Balancing Private Loss Against Public Gain to Test for a Violation of Due Process or a Taking Without Just Compensation

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BALANCING PRIVATE LOSS AGAINST PUBLIC GAIN TO TEST FOR A VIOLATION OF DUE PROCESS OR A TAKING WITHOUT JUST COMPENSATION

In the continuing effort to develop manageable rules for determining the constitutionality of land use regulations that diminish private rights in property, various courts have balanced private loss against public gain to test for two different constitutional violations, taking of private property without just compensation and deprivation of property without due process of law. Although it is often ignored, the distinction between these violations is essential because a taking without compensation can be corrected by payment whereas a violation of due process requires invalidation of the government action.

1. See cases cited in note 54 infra. For example, in Department of Ecology v. Pacesetter Constr. Co., 89 Wn. 2d 203, 207, 571 P.2d 196, 198 (1977), the Washington Supreme Court upheld the use of the "so-called test of balancing private loss against public gain" to determine whether the denial of a building permit under the Shoreline Management Act of 1971, Wash. Rev. Code ch. 90.58 (1976), to prevent view blockage and aesthetic degradation along the shore of Lake Washington, constituted an unconstitutional taking or damaging of private property without just compensation. The trial court had based its holding of no taking on the finding that the "drastic effect upon the neighborhood and the effect upon the neighbors is a much greater loss socially and generally than the loss to one owner in requiring him to restrict his use in a manner that will not cause deterioration of the present conditions of the shoreline." Pacesetter, 89 Wn. 2d at 208, 571 P.2d at 199. The landowner, Pacesetter, contended that this balancing test was unsound because it failed to distinguish between a regulation requiring compensation as a taking and a regulation supportable by the police power requiring no compensation. Id. at 210, 571 P.2d at 200. The court simply replied: "This criticism, however, has not served to change the view of the majority of the courts which accept the balancing test." Id.

In a concurring opinion two justices limited their acceptance of the balancing test: "I do want, however, to make it absolutely clear that the balancing test does have limits. There is, and must be, a point beyond which the interference with the rights of property ownership may not constitutionally go without just compensation regardless of the public interest." Id. at 216, 571 P.2d at 203 (Wright, C.J., and Hicks, J., concurring).

The court carefully avoided relying solely on the balancing test and noted that the landowner's reciprocal benefits from the same restriction on his neighbors' property reduced the value diminution to within permissible limits. Id. at 211-12, 571 P.2d at 200. See note 13 infra (discussion of the reciprocal benefits doctrine).

2. See cases cited in note 54 infra. For clear examples of this use of the balancing test, see note 100 infra.

3. The fifth amendment to the United States Constitution, which is enforceable against the states via the fourteenth amendment, provides: "nor shall private property be taken for public use, without just compensation."

4. The fourteenth amendment to the United States Constitution provides: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

5. See text accompanying notes 50-53 infra.
Many commentators have tackled the problem of developing a coherent theory of constitutional limitations on taking private property rights, with perplexingly little success. There is no consensus on the proper role for the test of balancing private loss against public gain. This comment examines only that one narrow aspect of the larger theoretical problem.

The first part of this comment examines the test of balancing private loss against public gain to establish the conceptual basis for analyzing its proper uses. The test is shown to require that land use regulations serve the general welfare and that the public benefits alone, without consideration of incidental private benefits, be sufficient to justify the burdens placed on private property.

Part II presents the essential characteristics of the due process and taking without compensation limitations as they have been construed by the United States Supreme Court and developed by other courts and commentators. It is shown that the prevailing approach to the taking issue, which allows some private property rights to be diminished without compensation, requires two distinct constitutional limitations on state action. One provides a check on arbitrary or improper action whether or not compensation is required, and the other limits the permissible reduction of property rights without compensation.

Finally, Part III examines the justification in United States Supreme Court precedent and legal theory for either use of this test. It resolves the conflicting interpretations of Pennsylvania Coal Co. v.

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For authors who argue that the balancing test is unsound as a test for a taking but should be used only to test for “minimal rationality” or “public purpose,” see P. Brown, The American Law Institute Model Land Development Code, The Taking Issue and Private Property Rights 17–20 (1975); Michelman, Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law, 80 Harv. L. Rev. 1165, 1193–96 (1967).
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Mahon\(^8\) and shows that balancing private loss against public gain should be used only to test for a violation of due process and not for a taking without compensation.

I. BALANCING PRIVATE LOSS AGAINST PUBLIC GAIN AS A FORM OF SOCIAL COST-BENEFIT ANALYSIS

Balancing private loss against public gain is one form of a broader analytic process which the Model Land Development Code calls balancing detriments and benefits.\(^9\) This analytic process measures changes in aggregate welfare by comparing all the benefits with all the detriments of a proposed action in a cost-benefit analysis performed from the perspective of society as a whole. The gains and losses may be combined and compared in many different ways, allowing many possible formulations.\(^10\) Regardless of the formulation used, however, two essential features of this social cost-benefit analysis allow it to be identified even in the murkiest opinions.

First, the factors considered on each side must be sufficiently similar that they can, at least subjectively, be added and subtracted on the same mental scale.\(^11\) Second, all effects on all individuals in society must be considered.\(^12\) Many individual effects can be considered in the aggregate, but each effect must be counted only once. The effect

8. 260 U.S. 393 (1922).

9. MODEL LAND DEVELOPMENT CODE § 7-401 (1976) ("Balance of Detriments and Benefits"). The drafters of the code apparently chose this term rather than cost-benefit to avoid the implication that the benefits and detriments should be valued in monetary terms as is often attempted in cost-benefit analyses. For a discussion of the problems and misunderstandings created by valuating nonquantifiable effects in monetary terms, see Note, Cost-Benefit Analysis and the National Environmental Policy Act of 1969, 24 STAN. L. REV. 1092, 1098-1106, 1111-14 (1972).

10. Possible formulations include the following: (1) all gains minus all losses equals change in welfare, (2) public gains plus private gains exceed public losses plus private losses, and (3) public gains minus public losses exceed private losses minus private gains. For examples of judicial use of various formulations of social cost-benefit analysis, see note 15 infra.

11. The Model Land Development Code provides: "Detriments or benefits shall not be denied consideration on the ground that they are indirect, intangible or not readily quantifiable." MODEL LAND DEVELOPMENT CODE § 7-402 (1976). The comments add: "[C]onsideration should not be limited only to those factors that can be easily translated into dollar figures. The long-range social and environmental effect of development may be of far greater importance than any immediately measurable costs or benefits." Id., Reporter's Note at 284. The land use agency is required to give its "opinion" whether the benefits outbalance the detriments. Id. §§ 7-401, -402, Reporter's Note, Illustrations (a)-(b).

