marshal precise economic data on this crucial issue.150 Nor
do I believe that these features exemplify the accommodation power in as
pristine a form as does, for example, the TDR program employed to protect
the Tudor Parks.151 Certainly, neither the Ramapo public officials nor the
Court of Appeals explicitly conceived of the plan as a showcase for that
power, since the accommodation power nomenclature is original to this article.
But my analysis is intended to demonstrate that the court’s preoccupation
with these features evidences its appreciation that the 18-year restriction could
not be justified solely on conventional police power grounds. That power’s
hallmark, after all, is noncompensatory regulation to protect community
health, safety and welfare, and not the compensation of land owners burdened
by needful public regulation. Professor Freund emphasized this point in his
now-classic distinction between the police and eminent domain powers:

[1]t may be said that the state takes property by eminent domain
because it is useful to the public, and under the police power because
it is harmful. . . . From this results the difference between the power
of eminent domain and the police power, that the former recognizes
a right to compensation, while the latter on principle does not.152

150. Id. at 380-81, 285 N.E.2d at 303, 334 N.Y.S.2d at 154.
151. See text accompanying notes 195-210 infra.

This position recurs in land use precedents both old and new. For example, one of
the objections raised by the landowner in Hadacheck v. City of Los Angeles, 239 U.S.
394 (1915), against a zoning ordinance barring the use of his land for brickmaking pur-
poses was that, in prohibiting his business altogether, the ordinance was unduly harsh.
Rejecting this contention, the court declared that “. . . we cannot declare invalid the
excertion of a power [the police power] which the city undoubtedly has because of a
charge that it does not exactly accommodate the conditions [that it sought to achieve]
or that some other exercise would have been better or less harsh.” Id. at 413-14. More
recently, in Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872
(1969), a California court invalidated an exaction imposed by a public authority pursuant
to its approval of a rezoning application, despite the latter’s insistence that the exaction
would redound to the developer’s economic benefit. “[F]ulfillment of public needs emanat-
ing from the proposed land use is the sine qua non of the exaction’s reasonableness,” the
court insisted. Id. at 422, 79 Cal. Rptr. at 880. Further, it reasoned:

Standing alone, the landowner’s economic benefit supplies inadequate under-
pinning for the exaction. The police power forms the exaction’s constitutional
foundation. That power is aimed at public need, not private profit. The landowner
should be free to reject the paternalism which forces him into an exaction con-
ceived for his personal benefit.
A straightforward way of testing the proposition is to ask what the Ramapo result would have been had the town simply barred subdivision for 18 years, wholly ignoring the restriction's private economic impacts. Prior case law and the obviously drastic nature of that restriction leave little doubt that the court would have struck down the plan as confiscatory. But through its elaborately crafted network of economic trade-offs—none of which, incidently, entails direct dollar compensation—the Ramapo plan was saved from this outcome and, more to the point, demonstrated that there is indeed a middle ground between the police and eminent domain powers.

But isn't the argument plausible that the plan's economic trade-offs simply brought the 18-year restriction under the police power's "reasonableness" umbrella? Yes, if it is conceded that the police power has developed since the time when Professor Freund wrote into two separate branches, each with its distinctive "reasonableness" test. Whichever labels are chosen, however, the essential point, reflected in Ramapo, is that there is a class of regulatory measures that fits neither into the traditional police nor eminent domain power niches and that escapes the confiscation objection only by affording burdened landowners fair compensation in the forms of appropriate economic trade-offs.

I prefer the accommodation power label because it promises to nurture a "fairness discipline" that is all too often ignored when measures are indiscriminately lumped under the police power heading. The label signals more clearly the necessity for a form of accounting that, while less demanding than that of formal eminent domain, is assuredly more searching than its traditional police power equivalent. The latter's impressionistic and typically conclusionary speculation, tied to some vague "balancing" of public and private interests, invites grave injustice when restrictions of the magnitude of those in Ramapo and Just are in issue.

The label also promises greater rationality in judicial opinions evaluating borderline restrictions. Illustrative of the confusion that currently reigns in the reports are the federal district and circuit court opinions in Art Neon Company v. City and County of Denver. In treating the plaint of billboard interests that a six-year amortization provision of Denver's sign ordinance was confiscatory, both courts became ensnared in the conceptual inadequacies of police and eminent domain doctrine, as traditionally conceived. The lower court (Art Neon I) defined as the issue whether or not the amortization pro-

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153. The phrase is that of Professor Michelman. See Michelman, supra note 17, at 1246.
154. See notes 117, 126, 142-52 and accompanying text supra.
156. 488 F.2d 118 (10th Cir. 1974).
157. Although only Art Neon I and II are discussed in text, the disagreement of these two courts recurs in the voluminous litigation dealing with nonconforming use
vision afforded just compensation for a formal taking. Adverting to a United States Supreme Court holding that, in leasehold condemnation cases generally, just compensation must include a premium for the likelihood of leasehold renewal (a routine practice among billboard lessors and lessees), the court ruled that the amortization period alone failed to measure up, and it admonished that "legislative rough approximations of just compensation won't do."

But in the eyes of the circuit court (Art Neon II), eminent domain law had nothing to do with the piece. To the appellate court, the case turned instead on the amortization provision's "reasonableness" under the police power. Rebuking the trial court, it proclaimed that the reasonableness test "is not a test of concept of 'just compensation,' " and that the amortization technique "contains no connotation of compensation or a requirement therefor." But its analysis belied these categorical assertions on two counts. First, the considerations it enumerated in profiling the reasonableness test contradicted the court's alleged disinterest in the provision's compensatory dimension. These included:

- the nature of the nonconforming use,
- the character of the structure,
- the location, what part of the individual's total business is concerned,
- the time periods, salvage, depreciation for income tax purposes, and depreciation for other purposes, and the monopoly or advantage, if any, resulting from the fact that similar new structures are prohibited in the same area.

If the provision were a police power exercise, pure and simple, most of these considerations would be gratuitous; like the factors identified in Ramapo, they speak to the mitigation of private loss, not to the prevention of land uses that, in Professor Freund's formulation, are "harmful" to the public.

amortization measures. As with these two cases, the opinions conflict sharply in their assessment of whether these measures are police power- or eminent domain power-based. Compare Hoffmann v. Kinealy, 389 S.W.2d 745 (Mo. 1965) (eminent domain), with City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (1954) (police power). See generally Annot., 22 A.L.R.3d 1134 (1968).

Other opinions can be found, however, which implicitly recognize that neither power affords an appropriate predicate for these measures. See, e.g., Naegele Outdoor Adv. Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968); Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A.2d 363 (1957). As noted in text, see text accompanying note 68 supra, Grant concedes its willingness to place amortization on a police power footing only because of the awkwardness of eminent domain doctrine. And though Naegele too terms amortization a police power exercise, its analysis falls just short of treating it as an eminent domain concept. Hence, it reasons:

If the value of the plaintiff's property interest was extinguished before the running of the three-year [amortization] period, there would be no taking, or if the value of freedom from new competition for the statutory period equalled the value of the property interest remaining at the end of the period, there would be just compensation [sic] for the taking.

Id. at 501, 162 N.W.2d at 213.


161. Art Neon Co. v. City and County of Denver, 488 F.2d 118, 121 (10th Cir. 1974).

162. Id.

163. Id. at 122.
Second, the court expressly relied upon *Berman v. Parker* as authority for its broad reading of the police power's scope, and quoted in full Justice Douglas' famous dictum extolling aesthetics as a planning goal. As noted earlier, however, *Berman* dealt not with the police power but with the propriety of governmental use of eminent domain for urban renewal purposes. Since the question in *Art Neon* was not whether government may pursue aesthetic goals—the litigants and both courts conceded that it could—but whether government must compensate when it seeks to achieve those goals by eliminating unsightly billboards, *Berman* is obviously inapposite. Its role as the centerpiece of the circuit court's opinion does point up, perhaps unwittingly, that court's ambivalence on the compensation problem.

