Modeling and Formalism in Takings Jurisprudence

Thomas Ross

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr
Part of the Law Commons

Recommended Citation

Available at: http://scholarship.law.nd.edu/ndlr/vol61/iss3/2
Modeling and Formalism in Takings Jurisprudence

Thomas Ross*

The fifth amendment of the United States Constitution provides that the government shall not take private property without paying just compensation.1 During the twentieth century, the United States Supreme Court has decided a series of cases addressing the issue of whether a particular governmental action constitutes a "taking" of private property for which compensation must be paid.2 The Court’s takings jurisprudence is an especially unruly

---

* Associate Professor of Law, University of Pittsburgh; B.A., 1971, J.D., 1974, University of Virginia. I am indebted to Professors Richard O. Brooks, James G. Durham, Cyril A. Fox, Jr., Lawrence A. Frolik, Arthur D. Hellman, Dennis R. Honabach, W. Leslie Peat, and Norman Williams, Jr. for their helpful comments on an earlier draft of the article. Paul Boynton, Class of 1987 at the University of Pittsburgh Law School, provided able research assistance. I also acknowledge the financial support from the University of Pittsburgh School of Law Dean’s Scholarship Fund.

1 "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend V. The principle is also part of state constitutional law. See 3 P. Nichols, Nichols’ Law of Eminent Domain § 8.1(2) (J. Sackman rev. 3d ed. 1985) (citations to state law analogs of fifth amendment principle).

2 See, e.g., Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862 (1984) (Environmental Protection Agency disclosure of trade secrets held a taking); Loretto v. Telegenix Corporation, 458 U.S. 419 (1982) (statute which permitted installations of cable television equipment on apartment buildings held a taking of landlord’s property); Texaco, Inc. v. Short, 454 U.S. 516 (1982) (statute which extinguished mineral rights after a period of nonexploitation is not a taking); Hodel v. Indiana, 452 U.S. 314 (1981) (federal statute regulating strip mining is not a taking); PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) (requiring shopping center owner to accommodate persons seeking signatures on petitions is not a taking); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (requiring public access to marina, part of the “navigable waters” of the U.S., held a taking); Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (“historical landmark” designation and consequent restriction on development of airspace above Grand Central Station is not a taking); Griggs v. Allegheny County, 369 U.S. 84 (1962) (airplanes taking off and landing near home located at end of runway held a taking); Armstrong v. United States, 364 U.S. 40 (1960) (governmental action which rendered materials men’s liens worthless held a taking); United States v. Causby, 328 U.S. 256 (1946) (airplane overflight held a taking); United States v. Willow River Power Co., 324 U.S. 499 (1945) (government projects which diminished the water power on navigable stream is not a taking); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (statute which prohibited the mining of coal so as to cause surface subsidence would not be constitutionally sanctioned in the absence of compensation); Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) (firing guns across land may be a taking); Block v. Hirsh, 256 U.S. 135 (1921) (rent control laws not a taking); United States v. Cress, 243 U.S. 316 (1917) (government projects which diminished water power on nonnavigable stream held a taking); Richards v. Washington Terminal Co., 233 U.S. 546 (1914) (compensation need not be paid to the owner of property near railroad tunnel for damage resulting from smoke, cinders, gases, dust, dirt, and vibration incident to prudent operation of railroad); Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82 (1913) (dredging of a deep water channel which destroyed cultivated oyster bed is not a taking); Monongahela Bridge Co. v. United States,
Takings Jurisprudence

The cases exhibit an apparent inconsistency, as general principles are gutted by exceptions. Furthermore, the Court itself confesses to relying on ad hoc solutions.

A particular sort of scholarly effort has evolved which is aimed at imposing order and coherence on our takings jurisprudence: use of the "decisional model" for the takings issue. The catalyst for this work was John Costonis's article, "Presumptive and Per Se Takings: A Decisional Model for the Takings Issue." Professor Costonis creates a four-step series of questions which he envisions would form the actual decisionmaking framework for the Justices in the takings cases. He asserts that this decisional model can provide...
the coherence now apparently absent in the Court's takings jurisprudence.

This article advances essentially two points. First, a decisional model, Costonis's or any other, is unlikely to reflect the Justices' actual decisionmaking processes in the takings cases. The essential premise of any decisional model is that each of the nine Justices will reach a decision in the takings cases within, and wholly within, a precisely drawn and mutually shared decisional framework. This premise is demonstrably untenable. Second, the concept of these types of decisional models, as well as the manner in which this particular model is offered, exemplify a formalistic sense of constitutional interpretation. "Formalism," as used here, is essentially the idea that solutions to the takings issue can somehow be value-neutral. The creator of the decisional model will likely cast his solution as value-neutral. Yet the creator will inevitably make value choices a part of the creation process.

The error of this particular sort of formalism is in supposing (or pretending) that a solution to the takings issue can be found outside one's substantive value framework. The costs of that error are in the way formalism can permit us to pretend that the hard value choices made in the takings cases are somehow not really value choices at all, a delusion which can stifle important reflection and debate about those choices.

Part I of the article will explain the nature of the decisional model using Costonis's offering as an example. Part II will argue that decisional models fail as descriptive theory. Finally, Part III will deal with modeling as formalism.

I. A Model

A. Stochastic and Deterministic Models

A "model" is a set of questions or principles which the creator asserts are, or ought to be, used by the Court in deciding takings cases. Creators may differ, however, in the expectations they have for their models. Their expectations may lead them to create either stochastic or deterministic decisional models. 

7 See notes 173-74 infra and accompanying text.

8 An analogous use of the terms "stochastic" and "deterministic" can be found in econometrics. An econometric model is essentially a set of assumptions and hypotheses about a particular state of affairs. For example, a model might contain assumptions relating to various features of the labor market and the hypothesis that the minimum wage law causes a higher level of unemployment than would occur without the law, all other things being equal. The model might be tested by empirical studies, but the econometric model is not, however, a picture of reality whose accuracy can be proven by empirical verification. The econometrician assumes that reality cannot be modeled exactly. One of the bases for this assumption is the idea of human indeterminacy, the notion of the inherent randomness
“Stochastic” is an adjective meaning “involving a random variable.” A decisional model for the takings issue is stochastic if it assumes the existence of a random variable attributable to the inherent indeterminacy in human decisionmaking. A stochastic model would set forth the questions or principles which are, or ought to be, part of the decisionmaking framework for each of the Justices without presuming to delimit precisely the actual decisionmaking framework of each of the Justices. This modeler assumes that an element of indeterminacy exists which makes the model always something short of a complete, actual picture of the decisionmaking process in each and every takings case. In any particular case, a Justice might see something that affects the decision yet is outside the model.

The contemporary Court’s stated framework for deciding takings cases is a stochastic model. The Court has expressed a set of principles for deciding its takings cases, but has also carefully staked out the element of indeterminacy.

No “set formula” exist[s] to determine, in all cases, whether compensation is constitutionally due for a government restriction of property. Ordinarily, the Court must engage in “essentially ad hoc, factual inquiries.” But the inquiry is not standardless. The economic impact of the regulation, especially in human behavior. In this sense the econometric model is stochastic and not deterministic. See P. Kennedy, A Guide To Econometrics 1-8 (1979).

Professor Tribe employs the term “model” in L. Tribe, American Constitutional Law (1978). His expectations for his seven “models” of constitutional law are quite different from the expectations of the creator of a deterministic decisional model. Representing approximate tendencies, emphases, and approaches rather than precise formal systems, these models are by no means mutually exclusive; constitutional discourse in any given period can thus be expected to draw on ideas and categories characteristic of more than one model. The models reflect neither entirely self-conscious patterns of thought nor wholly unconscious explanatory structures; they combine elements at both levels of awareness. Their main purpose, as will emerge, is heuristic; I believe they can enlarge understanding.

Id. at 1. The usefulness of such “models” is not challenged in this article.