12. If the benefit or burden for any individual is left out, the test no longer measures aggregate social welfare. See Michelman, supra note 7, at 1194.
of pollution on the polluters themselves can be either counted with other societal effects, or subtracted from benefits on the polluters' side of the balance.\footnote{13}

When all the effects on all individuals are considered in a form which allows them to be added and subtracted, the sum of these effects is a measurement of the change in aggregate welfare.\footnote{14} Social cost-benefit analysis determines whether a given state action serves the general welfare and, therefore, whether it is socially desirable.\footnote{15}

In the usual situation, when no private parties receive special benefits from a land use regulation,\footnote{16} the test of balancing private loss against public gain is simply one possible formulation of social cost-benefit analysis. But in the case in which private persons receive incidental benefits,\footnote{17} the test of balancing private loss against public gain

\footnote{13. The net burden on the individual must be compared with the net benefit for the rest of society rather than all of society, otherwise the effects on the individual are counted twice. For a different approach to the importance of separating the individuals from society in examining the gains, see Michelman. \textit{ supra} note 7, at 1194–95. If restricted landowners receive benefits from the same restrictions on surrounding property, these benefits must be subtracted from their burdens before comparing their loss to the public gain. This concept of reciprocal benefits is often used to justify the burdens imposed by land use restrictions. \textit{E.g.}, HFH Ltd. v. Superior Court of Los Angeles County, 15 Cal. 3d 508, 520–21, 542 P.2d 237, 246. 125 Cal. Rptr. 365, 374 (1975), \textit{cert. denied}, 425 U.S. 904 (1976); Rochester Business Inst. v. City of Rochester, 25 App. Div. 2d 97, 267 N.Y.S.2d 274, 279 (1966); Department of Ecology v. Pacesetter Constr. Co., 89 Wn. 2d 203, 210–211, 571 P.2d 196, 200 (1977).

\footnote{14. Professor Michelman uses the label "efficiency" to refer to changes in aggregate welfare: "An 'efficient' process is one which maximizes the total amount of welfare . . . ." Michelman. \textit{ supra} note 7, at 1173. For a complete exploration of the concept, see \textit{id.} at 1173–83. Michelman suggests that balancing private loss against public gain is an appropriate test of the minimal requirement that all state actions be efficient. \textit{id.} at 1195–96.

\footnote{15. Social cost-benefit analysis has many useful legal applications. A common example from negligence law is the Learned Hand formula for determining the reasonableness of a risk by comparing the burdens on the actor of avoiding the risk with the probable benefits for society. United States v. Carroll Towing Co., 159 F.2d 169 (2nd Cir. 1947). \textit{See} W. \textsc{Prosser}, \textsc{Torts} 149 (4th ed. 1971). Another example is the Supreme Court's balancing of the burden on interstate commerce against the benefits to a state from a train safety law. Southern Pac. Co. v. Arizona \textit{ex rel.} Sullivan, 325 U.S. 761 (1945). When a nuisance is caused by an adjoining land use, social cost-benefit analysis should be used to limit the remedy to damages when an injunction would place a greater burden on the defendants and society than the resulting benefits to the plaintiffs. \textit{See} Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870. 309 N.Y.S.2d 312 (1970); Ellickson, \textit{Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls}, 40 U. \textsc{Chi.} L. Rev. 681, 720–21 (1973).

\footnote{16. For a discussion of the problem of distinguishing private from public benefits, see note 34 \textit{infra}.

\footnote{17. For example, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), there were large benefits to the homeowner Mahon and only small benefits to the public. \textit{See} notes 60–62 and accompanying text \textit{infra}. Another example is Department of Ecology...
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is stricter than other forms of social cost-benefit analysis, because it requires that the public benefits alone, without consideration of the private benefits, be sufficient to justify the private losses. If this requirement is satisfied, any incidental benefits to private parties will only further increase the aggregate social welfare. The test of balancing private loss against public gain therefore requires not only an increase in aggregate welfare but also satisfaction of this minimal public benefit requirement.

II. CONSTITUTIONAL LIMITATIONS ON DIMINISHING PRIVATE RIGHTS IN PROPERTY

Balancing private loss against public gain has been used to test for both a deprivation of property without due process and a taking of property without just compensation. Before the propriety of either use can be explored, the two constitutional limitations, which are easily confused, must be clearly understood and distinguished.

A. Deprivation of Property Without Due Process of Law

In addition to creating procedural requirements, the words "due process" have been construed by the United States Supreme Court to create certain substantive limitations on government action. Although the possibility of strict review of all governmental actions under this doctrine has been limited by the Supreme Court, interpretations of the due process clause have consistently maintained that all governmental actions must meet certain minimal standards of propriety.

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18. The plain meaning of the words indicates that the test considers only the public benefits, and, in any case, state action cannot be justified by private gain.

19. See note 54 and accompanying text infra.

20. "[T]he substantive content of the Clause is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of [the due process clause in] the Fifth and Fourteenth Amendments." Moore v. City of East Cleveland, 431 U.S. 494, 543-44 (1977) (White, J., dissenting).

21. See L. Tribe, American Constitutional Law 450-51 (1978). However, some cases have mandated a strict standard of review under substantive due process to protect certain fundamental rights. See generally id. at 564-75. Some of the fundamental rights that Supreme Court Justices have listed as requiring special protection by strict judicial scrutiny are the rights of voting, association, access to courts, and certain rights to privacy. Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974). This strict scrutiny ap-
This minimal requirement of substantive due process is often expressed as the limitation that laws must not be "unnecessary," "unreasonable," "irrational," "arbitrary," or "capricious." Many courts express the same constitutional limitation as a general requirement of "reasonableness" without citing a specific constitutional source. The minimal requirements of substantive due process are often applied through the "means-ends test." This requires that (1) the legislative objectives must serve a valid public purpose within the powers of the legislature, and (2) the means employed must bear a rational relationship to the achievement of those objectives. This standard embodies a strong deference to the judgment of the legislature in accordance with the principle of separation of powers.


24. E.g., Moore v. City of East Cleveland, 431 U.S. 494, 548 (1977) (“No case that I know of . . . has announced that there is some legislation with respect to which there no longer exists a means-ends test as a matter of substantive due process law”) (White, J., dissenting).


26. See Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); Zahn v. Board of Pub. Works, 274 U.S. 325, 328 (1927). Within this standard the degree of deference for both the ends and the means seems to vary with the type of case. In land use cases deference by the U.S. Supreme Court to the legislative judgment of objectives is very broad. Practically any conceivable public purpose will be sustained. Berman v. Parker, 348 U.S. 26, 31-33 (1954), and the Court will presume that a public purpose exists if no specific evidence is presented. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) (“No doubt there is a public interest even in this, as there is in . . . all that happens within the commonwealth”).