In short, the circuit court was correct in its premise that the reasonableness test "is not a test of 'just compensation,'" but wrong in concluding therefore that the amortization technique contains "'no connotation of compensation or a requirement therefor.'" This non sequitur resulted because the court failed to recognize that fair compensation was an intermediate approach between just compensation and no compensation, despite its use of reasoning that in fact pointed in this direction. One would have liked to have seen a third opinion, an *Art Neon* II ½ as it were, in which the conceptual inadequacies of tired police power/eminent domain doctrine were frankly acknowledged and the corresponding need for a third alternative addressed.

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**SPECTRUM OF LAND USE INTENSITY**

<table>
<thead>
<tr>
<th>INTENSITY INDEX</th>
<th>USE</th>
<th>VALUE</th>
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<tbody>
<tr>
<td>Highest and Best Use &lt;br&gt;Unrestricted by Public Regulation</td>
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<tr>
<td>Allowable Use</td>
<td>Gravel Extraction</td>
<td>$2,000,000</td>
</tr>
<tr>
<td>Reasonable Beneficial Use &lt;br&gt;Single Family House &lt;br&gt;1 Dwelling Unit/Acre</td>
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<tr>
<td>Zero Intensity Use</td>
<td>None</td>
<td>$-20,000</td>
</tr>
</tbody>
</table>

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164. *Id.* at 121.
165. See text accompanying notes 59-67 *supra*.
166. 488 F.2d at 121.
167. An example of implicit judicial use of the Spectrum of Land Use Intensity appears in Justice Hall's opinion in *Morris County Land Improvement Co. v. Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963) (*Morris County I*). Rejected as unconstitutionally confiscatory in that case was the zoning of the developer-plaintiff's land as a "Meadows Development Zone." This classification precluded him from any but agricultural or aquaculture-related uses. Embroidering somewhat on the facts in *Morris County I*, the parcel's economic value might be portrayed as follows on the Spectrum of Land Use Intensity:

a. An Overview of TDR Programs.168 TDR programs modify conventional property conceptions in two respects. First, they divide "property" into

If the court had deemed the zoning a literal taking, it would have had no choice but to direct the township to pay for the less-than-fee interest "condemned" or, at the least, to leave the land unzoned, freeing the developer to do as he wished with it. In fact, Justice Hall approved neither alternative. Disdaining any discussion of payment, he warned that voiding all zoning "would permit the establishment of any use by any means—a result which might well be damaging to the overall local public interest." Id. at 559, 193 A.2d 243-44. Instead, he directed the township to increase the parcel's development potential sufficiently to cure the constitutional objection, but authorized it to give full weight, consistent with constitutional constraints, to the "special characteristics and particular problems of the district." Id. at 559, 193 A.2d at 244. The decree splits the difference between the extremes of the police and eminent domain power resolutions. Cf. ALI MODEL LAND DEVELOPMENT CODE § 9-112(3) (Proposed Official Draft 1975) [hereinafter cited as CODE].

Morris County I shows that there is an alternative to leaving the land "completely unzoned" when a regulation is declared invalid. See Enclosure, supra note 30, at 1253. For results analogous to Morris County I, see, e.g., Sinclair Pipe Line Co. v. Village of Richton Park, 19 Ill. 2d 370, 167 N.E.2d 406 (1960); City of Miami Beach v. Weiss, 217 So. 2d 836 (Fla. 1969). See generally 2 C. RATHKOPF, THE LAW OF ZONING AND PLANNING, ch. 36, § 6 (3d ed. 1972). The view that invalidation leaves the land unzoned may be shaped in some precedents that if the court went further, they would violate the separation of powers doctrine. See, e.g., Fairfax County v. Allman, 215 Va. 434, 211 S.E.2d 48 (1975); City of Miami Beach v. Weiss, supra. This is a misconception. Justice Hall's resolution only brackets the area on the Spectrum of Land Use Intensity within which the township may permissibly zone; it does not mandate a specific outcome for local legislative officials. Moreover, some interpenetration of judicial and legislative roles in this area is inevitable. A better explanation for the judicial deference is the greater familiarity of legislators with local circumstances, planning goals, and resources allocable to compensatory regulation.

A direct judicial application of the accommodation power would occur where, in an "eminent domain" proceeding, the condemnee successfully attacks the zoning of his parcel as confiscatory, and the court provides for its valuation on a Reasonable Beneficial Use level, rather than on its status as "unzoned,"—i.e., its Highest and Best Use Unrestricted by Public Regulation. Cf. CODE § 5-303(5). Although this result would seem to be called for by Justice Hall's reasoning, a New Jersey intermediate court granted relief based on the Highest and Best Use standard in a companion case to Morris County I, Jersey Central Power & Light Co. v. Morris County Land Improvement Co., 91 N.J. Super. 40, 219 A.2d 180 (App. Div. 1966) (Morris County II). While Morris County I was pending before the New Jersey Supreme Court, the power company initiated eminent domain proceedings to acquire a public utility easement over nine acres of the developer's land. Prior to the completion of those proceedings, Justice Hall rendered his decision.

Had the Morris County II court honored Hall's reasoning, the nine acres would have been valued on a Reasonable Beneficial Use level, which presumably would have been skewed by its Resource Protection level (Meadows Development Zone) and its Allowable Use level (Gravel Extraction). Instead, the court opted for the Highest and Best Use Unrestricted by Public Regulation level (Industrial), incorrectly assuming that Morris County I must be held as having declared the "Meadows Development Zone" regulations void in their very inception. Accordingly, there was no valid zoning regulation with regard to the property in question at the time of the taking, and defendant was entitled to an instruction [refused by the trial court] to that effect. Id. at 49, 219 A.2d at 184. The Morris County II result, apparently replicated elsewhere, see Zogby v. State, 53 Misc. 2d 740, 279 N.Y.S.2d 665 (Cl. Ct., N.Y. 1967), is unfortunate both in its failure to heed Justice Hall's actual reasoning and in its resulting imposition of an indefensible surcharge on the public fisc—results that could be avoided in future litigation of this type by explicit use of the accommodation power.

168. For more detailed treatment of the TDR concept, see, e.g., THE TRANSFER OF DEVELOPMENT RIGHTS: A NEW TECHNIQUE OF LAND USE REGULATION (Rose ed. 1975); COSTONIS, DEVELOPMENT RIGHTS TRANSFER: AN EXPLORATORY ESSAY, 83 YALE L.J. 75 (1973); Transferable Development Rights (ASPO PAS Report No. 304, Mar. 1975); TRANSFER OF DEVELOPMENT RIGHTS, 34 URBAN LAND I (1975).

Specific TDR proposals and accompanying case studies include J. COSTONIS & J.
two root components: the physical land itself and the development potential or "development rights" of that land, usually measured by the zoning restrictions applicable to it. Second, they authorize the transfer of these development rights from the host parcel to other parcels whose total development rights are thereby proportionately augmented. Although the rationale for permitting transfers encompasses a variety of urban design, planning and land transactions goals, TDR's major attraction is its role in offsetting economic hardships incurred by private landowners as a result of resource protection programs. Examples of such hardships might include the plight of the owner who must preserve a diminutive landmark building in a central business district zoned for New Brutalist megastructures, or the owner who must retain as open space prime land lying in the path of, and zoned for, commercial or residential development. Fundamental to TDR is the premise that the resource owner's confiscation objection to such regulation will be blunted by the benefits that he is enabled to receive, either by selling his package of development rights to owners of transferee parcels, or, should he also be the owner of the transferee site, by retaining the market value of the additional development potential that the rights represent.

The typical TDR program proceeds in four phases. First, the administering authority must pinpoint the sites from which development rights may be transferred. The criterion for selection may be either protection of improvements on the sites, as in the case of landmark buildings, or protection of the sites themselves, as in the case of ecologically sensitive prime agricultural or open-space lands. In both cases, the authority fears that the present low density of the sites renders them vulnerable to market pressures for more intensive development—from landmark to office tower or from nature preserve to condohotel.