10 It is often difficult to determine the expectations of the modeler. In Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundation of “Just Compensation” Law, 80 Harv. L. Rev. 1165 (1967), the author identifies the values of utilitarianism and fairness which he asserts ought to be the foundation of takings jurisprudence. Moreover, he expresses those values in a set of principles which could be thought of as a model. Michelman does not, however, go on to assert that judges will simply decide cases pursuant to the model. Michelman sees the process of deciding takings cases by reference to the values of utilitarianism and fairness as an extremely complex and indeterminate process. Thus, Michelman's model appears stochastic in nature. See id. at 1248-52. Costonis criticizes Michelman's work as "abstract" and "ambiguous." Costonis, supra note 6, at 527 n.245. More recently, Professor Epstein has proposed a model "to lend intellectual coherence to the current body of eminent domain law." Epstein, Not Deference, But Doctrine: The Eminent Domain Clause, 1982 Sup. Ct. Rev. 351, 380. See also R. Epstein, Takings: Private Property and the Power of Eminent Domain (1985).
is of particular significance. "So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."¹¹

This insistence on the "ad hoc" nature of the inquiry reflects the element of indeterminacy. In any particular takings case a factual feature not accounted for by the general principles may influence the Justices.

A deterministic model for the takings issue purports to reflect in a whole and accurate way the decisionmaking process of the Court. Justices would decide takings cases solely by reference to the questions contained in the model. They would ignore the features of any particular case which fell outside the perimeters of the model, for the deterministic modeler believes that the model accounts for all relevant variables.

The deterministic model, however, does not assure a prediction of the outcome in particular cases. The questions of the model will "determine" the outcome of a case in the sense that the modeler presumes the Justices use only those questions to decide the case. The nature of the questions might allow different Justices to reach different answers.

Professor Costonis offers a deterministic model for the takings issue. Costonis's ambition is to substitute his deterministic model for the Court's proclaimed stochastic model, thereby providing the coherence now lacking in takings jurisprudence.¹² One of the basic theses of this article is that Costonis will surely fail in his ambition because any deterministic model for the takings issue will fail to reflect the actual decisionmaking process of the Justices.¹³

B. Costonis's Model

The Costonis model has four elements, the first being the statement of a presumption: "A governmental incursion, physical or regulatory, under which property is taken is a presumptive, not

¹² Professor Costonis makes both the positive and normative claims. He claims the model is both "a principled, coherent predicate for judicial management of compensation practice under the takings clause" and "reasonably descriptive of the [Court's] general direction." Costonis, supra note 6, at 469.
¹³ This article attacks the deterministic, not stochastic, decisional model for the takings issue. Stochastic models which acknowledge both the inherent indeterminacy of human decisionmaking and the inevitable value judgments embodied within the model can be valid, useful offerings. Therefore, the term "model" will be used throughout the balance of the article to refer to a deterministic decisional model for the takings issue. Similarly, the terms "modeler" and "modeling" will refer to the deterministic theorist and enterprise.
per se, taking.” Costonis relies on non-constitutional property law and “ordinary language” to determine when a “taking” that triggers the presumption has occurred. The balance of the model provides the structure whereby the government may overcome the presumption.

Costonis styles the second element of his model the “due process-takings phase.” The issue is “[w]hether a linkage exists between the purpose of a measure and the use of the affected property.” The government’s failure to establish the link is a sufficient, although not necessary, condition for the “taking” conclusion. Without the linkage, the Court must find a taking without further resort to the other elements of the model. If the linkage is found, the analysis proceeds to the third element.

Costonis’s third element, the “pure takings phase,” asks whether the measure infringes more severely than necessary to achieve the intended goals. Using this third element the Court asks whether there is a less property-damaging way to achieve the goals, presumable excluding the always theoretically available and less damaging alternative of paying compensation.

An obvious difficulty with both the second and third elements is determining the weight of the government’s burden. The fourth element of Costonis’s model addresses this point. The character of the government’s showing will depend on the relative weight of the competing values. The decisionmaker ranks the values asserted by the government and, alternatively, by the property owner on a scale from more significant to less significant. The government’s scale runs from safety as most significant to “less well-established police power ends” as least significant. The property owner’s

14 See Costonis, supra note 6, at 469 (emphasis omitted).
15 Id. at 515.
16 Id. at 485.
17 Id. at 487. Costonis provides an example to explain this phrase. Suppose a state passes an antiexclusionary zoning statute requiring every municipality to designate within its land use control system certain residential zones in which twenty percent of any new housing units must be set aside for, and be affordable by, moderate and low income families. If a landowner/developer whose land is designated for moderate and low income housing challenges the controls as a taking, the issue in the due process-takings element is whether the developer’s proposed use, construction of residential units for profit, is linked to the antiexclusionary zoning purpose of the measure. Costonis does not answer the question but suggests that the government has a strong argument on these facts. Id. at 489-91. The example is taken from Southern Burlington County NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (“inclusionary zoning” not a taking). But see Board of Supervisors of Fairfax County v. DeGroff Enter., Inc., 214 Va. 235, 198 S.E.2d 600 (1973) (“inclusionary zoning” held a taking).
18 Costonis, supra note 6, at 487.
19 Id. at 495.
20 Id. at 499.
21 Id. at 500.
scale ranges from the “dominion” interest which is most significant, to the financial interest which is least significant. The dominion interest is analogous to the social science idea of the “territorial imperative.”

The government’s physical and permanent ouster of a citizen from her home would implicate the dominion interest. The combination of a dominion interest being thwarted by a less well-established police power end would impose the heaviest burden on the government. Other permutations would produce lesser burdens.

Costonis analogizes value ranking to the tiers of review in the civil liberties area. He analogizes the heaviest burden to the

---

22 Id. at 499.
23 Id. at 523 n.237 (citing R. AUDREY, THE TERRITORIAL IMPERATIVE: A PERSONAL INQUIRY INTO THE ANIMAL ORIGINS OF PROPERTY AND NATIONS (1966)).
24 “Government’s burden will be less stringent in conflicts between public safety and a landowner’s economic interest in property, for example, than in conflicts in which a less well-established police power goal is opposed to the proprietor’s dominion interest.” Costonis, supra note 6, at 500.
25 Costonis extends his analogy to two types of “civil liberties” cases—land use regulations which impinge on free speech values and the equal protection/gender discrimination cases. He describes the standard of review in the land use cases as “requiring a ‘narrowly drawn regulation’ furthering a ‘sufficiently substantial governmental [interest].’ ” Id. at 522 n.231 (quoting Schad v. Borough of Mount Ephraim, 452 U.S. 61, 68-71 (1981)). The gender discrimination cases, according to Costonis, are governed by an “intermediate level of scrutiny.” Id. at 522.

The actual standard of review employed by the Court in the land use/free speech cases is, however, much more uncertain than Costonis suggests. The cases Costonis relies on are Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981), and Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981). In Metromedia the Court struck down San Diego’s billboard ordinance. 453 U.S. at 521. In Schad the Court held the borough’s ordinance excluding live entertainment unconstitutional. 452 U.S. at 76-77. Each case spawned five separate opinions, with no opinion commanding the unqualified agreement of a majority of the Court. The opinions reflect a Court splintered on the question of the appropriate standard of review. The cases are, to borrow Justice Rehnquist’s characterization of the Metromedia opinions, “a virtual Tower of Babel.” 453 U.S. at 569.

The gender discrimination cases are also far less straightforward than Costonis implies by his simple “intermediate level of review” label. Costonis cites a series of cases to support his proposition that gender discrimination triggers an “intermediate level” of scrutiny under the equal protection clause. Costonis, supra note 6, at 522 n.230. Yet in none of the cases cited did a majority of the Court join in an opinion enunciating the “intermediate level” of scrutiny. For example, in the most recent case cited by Costonis, Craig v. Boren, 429 U.S. 190 (1976), Justice Brennan’s opinion does say that “classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives.” Id. at 197. However, Justice Brennan was able to persuade only two other Justices to join the opinion without qualification. Each of the other Justices wrote a separate opinion, yielding an aggregate of seven opinions in Craig. The Justices expressed different standards of review and even skepticism of the entire “tiers of review” concept. Although more recent cases suggest that most of the Justices embrace some form of “heightened scrutiny” in the gender discrimination context, the basic disharmony persists. See, e.g., Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (a gender discrimination case in which the Court split 5 to 4 in four separate opinions).