Judicial deference to the legislative judgment of the means is less broad. In Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928), the Court overruled the judgment of the local zoning authorities on the proper location of a zoning boundary because it could see no reason not to relocate it and the master below found that its present location did not promote the general welfare.

Although the requisite relationship between the means and the ends is often labeled "substantial." Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928); Village of Eu-
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In the context of land use regulation, the essential idea of the minimal substantive due process limitation is that while all individuals in society must yield some of their property rights without compensation for the good of all, these rights can be taken only by governmental actions which pass certain minimal standards of propriety.

B. Taking Private Property for Public Use Without Just Compensation

The fifth amendment's prohibition against taking private property for public use without just compensation has been incorporated by interpretations of the United States Supreme Court into the due process clause of the fourteenth amendment to make it enforceable against the states as well as the federal government. Although the protection for private property is expressed in absolute terms, "[g]overnment hardly could go on if, to some extent, values incident to property could not be diminished" by regulation without compensation. But "if regulation goes too far it will be recognized as a taking." Both courts and scholars have struggled with the problem of determining when a landowner must be compensated, but as yet there is no consensus on either general principles or appropriate rules for deciding cases.

clid v. Ambler Realty Co., 272 U.S. 365, 395 (1926), the present Supreme Court sees this as the same as the requirement of a "rational" relationship, Moore v. City of East Cleveland, 431 U.S. 494, 498 n.6 (1977) (articulating the requirement of a "rational" relationship while quoting the requirement of a "substantial" relationship from an earlier case). If the legislative judgment of this relationship is even debatably valid, it will not be disturbed. Zahn v. Board of Pub. Works, 274 U.S. 325, 328 (1927); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). In a more recent land use case, the Supreme Court quoted a formulation from 1894: "[I]t must appear . . . that the means are reasonably necessary for the accomplishment of the purpose." Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962) (quoting Lawton v. Steele, 152 U.S. 133, 137 (1894)).

27. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); Chicago B. & O. R. Co. v. City of Chicago, 166 U.S. 226. 233 (1897). State constitutions also require that compensation accompany the taking of property. E.g., Wash. Const. art. 1, § 16 ("No private property shall be taken or damaged for public or private use without just compensation").


29. Id. at 415.

30. Van Alstyne, supra note 6, at 1-3. Contemporary courts often consider a diversity of factors developed by both courts and academicians. For example, in a recent Washington case upholding uncompensated flood plain restrictions, the court considered eleven different factors: (1) valid legislative objective, (2) not a public improvement, (3) no flowage easement sought, (4) no property interest acquired, (5) not set aside for public use, (6) no enhancement of a governmental enterprise, (7) no physical
The essential idea of the limitation on taking private property without compensation is that while the individual is expected to yield certain property interests without compensation to governmental actions which pass the minimal standards of propriety, if the burden on a single individual exceeds the amount that one may fairly be expected to bear, compensation must be paid. The various factors considered relevant to the question of taking without compensation can be classified into four basic elements which comprise the concept of fairness.

The first is the element of distribution. When a burden is fairly distributed throughout the community, compensation is never required. This is the essence of a tax. As the burden is confined to fewer people the need for compensation grows.

The second element is the quality of the taken property interest. For example, while compensation is usually required when a recognized estate in land is taken, compensation is seldom required when invasion, (8) no discrimination, (9) rational relationship between means and end, (10) no prohibition of all profitable use, and (11) the state did not create the necessity for regulation. Maple Leaf Investors, Inc. v. Department of Ecology. 88 Wn. 2d 726. 733–34, 565 P.2d 1162, 1165–66 (1977).

31. When the theory of compensation is viewed from this perspective, it follows that the amount of compensation that the government should pay is only the increment by which the individual's burden exceeds the amount he is expected to bear without compensation. Each case could be seen as involving part eminent domain and part police power, so that only part of the deprivation would have to be compensated. See Stoebuck, A General Theory of Eminent Domain, 47 WASH. L. REV. 553, 607 (1972). A practical solution to the problem of placing a value on each of the parts could save large amounts of money for local governments who take the compensable regulation approach. See notes 51–52 and accompanying text infra.

32. The Wisconsin court has expressed the essential idea very well:

[I]f the damage is such as to be suffered by many similarly situated . . . and ought to be borne by the individual as a member of society for the good of the public safety, health or general welfare, it is said to be a reasonable exercise of the police power, but if the damage is so great to the individual that he ought not to bear it under contemporary standards, then courts are inclined to treat it as a “taking” . . . . Stefan Auto Body v. State Highway Comm'n. 21 Wis. 2d 363, 124 N.W.2d 319, 323 (1963).


34. The element of the distribution of the burden has a parallel consideration in the distribution of the benefit. When the benefits are conferred upon a very small group, the action is improper as a use of government power for private benefit; or at least, if compensation is due to those who are burdened, it should be paid by the private beneficiaries. As the number of beneficiaries increases, the duty of the beneficiaries to pay decreases. If the number of beneficiaries is great enough, the benefits are considered public rather than private. Contra, W. STOEBUCK, supra note 6, at 201 (all benefits are private except those which directly benefit government-owned land).

35. E.g., Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) (right to mine subsurface minerals cannot be taken without compensation).
a nuisance or source of harm to society is regulated.36

The third element, quantity, is expressed in the diminution in value test37 promulgated by Justice Holmes in Pennsylvania Coal Co. v. Mahon.38 When the diminution in property value suffered by a single property owner becomes excessive, she is entitled to compensation.39

This element includes both the idea that all landowners can be expected to yield de minimus property rights for the benefit of all, and the notion that compensation should not be paid when settlement (or transaction) costs exceed the benefits.40

The fourth is the element of reliance. When a landowner had actual or constructive notice of impending regulations before he purchased his land, it seems fair to deny compensation.41 Likewise, when a land-

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36. See Kusler, supra note 7, at 22-28; Michelman, supra note 7, at 1196-201. In 1904, Professor Freund expressed another quality consideration:

[T]he 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.


The harm-to-society/benefit-to-society distinction is sometimes elusive because the elimination of a harm can often be viewed as the conferral of a benefit. For example, if local authorities require the draining of a mosquito breeding swamp on private land, is society benefited by the reduction in mosquitoes or has the harm of mosquitoes been eliminated?

A theory offered by Professor Sax also examines the quality element: no compensation is required if the government is arbitrating between conflicting adjacent land uses rather than conducting a government enterprise. Sax, Takings, Private Property and Public Rights, 81 YALE L.J. 149 (1971).