Second, the authority must identify correlative "transfer districts," areas to which the rights may be transferred. These districts must be appropriate receiving areas for added density both in light of the community's over-all planning goals and of the capacity of the districts' physical and service infrastructures to absorb the density. Next, machinery for the actual transfer of

SHLAES, DEVELOPMENT RIGHTS TRANSFERS: A SOLUTION TO CHICAGO'S LANDMARKS DILEMMA (Chicago Chapter Foundation of the American Institute of Architects & National Trust for Historic Preservation, 1971); J. COSTANIS, SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE (1974) (with Robert De Voy and Rai Okamoto); PUERTO RICO PLAN, supra. In the first of these studies, Mr. Shlaes prepared the economic feasibility section and contributed major insights to its conceptual and legal portions. Mr. De Voy, aided by his associates at Real Estate Research Corporation, prepared the basic draft and reviewed the final draft of the economic chapters (3 and 4) of SPACE ADRIFT, supra, as well as providing valuable assistance on that TDR study as a whole; Mr. Okamoto played a similar role regarding the urban design chapter (5) of SPACE ADRIFT. Likewise, the economics section of the PUERTO RICO PLAN is the work of Mr. De Voy, who again contributed broadly to that study's other sections.

Other pertinent TDR studies are referenced in the footnotes to the subsection that follows. A more complete TDR bibliography and a listing of pending or adopted TDR legislation can be found in Transferable Development Rights, supra at 63-64.
rights must be set in motion. Under some schemes, transfers occur exclusively between private landowners subject to general public supervision. Under others, only government can transfer the rights, and the resulting income is used to create an "Environmental Trust Fund" from which cash awards are made to resource owners. A mixed pattern of private and governmental transfers is prescribed by a third variant; here, government makes the transfer only if the resource owner declines to do so. Again, the income generated through public sale is used to cancel the costs to government of compensating affected owners. In return for compensation, the resource owner must provide firm assurances that his site will be developed consistently with the Resource Protection restrictions; typically, a less-than-fee protective interest is conveyed to government for this purpose.

Lastly, criteria must be devised to determine exactly what the owner ought to receive for his losses under the program, whether payment is made in development rights or in dollars. Two patterns prevail. One determines the compensation by measuring the difference between the quantity of rights actually used at the resource site and the total quantity of rights authorized for the site by existing zoning. For example, if a landmark site is currently zoned to permit the construction of an office building containing 1,000,000 square feet and the landmark itself contains only 250,000 square feet, the site's owner may transfer the remaining 750,000 square feet or, under TDR programs incorporating the cash alternative, receive a dollar award equal to the value of that increment of space. The second pattern, on the other hand, entitles the resource owner to transfer only that quantity of rights—or to receive its cash equivalent—required to take up the slack between the economic return possible at his site under the Resource Protection zoning and the return under zoning fixed at the Reasonable Beneficial Use level. If a marginal increase in development potential would not endanger the protected resource, government may alternatively increase the site's development potential to the latter level, much as it does when it grants a variance under traditional zoning procedures.

Should TDR be predicated on the eminent domain power, on the police power or on the accommodation power? Before that question can be answered, it is necessary to identify the particular TDR variant addressed. Aside from possible procedural complications, the question can confidently be answered for those TDR variants that compensate the resource owner in dollars for

171. For an example of this approach, see Puerto Rico Plan, supra note 13, at 9-24.
172. Id.
the difference in his site's value before and after the program is instituted. By hypothesis, these variants square with eminent domain doctrine. Given a jurisdiction, moreover, in which the special benefits doctrine is liberally interpreted, TDR variants compensating the owner in development rights calculated by the above measure will also comport with eminent domain doctrine. If these rights are equal to the combined value of the parcel acquired (the less-than-fee protective interest in the site) and to the damages, if any, accruing to the remainder (the resource site itself and, if relevant, its improvements), then they will cancel out any compensation due the owner in a jurisdiction which permits special benefits to be set off against amounts due under both headings.\textsuperscript{173}

In its differences from these patterns, the variant addressed below may properly be termed TDR's hardest case. Under it, acceptance of non-dollar compensation in the form of development rights is mandatory, not optional, with the resource owner.\textsuperscript{174} Further, the quantum of transferable rights is

173. See text accompanying notes 79-89 supra.

The position offered in text reflects a substantial evolution of my view on the constitutional status of development rights as adequate compensation. In an earlier article, I posed, but did not resolve, the question whether TDR would be constitutionally defective because development rights are not cash compensation and, in the case of jurisdictions permitting special benefits to be set-off against the parcel taken, because development rights might be deemed to have too speculative a value to qualify as special benefits. See Costonis, \textit{The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks}, 85 Harv. L. Rev. 594, 598 n.73 (1972). As indicated in text, however, I am now confident, first, that the dollar compensation objection is not compelling if TDR is predicated on the accommodation power, and, second, that in jurisdictions permitting the set-off of special benefits against the parcel taken, development rights ought dearly to qualify as special benefits even from the perspective of eminent domain doctrine. The latter judgment is the direct outgrowth of the three case studies undertaken by the writer with Messrs. Silaes and De Voe, see note 168 supra, which are persuasive that the value of development rights is no more speculative and, in fact, a good deal less so, than other economic opportunities that have traditionally comported with the special benefits doctrine.

174. Fur-Lex Realty, Inc. v. Lindsay, 376 N.Y.S.2d 398 (Sup. Ct. 1975) confirms that it is the mandatory character of TDR as forced compensation rather than the TDR concept itself that will prove a sticking point for the courts. At issue in that case was the validity of a transaction in which the City of New York entered into a lease of the site of the Appellate Division (First District) Courthouse, a designated landmark, which enabled the lessee, the owner of an adjoining site, to transfer 100,000 square feet of the unused development rights of the Courthouse site to his site. The Courthouse site was then subleased back to the city for continued use as a courthouse, less the development rights. This arrangement is further described in Costonis, \textit{The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks}, 85 Harv. L. Rev. 574, 586 n.44 (1972). Joining both the city and the private lessee as defendants, Fur-Lex Realty, a lessee of a nearby city parcel, challenged the transaction on the grounds, inter alia, of spot zoning and of improper disposition of municipal property. The court rejected both contentions on the defendants' motion for summary judgment.

\textit{Fur-Lex}' treatment of the spot zoning objection is to be contrasted with that in \textit{Tudor Parks}, which suggested, as an alternative basis for its ruling, that the latter TDR scheme invaded the rights of property owners at sites adjoining the site or sites to which transfers could be made, see Fred F. French Inv. Co. v. City of New York, 77 Misc. 2d 190, 352 N.Y.S.2d 762 (Sup. Ct. N.Y. Co. 1973). This position has been endorsed in an article critical of the various New York City TDR programs. \textit{See Note, Development Rights Transfer in New York City}, 82 Yale L.J. 383 (1972). For the view that coordinating a specific TDR program with the regulatory authority's overall planning regime should obviate this objection, see Costonis, \textit{Development Rights Transfer: An Exploratory Essay}, 83 Yale L.J. 75, 87-91, 124 (1973).
equal in value to the difference between his site's Resource Protection and Reasonable Beneficial Use values rather than between its Resource Protection and Allowable Use (or higher) values. Since this variant clearly conflicts with eminent domain's standard of just compensation, the question is whether it rests instead on the police or the accommodation power. Under the analytical framework developed in this article, the answer is the accommodation power.

1. The Police Power: A Dubious Predicate for TDR. My view is not universally shared. Norman Marcus, for example, has placed TDR squarely on a police power footing. In his argument, he advances a cogent, indeed brilliant, analysis of TDR's two basic postulates: first, that strong legal, planning and policy considerations favor the concept of severing development rights from their host parcel and transferring them to other land; and second, that "because the essence of property [in 20th century America] is its potential for profitable use" and not its "location in space and dominion over a defined surface of land" as in earlier times, authorizing resource owners to transfer their frozen development rights can be a fair and practicable way of mitigating their losses.

But to conclude from these premises that TDR is therefore founded on the police power is unpersuasive. The conclusion resurrects the misconception fathered by the Holmes aphorism and compounded, perhaps inadvertently, in Berman v. Parker that "regulation" is the exclusive province of the police power. In reality, regulation is a goal of all three powers—police, accommodation and eminent domain. The conclusion, moreover, does violence to the settled view, formulated by Professor Freund and consistently affirmed in precedent, that the police power's object is to safeguard community health, safety and welfare independently of any concern for compensating burdened landowners. TDR's raison d'être, on the other hand, is precisely to insure that landowners are fairly treated. Finally, the conclusion's reliance on the vague "reasonableness" test of current police power doctrine threatens to erode the fairness discipline nurtured by TDR because it implies that TDR's compensatory supplements are a matter of legislative grace and not a constitutional imperative.