The Court’s most recent equal protection pronouncement also reflects the tenuous nature of the tiers of review concept. In City of Cleburne v. Cleburne Living Center, 105 S. Ct. 3249 (1985), the Court struck down, on equal protection grounds, a zoning ordinance
"strict scrutiny" concept. The fourth element of the model prescribes the level of judicial scrutiny. The level of scrutiny will be graduated from an active to a more passive review of the government's judgment that it may undertake an action without providing compensation. The level of scrutiny will depend upon the competing values and manner of government infringement.\textsuperscript{26}

Costonis's model is best understood by contrasting it with the Court's approach in its 1983 decision, \textit{Loretto v. Teleprompter Manhattan CATV Corp.}\textsuperscript{27} Costonis uses the Court's approach in \textit{Loretto} as the foil for his theory. In \textit{Loretto} a New York City landlord challenged a state statute which allowed cable television companies to place cables and other equipment on or within apartment buildings without the landlord's consent, but with the payment of a fee set by a state commission. The landlord challenged the statute as an uncompensated "taking" of her property.\textsuperscript{28}

The Court held that the statute affected an unconstitutional taking of the landlord's private property.\textsuperscript{29} In the majority opinion, Justice Marshall set forth the basic rule which decided the case and his sense of the Court's general approach to the takings issue. "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it

which required a special use permit for a group home for the mentally retarded. 105 S. Ct. at 3260. The \textit{Cleburne} case spawned three opinions which, taken together, cast serious doubt on the helpfulness of the tiers of review model in equal protection cases. The majority opinion purported to apply a rationality test and concluded that the ordinance was irrational. Justice Marshall's separate concurring/dissenting opinion (in which Justices Brennan and Blackmun joined) accused the majority of applying a standard of review stricter than mere "rationality." \textit{Id.} at 3263-65 (Marshall, J., concurring in part and dissenting in part). The concurring opinion, authored by Justice Stevens and joined by Chief Justice Burger, is essentially an assertion that there is no such thing as the tiers of review in equal protection analysis. \textit{Id.} at 3260 (Stevens, J., concurring).

Justice Powell has also expressed uncertainty about the nature of the equal protection doctrine:

\begin{quote}
The problem is this: in a democratic society there inevitably are both winners and losers. The fact that one group is disadvantaged by a particular piece of legislation, or action of government, therefore does not prove that the process has failed to function properly. To infer otherwise—that the process has been corrupted by invidious discrimination—a judge must have some \textit{substantive} vision of what results the process should have yielded. Otherwise he has no way to know that the process was unfair.
\end{quote}


Costonis has created a model which he believes will move the Court's takings jurisprudence away from the confusion of the ad hoc approach. As part of this effort, he believes that his model will move takings jurisprudence, at least in form, closer to the civil liberties jurisprudence. Ironically, the civil liberties jurisprudence is, if anything, more confused than the takings jurisprudence.

\textsuperscript{26} Costonis, \textit{supra} note 6, at 499.
\textsuperscript{27} 458 U.S. 419 (1982).
\textsuperscript{28} \textit{Id.} at 424.
\textsuperscript{29} \textit{Id.} at 421.
may serve." Apart from permanent physical occupations, "the Court must engage in essentially ad hoc factual inquiries." The approach embodied in Justice Marshall's opinion splits challenged governmental action into two categories: permanent physical occupations and all other forms of governmental action. The Court will only apply a per se taking rule to permanent physical occupations, and will engage in an ad hoc analysis in cases involving any other type of governmental action.

Costonis makes the Loretto approach the point of contrast for his alternative theory. His model rejects the split, subjecting all takings cases to the same decisionmaking model. His model also offers coherence and precision, which are apparently lacking in the ad hoc approach.

Costonis explicates his model by applying it to the Loretto case. Analysis under his model begins with the presumption of a taking. "[F]rom the standpoint of real (or personal) property law and ordinary language" property has been taken by the operation of the New York statute. Once a presumption of taking is established, Costonis's analysis jumps to the fourth element, which will determine the weight of the government's burden in overcoming the presumption. The values advanced by the New York statute and alternatively the values of the landlord which are threatened by the statute must be identified and placed on the value spectrum. In Costonis's view the government's purpose was not to aid cable companies, but rather to provide "important communications and education benefits to tenants and to other cable subscribers statewide." Where this particular value falls on the spectrum of wel-

30 Id. at 426.
32 "Loretto is splendid foil for this article because the points of disagreement between the two are clearcut and fundamental." Costonis, supra note 6, at 471.
33 Id. at 515.
34 Id. at 517. Neither the majority nor dissenting opinion in Loretto challenged the public benefit characterization of cable television. The Court thereby avoided addressing the question of whether the New York law, even if it provided compensation to the landlords, would be a taking for a "public use." See generally Ross, Transferring Land to Private Entities by the Power of Eminent Domain, 51 GEO. WASH. L. REV. 355 (1983); Meidinger, The "Public Uses" of Eminent Domain: History and Policy, 11 ENVTL. L. 1 (1980); Berger, The Public Use Requirement in Eminent Domain, 57 OR. L. REV. 203 (1978); Note, The Meaning of Public Use in the Law of Eminent Domain in Urban Renewal, 68 HARV. L. REV. 1422 (1955); Comment, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 YALE L.J. 599 (1949). One could argue that the primary purpose of the law was to aid the cable television companies and that the regulation, even if it provided compensation, failed to satisfy the "public use" limitation. This argument, however, is unlikely to sway the contemporary Court given their decision in Hawaii Hous. Auth. v. Midkiff, 104 S. Ct. 2321, 2330-31 (1984). In that unanimous opinion the Court equated the "public use" limitation with the substantive due process "rationality" standard and stressed the Court's deferential attitude to the legislative judgment of public benefit. See id. at 2330-31.
fare values he does not make clear. Costonis classifies the landlord’s interests as essentially financial, falling “sufficiently close to the economic side of the property values spectrum.”35 He suggests that an intermediate level of scrutiny, analogous to that employed in the gender discrimination cases, flows from this particular constellation of values.36

Given the intermediate burden, one must ask if the second element, “use-dependency,” is satisfied. The landlord’s use is residential rental for profit; the government’s purpose is to facilitate cable service to tenants. Without clearly answering the question, Costonis points out that “few relationships in this century have been subject to such extensive legal modifications and regulations as that between landlord and tenant.” He then implies that the use-dependency element is satisfied.37

Turning to the “pure takings phase,” the third element of the model, Costonis emphasizes the landlord protections built into the statute.38 The statute mandates some attention to the landlord’s interests as to the location of the equipment and provides for cable company liability for any damage to the building. He seems to conclude that the state could probably carry its burden of proving that the statute does not infringe more severely than necessary on the landlord’s interests.39

Costonis does not clearly answer how his model would apply to Loretto. The model, however, would require an analysis different from Justice Marshall’s per se rule. Additionally, the state would appear to have a distinct chance of winning under the model, particularly in light of the intermediate level of judicial scrutiny.

Costonis’s model might provide the starting point for any

35 Costonis, supra note 6, at 523.
36 Id. at 522-23.
37 Id. at 519. In the quoted language Costonis reveals a problem with his particular model. While it is true that the landlord/tenant relationship has been extensively regulated, that observation has no direct relationship to the issue of use-dependency. Use-dependency is an inquiry into the relationship between the owner’s use of the property and the goal of the particular governmental regulation at issue. Extensive regulation of landlords for other purposes tells us nothing about the relationship between the landlord’s use of this property and the government’s goal of facilitating cable television.

The observation seems relevant, however, if one assumes that landlords’ reasonable expectations are relevant to the takings issue and such expectations are likely to be affected by the recent history of pervasive regulation. The assumed role of expectations in takings analysis has support in the case law. See, e.g., note 98 infra and accompanying text. The problem for Costonis is that the question of reasonable expectations of the property owner has no place in his model.
38 Costonis, supra note 6, at 521.
39 “On its face, section 828 would appear to be carefully tailored to afford maximum protection to landlord’s property interest. And, given the Court’s assessment of the encroachment-purposes relationship in opinions sustaining other kinds of physical invasions, section 828 would appear to be constitutional.” Id. at 521.
number of intellectual endeavors. One could challenge the positive claim and argue that recent takings cases do not fit the model.\footnote{The \textit{Loretto} case obviously does not fit Costonis’s model. He explains this as proof by “negative example.” \textit{Id.} at 469-70. Ruckelshaus v. Monsanto Co., 104 S. Ct. 2862 (1984), a recent takings case which postdates the Costonis article, also does not seem to fit the model. Monsanto challenged the Environmental Protection Agency’s (EPA’s) proposed disclosure of trade secrets submitted by Monsanto to the EPA as part of the pesticide licensing process. The EPA was operating pursuant to a federal statute which authorized the disclosure of the trade secrets. \textit{Id.} at 2869-70. 