37. For discussions of the diminution in value test, see F. Bosselman, supra note 6, at 208-11; Berger, supra note 6, at 175-77; Kusler, supra note 7, at 33-34; Mercer, Regulation (Police Power) v. Taking (Eminent Domain), 6 N.C. CENT. L.J. 177, 186 (1975); Michelman, supra note 7, at 1190-93; Plater, supra note 7, at 228-36; Sax, Takings and the Police Power, 74 YALE L.J. 36, 50 (1964).

38. "When [the extent of diminution] reaches a certain magnitude, in most . . . cases there must be an exercise of eminent domain and compensation to sustain the act." 260 U.S. 393, 413 (1922). This test has been reaffirmed in dicta. Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

39. But the standard for judging the extent of diminution has never been clarified. Some of the possible standards to which the diminution in value can be compared are: (1) the total value of the property, (2) the wealth of the owner, (3) the extent of uncompensated burdens imposed upon other landowners, and (4) a given amount in constant dollars. The total value of the property is often assumed to be the standard, but this still leaves unresolved issues. For example, is it the value of the entire tract, or only the value of the portion affected by the restriction? See Michelman, supra note 7, at 1192.

40. See Berger, supra note 6, at 201 ("Compensation should not be paid unless the damage . . . is substantially more than the cost of administering payment"); Michelman, supra note 7, at 1215 ("compensation is due whenever demoralization costs exceed settlement costs").

41. This element includes the first-in-time approach advocated by Professor Berger
owner has justifiably relied on existing zoning of his own or surrounding land, it seems fair to compensate him for changes which actually cause financial losses.\textsuperscript{42}

All of these four elements—distribution, quality, quantity, and reliance—relate to the issue of fairness. Addressing these elements will facilitate analysis of the compensation issue, although the problem remains of evaluating the factors within each element and deciding which elements should carry the most weight.

C. Distinguishing a Taking Without Due Process from a Taking Without Compensation

The literal meanings of the words in the due process and compensation clauses of the Constitution give few clues to the content of the protections as they have been construed by the United States Supreme Court.\textsuperscript{43} One may at first fail to discern any theoretical or philosophical reason that either clause should have the content it has been given. But it appears that the Supreme Court opinions have been reaching toward two logically distinct, complementary limitations in an attempt to construct a coherent set of legal principles which reflects cultural notions of justice. That is, because all individuals must yield some property rights for the good of society, two different limitations are required to protect against improper exertions of governmental power to take private property.

The first limitation, the minimal requirement of substantive due process, focuses on the taking of individual property rights where no

\footnotesize{for dealing with adjacent conflicting land uses. Berger, supra note 6, at 193. 195–226. Under this approach, if a regulation proscribes a land use which started after passage of the regulation, no compensation is required because the investor had notice of the conflict, whereas if the regulation proscribes a prior land use, compensation is required because the investor justifiably relied on the lack of conflict with surrounding uses.

42. Compensation should be based on principles of restitution, measured by actual losses, rather than expectation, measured by lost profits or "benefit of the bargain." If the zoning authority downzones an area, the landowners should not be allowed to recover the profits they expected to make through improvements or market appreciation, but they should be compensated for actual losses (with fair interest) when they sell the downzoned property.

The commentators do not agree on the proper role for the landowner's expectations in taking theory. Sax, supra note 36, at 180–81 (1971), suggests that expectations should not be considered: Berger, supra note 6, at 174, argues that expectations are a critical factor, and Michelman, supra note 7, at 1211–14, suggests a trade-off between the values of respecting expectations and the need for progress in land use patterns. But none of the authors considers the distinction between restitution based on justifiable reliance and payment for lost expectations.

43. See, e.g., note 20 supra.
compensation is required and asks whether the government has acted properly. The second limitation, the compensation requirement, considers whether the government has taken more from an individual than he should fairly be expected to give up without compensation.

Perhaps because the compensation clause has been incorporated into the due process clause, and perhaps because both constitutional protections apply to governmental actions which take property interests, courts and commentators have failed to distinguish the two limitations. In many decisions, it is difficult to know which limitation is being considered, and it appears that the two have often been merged into a single standard. An examination of the language used

44. See note 27 and accompanying text supra.

45. For example, in LaSalle Nat'l Bank v. County of Cook, 12 Ill. 2d 40, 145 N.E.2d 65, 69 (1957), while considering whether an ordinance bore a real and substantial relation to the general welfare, the court listed six factors deemed relevant to this determination. Eight years later, in a case between the same parties, a lower court considered both the minimal due process and compensation issues and cited the six factors from the earlier case while examining the compensation issue. LaSalle Nat'l Bank v. County of Cook, 60 Ill. App. 2d 39, 208 N.E.2d 430, 436 (1965).

46. Typically, authors focus only on the fifth amendment's prohibition against taking private property without just compensation. E.g., F. BosseLMAN, supra note 6, at Frontfly, Preface at i; Kusler, supra note 7, at 2-3; Kratovil & Harrison, supra note 7, at 596-97, 601-02. The due process issue is often ignored in the analysis of cases. For example, the authors of The Taking Issue present the "real and substantial relation" requirement in Powell v. Pennsylvania, 127 U.S. 678 (1888), as a test for a taking without compensation, F. BosseLMAN, supra note 6, at 121, and in the chapter on taking by regulation, they quote judicial requirements of a "substantial relationship," id. at 190, and a "rational basis," id. at 193, without mentioning due process or the fourteenth amendment. Although one author recognizes three different sources of constitutional limitations on taking private property—due process, equal protection, and "taking," Kusler, supra note 7, at 13—the body of his article focuses on "factors relevant to the question of taking." Id. at 20. When he states that "[t]he typical judicial test [for a taking without compensation] balances the harm posed to society... against the impact of the regulations upon the usability of the parcel," id., he cites cases that use balancing to test for the minimal requirements of due process: Town of Caledonia v. Racine Limestone Co., 266 Wis. 475, 479, 63 N.W.2d 697, 699 (1954) and Miller Bros. Lumber Co. v. City of Chicago, 414 Ill. 162, 111 N.E.2d 149 (1953), id. The research for this comment has produced only one article which focuses on the due process issue: Donaldson, Regulation of Conduct in Relation to Land—The Need to Purge Natural Law Constraints from the Fourteenth Amendment, 16 WM. & MARY L. REV. 187 (1974).