Perhaps my disagreement with Marcus is little more than a querelle des mots between friends coming at the compensation question from opposite directions. Obviously more sympathetic to The Taking Issue's philosophy

176. Id. at 89-94.
177. Id. at 88.
178. Id. at 87.
179. See text accompanying notes 52-67 supra.
180. See text accompanying notes 150-52 supra.
181. See text accompanying notes 153-67 supra.
than I, Marcus questions why, since the Fifth Amendment is given short shrift under recent environmentally-oriented decisions, conscientious governmental efforts to extend some compensation to resource owners should not prevail when challenged on confiscation grounds.\footnote{182} Skeptical of that philosophy's fairness and its accuracy as a portrayal even of recent taking jurisprudence,\footnote{183} I am a good deal more reluctant to fold TDR into the spongy batter of police power reasoning. In our results, however, we are not far apart. Marcus alludes to two kinds of compensation—the more stringent just compensation of eminent domain law and the less exacting "equitable" or "fair" compensation of TDR. Our difference is that he urges employment of the latter "where legitimate police power restrictions on private property are at issue."\footnote{184} As I have acknowledged earlier,\footnote{185} linking fair compensation to the police power is not an inherently implausible course, but the basic transformation of the police power which such a linkage works must be understood clearly by planning authorities and the courts. Because I am apprehensive that it will not be understood, the linkage approach is less satisfactory in my judgment than recognition of an independent accommodation power.

ii. The Accommodation Power: A More Fitting Predicate for TDR. The Tudor Parks decision, discussed below, confirms that TDR will be challenged because it does not measure up to formal eminent domain standards. The challenge should not succeed. A TDR program's validity should depend instead upon whether its promise of compensation is real or illusory. If those rights, together with the economic return possible under the parcel's Resource Protection zoning, satisfy the Reasonable Beneficial Use standard, the matter should end there. But if the development rights certificates are mere bogus bills cranked out on some government printing press, firm judicial intervention is in order.

Fear that development rights will afford illusory compensation recurs in commentary\footnote{186} contesting TDR's constitutionality and tipped the balance against the TDR program in Tudor Parks. Concern on this score is certainly not unreasonable but it should be tempered with an appreciation of the formal requirements of constitutional argument and of the capabilities of standard appraisal practice. As to the first, it is important to distinguish facial constitutional challenges from challenges to a measure as applied. The marketability of development rights would be in issue in a facial challenge only if the premise of marketability were so far-fetched as to be absurd. But appraisal sources

\begin{itemize}
\item \footnote{182} See Marcus, \textit{supra} note 175, at 104.
\item \footnote{183} See notes 128, 134 \textit{supra}.
\item \footnote{184} Marcus, \textit{supra} note 175, at 104 (emphasis added).
\item \footnote{185} See text accompanying note 153 \textit{supra}.
\item \footnote{186} See \textit{Note, The Unconstitutionality of Transferable Development Rights}, 84 \textit{Yale L.J.} 1101 (1975); \textit{Note, Development Rights Transfers in New York City}, \textit{supra} note 174.
\end{itemize}
and judicial precedent established just the opposite. Appraisal theory and at least three TDR case studies fully support the unsurprising proposition that increasing a parcel's development potential by transferring development rights to it will increase its fair market value, so long as there is a market demand for new construction incorporating the transferred rights. Whether that market will exist, of course, is a fact question, turning wholly upon the contingencies affecting the litigant's parcel and the relevant TDR program and land use regime.

Judicial support appears indirectly in numerous decisions equating property rights with the right to exploit land for profit and directly in the majority and concurring opinions in the New York Court of Appeals' decision, Newport Associates, Inc. v. Solow. Disputed in that case was whether the holder of a long-term lease could transfer the leased parcel's unused development rights to an adjoining parcel. The question was resolved favorably to the defendant-lessee on the ground that the lease did not by its terms preclude the transfer. More important for our purposes is language in both opinions explicitly describing the contested development rights as a "valuable asset." Judge Breitel's concurring comments in this regard merit quotation in full:

"Plaintiff has lost by defendant's action... a valuable asset in the air development rights over its building. It has thereby lost its right to "transfer" or use its air development rights by alienation of the reversion to an abutting owner, or by acquiring an abutting property. That right to transfer or exploit the air development rights required no warrant in the zoning ordinance. Air rights, including the special floor area ratios defined in the ordinance, are valuable and transferable, even if only as an adjunct to a reversion or to a long-term leasehold."

The appropriate mode, therefore, for challenging a TDR program is as it applies to specific landowners. Centering on the marketworthiness of the rights, such challenges will require careful preparation by the resource owner and the planning authority, and will call for substantially more than the impressionistic judicial scrutiny typifying current zoning litigation. On the other hand, they will be markedly less taxing for the courts and litigants than are formal eminent domain proceedings. Standard appraisal methodologies and

188. See note 168, supra.
191. Id. at 268, 283 N.E.2d at 602, 332 N.Y.S.2d at 621.
192. Id. at 267, 268, 283 N.E.2d at 602, 332 N.Y.S.2d at 620, 621.
193. Id. at 268, 283 N.E.2d at 602-03, 332 N.Y.S.2d at 621.
Market analysis techniques can establish the value of development rights with a degree of precision that will enable the courts to insure that resource owners are not gouged. Nor should it be forgotten that the courts are not strangers to the types of valuation questions posed by TDR. This point is underscored by the large volume of litigation dealing with such matters as benefit assessment levies, special benefits in partial takings situations, and growth control and resource protection programs—which, if the thesis of this article is correct, are harbingers of the accommodation power. And with the wildfire adoption of these programs in the 70’s, a corresponding increase in judicial familiarity with, and sophistication in resolving, questions arising under that power can be anticipated.

b. Tudor Parks: Old Wine in New Bottles. The occasion for the Tudor Parks litigation was New York City’s enactment of a TDR program in 1972 to bar the construction that the R-10 zoning then in effect permitted on two privately owned parks surrounded by the Tudor City apartment-hotel complex. The program places the parks in a P overlay district, limiting their use to passive recreational uses, and authorizes the developer-owner to transfer their full complement of unused rights to a mid-Manhattan transfer district; it also requires that the parks be opened to the general public but only after the city has certified the first transfer of rights from them. In permitting the transfer authorization to exceed the minimum amount of rights necessary to insure a Reasonable Beneficial Use return, the program is more lenient than our hard case. It is significant too that land values in the commercially zoned transfer district, where the developer-owner has extensive holdings, are double those in the residentially zoned Tudor City area—although this advantage must be temporarily discounted in light of the currently overbuilt state of New York City’s office-commercial space market.

Despite these advantages, the developer’s self-initiated attempt to transfer the park’s rights to a contemplated project sited adjacent to the Tudor City complex, and the tender of a “substantial offer” to the developer for the rights transferable under the TDR program, both the developer and its mortgagee brought an inverse condemnation action against the city. They sought summary judgment on the ground that the P zoning is a literal taking for which just compensation must be paid. Although the trial court agreed that a “taking” had occurred, it did not award compensation, but reinstated the prior R-10 zoning classification instead.
Employing a divide-and-conquer rationale, the court rigidly compartmentalized the program's two components, evaluating each in isolation from the other. Looking first to the P zoning, it concluded that the use restriction was an unreasonable exercise of the police power because it "significantly deprives the [mortgagee] of its security for the mortgage," and "bars the [developer] from any economic use of [its] property."201 Were P zoning the whole of the program, of course, the court's reasoning would be incontrovertible. Indeed, the program would then be the legal equivalent of a Ramapo plan which retained only the 18-year subdivision restriction and not the network of economic trade-offs that saved that restriction from invalidation.