The Court unanimously concluded that the disclosure would affect a taking of Monsanto’s property. The Court, however, drew an important line, protecting only the disclosure of data submitted by Monsanto between 1972 and 1978. From 1972 to 1978 the federal licensing statute contained some assurances of protection of the trade secrets from disclosure. The 1978 amendments to the statute removed those assurances and explicitly provided for disclosure. Justice O’Connor wrote a concurring opinion suggesting that she might extend the taking label to data submitted before 1972. \textit{Id.} at 2883 (O’Connor, J., concurring).}

One could also challenge the normative claim and argue that his model is the wrong model.\footnote{Costonis’s model represents a set of value choices which could be criticized in various ways. See notes 181-94 infra and accompanying text. For example, a critic might challenge Costonis’s elevation of the “dominion” interest to the position of prime importance. One could argue that a devastating financial loss is sometimes as significant as a loss of dominion.}

A critic might also construct an alter-
native model. Throughout this article, however, Costonis's model is used as an example of a way of thinking about the takings issue. The critique will not focus on the normative or positive appeal of Costonis's model or any other particular model. Instead, the article focuses on the very idea of models for the takings issue and the basic sense of constitutional interpretation projected by modeling. This article argues that the intellectual enterprise of modeling the takings issue is a misguided and undesirable enterprise, whatever form the particular model takes.

II. Modeling

The intellectual enterprise of modeling may take the form of positive or normative theorizing. A modeler who claims that his model reflects the Justices' actual decisionmaking processes in past takings cases is making a positive or descriptive claim. A modeler who claims that any such model is somehow the right or appropriate decisionmaking framework for the Justices is making a normative claim.

The modeler of the takings issue, whether making one or both claims, assumes that a single decisional model can reflect the actual decisionmaking process of each of the Justices in each of a range of future (or past) cases which pose the takings issue. This assumption embodies two levels of consistency. First, the modeler assumes that the same model can be adopted and applied by each and every Justice. Second, the modeler assumes that the same model can be applied to each and every case that presents the takings issue. The assumption evokes a particular image—nine Justices reaching decisions in each takings case, with each Justice operating within, and wholly within, a precisely drawn and shared decisional framework.

42 The alternative model might take the form of either an amendment to Costonis's model or a completely different model. An obvious amendment would be to change the presumption of the first element from a presumption of "taking" to a presumption of "no taking." See notes 181-82 infra and accompanying text. An altogether different model might be patterned after the efficiency formula in Michelman's article. See Michelman, supra note 10, at 1214-15.

43 This part of the article will be devoted to destroying the textual image in the context of the takings cases. The article does not address the question of whether the problems with modeling might extend beyond the takings issue to other areas of the Court's decisionmaking.

Although the article makes no claims beyond the takings issue, the apparent breakdown of a decisional model in the establishment clause cases is worth noting. As a matter of hornbook constitutional law, the establishment clause cases are resolved by a three-part test: When a law is challenged under the establishment clause it must pass a three part test. First, it must have a secular purpose. Second, it must have a primary secular effect. Third, it must not involve the government in an excessive entanglement with religion. When the potentiality for excessive entanglement must be deter-
Powerful reasons exist to doubt the reality of such an image. First, the reality of the contemporary takings cases does not fit the image. A review of these cases suggests that the Justices are divided over the basic ways in which they view the takings issue as they move from case to case.\textsuperscript{44} Second, certain features of the takings issue and the decisional process would account for such a division within the Court.\textsuperscript{45} These features are not unique to the contemporary Court and would persist despite a change in membership on the Court.\textsuperscript{46} Thus, any single decisional model for the takings issue will likely fail in its positive theoretical aspiration, whether applied to the contemporary or a future Court.

A. Contemporary Takings Cases

The contemporary Court has rendered both split and unanimous decisions in takings cases.\textsuperscript{47} This observation does not, however, preclude another three part test is employed. The degree of entanglement is estimated by evaluating: (1) the character and purpose of the religious institution to be benefited, (2) the nature of the aid, and (3) the resulting relationship between the government and religious authorities. Additionally (although this may be considered a part of the entanglement test) the law must not create an excessive degree of political division along religious lines.

J. NOWAK, R. ROTUNDA, \\ & J. YOUNG, CONSTITUTIONAL LAW 1031 (2d ed. 1983). The breakdown of this test/model can be seen in the Court's most recent establishment clause cases. In Wallace v. Jaffree, 105 S. Ct. 2479 (1985), the Court struck down an Alabama statute which prescribed a minute of silence for "meditation or voluntary prayer" in the public schools. \textit{Id.} at 2492-93. Justice Stevens's opinion for the Court reiterated the three-part test; the other five opinions demonstrate the weakness of the test as a decisional model for the Court. \textit{See id.} at 2489-90. Justice Powell in his concurrence defended the test, but this defense only highlights the attacks by the other Justices. \textit{Id.} at 2493-96 (Powell, J., concurring). Justice O'Connor concurred in the judgment yet asserted the need to reexamine the traditional test. \textit{Id.} at 2496-505 (O'Connor, J., concurring). Justice White's dissent reiterated his long-standing difficulties with the test. \textit{Id.} at 2508 (White, J., dissenting). Justice Rehnquist, in dissent, challenged the usefulness of the test. \textit{Id.} at 2508-20 (Rehnquist, J., dissenting). The most forthright attack on the test is set forth in Chief Justice Burger's dissent: "The Court's extended treatment of the 'test' . . . suggests a naive preoccupation with an easy, bright-line approach for addressing constitutional issues. . . . [O]ur responsibility is not to apply tidy formulas by rote. . . ." \textit{Id.} at 2507 (Burger, C.J., dissenting). \textit{See also} Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3249 (1985) (White, J., dissenting).

\textsuperscript{44} \textit{See} text accompanying notes 47-115 \textit{infra}.

\textsuperscript{45} \textit{See} text accompanying notes 116-72 \textit{infra}.

\textsuperscript{46} The term "contemporary Court" is defined here as commencing with the case of Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). Although the definition is somewhat arbitrary, the takings jurisprudence commencing with the \textit{Penn Central} case involved virtually the same set of Justices (only Justice O'Connor was substituted for Justice Stewart) and spanned a period of time without the sort of significant social upheaval which might make the term "contemporary" somehow inappropriate.

ever, refute or establish the possibility of modeling. Under the Costonis model, the Justices could each use the four elements of the model and still disagree as to the ultimate conclusion. When nine human beings each ask themselves whether a particular governmental incursion satisfies the "use-dependency" element, occasional disagreement on the answer is hardly surprising. On the other hand, unanimity in decision does not assure the presence of a single, commonly shared decisional framework. Nine human beings can easily arrive at the same decision by different paths.

Determining the actual decisionmaking processes of an individual or a group is difficult. Determining the actual decisionmaking processes of the Court, where secrecy in deliberation is a fundamental tenet, is especially difficult. Scholars cannot observe the interaction of the Court's conferences. Everything we know about the Court's decisional processes comes initially from the Justices.


48 Costonis himself contemplates this sort of indeterminacy within his own model. Costonis, supra note 6, at 524. He does not assert that his model will permit a sure prediction of the outcome nor assure unanimous decisions. He does claim, however, that his model can deliver "consistent, even-handed application of a coherent decisional approach over time." Id. His model, although "deterministic," is not mechanical in operation. See notes 11-13 supra and accompanying text.