47. Justice Stevens noted this phenomenon of merger: "In his opinion for the Court, Mr. Justice Sutherland fused the two express constitutional restrictions on any state interference with private property—that property shall not be taken without due process nor for a public purpose without just compensation—into a single standard ...." Moore v. City of East Cleveland, 431 U.S. 494, 514 (1977) (Stevens, J., concurring, discussing Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)). In another example, a state court stated:

[The police power] cannot be exercised unless it bears a rational relationship to the subjects which fall fairly within the police power and unless the means used are
is often of little help because the same words, especially "taking," "confiscatory," and "unreasonable," are frequently used for both limitations.\textsuperscript{48} The only words that seem to be useful in determining which limitation the Court actually applied are: "compensation"\textsuperscript{49} for the limitation that focuses on fairness for the individual, and "arbitrary," "capricious," "public purpose," and "rational relationship"\textsuperscript{50} for the limitation that focuses on the propriety of government actions.

Does it matter that the limitations are often merged? One might argue that, as long as all the relevant tests for both limitations are applied, the proper finding on the question of constitutionality will always be reached. This is true, but the possible remedies for the two constitutional violations are not the same. A taking without compensation can be corrected by payment, but a governmental action that is arbitrary or serves no valid public purpose must be voided. The Model Land Development Code\textsuperscript{51} and some commentators\textsuperscript{52} encourage allowing the government the option of paying to correct the defect without further proceedings when a regulation is found to constitute a

\textsuperscript{48} Horowitz v. Town of Waterford, 151 Conn. 323, 197 A.2d 636, 637-38 (1964) (emphasis added).

\textsuperscript{49} "Taking" has been used while discussing the compensation issue, Sibson v. State, 115 N.H. 124, 336 A.2d 239, 241 (1975), and while discussing the due process issue. Metzger v. Town of Brentwood, 374 A.2d 954, 956, 958 (N.H. 1977).

"Confiscatory" has been used while discussing the compensation issue. Dooley v. Town Plan & Zoning Comm'n, 151 Conn. 309, 197 A.2d 770, 772, 775 (1964), and while discussing the due process issue. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386 (1926); C. Miller Chevrolet, Inc. v. City of Willoughby Hills, 38 Ohio St. 2d 298, 313 N.E.2d 400, 405 (1974).

"Unreasonable" has been used while discussing the compensation issue, Stefan Auto Body v. State Highway Comm'n, 21 Wis. 2d 363, 124 N.W.2d 319, 323 (1963), and while discussing the due process issue. Richardson v. Beattie, 98 N.H. 71, 95 A.2d 122, 124, 125 (1953); Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972), cert. denied, 409 U.S. 1108 (1973).


\textsuperscript{51} MODEL LAND DEVELOPMENT CODE § 9-112(3) (1976).

\textsuperscript{52} F. BOSSELMAN, supra note 6, at 302-09; Kusler, supra note 7, at 75-79.
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taking without compensation. The adoption of this plan would make imperative the careful distinction\textsuperscript{53} between these two limitations.

III. PROPER USE OF BALANCING PRIVATE LOSS AGAINST PUBLIC GAIN TO TEST FOR UNCONSTITUTIONAL DEPRIVATIONS OF PROPERTY

A. United States Supreme Court Precedent

Although state courts have used the test of balancing private loss against public gain to determine constitutionality under both the due process and the compensation clauses,\textsuperscript{54} whether and how it has been used by the United States Supreme Court is debatable. Two authors,\textsuperscript{55}

\textsuperscript{53} In a lengthy opinion, the Maryland Federal District Court carefully distinguished the two issues: “The fifth amendment employs two independent clauses to address two independent issues. . . . [A] claim of deprivation of property without due process cannot be blended as one and the same with the claim that property has been taken for public use, without just compensation.” Smoke Rise, Inc. v. Washington Suburban San. Comm’n, 400 F. Supp. 1369, 1381 (D. Md. 1975) (emphasis by the court).

In Czech v. Blaine, 253 N.W.2d 272 (Minn. 1977), the Supreme Court of Minnesota recognized the importance of this distinction. The trial court had voided an action of the city council under due process because it was capricious. The supreme court vacated this judgment, finding instead an unconstitutional taking without compensation.

\textsuperscript{54} The following courts appear to have expressed the test of balancing private loss against public gain to determine whether requirements of due process have been violated: Guhl v. Holcomb Bridge Road Corp., 238 Ga. 322, 232 S.E. 2d 830 (1977); Tiffinston v. City of Urbana, 29 Ill. 2d 22, 193 N.E.2d 1 (1963); Franz v. Village of Morton Grove, 28 Ill. 2d 246, 190 N.E.2d 790, 792 (1963); Rockville Fuel & Feed Co. v. City of Gaithersburg, 266 Md. 117, 291 A.2d 672 (1972); Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891 (1972), cert. denied, 409 U.S. 1108 (1973); Huttig v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963); Metzger v. Town of Brentwood, 374 A.2d 954 (N.H. 1977); Richardson v. Beattie, 98 N.H. 71, 95 A.2d 122 (1953); Shepard v. Village of Skaneateles, 300 N.Y. 115, 89 N.E.2d 619 (1949); C. Miller Chevrolet, Inc. v. City of Willoughby Hills, 38 Ohio St. 2d 298, 313 N.E.2d 400 (1974).


\textsuperscript{55} F. Bosseman, supra note 6, at 139, 207, 238, 256; Kratovil & Harrison, supra note 7, at 609. It is likely that Kratovil and Harrison began the misconception about Pennsylvania Coal in 1954 because theirs is the oldest citation to this case for the balancing idea and their other citations for balancing, Mansfield & Swett, Inc. v. Town of West Orange, 120 N.J.L. 145, 198 A. 225, 230 (1938) and Reschke v. Village of Winnetka, 363 Ill. 478, 2 N.E.2d 718 (1936). mentioned only state cases.
and courts in two jurisdictions,\textsuperscript{56} cite \textit{Pennsylvania Coal Co. v. Mahon}\textsuperscript{57} as Supreme Court authority for the proposition that balancing private loss against public gain is a proper test for deciding when compensation must be paid. Two other commentators conclude that the balancing test was not used by Justice Holmes,\textsuperscript{58} but apparently no one has presented a complete analysis of this case. Although the opinion is not entirely clear, it appears that while considering the constitutionality of one application of the statute, Justice Holmes balanced private loss against public gain as a test for substantive due process, and, while considering the constitutionality of another application of the statute, he examined the extent of value diminution to test for a taking without just compensation.

In \textit{Pennsylvania Coal}, Mahon, a private citizen, sought to enforce a new statute regulating coal mining which would prevent mining under his house that might cause the surface to subside. After a brief introduction to the concept of police power and its limitations, the Court presented its opinion in two parts. It first considered the statute's application to the land under Mahon's house, the only question before the Court. Then, because the state attorney general and other interested parties had participated in the hearings below, it gratuitously offered its opinion on the constitutionality of the statute's application to land under public streets and cities in the second part.\textsuperscript{59} The analyses in these two parts are entirely different: the first primarily involved benefits for private landowners and the second involved large benefits for the public.