But there is more to the Tudor Parks program—namely, its transfer component. If the court had treated this component as an integral part of the overall scheme, it might have altered its conclusion that the P zoning was enacted under the police power, and tested the compensation afforded by the transfer authorization against a measure less demanding than that of eminent domain law. Regrettably, the court did neither; instead, its assessment of the transfer authorization is as perfunctory as it is unenlightening. Viewing the authorization as evidence that the city recognized the "need of some modicum of compensation,"202 the court dismissed it in the following single sentence:

Pursuant to [the TDR program] the owner is confronted with the problem of acquiring 30,000 square feet of property suitable for his purpose in the newly proscribed [sic] area but he is left to his own resources for acquisition and funding in what may be an unpredictable market of the future.203

The trial court's opinion is unfortunate, both in its offhand consideration of the transfer authorization's potential as fair compensation and in its decision to invalidate the TDR program by summary judgment. In neither regard does its handling of the case respect the constraints attaching to what was really a constitutional attack on a TDR program as applied. This is not neces-

201. Id. at 202-03, 352 N.Y.S.2d at 766.
202. Id. at 201, 352 N.Y.S.2d at 764.
203. Id. at 201, 352 N.Y.S.2d at 765.

The court erred in its assumption that the TDR program limits transfers only to transferee sites that the transferor owns. In fact, the rights are transferable to sites of non-transferors as well, thereby vastly enlarging their market. See New York, N.Y., Zoning Resolution art. IX §§ 99-00 et seq. (1973). Also prejudicial in the program's analysis was the court's implication that the developer's prospects for financial success at the Tudor Parks' site is all but guaranteed, while development elsewhere would be a high risk venture. As the unhappy outcome of the Old Stock Exchange controversy, see text accompanying notes 251-52, warns, however, prospects for success in either case are hardly assured. Relevant to this point is Ada Louise Huxtable's tongue-in-cheek suggestion that, in view of the collapse of New York City's office space market in the early 70's, the owner of the Grand Central Terminal should perhaps compensate the City of New York for rescuing it from the financial debacle that almost certainly would have occurred had it not been blocked by the city from going ahead with plans for the construction of a second Pan American-type office building atop that landmark structure. See, Huxtable, Why Did We Lose Grand Central as a Landmark?, N.Y. Times, Feb. 2, 1975, § 2 (Arts & Leisure), at 26, col. 1. The litigation arising from the city's attempt to prevent this construction is discussed in notes 210, 229 infra.
sarily to claim that the result should go the other way if premised on a thorough consideration of Tudor Parks' facts, but rather to underscore that, by failing to make proper inquiry, the court reached its conclusion in an informational vacuum.

Paradoxically, the ingredients that might have led to a denial of the summary judgment motion and a trial on the compensation question are present in the trial court's reasoning. To its credit, the court rejected the plaintiffs' premise that the police and eminent domain powers are correlative.204 By dismissing their inverse condemnation claim out of hand, it recognized that a regulatory measure exceeding the police power's ambit is not ipso facto an exercise of the eminent domain power. Further, it affirmed the Reasonable Beneficial Use standard as the determinant of when a regulatory measure requires compensation.205 In remarking on the developer's earlier self-initiated request for a transfer authorization,206 moreover, the court surely was aware that, even from the developer's viewpoint, the TDR solution contains enough promise of recompense to be taken seriously. Again, it appears to have had a glimmering of the propriety of intermediate compensatory formats because it spoke of a "modicum of compensation"207 and of compensation that is "fair" and "reasonable."208 Finally, it appreciated the futility of forcing the city down the eminent domain path in observing that the cost of outright public acquisition of the parks would be "extremely high."209

*Tudor Parks* is now pending before the New York Court of Appeals. As the author of the *Ramapo* and *Newport Associates* decisions, that tribunal, it can be ventured, will prove more discerning in its evaluation of these factors. Hopefully, it will not overlook the opportunity that *Tudor Parks* affords for the "re-examination of . . . judicial and legal thinking in [the compensation] area" called for by Judge Breitel in *Ramapo*.210

204. *Id.* at 204-05, 352 N.Y.S.2d 767-68.
205. *Id.* at 202, 352 N.Y.S.2d 765-66.
206. *Id.* at 201, 352 N.Y.S.2d 764.
207. *Id.*
208. *Id.* at 203, 352 N.Y.S.2d 766.
209. *Id.* at 204, 352 N.Y.S.2d 767.
210. Although the discussion in text focuses on *Tudor Parks*, its ramifications for two recent New York cases invalidating landmark designations as takings are patent because the TDR option provided under the New York City landmarks program, see note 170 supra, was available to both landmark owners. See *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974) (J. P. Morgan Mansion) and *Penn Central Trans. Co. v. City of New York*, Index No. 14761/69 (Sup. Ct. N.Y. Co. 1975) (Grand Central Terminal). Of the two cases, *Lutheran Church* is the more inexplicable because the landmark owner had not made a factual showing of economic hardship, absent which the Reasonable Beneficial Use standard presumably ought to have applied to bar its taking claim. See *Lutheran Church* in *America v. City of New York*, *id.* at 132, 316 N.E.2d at 312, 359 N.Y.S.2d at 17 (Jasen, J., dissenting). Since the court expressly refrained from declaring the landmark ordinance facially invalid, see *id.* at 131, 316 N.E.2d at 311, 359 N.Y.S.2d at 16, and yet did not have before it facts establishing the ordinance's invalidity as applied, its decision is doubly puzzling. Moreover, even if economic hardship is assumed, the court's failure to examine the TDR option's suitability as an adequate compensatory alternative hardly squares with its reasoning in *Ramapo*, see text accompanying notes 145-52 supra, a
Institutional Responsibilities Under the Accommodation Power

1. Integration of the Police and Eminent Domain Powers: An Incomplete Model.

A convenient point of departure for deciding who should do what under the accommodation power is to look at its closest theoretical analogue—the notion of "integrating" the police and eminent domain powers. A perennial source of contention among the commentators, this notion has precipitated a cleavage as sharp as the one dividing the police power enthusiasts and the private marketeers, whose dispute derives from roughly parallel considerations.

Opponents of integration—which they tend to equate with permitting inverse condemnation actions against regulatory authorities—have put forth a catalog of by-now familiar objections: the notion's potential for unexpected and drastic liability would inhibit public planning initiatives; its reliance on monetary relief to cure "illegal" public actions rather than on injunctive relief (which merely revokes the defective regulation) is misconceived; integration would put courts in the business of allocating public resources at the behest of private claimants, instead of leaving that job to legislatures responding to general public needs; and, finally, it is pregnant with all manner of administrative complexities—the kind of property interest if any (fee or less-than-fee, permanent or temporary) that government would receive for the compensation paid, which measure of compensation to prescribe, and the legal contingencies point implicitly recognized by Judge Jasen in a dissenting opinion in which Chief Judge Breitel joined. Id. at 133 n.2, 316 N.E.2d at 313 n.2, 359 N.Y.S.2d at 18 n.2.

Penn Central, on the other hand, is a twin to Tudor Parks in its blithe dismissal of the TDR option. Dubiously interpreting Lutheran Church as holding that "landmarks designation generally constitutes a taking for which compensation is mandated," id. at 8, the court rejected the TDR option with the blanket assertion that it "neither provided compensation nor minimized the harm suffered by plaintiffs due to the designation of the Terminal as a landmark." Penn Central Trans. Co. v. City of New York, Index No. 14763, Findings of Fact and Declarations of Law at 8 (Sup. Ct. 1975). But the option clearly does both, as the city established at trial. The issue that the court ought to have explored is a good deal more fine-grained: whether the extent or degree of minimization of harm afforded by the option (as well as by tax abatement advantages and other concessions that the city has long afforded to Penn Central and its predecessor) reduced the plaintiffs' injury to a level that comports with the Reasonable Beneficial Use standard. Since the court failed to discuss the standards that it was applying—though it apparently leaned strongly toward those of eminent domain—its opinion is both elliptical and conclusory. Penn Central's oracular posture, together with its extreme reading of the admittedly confusing Lutheran Church decision, bespeaks the need for searching review and clarification in the appeal that the city has lodged.