49 The story of the Court's decision in Brown v. Board of Educ., 349 U.S. 294 (1954), provides an example of a unanimous decision arrived at by different paths. Chief Justice Warren began with a divided Court and led them to unanimity in decision. How they got there is a complex story. Different Justices were affected by different arguments. Law clerks apparently played a significant role in some instances. Throughout, the leadership of Chief Justice Warren seemed crucial. See B. Schwartz, Super Chief 72-127 (1983); R. Kluger, Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality 678-699 (1976).


51 The work of the social scientists who have studied judicial decisionmaking is summarized infra at notes 145-54 and accompanying text. Most of these scholars have noted the difficulty posed by the Court's tradition of secrecy. See, e.g., W. Murphy, Elements of Judicial Strategy 200 (1964).

One scholar has explicitly pointed out the problems with using theories which are "the products of laboratory groups which have had their every action (physical and verbal) carefully scrutinized by highly trained observers" and applying those theories to the Court. See T. Becker, Political Behavioralism and Modern Jurisprudence 28 (1964).

52 The closest we can come to direct evidence of the decisional processes of the Justices, other than what the Justices choose to tell us in their opinions, are the accounts of their law clerks. Although there is a supposed tradition of reticence attributed to the clerks, exceptions exist. See, e.g., McCormack, A Law Clerk's Recollections, 46 Colum. L. Rev. 710, 712 (1946) (a discussion of, inter alia, the decisional process of Justice Sutherland in Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)). See also B. Woodward & S. Armstrong, The
The only substantial and available evidence regarding the Court's decisional processes in the contemporary takings cases is to be found in the opinions. Other sources, such as correspondence or other personal papers of the Justices, are not yet available in any substantial form.53

Reading an opinion to discern the actual decisionmaking process of the Justices, however, is always an uncertain quest. Opinions serve multiple functions, some of which tend to obscure the actual decisional framework employed. For example, in a case where the Court divides, the language of an opinion may have a coalition-forming function.54 The language of the majority opinion may have to be tailored somewhat in order to capture the necessary coalition. In the tailoring process the actual decisional framework employed by the author may be disguised.55 Moreover, Justices may join in an opinion which, although it may reflect the decisional process of the authoring Justice, does not truly reflect the decisional process of the other Justices.56

53 Even when personal papers are available, the problems for the scholar who seeks to understand the decisional processes of the Court are far from over. Justices will presumably be selective in what they choose to commit to writing. Even contemporaneously prepared observations of the decisional processes, such as notes prepared during conferences, may be prepared with the thought of future publication. The ordinary time lag in publication typically makes it impossible to discuss the notes with their author. Also, personal papers are not routinely created and made available. Only a few Justices have prepared and made available a set of comprehensive personal papers. See J. Howard, Mr. Justice Murphy viii (1968) (Justice Murphy kept "voluminous records"); A. Bickel, The Unpublished Opinions of Mr. Justice Brandeis vi (1957) (Brandeis' files "constitute a renewable revelation"). Thus, the evidence from personal papers is both filtered and scanty. See Ulmer, Bricolage and Assorted Thoughts on Working in the Papers of Supreme Court Justices, 35 J. Pol. 286 (1973).


55 After publication of the opinion in Brown v. Board of Educ., commentators seized upon footnote 11 which cited sociological studies relating to the performance of children in segregated schools. 347 U.S. at 494 n.11. Most commentators concluded that the footnote was evidence that the Court had relied upon the sociological studies. See, e.g., Reston, A Sociological Decision, N.Y. Times, May 18, 1954, at 14, col. 4 (quoted in R. Kluger, supra note 49, at 711); B. Schwartz, supra note 49, at 107. In fact, the evidence suggests that no Justice read or relied on the studies. B. Schwartz, supra note 49, at 107-08.

56 Justices Brandeis and Holmes, for example, confessed to sometimes suppressing dissents. See A. Bickel, supra note 53, at 18. But see Hellman, The Proposed Intercircuit Tribunal: Do We Need It? Will It Work? 11 Hastings Const. L.Q. 375, 384 (1984) ("[T]here can be no doubt that the members of the present Court, even more than their predecessors, have a strong desire to make known their individual views in the cases before them."). For a gen-
Nonetheless, the opinions provide a rough view into the decisionmaking processes. We must assume that Justices do not routinely author, or even join in, opinions which do not roughly reflect the way they view the case. Thus, the opinions, especially over a range of takings cases, can tell us something of the decisional frameworks involved.

The opinions in the contemporary takings cases in which the Court split, Penn Central Transp. Co. v. City of New York,57 Kaiser Aetna v. United States,58 and Loretto v. Teleprompter Manhattan CATV Corp.,59 reveal a fundamental divergence in the ways of looking at the cases.60 In each of these cases, the contemporary Court revealed a split in both the decision and the decisional framework.

1. Penn Central

In Penn Central, the Penn Central Transportation Company challenged the constitutionality of the designation of its Grand Central Station property as a “landmark site” under New York City’s Landmarks Preservation Law and the restrictions on development which followed from the designation.61 Specifically, Penn Central had entered into an agreement for the development of an

---

60 The “contemporary Court” (see note 46 supra) has decided two unanimous takings cases, Ruckelshaus v. Monsanto, 104 S. Ct. 2862 (1984), and Andrus v. Allard, 444 U.S. 51 (1979). Although unanimously decided, these cases imply a divergence in the Court’s perception of the takings issue.
61 The two cases seem dissonant. If the owner of the eagle feathers has some meaningful residual interest, so it would seem does Monsanto. Monsanto is free to exploit the data and may even enjoy some competitive advantage in having the data first. Conversely, if Monsanto’s investment-backed expectations have been frustrated, so it would seem has the eagle feather owner’s.
61 438 U.S. at 119.
office tower in the airspace above Grand Central Station. The city commission empowered to review the development called the proposed development "an aesthetic joke" and withheld the necessary approval.62 Penn Central sued, challenging the City's action as an unconstitutional taking of its private property without just compensation. The Court, in a split decision, concluded "no taking."63

Justice Brennan's majority opinion treats the takings issue as an ad hoc, multifactor balancing inquiry. He begins the analytic portion of the opinion by stressing the ad hoc nature of the decisional framework in takings cases.64 The general principles, such as the degree of economic impact, operate in Justice Brennan's analysis as background ideas against which the particular facts are considered, not as rules which determine the answer to the takings issue.65 Justice Brennan repeatedly relied on the particular features

62 [We have] no fixed rule against making additions to designated buildings—it all depends on how they are done . . . . But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The "addition" would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.

Id. at 117-18 (quoting the New York Landmarks Preservation Commission).

63 [W]e conclude that the application of New York City's Landmarks Law has not effected a "taking" of appellants' property. The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties.

Id. at 138.

64 "This Court, quite simply, has been unable to develop any 'set formula' . . . ." Id. at 124. "[The taking analysis] depends largely upon the particular circumstances . . . ." Id.

65 Id. at 123-28. Although Justice Brennan explicitly acknowledges the absence of any set formula, his description of the twentieth century cases reads as though he would hope to reconcile the cases by deriving principles of universal application. For example, he discusses Hadacheck v. Sebastian, 239 U.S. 394 (1915), in which the Court held that Los Angeles' prohibition of a preexisting brickyard operation from what had become a residential area was not a taking, notwithstanding an overwhelming reduction in the market value of the property. Hadacheck was decided, according to Justice Brennan, "on the ground that the legislature had reasonably concluded that the presence of the brickyard was inconsistent with neighboring uses." 438 U.S. at 126. Two paragraphs later in the opinion he discusses Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), as though it were perfectly consistent with his reading of Hadacheck. "[Pennsylvania Coal] is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.' " Id. at 127. What Justice Brennan does not say is why Hadacheck's expectations were not similarly frustrated, or conversely, why the Pennsylvania Coal Co. was not proposing to use their property in a manner inconsistent with the surface owner/neighbor's use.