In the first part, the Court examined the legislative objective for a public purpose and merely presumed that the protection of this single


\textsuperscript{57} 260 U.S. 393 (1922).

\textsuperscript{58} P. Brown, \textit{supra} note 7, at 18; Mercer, \textit{supra} note 37, at 189.

\textsuperscript{59} The Court stated:

If we were to deal with the plaintiff's position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.

But the case has been treated as one in which the general validity of the act should be discussed. The attorney general of the state, the city of Scranton, and the representatives of other extensive interests, were allowed to take part in the argument below, and have submitted their contentions here. It seems therefore, to be our duty to go farther in the statement of our opinion, in order that it be known at once, and that further suits should not be brought in vain.

260 U.S. 393, 414 (1922).
private house involves some public interest because the public has an interest in everything that happens within the commonwealth. The Court then observed that the presumed public interest was small because there was no public nuisance, the damage was not public, the statute did not apply to all land with houses, and personal safety was not involved. Next, it noted that a valuable estate in land was abolished and concluded "that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights," indicating that the means employed by the statute were too harsh and not justified by the end to be achieved. The quoted passage clearly requires a comparison between public interest and private loss, and it is only a small step from this to an analytic balancing between private loss and public gain.

In this part of the opinion the Court did not mention the possibility of compensation or eminent domain. Its observation that there was little public interest involved effectively precluded the option of paying compensation because eminent domain cannot be exercised at public expense for only private benefit. The Court's approach, considering first whether there was a valid public purpose and then whether the result of the statute was suited to accomplishing that public purpose, followed the usual pattern of application of the means-ends test for the minimal requirements of substantive due process.

By contrast, in the second part of the opinion, the Court assumed that there was a sufficient public interest in protecting the streets and cities to warrant the exercise of eminent domain and repeatedly emphasized the option of compensation. This implies that the Court found the act to be sufficiently related to a public purpose to pass the minimal requirements of substantive due process. The Court applied the value diminution test to determine whether these same objec-

60. Id. at 413.
61. Id. at 413–14.
62. Id. at 414. The Court considered only the public interest in protecting Mahon's house and no other property.
63. "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use." Id. at 415.
64. See notes 24–26 and accompanying text supra.
65. "[W]e assume that an exigency exists that would warrant the exercise of eminent domain." 260 U.S. at 416.
66. The Court mentioned the idea of compensation five times in the second half. Id. at 415–16. "The rights of the public in a street purchased or laid out by eminent domain are those it has paid for." Id. at 416.
67. "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Id. at 415. "One fact for consideration . . . is the extent of the diminution." Id. at 413. "[This statute which] make[s] it commercially
tives could be accomplished without compensation and concluded that the state was required to pay for the change. It did not evaluate the benefits to the public, a prerequisite to balancing private loss against public gain, and twice stated that large public benefits cannot justify denying compensation, an explicit refusal to apply this balancing test to the question of taking without compensation.

The sharp difference in approach between the two parts of the opinion suggests that Justice Holmes had two different limitations in mind. The first part focused on the propriety of the governmental action while the second part focused on the burden imposed on the regulated landowners.

impractical to mine certain coal has very nearly the same effect ... as appropriating or destroying it.” Id. at 414.

68. “[W]e see no more authority [for taking the right to support] without compensation than there was for taking the right of way [which was paid for] and refusing to pay for it because the public wanted it very much.” Id. at 415. “We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.” Id. at 416.

69. Dicta from another case support the conclusion that the United States Supreme Court approves of balancing private loss against public gain to test for the minimal requirements of substantive due process. In Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), the owner of a gravel pit challenged the constitutionality of a restriction on dredging and pit excavating. The Court considered separately the questions of a taking without compensation and “reasonableness,” a requirement of substantive due process:

How far a regulation may go before it becomes a taking we need not now decide ... [W]e find no indication that the prohibitory effect of Ordinance No. 16 is sufficient to render it an unconstitutional taking if it is otherwise a valid police regulation.

The question, therefore, narrows to whether the prohibition ... is a valid exercise of the town’s police power ... Except for the substitution of the familiar standard of “reasonableness,” this Court has generally refrained from announcing any specific criteria.

Id. at 594.

Although the Court found the record insufficient to overcome the presumption in favor of the state, id. at 595, it identified the information needed for evaluating the “reasonableness” of the ordinance: “we therefore need to know such things as the nature of the menace against which it will protect ... and the loss which appellants will suffer from the imposition of the ordinance.” Id., implying that if the loss were greater than the menace, the ordinance would be unreasonable and would violate substantive due process.

In Dahl v. City of Palo Alto, 372 F. Supp. 647, 648 (N.D. Cal. 1974), a federal court read the Goldblatt case to require a balancing of “the interests of the public” against “the oppressiveness of the action” to determine the question of reasonableness. However, it misconstrued Goldblatt when it stated that the determination of “where regulation ends and taking begins” is “a question of reasonableness.”
B. Justification for Balancing Private Loss Against Public Gain to Test for a Violation of Due Process

Balancing private loss against public gain is justified as a test for due process by four different considerations. First, as a form of social cost-benefit analysis, this test requires that all governmental actions provide some benefit to society by increasing aggregate welfare. This goes to the heart of substantive due process, which requires that all governmental actions meet minimal standards of propriety. Although there are serious limitations on the objectivity of this test, it may serve in some cases as a more manageable and objective judicial standard than the usual catchwords such as arbitrary, capricious, public purpose, and rational relationship.

Second, in contrast to the other forms of social cost-benefit analysis, the test of balancing private loss against public gain includes an additional requirement of creating public benefits rather than only private benefits, another element of substantive due process.

Third, balancing private loss against public gain is an appropriate test for the adequacy of the means in the means-ends test. The United States Supreme Court has held that an examination of the means allows scrutiny of the actual results of the statute’s application and not just the face of the act. The Court requires that the actual results of a land use ordinance genuinely promote health, safety, convenience, or general welfare, and social cost-benefit analysis tests for just this requirement. Balancing is therefore an appropriate test for the means requirement, which all legislation affecting private property must pass.