Taken together, Lutheran Church and Penn Central cast a pall not only on the future of landmarks preservation in New York City, see Huxtable, Landmarks Are in Trouble with the Law, N.Y. Times, Dec. 22, 1974, § A at 2, col. 1, but on the entire fabric of legitimate public governance so thoughtfully woven in Ramapo. At their very best, these cases represent a serious retrogression from Judge Breitel's call for the sorely needed re-evaluation of outmoded doctrine that serves neither public nor private interests.

circumscribing government's power to repeal obsolete restrictions. Supporters212 of integration counter with an equally familiar litany: requiring government to compensate would enhance rational public decision-making by exposing the true costs of regulation; it would protect individual liberty by safeguarding private rights from governmental over-reaching; and it would insure the integrity of comprehensive planning by preventing rather than licensing discordant private development.

How is one to choose sides if, as this writer believes, the arguments of both are equally plausible in the abstract? Intelligent choice is impossible absent a coherent conception both of what is meant by "integration" and of the quite different contexts to which it pertains. Current commentary and case law afford neither. Their persistence in mis-equating the "police power" with "regulation" retards progress on both counts. Further, while many commentators have rightly impugned the either/or posture of current thought,213 they have not as yet offered prescriptions that dissolve the policy and doctrinal blockages of the two powers. Illustrative of unproductive judicial attitudes are the vague musings of one court about achieving fairer public governance by "overlaying the police power with the requirement of just compensation,"214 a neat trick which is likely to be about as helpful as trying to make toast by plugging an AC toaster into a DC circuit.215

The debate's edge has been similarly dulled by its inattention to contexts. Two can be identified, each entailing private challenges to a regulatory program's restrictions, but differing from each other in terms of their legislative character. The first, exemplified by conventional zoning, comprehends those

213. See authorities cited in note 212 supra.
214. See Taking, supra note 3, his 1965 proposal for a "third alternative" to the traditional police and eminent domain power responses to that question is, in my judgment, a fresh contribution to land use thought. Despite fundamental differences between the approaches advocated in that and the present article—Mr. Bosselman, for example, does not call for an independent third power as do I—Mr. Bosselman's thesis has significantly influenced the viewpoint expressed in this article, and my debt to him is substantial. It has also influenced the ALI Model Land Development Code, of which Mr. Bosselman is Associate Reporter, with respect to Code provisions authorizing courts to key eminent domain compensation awards to what is an analogue to the Reasonable Beneficial Use standard, see Code § 5-303(5), and to grant local governments the option of curing con­­fiscatory land use measures through compensation. Id. at § 9-112(3).
restrictions adopted by legislatures in the good faith belief that they comport with the police power. The second, illustrated by the kinds of resource protection and growth management initiatives considered earlier, covers borderline restrictions. Because they are recognized as such by the legislature, it buttresses them with a compensatory supplement, such as the network of economic trade-offs in Ramapo or TDR in Tudor Parks. The legislature may direct the administering authority to extend the compensatory supplement automatically, as in these examples, or it may provide that compensation be afforded only if a court rules that, without it, the restriction would be invalid. Under the first alternative, the court reviews the proffered compensation's compatibility with the fair compensation standard; under the latter, it decides the threshold question whether or not the restriction passes muster under the police power. In neither case may it enjoin enforcement of the restriction, however. Instead, it must provisionally grant appropriate compensatory relief, staying its order for a reasonable period to allow the administering agency to elect between compensating or, if necessary resources are lacking, liberalizing the offending restriction in accordance with the Reasonable Beneficial Use standard.

Restrictions in this second context can be reviewed in alternative ways. In one, the courts alone can pass on whether the challenged restriction is constitutional as applied, and can fix fair compensation if the program of which it is a part affords an insufficient compensatory supplement or none at all. In the second, these responsibilities devolve initially upon an administrative agency whose determinations on both counts are expressly made subject to judicial review.

By introducing the accommodation power and distinguishing between the two frameworks, the terms of the debate about integration are sufficiently clarified, I believe, to weigh properly the various arguments advanced for and against a more systematic compensation practice. Offered here is a compromise position: private litigants should not be permitted to compel government to compensate for overbroad regulatory measures; but, to deal fairly with landowners and to enhance the prospect for effective regulation, government should resort to the accommodation power whenever it recognizes beforehand that restrictions it imposes may not be defensible under the police power.

216. For a treatment of alternative remedies that are appropriate in this framework, see text accompanying notes 49-51 and note 167 supra.
217. See text accompanying notes 168-73 supra.
218. See text accompanying notes 145-53 supra.
219. See Puerto Rico Plan, supra note 13; cf. text accompanying notes 233-51 infra, discussing Massachusetts statutes imposing height limitations adjacent to the state capitol building and providing public access to the state's beaches.
220. An analogous judicial role is prescribed in Code § 9-112(3).
221. Cf. the Massachusetts statutes discussed in text accompanying notes 233-50 infra.
222. See Puerto Rico Plan, supra note 13, at 9-16.
None of the objections to a systematic compensation practice is persuasive against this resolution. Under it, compensation costs will be neither unexpected nor drastic. For one thing, the legislature will have the chance to anticipate them in formulating the regulations, while courts will not be able to award them on their own authority. Second, compensation can take the form of dollar or non-dollar awards keyed to the Reasonable Beneficial Use standard, rather than dollars only, keyed to the Highest and Best Use standard. Finally, if the administering authority lacks the resources, or power, to compensate, it can still implement its program by easing a defective restriction, much as local governments grant variances under conventional zoning. With such flexibility, any apprehension that public planning initiatives will be inhibited seems misplaced. The argument which favors injunctive over compensatory relief for illegal public action also loses force when a range of curatives for the possible illegality are built into the very program under which the action is taken. Similarly academic is the issue of who, as between legislatures and courts, should be the allocator of public resources. The legislature's adoption of programs under the accommodation power signals its decision that, if available, compensation be afforded where necessary. And since courts may not compel compensatory relief in either context, the decision to compensate always remains with the legislature or administering agency.

Nor is the potential complexity of administering accommodation power-based programs fatal to their adoption. Against this complexity must be weighed fairness and government's capacity to manage land use. If complexity outweighs fairness, then by the same reasoning, the Fifth Amendment should be excised from the federal Constitution because the administrative burdens of eminent domain far surpass those of the accommodation power. As to the programs' technical demands, confidence in government appears warranted in view of the favorable results recorded in recent years under a variety of innovative land use techniques which rival accommodation power-based programs in complexity. Experience with these innovations, moreover, suggests that legislatures will enact accommodation power-based programs on a selective, tightly circumscribed basis, and can thus progressively refine their treatment of technical issues.

Last to be evaluated is the prediction that a systematic compensation practice...
practice will unleash a firestorm of litigation. It is difficult to gauge whether accommodation power-based programs will generate more litigation than arises currently from the practice of pushing the police power to its outer limits and beyond. Experience in England and, on a more limited basis, at home shows that surprisingly few claims tend to be prosecuted when compensation is afforded as a curative for overbroad regulatory measures. Litigation can also be restrained, should a particular program nonetheless trigger a large number of claims, by the use of administrative agencies to screen and, in many instances, to dispose of these claims. Even a material increase in litigation, however, would seem an acceptable price to pay for the concomitant advantage of strengthening the legal, political and ethical foundations of public governance.

The proposed resolution is also sensitive to the concerns of the advocates of the integration notion although it does stop short of endorsing their insistence upon inverse condemnation as the tool to control excesses under the police power. Enactment of regulatory programs within the accommodation power framework assumes that the legislature has assessed their probable costs and has made the policy judgment that, as a matter of fairness, the public sector should either bear these costs or reduce them to a constitutionally tolerable level by the variance route. Incursions on individual liberty will certainly occur less frequently than under current practice. Further, the comprehensive plan will be less vulnerable to hole-poking: this outcome will be avoided altogether when compensation is afforded, and it will be held within narrower bonds when, lacking compensatory resources, government instead permits incremental density increases.