The last general principle Justice Brennan derives also reveals the difficulty of reconciling the twentieth century cases. First, his own articulation of the principle gives the game away. "Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.' " Id. at 128 (emphasis added). Second, his supporting citations include a "but see" cite to YMCA v. United States, 395 U.S. 85 (1969). In the YMCA case, U.S. troops attempting to quell riots in the Canal Zone had taken up positions in a privately-owned building.
of the landmark preservation law and its impact on Penn Central. For example, Penn Central argued that the application of the law had “taken” its airspace. Justice Brennan responded that in this case the appropriate property unit was the city tax block occupied by the station and not just the airspace above the station.\textsuperscript{66} Penn Central had in effect conceded the ability to earn a “reasonable return” on that larger parcel.\textsuperscript{67} Penn Central also argued that the law caused a significant diminution in the value of the property and did so in a selective manner.\textsuperscript{68} Unlike zoning, which can also significantly diminish property value, the landmarks law burdened only selected parcels of property in the city.\textsuperscript{69} Justice Brennan’s response to this argument again shows a balancing approach with emphasis on the particular facts. In his view, the law reflected a comprehensive plan for historic preservation; the procedures for selecting landmark sites were not arbitrary, and Penn Central benefited as a citizen/property owner in a city which preserved its historic sites.\textsuperscript{70} Finally, in discussing the issue of whether the law as applied to Grand Central Station had worked a diminution in value of sufficient magnitude to require compensation, Justice Brennan stressed two factual features: the possibility of the City’s approval of some lesser development of the airspace; and, the possible transfer of the development rights to another city site owned by Penn Central.\textsuperscript{71} In the ad hoc balancing framework these possibilities sufficiently mitigated the impact of the regulation, permitting Jus-

\textsuperscript{66} “Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the “landmark site.”

\textsuperscript{67} Id. at 129. Penn Central’s concession may be some evidence of the difficulty of modeling the takings issue. Penn Central’s presumably able lawyers may have assumed that other factual features such as the selective nature of the landmarks law would have been more important. The concession, which seems foolish in hindsight, may have simply been the result of an educated but wrong guess as to the factual features which turned out to be crucial in this particular takings case.

\textsuperscript{68} Id. at 131-32.

\textsuperscript{69} “[T]he New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and ... over 400 landmarks and 31 historic districts have been designated pursuant to this plan.” Id. at 132.

\textsuperscript{70} Id. at 132-35.

\textsuperscript{71} Appellants ... exaggerate the effect of the law on their ability to make use of the air rights above the Terminal in two respects. First, it simply cannot be maintained, on this record, that appellants have been prohibited from occupying any portion of the airspace above the Terminal. While the Commission’s actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriate-

Although the rioters inflicted substantial damage to the building as part of an assault on the troops inside, the Court concluded that this was not a taking. Id. at 93.
tice Brennan to conclude that compensation need not have been paid.

Justice Rehnquist, in his dissent, projected a different decisional framework, a completely different way of looking at the takings issue in *Penn Central*. In contrast to Justice Brennan’s ad hoc balancing, Justice Rehnquist employed a combination of “literal” reading of the constitutional language and strict reading of precedent.

Justice Rehnquist, in effect, dropped the language of the fifth amendment on top of the facts. For Justice Rehnquist, “property” includes the right to use and develop airspace, both in its literal sense and as established by precedent. He also concluded that property has been “taken” when the government deprives the property owner of its use, whether or not the government has formally appropriated the property. “[New York City has] thus destroyed—in a literal sense, ‘taken’—substantial property rights of *Penn Central*.”

For Justice Rehnquist, “property” includes the right to use and develop airspace, both in its literal sense and as established by precedent. He also concluded that property has been “taken” when the government deprives the property owner of its use, whether or not the government has formally appropriated the property. “[New York City has] thus destroyed—in a literal sense, ‘taken’—substantial property rights of *Penn Central*.”

Id. at 136-37 (emphasis in original; footnote omitted).

Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City’s transferable development rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable.

Id. at 137 (footnote omitted).

72 Id. at 141-42 (Rehnquist, J., dissenting).

73 Justice Rehnquist projects throughout his dissent the idea that the issues are well settled as a matter of precedent. See id. at 138-53. While it is true that the principles which he applied find support in the case law, making his cites technically correct, the precedents are factually distinguishable from *Penn Central*. This factual distinction not highlighted by Justice Rehnquist seems crucial to any takings analysis which purports to rely on precedent.

In support of his assertion that the term “property” includes air rights, he cites to a set of cases each involving a physical encroachment by the government into the air space. See *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922); *Butler v. Frontier Tel. Co.*, 186 N.Y. 486, 79 N.E. 716 (1906). He does not discuss the factual distinction between cases of physical encroachment (cited cases) as opposed to cases of regulation of development (*Penn Central*).

74 438 U.S. at 143-44 (Rehnquist, J., dissenting). Justice Rehnquist relies upon three cases for the proposition that deprivation of use, even without formal appropriation, constitutes a taking. Although each case can be thought of as supporting the general proposition, each case involved an element of physical intervention by the government which makes it distinguishable from *Penn Central*. See *Dugan v. Rank*, 372 U.S. 609 (1963) (government’s reclamation project diverts water away from land); *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (government appropriates leased space from tenant; “just compensation” deemed to include some consequential damages); *United States v. Lynah*, 188 U.S. 445 (1903) (government’s construction of dam on Savannah River floods rice plantation land).

75 438 U.S. at 143 (Rehnquist, J., dissenting).
Justice Rehnquist asserted that the “taking” label can be avoided only if the case fits one of the two historical precedential exceptions—the “nuisance” (or “noxious use”) exception and the “reciprocity” exception.\(^\text{76}\) He derived from precedent the “nuisance exception,” the principle that the state may deny uses of property which harm other members of the community.\(^\text{77}\) By contrast, Penn Central was not proposing to use its airspace in a way which would harm others. In fact, New York City was acting to preserve a use (or nonuse) of the property which benefited New Yorkers and visitors. Thus, Justice Rehnquist concluded that the case fell outside the confines of the traditional nuisance exception.\(^\text{78}\)

In Justice Rehnquist’s view the case also fell outside the reciprocity exception exemplified by traditional zoning.\(^\text{79}\) Traditional zoning regulation imposes restrictions on all property within a community and, while individual property values will be diminished, property owners as a group and over time will share in the benefits, at least in theory.\(^\text{80}\) Unlike zoning, the application of the

\(^{76}\) Id. at 144-50.

\(^{77}\) Id. at 144-46. The “nuisance” exception is built around the distinction between uses of property which harm neighbors versus uses which do not harm (or even benefit) neighbors. The doctrinal principle is that uses of property which harm neighbors are susceptible to regulation or prohibition without compensation. Justice Brennan does not find the distinction helpful. Id. at 133-34 n.30. Some commentators have questioned the logic of the harm/benefit distinction. \(^{77}\) Id. at 133-34 n.30. Some commentators have questioned the logic of the harm/benefit distinction.　See, e.g., Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. Chi. L. Rev. 681, 728-31 (1973); Sax, Takings and the Police Power, 74 Yale L.J. 36 (1964); Coase, The Problem of Social Cost, 3 J. L. & Econ. 1 (1960). The essential difficulty with the harm/benefit distinction is that when neighboring uses of property conflict, it is simplistic to say that one neighbor’s use is harmful, thereby implying that the other neighbor’s use is benign. The conflict results from the particular combination of uses. For example, a cement plant spewing particulates and located next to a residence might be said to be a harmful use. One might even suggest that the cement plant is “causing” the problem. The characterization is simplistic because the conflict would not arise if the residence were, for example, another cement plant. The conflict arises because of the combination of a cement plant next to a home. In this sense the home is as much a cause of the problem as the plant. When the owner of the residence seeks a shutdown of the cement plant, is he seeking to prevent a harm or is he seeking to capture the benefit of a nonoffensive alternative use of the neighboring property? Similarly, if an “aesthetic joke” were to be constructed over the terminal, would Penn Central be harming the neighbors or would the neighbors merely be denied a benefit previously enjoyed?

The common law of nuisance from which the “noxious use” exception is borrowed reflects the complexity of sorting out the respective rights and liabilities of conflicting uses. The court may permit a “noxious use” to persist so long as the noxious user pays damages to its neighbors. \(^{78}\) See Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (the social utility of the noxious cement plant outweighed the utility of the residential neighboring uses). The noxious use may be ousted, but with the proviso that the neighbors pay to the noxious user the cost of relocating or shutting down. See Spur Indus., Inc. v. Del E. Webb Dev. Co., 108 Ariz. 178, 494 P.2d 700 (1972).

\(^{79}\) Id. at 147.