Fourth, balancing private loss against public gain, like all forms of social cost-benefit analysis, is an appropriate test for some of the catchwords enunciated by courts as standards for the minimal re-

70. See notes 9–15 and accompanying text supra.
71. This is the public purpose requirement. See notes 16–17 and accompanying text supra.
72. See note 25 and accompanying text supra.
74. “Here, the express finding of the master . . . is that the health, safety, convenience, and general welfare of the inhabitants of the part of the city affected will not be promoted by . . . the ordinance . . . . This finding . . . is determinative of the case.” Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928).
75. See notes 14–15 and accompanying text supra.
76. Because all legislation must pass the means-ends test, see note 24 supra, social cost-benefit analysis is an appropriate minimal test for the constitutionality of all legislation.
77. See note 22 and accompanying text supra.
quirements of substantive due process, such as "unnecessary" and "unreasonable." A law which does not in some way increase the general welfare is clearly "unnecessary." Many state courts have balanced private loss against public gain as a test for "reasonableness" under substantive due process.\(^7\) A good example is *Richardson v. Beattie,*\(^7\) in which a regulation prohibiting boating on a public pond to protect the purity of a water supply was challenged as unreasonable by riparian landowners who were specially affected. The court stated:

In passing upon the reasonableness of legislation . . . the court is required to balance the importance of the public benefit which is sought to be promoted against the seriousness of the restriction of private right sought to be imposed. . . . "[T]he more insistent the public need the more may private rights be restricted."

Noting that the problem was easily solved by chlorination,\(^8\) the court held that because the burdens on adjoining landowners outweighed the benefits for the public, the regulation was void as unreasonable.\(^8\)

These four justifications for balancing private loss against public gain to test for a violation of due process have all presumed a context of challenges to actions of legislatures or their subordinate bodies. In these situations, unless certain provisions of the Bill of Rights or certain other fundamental interests are violated, the courts must give broad deference to the legislative valuation of gains and losses.\(^8\) But, without challenging the legislative judgment, the court can use those same valuations to invalidate legislation under a social cost-benefit analysis in two situations.

First, the legislature cannot foresee all possible applications of a statute which will affect each individual differently. If, in a particular situation, the court finds that, according to the legislative valuations, the public benefits are smaller than the private burdens, the court may invalidate that application as inconsistent with the legislative intent.\(^8\)

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78. *E.g.*, Franz v. Village of Morton Grove, 28 Ill. 2d 246, 190 N.E.2d 790 (1963); Rockville Fuel & Feed Co. v. City of Gaithersburg, 266 Md. 117, 291 A.2d 672 (1972); Huttig v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963); Richardson v. Beattie, 98 N.H. 71, 95 A.2d 122 (1953).

79. 98 N.H. 71, 95 A.2d 122 (1953).

80. 95 A.2d at 125 (citations omitted).

81. *Id.*

82. 95 A.2d at 126. The compensation issue was not considered in this case.

83. *See* note 26 and accompanying text *supra.* Of course state courts may enforce the due process provisions in their own constitutions as they choose.

84. *E.g.*, Hamer v. Town of Ross, 59 Cal. 2d 776, 382 P.2d 375, 31 Cal. Rptr. 335 (1963) (one-acre minimum lot size was unduly oppressive when parcel was surrounded by smaller lots and no public benefit would accrue); Reynolds v. Barrett, 12 Cal. 2d
Second, in the legislative process, a majority receiving small benefits can impose large burdens on a minority. By applying the legislative valuations, a court can invalidate this type of statute with a social cost-benefit analysis as serving no public purpose and not increasing the general welfare.\(^8\)

An exercise of eminent domain must also serve a public purpose\(^8\) and meet the requirements of due process. If the condemnation confers no benefits on private parties, the test of balancing private loss against public gain is the same as a social cost-benefit analysis,\(^8\) and, because the landowner is presumed to be fairly compensated, this test requires only that the benefits to the public exceed the costs.\(^8\) This is usually the case, since public officials use cost-benefit analysis in decisionmaking. But if the test is not satisfied, evidencing an improper governmental action, a court should invalidate the exercise of eminent domain as serving no public purpose.

C. Conflict Between Balancing Private Loss Against Public Gain and the Principles of Just Compensation

Balancing private loss against public gain has been shown to be a suitable test for due process, and it remains to be demonstrated why this test is not also a suitable indicator for the requirement of compensation. This section will show that this use of the balancing test is inconsistent with the clear meaning of the Constitution, violates the basic principle of fairness behind the compensation requirement, contradicts doctrine enunciated in Pennsylvania Coal, and denies government the remedy of paying compensation.

The words of the Constitution clearly intend that compensation must accompany the taking of property in some situations. Use of the balancing test would allow any property to be taken without compen-

\(^244\), 83 P.2d 29, 33 (1938) (although the general ordinance was valid, residential zoning of parcel surrounded by businesses was unconstitutional because "[t]o hold otherwise would be to needlessly injure plaintiffs, without a compensating benefit to the public").

\(^85\). For example, if there are two dominant crops in an agricultural district, and the minority's crop nurtures a pest for the majority's crop, the majority may pass a law prohibiting cultivation of the other crop. See, e.g., Miller v. Schoene, 276 U.S. 272 (1928) (rust from cedar trees attacked apple orchard). If the resulting economic loss to the minority exceeds the economic benefits for the majority, the law should be declared unconstitutional as damaging to the general welfare. See Michelman, supra note 7, at 1195.


\(^87\). See text accompanying notes 11-17 supra.

\(^88\). If the compensation is "just," it should exactly balance the individual losses, leaving only gains and losses for the rest of society in the formula. See generally Michelman, supra note 7, at 1195.
sation if the public benefits are great enough. Would not the public benefits of a new school house be greater than the value of the land on which it is built?

Commentators agree that fairness must be the guiding principle behind any resolution of the issue of taking without compensation. Fairness requires that property owners who are similarly situated and restricted by identical regulations be treated alike. Because the test of balancing private loss against public gain considers distant public benefits, a factor unrelated to the landowner's type or extent of burden, it violates this requirement. For example, in the Richardson case discussed above, if the riparian landowners had alleged a taking without just compensation, this use of the test would have indicated a need for compensation since the public benefit was adjudged smaller than their losses. On the other hand, if the same activities by boaters had caused a greater contamination problem with more harm to the distant public, no compensation would have been required. In these two hypotheticals the landowners are similarly situated but the question of compensation is determined solely by a factor which is unrelated to the landowners' situation, the magnitude of benefits for the public. This differing treatment violates fairness.

Balancing private loss against public gain to test for a taking without compensation contradicts two doctrines enunciated by the United States Supreme Court in Pennsylvania Coal. First, public need, no matter how strong, cannot justify taking private property without compensation, and second, in most cases, when the extent of value diminution is great enough, compensation is required. The use of

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89. See Stoebuck, The Property Right of Access Versus the Power of Eminent Domain, 47 Tex. L. Rev. 733, 748 (1969) (comment on the obvious problem with using the balancing test in the area of compensation for loss of highway access).

90. See Berger, supra note 6, at 167-69; Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 63, 81 n.53 (1962); Michelman, supra note 7, at 1171-72.