Left unremedied by my proposed resolution are the private losses incurred between passage of a defective measure and a decision by the regulatory authority to forego the compensatory option. The decision to leave these losses with the landowner is not reached lightly. Time truly is money for the real

225. See Taking, supra note 5, 276, 279-83.
226. Empirical data on this question is scant because of the limited compensation practice in the United States. Two possibly useful indicators of the probability of a minimal claims response can be cited, however. First, the Massachusetts Coastal Wetlands Act of 1965, 130 Mass. Gen. Laws Ann. § 105 (Supp. 1971), authorizes local governments to impose “coastal protective orders,” which effectively prohibit any substantial development activity in the area protected. Should a reviewing court agree with a private challenge that a given order is confiscatory, it may grant the local government an option to cure the order through compensation. In a study of experience under the act, Fred Bosselman and David Callies reported that while over “two thirds of [the state’s] coastal wetlands [are] covered by protective orders . . . actual negotiations have been required with only about 100 owners and . . . only one objection will come to trial in the courts”; F. Bosselman and D. Callies, The Quiet Revolution in Land Use Control 225 (1971). Second, while municipal landmark ordinances typically provide for a real estate tax reduction for designated landmark properties, a survey of 12 American cities conducted by the writer in 1970 indicated that such reductions had been afforded in only one city and were seldom requested by landmark owners. See Costonis, The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks, 85 Harv. L. Rev. 574, 578 n.18 (1972).
estate community, and more than one regulatory authority has forced a developer into bankruptcy by playing a waiting game in which it holds the trump card. But, while courts should deal sternly with bad faith or palpably unreasonable exercises of the police power, they should not otherwise compel government to compensate for a "temporary taking." Here, those favoring leeway for government to discharge its planning responsibilities have the better of the argument, in my judgment. But the question of how to treat these losses is a close one, the most troublesome policy issue posed by the discussion in this subsection.


a. The Legislatures. Primary responsibility for nurturing the accommodation power must rest with the legislature. Cognizant that desirable land use programs can cast undue losses on some landowners, the legislature should backstop what is currently regarded as the police power dimension of these programs with a compensatory supplement predicated on the accommodation power and fair compensation.

In addition to their status as program formulators, legislatures will have other leadership functions. If local governments are to implement the program, they will need some legal foundation to do so, such as an enabling act adopted by the state legislature. Of the three departments of government, moreover, the legislature is best fitted to define those community values which should be protected through land use regimes, to assess the likely regulatory and fiscal impacts of those regimes, and to devise appropriate compensatory formats when necessary. In addressing these issues, of course, they will also fix standards that determine which private expectancies are "property," in the sense

227. For a breakdown of the dollar costs that developers in Puerto Rico incur as a result of delays in receiving development approvals from the Puerto Rico Planning Board, see Puerto Rico Plan, supra note 13, at 46-47.


229. An example of the staggering liabilities that the government might incur appears in the saga of Grand Central Terminal, which was designated as a New York City landmark in 1967. The predecessor to the Penn Central Corporation, the site's present owner, had entered into a groundlease with a developer which anticipated construction of a second Pan American-type office building over the landmark and called for annual lease payments in the order of $2.2 million. But construction was barred by the New York City Landmarks Commission because of the Terminal's landmark status. In 1975 a New York trial court declared the designation a taking. See note 210 supra. Assuming that damages for a temporary taking between 1967 and 1975 were calculated on the basis of the groundlease's income stream, they could run upwards of $15 million. See generally Huxtable, Why Did We Lose Grand Central as a Landmark?, N.Y. Times, Feb. 2, 1975, § 2 (Arts & Leisure) at 26, col. 1. For the view that compensation for a temporary taking ought to be payable in such instances, see Comment, Landmark Preservation Laws: Compensation for a Temporary Taking, 35 U. Chi. L. Rev. 362 (1968); cf. Lomarch Corp. v. City of Englewood, 51 N.J. 108, 237 A.2d 881 (1968).
that their invasion requires compensation at all. This last determination will also afford the kind of guidance so long neglected and sorely needed for the rational development of police and eminent domain doctrine generally.

b. Administering and Administrative Agencies. While some accommodation power-based programs will be directly implemented by state or regional entities, many will fall within the province of local governments. To the extent that these local bodies prosecute such programs under general enabling acts, they can be regarded as legislatures in the sense used here. City councils and county boards of supervisors can be expected to delegate the programs' actual administration to the entity referred to in the American Law Institute Model Land Development Code as the "local land development agency."230 This umbrella term includes existing plan commissions, urban renewal authorities, landmark commissions, and the like. Because it will be the job of that agency to implement legislative mandates in light of the circumstances in the pertinent jurisdiction, it must be staffed with individuals knowledgeable in the legal, planning and land economics-appraisal fields, and it must receive forceful political backing.

Administrative agencies may also serve as claims commissions. State and regional agencies are more likely to carry out this function because their administrative staffs, resources and broader planning concerns permit a more sophisticated and systematic treatment of private claims than would be feasible for many local governments. While it might be inappropriate to vest both program administration and claims adjudication functions in the same agency, the separate agencies charged with these respective tasks should routinely touch base with one another to coordinate the pertinent program's regulatory and fiscal aspects.

c. The Courts. And then there are the courts. Their role in the compensation quandary has been so troubled that influential commentators have urged that it be sharply de-emphasized, if not eliminated altogether.231 While active legislative involvement of the type described above should diminish the courts' role considerably, it will not and, in my judgment, should not, reduce them to bit players. The federal and state constitutions, after all, install the courts as the ultimate arbiters of the compensation question, a mainstay in contemporary land use litigation. As Ramapo and Tudor Parks confirm, it is inevitable that accommodation power-based programs will come before the courts, especially in the early years of that power's doctrinal elaboration. The assessment of the judiciary's role found in the earlier discussion of those cases232 will not be repeated here. Instead, this section closes with a critique

231. See authorities cited note 121 supra.
of three Massachusetts decisions—two vintage\textsuperscript{233} and one modern\textsuperscript{234}—which, in negating the judicial-legislative teamwork required for the conduct of these programs, threaten to strangle the accommodation power in its crib.

The sequence commences innocently enough with \textit{Attorney General v. Williams},\textsuperscript{235} in which the court sustained an 1898 statute that imposed height limits on the buildings around Boston’s Copley Square and provided eminent domain relief for the burdened landowners. Sustaining the measure against a public use objection, the court also volunteered that “it would be hard to say that the statute might not have been passed in the exercise of the police power.”\textsuperscript{236}

Emboldened by that dictum, the Massachusetts Legislature imposed similar restrictions the following year on parcels adjoining its capitol building and provided for eminent domain damages only “if and insofar as the act and proceedings to enforce it may deprive the [landowners] of rights existing under the constitution.”\textsuperscript{237} In \textit{Parker v. Commonwealth},\textsuperscript{238} the State Attorney General’s demurrer to the landowners’ petition for eminent domain damages was sustained by the trial court. On review, the then-Chief Justice Holmes, in his opinion for the Massachusetts Supreme Judicial Court, stated that the attorney general construed the statute “as importing an exercise of the police power so far as the legislature could constitutionally go, and as saving a remedy for all damages beyond that point.”\textsuperscript{239} Without deciding whether the measure was valid under the police power, Holmes rejected this construction, reasoning that:

while we can gather that the legislature was willing to take anything without paying for it that this court should say that it could, we do not find anything that even suggests a legislative adjudication that the public welfare requires that petitioners’ property should be restricted without compensation to them.\textsuperscript{240}

The defect in the attorney general’s position, according to Holmes, was that the statute:

\textit{gives a remedy if the act deprives the parties of rights existing under the constitution. In the absence of an adjudication by the Legislature that the public needs require the petitioners’ property to be restricted without compensation, the statute does deprive the parties of such rights, and on the construction of the statute which we adopt there has been no such adjudication.}\textsuperscript{241}

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\textsuperscript{234} \textit{In re Opinion of the Justices}, 313 N.E.2d 561 (1974).
\textsuperscript{235} 174 Mass. 476, 55 N.E. 77 (1899).
\textsuperscript{236} \textit{Id.} at 478, 55 N.E. at 77.
\textsuperscript{238} \textit{Id.}
\textsuperscript{239} \textit{Id.} at 204, 59 N.E. at 635.
\textsuperscript{240} \textit{Id.} at 204-05, 59 N.E. at 635.
\textsuperscript{241} \textit{Id.} at 205, 59 N.E. at 635.
\end{flushleft}
Accordingly, he remanded the action so that damages could be assessed and awarded to the landowners.