\(^{80}\) The “reciprocity” label was used by Justice Holmes in the Mahon case. See Penn-
landmark law singled out Penn Central's property. An enormous burden was thus imposed on Penn Central, a burden not offset by similar and reciprocal restrictions on its neighbors. Thus, Justice Rehnquist concluded that the case was not an example of the reciprocity exception. 81

Justices Brennan and Rehnquist disagree in Penn Central not simply because they find different answers to common questions; they also bring different sets of questions and different decisional frameworks to the takings issue. 82 Justice Brennan asked in effect—what is the sensible solution given the particular facts of Penn Central as those facts are viewed against a backdrop of basic ideas? He used precedent to reaffirm the basic background ideas. Alternatively, Justice Rehnquist asked—what are the relevant rules and what do they tell us to do? Precedent is used to derive the rules. The facts of Penn Central become relevant only to the extent that they relate to the rules. To the extent the opinions do reflect the decisionmaking frameworks of the Justices who wrote and joined in the opinions, the Penn Central opinions are evidence that the contemporary Justices do not operate according to the modeler's first assumption of consistency, i.e., each and every Justice is using a single, common decisional framework.

2. Kaiser Aetna

The Court split again, in both its decision and decisional framework, in Kaiser Aetna v. United States. 83 Kaiser Aetna had spent considerable sums of money in the development of a "marina-style community" surrounding Kuapa Pond on the island of Oahu, Hawaii. As part of the development work, Kaiser Aetna dredged the Pond and built channels connecting it with the Pacific Ocean, work done with the knowledge and acquiescence of the Army Corps of Engineers. The Pond itself was treated as private property by Hawaiian custom and history and was leased by Kaiser Aetna. The United States filed suit to obtain public access to the Pond, assert-

81 [A] multimillion dollar loss has been imposed on appellants; it is uniquely felt and is not offset by any benefits flowing from the preservation of some 400 other 'landmarks' in New York City. Appellees have imposed a substantial cost on less than one-tenth of one percent of the buildings in New York City for the general benefit of all its people. 438 U.S. at 147 (Rehnquist, J., dissenting).

82 The two opinions also diverge on more particular ideas. Justice Brennan explicitly rejected the value of the harm/benefit distinction implied in the nuisance cases. Id. at 133-34 n.30. Justice Rehnquist found the "reasonable return" idea unhelpful. Id. at 149 n.13.

ing that the Pond, post-dredging, was part of the navigable waters of the United States and therefore subject to the navigation servitude of the commerce clause. Kaiser Aetna asserted that subjecting Kuapa Pond to public access would constitute a "taking" of their private property. A divided Court agreed and concluded "taking."  

Justice Rehnquist changed both his role and his decisional framework in Kaiser Aetna from his position in Penn Central. Writing for the majority in Kaiser Aetna, Rehnquist championed the ad hoc perspective on the takings issue:

As was recently pointed out in Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), this Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Id. at 124. Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries . . . .

Throughout the opinion, Justice Rehnquist projected this ad hoc decisional framework.

The first hurdle to the decision was the set of precedents which seemed to stand for the hornbook principle that the riparian owner is not entitled to compensation for loss resulting from the regulation of navigable waters. "The strict logic of the more recent . . . .

84 Id. at 168.
85 Id. at 179-80.
86 Id. at 174-75.
87 "The United States has power to legislate with respect to navigable bodies of water because it has power to regulate commerce. A riparian or littoral owner is not entitled to recover damages even if he suffers a loss due to legislation relating to navigation." W. BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY 45 (3d ed. 1965).

The actual picture which emerges from the cases is more complex. In Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893), the government took over the Pittsburgh-Morgantown canal system. The condemnation award, following the explicit directions of the enabling statute, excluded the company's right to collect tolls, and only the tangible property taken was included in the computation of just compensation. The hornbook resolution of this case would be that the riparian owner has no legally-recognized interest in navigable waters and no right to compensation when the government's action takes value from him which is attributable to the navigable waters. In Monongahela the Court held that the award must include compensation for the toll rights. Id. at 344-45. Justice Brewer characterized the case as a collision of the commerce clause and the fifth amendment, concluding that the commerce clause legitimated the action but the fifth amendment required compensation. Id. at 341-42. Because the state and federal government had encouraged the private investment, the toll rights became "vested" and compensation was required. Id. at 344-45.

The hornbook rule was seemingly revived, however, in United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913), which involved the condemnation of land on the St. Mary's River, a navigable body of water. Landowners holding title to the waterbed sought compensation for the diminution in value attributable to the loss of water power. Justice Lurton, speaking for a unanimous Court, concluded that the landowner had no right
cases limiting the government’s liability to pay damages for riparian access, if carried to its ultimate conclusion, might completely swallow up any private claim for ‘just compensation.’”88 Justice Rehnquist explained all this away by the Holmes adage—“the life of the law has not been logic, it has been experience”89—and by describing the older navigation servitude cases as “[o]ld, unhappy, far-off things, and battles long ago.”90

Thus freed of precedential obstacles, Justice Rehnquist applied the ad hoc decisional framework by focusing on the particular features of the case.91 Kaiser Aetna invested millions of dollars on the important assumption that it would have exclusive use of the Pond. The Army Corps of Engineers acquiesced in the dredging work that made the Pond “navigable waters.” Although an “estoppel” theory is supposedly unavailable against the United States, the government’s actions lead to the “fruition of a number of expectancies to compensation for value attributable to the water power of the navigable waters. Id. at 73-74. Oddly, Justice Lurton did permit the landowner compensation for the “element of value [attributable to the] availability of these parcels of land for lock and canal purposes.” Id. at 76.

Four years later in United States v. Cress, 243 U.S. 316 (1917), the Court resurrected the commerce clause/fifth amendment clash. The government’s damming of navigable rivers raised the level of water on a non-navigable stream and thereby diminished the water power of the property owner’s mill. The court found that “[t]he right to have the water flow away . . . unobstructed, except in the course of nature” is a compensable right, notwithstanding that the governmental action causing the obstruction was done under the navigation servitude. Id. at 330. The hornbook rule was losing two to one, but the game went on.

In United States v. Willow River Power Co., 324 U.S. 499 (1945), the government constructed a dam on the Mississippi River which raised the water level on the St. Croix, a navigable river, and thereby took away the head for the landowner’s power plant. Justice Jackson stated that the right to the head did not have the support of the law and hence there was no taking. Id. at 502.

Even if Cress and Willow River can somehow be reconciled by the navigable/nonnavigable distinction, Kaiser Aetna v. United States, 444 U.S. 164 (1979) throws everything back into disarray. In Kaiser Aetna the waters were clearly “navigable,” yet the imposition of the navigation servitude was deemed a taking. Id. at 180.

88 444 U.S. at 177.
89 Id. Quotations from Holmes are widely used and rarely put into context. See R. Pohlman, JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE 1 (1984) (twentieth century reviewers have reduced Holmes's ideas to “a bundle of aphorisms”); White, The Rise and Fall of Justice Holmes, 39 U. CHI. L. REV. 51 (1971) (American intellectuals have focused on Holmes the “stylist”). O. Holmes, THE COMMON LAW (1881), from which the Rehnquist quote is taken, is a complex work. See, e.g., G. Gilmore, THE AGES OF AMERICAN LAW 51-56 (1977); O. Holmes, THE COMMON LAW (M. Howe ed. 1963) (editor’s introduction). Moreover, the language surrounding the aphorism used by Justice Rehnquist is anything but a clear mandate to ignore troublesome historical precedents. Within the same paragraph Holmes states: “[T]he law’s] form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.” O. Holmes, THE COMMON LAW, supra, at 2.
90 444 U.S. at 177.
91 Id. at 178-80.
embodied in the concept of 'property.'”92 Justice Rehnquist also suggested that the imposition of the servitude might be characterized as an "actual physical invasion."93 He concluded that if the government wanted to make Kuapa Pond into “a public aquatic park,” it must pay just compensation.94

Justice Blackmun, author of the dissent, viewed the case differently. He relied on the application of four abstract principles, each derived from precedent. First, waters subject to the “ebb and flow,” like Kuapa Pond, are “navigable waters.”95 Second, the navigation servitude extends to all navigable waters, and hence to Kuapa Pond.96 Third, a property owner’s loss related to the owner’s “access to, and use of, navigable waters” is a non-compensable loss, no matter how significant the riparian owner’s investment.97 Finally, the status of the relevant waters under state law cannot alter the federal constitutional analysis.98 Thus, the treat-
ment of Kuapa Pond as private property under Hawaiian custom was irrelevant. Applying these four principles, Justice Blackmun concluded no taking.\(^9\)

The opinions in *Kaiser Aetna* demonstrate a split in perception which belies the image of a single, common model. Justice Blackmun searched for the answer in the strict application of abstract rules derived from precedent. Justice Rehnquist, after shedding the constraints of precedent, saw a collision of constitutional provisions which could only be resolved by careful attention to the particular features of *Kaiser Aetna*. Again, the opinions show a divergence in decisional frameworks. No single, common decisional framework can be drawn out of the *Kaiser Aetna* opinions.