93. 260 U.S. at 413, 415. See note 67 and accompanying text supra. Some commentators have confused the test of balancing private loss against public gain with the value diminution test. For example, the authors of The Taking Issue, while exploring the private loss side of balancing private loss against public gain, quoted studies based on cases involving only the value diminution test. F. Bosseman, supra note 6, at 208-11. Plater combined the two tests to create a single "diminution-balancing test." Plater, supra note 7, at 243-56.

In the controversy over the appropriate standard for the value diminution test, Professor Allison Dunham suggested that the diminution is excessive when the private cost
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balancing violates both of these doctrines by allowing property values to be completely destroyed without compensation if the public interest is great enough. Note that both of these doctrines favor equal treatment for similarly situated landowners by focusing only on factors related to the landowners' situation.

An essential characteristic of a violation of the compensation requirement is that payment to the landowner will remedy the defect. Testing for the requirement of compensation by balancing private loss against public gain would deny this remedy because no amount of compensation can correct a failure of this balancing test. Any money paid by the government is a public cost which reduces the net public benefits. This reduction in public gain is exactly equal to the reduction in private loss to the landowner, so the balancing test still will not be satisfied.

In cases concerning the compensation issue it is important to distinguish an application of balancing private loss against public gain from a consideration of the element of the quality of the property rights taken. The confusion often arises in cases involving a nuisance or source of harm to society, like the wetlands cases in which landowners are prohibited, without compensation, from filling marshlands because of the resulting damage to the ecosystem. In some of these cases, although the courts note the extent of the public interest which motivated the legislation, the decisions properly turn on the fact that the regulation prevents a harm to society rather than securing a gain. For example, in Just v. Marinette County, the Wisconsin court observed: "[W]e have a restriction on the use of a citizen's property, not to secure a benefit for the public, but to prevent a harm

exceeds the public need. But this then becomes the balancing test which can sustain a regulation no matter how large the diminution. Dunham, supra note 90, at 76.

94. This is the approach taken in the second part of the Pennsylvania Coal opinion. See text accompanying notes 65–68 supra.
95. See text accompanying notes 35–36 supra.
97. In a recent New Hampshire case the court wrote: "'It is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principles of property taken under the right of eminent domain.'" Sibson v. State, 115 N.H. 124, 336 A.2d 239, 242 (1972) (quoting Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 86 (1851)). Note that the court's mention of balancing private loss against public gain was only by analogy to cases which had clearly used it to test for the minimal requirements of substantive due process. This reading of Sibson was affirmed in Metzger v. Town of Brentwood, 374 A.2d 954 (N.H. 1977).
98. 56 Wis. 2d 7, 201 N.W.2d 761 (1972).
from the change in the natural character of the citizen’s property." 99 The court therefore concluded that no compensation was required. Of course, in addition to considering the quality of the rights taken, a court should consider the magnitude of the public interest, because, if it is insufficient to justify the burdens on the landowners, the court should find a violation of the minimal requirements of substantive due process.

IV. SUMMARY

As a contributing rationale for deciding challenges to the constitutionality of land use regulations, many courts have applied the test of balancing private loss against public gain. This test is one of many possible formulations of a cost-benefit analysis for all of society, a method of predicting increases or decreases in aggregate welfare resulting from a proposed action. This particular formulation of social cost-benefit analysis includes a further limitation that incidental special benefits to private parties cannot be counted to help satisfy the test. If a state action fails this test the courts conclude that it violates the federal or state constitution. However, the courts do not agree on which provision is violated. Some find a violation of the fifth amendment’s prohibition against taking private property without compensation, while others find a deprivation of private property without due process of law violating the substantive requirements of the due process clause in the fourteenth amendment.

The distinction between these two limitations, which is seldom recognized in judicial opinions, 100 is fundamental. Beginning with the

99. 201 N.W.2d at 767–68.
100. This author has found two exemplary state court opinions that distinguish the two constitutional limitations and use the balancing test properly. In Rockville Fuel & Feed Co. v. City of Gaithersburg, 266 Md. 117, 291 A.2d 672 (1972), the court properly distinguished the taking and due process limitations when it stated:

Rockville Fuel does not contend ... that the zoning amendment ... would amount to a taking of its land for public use without the payment of just compensation ....

The question then is whether or not the amendatory zoning ordinance is unconstitutional as being arbitrary, unreasonable, capricious or discriminatory and thus a violation of the provisions of ... the Maryland Constitution prohibiting a denial of due process of law and the provisions of the Fourteenth Amendment of the United States Constitution.

291 A.2d at 677. The court then quoted with approval the opinion of the court below, which applied balancing to determine whether the ordinance was unreasonable and arbitrary: "'[T]he City Council could have found that cement mixing plants ... so seriously incommoded the health, comfort and general welfare that the benefit to the public good brought about by their removal ... substantially outweighed the resulting harm to
premise that all individuals are expected to yield some property interests without compensation for the good of all, it can be shown that two distinct, complementary limitations on governmental power to take property rights are required. The minimal requirements of substantive due process ensure that all governmental deprivations of property meet certain standards of propriety whether or not compensation is required, and the compensation provision ensures that a property owner will be paid if his burden exceeds that which an individual is expected to yield without compensation. It is important that courts distinguish these limitations because a violation of the compensation requirement is correctable by government payment while an action that is improper for any other reason must be voided.

Opinions of the United States Supreme Court and the theory behind the principles that underlie each limitation indicate that balancing private loss against public gain is an appropriate test for a violation of substantive due process but unjustifiable as a test for an unconstitutional taking without compensation. As a form of social cost-benefit analysis, this test identifies actions that do not serve a public purpose and, therefore, violate due process. If applied to the compensation issue, this test contravenes the principle of fairness which is fundamental to that constitutional limitation.

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In Huttig v. City of Richmond Heights, 372 S.W.2d 833 (Mo. 1963), the due process analysis began with the statements that the restriction must not be "clearly arbitrary and unreasonable" and must "bear a substantial relation to the public... welfare." Id. at 839. The court noted that value diminution is "an element to be considered, particularly in ascertaining the relationship of the zoning to the public welfare," id. at 840, and concluded that the basic question was "[I]s the extent of the public interest and welfare great enough to outweigh the demonstrated detriment to the individual interests...?" Id. at 842. Finding that the benefits for the neighborhood were small compared to the plaintiffs' burden, the court concluded that the zoning bore "no substantial relationship to the public... welfare." Id. at 843. It held this to be a violation of "the due process clauses... of both the State and Federal Constitutions," id., and then stated: "Having so ruled, it is unnecessary to pass specifically upon the additional [contention] that... plaintiffs' property is taken without compensation..." Id.