The *Parker* result turned on statutory construction rather than on constitutional grounds. Seventy-five years later in *In Re Opinion of the Justices*,\(^2\) however, the Massachusetts Supreme Judicial Court hinted that such a measure, inviting the court to determine whether or not there was a taking and to fix appropriate eminent domain damages if there were, might run afoul of the separation of powers doctrine. At issue in that advisory opinion was the constitutionality of a clumsily drafted bill\(^3\) intended to provide public access to the stretch of state coastline between the mean high water and extreme low water line. Because a colonial legislature in 1649 had granted title to this zone to littoral owners subject to a general reservation of public rights, the Massachusetts Legislature was uncertain of the measure's status under the police power. Wishing to insure public access even if it had to compensate, the legislature authorized record owners of littoral property to test the question under the state's condemnation statute and to be awarded compensation should the court determine that the public rights reserved under the 1649 act did not include beach access. Invalidating the 1974 measure on a variety of grounds not pertinent here, the court also warned that the legislature's forward pass to the judiciary "raise[s] serious constitutional questions"\(^4\) with respect to the separation of powers doctrine.

A critique of *Parker* and *In Re Opinion of the Justices* might best commence with the latter's hint that the legislative-judicial teamwork envisaged under accommodation power-based programs encroaches on the separation of powers doctrine. In addition to those fundamental differences which allow the beach access bill to be readily distinguished from the accommodation power variants portrayed earlier,\(^5\) the opinion affords on other grounds a poorly reasoned basis for vetoing this teamwork. As the court viewed it, the bill "attempts to transfer from the Legislature to the courts . . . the decision whether or not to compensate, that is, whether or not to exercise the power of eminent domain."\(^6\) Were this truly so, there would indeed be cause both for constitutional concern and for doubts about a policy of allowing courts rather than legislatures to allocate public resources. But the beach access bill and, even more certainly, the accommodation power variants envisage noth-

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\(^3\) An Act Authorizing Public Right-of-Passage Along Certain Coastlines of the Commonwealth, House No. 481, reproduced in *id.* at 563-64.
\(^5\) The key difference is that the Massachusetts bill was facially unconstitutional, see *id.* at 568, while accommodation power-based measures, such as the Tudor Parks TDR program, if unconstitutional at all, will be so only in their application to specific properties. See text accompanying notes 186-94 *supra.* As a result of poor draftsmanship, moreover, the Massachusetts bill was defective on a number of procedural due process grounds, see *In re Opinion of the Justices*, 313 N.E.2d 561, 569-71 (1974).
ing of the sort. In both instances, the legislature itself has already made the
decision to award compensation if necessary to reach the desired regulatory
result. Recognizing that compensation may not be required in borderline cases
—witness the dictum in *Attorney General v. Williams*—and being properly chary of the needless expenditure of scarce public resources, the legis-
lature has simply chosen to await a judicial determination of the measure's
adequacy before committing these resources. Under these circumstances, the
court is no more a party to violation of the separation of powers doctrine
than it is in any run-of-the-mill eminent domain case.

In short, if it is no violation of that doctrine for a court to adjudicate
these two issues in separate proceedings, why is it violated if a court deter-
mines them in consolidated proceedings under circumstances in which the
legislature has already agreed that compensation be paid if necessary?

Taken at face value, moreover, the court’s reasoning would directly im-
pugn the constitutionality of inverse condemnation proceedings. These pro-
ceedings address the same issues—whether the challenged public action is
sustainable under the police power and, if not, what compensation is due
the private challenger—without being tagged illegal. Yet, under the court's
rationale, they are even more objectionable because they take place in a set-
ting where the legislature not only has given no prior indication of its willing-
ness to compensate but has instead indicated precisely the opposite.

If constitutional objections to legislative-judicial teamwork are spurious,
does the teamwork do violence to the judiciary’s status in any other credible
respect? I think not. Holmes' opinion in *Parker* is elliptical in this regard,
resting instead on a narrow question of statutory interpretation. Yet even on
that level, the opinion dissembles. First, he construes the 1899 statute not to
be a "legislative adjudication that the public welfare requires that the [land-
owners’ property] should be restricted without compensation to them," and then he concedes that, under the statute, "the legislature is willing to
take anything without paying for it that the courts should say that it could." Though made conditional on the outcome of subsequent judicial review, it
is evident that the legislature did “adjudicate” that compensation be paid—
unless Holmes would have us believe that all conditional propositions are
ambiguous.

Although the reason for Holmes’ strained construction must remain a
matter of speculation, the suggestion is plausible that, because Holmes and
the courts generally were imbued with the laissez-faire attitude of their
times, they were unlikely to be sympathetic to innovations like the 1899
statute. Also, they were likely to be reluctant, in any event, to become em-

247. See note 236 and accompanying text supra.
249. *Id.* at 204-05, 59 N.E. 634, 634-35 (1901).
250. See authority cited in note 48 supra.
broiled in the type of fine-tuning that the legislature requested, when it offered the court only a passing reference to "constitutional rights" to guide it in resolving the taking question. Today, if not then, that reluctance is misconceived. Private rights are no longer accorded great deference when they conflict with sound public goals. And, while both the complexity of the required fine-tuning and the legislative default in aiding the courts continue, a judicial retort of "After you, Alphonse" will only serve to perpetuate confused taking doctrine and, in the process, to condone unfair land use measures. Whether they like it or not, courts are and will continue to be faced with a plethora of actions challenging regulatory measures on confiscation grounds. It would serve their interests, as well as those of regulatory authorities and the private sector, to encourage legislative initiatives, such as accommodation power-based programs, that afford a fair, rational and systematic judgmental framework for dealing with the compensation question.

**Conclusion**

The Old Stock Exchange Building, a fragile business palace marrying grace with utility, stood proudly in the heart of Chicago's Loop in 1971. Conceived by Louis Sullivan and Dankmar Adler, the Exchange won national and international acclaim as a gem of the Chicago School of Architecture, which, at the turn of the century, created the foundations for modern architectural design and engineering. Though fully rented and a profitable office building in 1968, the Exchange was chastised in 1971 by its new owners, a development syndicate, as economically unviable. The developers then gave substance to their charge by refusing to renew the leases of the building's tenants. Spurred on by the easy availability of mortgage financing and the rash of construction that was then adding five million square feet of office space annually to Chicago's total inventory of 60-million square feet, they had little use for the 13-story Exchange when Chicago's zoning permitted upwards of a 40-story building on the site. Despite the eleventh-hour efforts of the press, citizens groups and others to bring the Exchange under the limited protection of the city's preservation ordinance, the city council refused to go along—lest the Exchange, in the words of one Daley alderman, become known as "Chicago's White Elephant." The building was torn down in 1972, a casualty of market forces.

But the story does not end there. Shortly after completion of the Exchange's pedestrian, 43-story replacement in 1975, the developers sought a court-sanctioned financial reorganization because the new building, they said,

was "economically unviable." Like many other developers in Chicago and other American cities during the late 60's and early 70's, they had badly misread the market, and had failed to see that it would soon be glutted by the construction orgy then going on; as a result, two-thirds of their new building was left untenanted.

The terrible irony of this tale recurs again and again, not only for landmark buildings, but for other man-made and natural amenities. To this observer, the near-bankruptcy of the Exchange's developers is dwarfed by the larger social bankruptcy that market fatalism portends. But tragic as the loss of the Exchange and other amenities surely are, they do not warrant the emasculation of constitutional constraints against governmental overreaching either, in my judgment. These losses, instead, proclaim two clear messages. First is our urgent need for a fresh look at current property conceptions, whose inertness all but guarantees mindless repetition of the Stock Exchange debacle. Second is the need to preclude future debacles by transforming our legal and institutional arrangements so they can accommodate the tensions between the dictates of fairness and of effective public governance.

These tensions, gratuitously inflamed by the current police power/ eminent domain deadlock, are the subject of this article. The necessity for recognition of the accommodation power and fair compensation is its thesis. Prevention of the irony recounted in the Old Stock Exchange tale is its goal. Bonding these elements together is the underlying conviction—and a greater irony still—that government has at hand the means for resolving these tensions but, immobilized by doctrinal rigidities, doesn't seem to know it.