*Kaiser Aetna* also casts doubt on the second level of consistency essential to modeling, the assumption that the Justices will consistently use the same decisional framework in every case that presents the takings issue. Justice Rehnquist apparently applied a literal reading, precedential framework in *Penn Central* and an ad hoc, non-precedential framework in *Kaiser Aetna*.

This apparent inconsistency may arise from the modeler's assumption that the Justices will put all cases invoking the takings issue into the same analytic pigeonhole.\(^10\) The Justices may in fact see a greater degree of distinction among cases. For example, Justice Rehnquist might consistently use the literal approach in all historic preservation/takings cases and the ad hoc approach in all navigation servitude/takings cases. If this were the case, a single model for the takings issue would fail, but a set of models of the various subcategories of takings cases might be viable.

Modeling of takings jurisprudence by using different models for different categories of cases will not, however, be likely to succeed. First, any multiple model theory which included the ad hoc approach would not be true to modeling's basic tenets. The ad hoc

---

\(^9\) Id. at 192 (Blackmun, J., dissenting).

\(^10\) One who seeks to pigeonhole the takings cases must first decide whether a particular case constitutes a takings case at all. For example, in Justice Brennan's *Penn Central* opinion he lists *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), as a takings case. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978). Yet in *Goldblatt* the property owner did not allege the facts necessary to advance a fifth amendment takings claim. The opinion in *Goldblatt* focused on the substantive due process inquiry. 369 U.S. at 590-91.

A similar problem exists with regard to *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). See notes 133-36 infra and accompanying text. Although Justice Holmes used the term "taking," some have argued that his use was metaphoric and that the case was grounded only in the substantive due process issue. See, e.g., Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto*, 9 VT. L. REV. 193, 210 (1984).
approach is not a true model, as the term has been defined here. The ad hoc approach permits a freewheeling and mutable decisional process which is the antithesis of the precision and constancy of modeling. Second, although it is possible that Justice Rehnquist decides takings cases in a way that could be accurately represented by a set of models, certain features of the takings issue and decisional process undercut the possibility. Moreover, even if Justice Rehnquist could be so modeled, the features to be discussed suggest that his set of models will not be the Brennan, or even the Burger, models.

3. Loretto

The final case to be considered in this part of the article best exhibits the intensity of division in decisional frameworks within the contemporary Court. In Loretto v. Teleprompter Manhattan CATV Corp., a New York City landlord challenged a state statute which allowed cable television companies to place cables and other equipment on and within her apartment building, without her consent, but with the payment of a nominal $1 fee set by a state commission. The majority of the Court concluded that the statute effected an unconstitutional taking of the landlord's property.

Justice Marshall's majority opinion and Justice Blackmun's dissent exhibit a particularly striking dissimilarity in decisional frameworks. Justice Marshall resolved the takings issue by applying a per se abstract rule—"a permanent physical occupation authorized by the government is a taking without regard to the public interests that it may serve." He derived the rule from a dubious reading of precedent, noted that recent cases did not explicitly

101 See notes 7-13 supra and accompanying text. All models, even deterministic ones, will have an irreducible element of “ad hocery.” The decision to invoke the model, the perception of a “takings issue,” is ad hoc. The deterministic modeler would seek to keep the “ad hocery” to that minimal level.

102 See notes 116-72 infra and accompanying text.

103 458 U.S. 419 (1982).

104 Our holding today is very narrow. We affirm the traditional rule that a permanent physical occupation of property is a taking. In such a case, the property owner entertains a historically rooted expectation of compensation, and the character of the invasion is qualitatively more intrusive than perhaps any other category of property regulation.

105 Id. at 441.

106 None of the cases cited by Justice Marshall directly addressed the de minimis issue at the heart of the Loretto case. In some of the cases the Court found a taking where the government caused significant flooding damage to property. See United States v. Lynah, 188 U.S. 445 (1903); Pumpelly v. Green Bay Co., 80 U.S. 166 (1871). In other cases the Court found a taking where the value of the property had been significantly diminished. See United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) (government's activities caused under-flooding of land destroying its usefulness as agricultural land); United States
repudiate the rule, and argued that "the purposes of the Takings Clause compel its retention." Employing this decisional framework, Justice Marshall placed the New York statute in the "permanent physical occupation" pigeonhole, and the takings issue was resolved, mechanically and without further ado.

The Blackmun dissent projected the ad hoc balancing decisional framework, in sharp contrast to the per se rule. "[T]akings claims are properly evaluated under a multifactor balancing test." Applying this balancing test, Justice Blackmun stressed the analogy to other forms of landlord regulation, such as regulations requiring landlords to put mailboxes and fire extinguishers in apartment buildings. He also stressed the minimal size of the invasion and the presumably minimal negative (if not positive) impact on the building's fair market value. The decisional framework revealed in the dissenting opinion relied on the particular features of the Loretto case and a balancing of interests, not on the application of an abstract per se rule.

v. Cress, 243 U.S. 316 (1917) (government's activities raised the level of a stream and destroyed the usefulness of the property as a mill site). Justice Marshall cited two cases in which the Court concluded no taking. See Sanguinetti v. United States, 264 U.S. 146 (1924); Bedford v. United States, 192 U.S. 217 (1904). He also relied on two cases in which the taking question was not the issue. See Western Union Tel. Co. v. Pennsylvania R.R. Co., 195 U.S. 540 (1904) (issue concerned whether federal law granted the telegraph company the power of eminent domain); City of St. Louis v. Western Union Tel. Co., 148 U.S. 92 (1892) (issue concerned the city’s charge for use of public property).

We have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Taking Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred. In such a case, "the character of the government action" not only is an important factor in resolving whether the action works a taking but also is determinative.

Id.

[O]ther New York multiple dwelling statutes not only oblige landlords to surrender significantly larger portions of common space for their tenants' use, but also compel the landlord—rather than the tenants or the private installers—to pay for and to maintain the equipment. For example, New York landlords are required by law to provide and pay for mailboxes that occupy more than five times the volume that Teleprompter's cable occupies on appellant's building. If the State constitutionally can insist that appellant make this sacrifice so that her tenants may receive mail, it is hard to understand why the State may not require her to surrender less space, filled at another's expense, so that those same tenants can receive television signals.

Id. at 453 (emphasis in original) (citation omitted). See also id. at 452.

"At issue are about 36 feet of cable one-half inch in diameter and two 4" X 4" X 4" metal boxes. Jointly, the cable and boxes occupy only about one-eighth of a cubic foot of space on the roof of appellant's Manhattan apartment building." Id. at 443. "As a practical matter, the regulation ensures that tenants living in the building will have access to cable television for as long as that building is used for rental purposes, and thereby likely increases both the building's resale value and its attractiveness on the rental market." Id. at 452.
The divisions of *Penn Central*, *Kaiser Aetna*, and *Loretto* go deeper than differences in decision. The opinions in these cases exhibit differences in decisional frameworks that make modeling of the contemporary Court's takings cases problematic. Moreover, the problem is not simply two different factions of Justices employing only two distinct decisional frameworks. The decisional frameworks differ not only among the Justices in any particular case, but also for at least some of the Justices individually as they move from case to case. For example, Justice Rehnquist projected a literalism and strict reading of precedent in his *Penn Central* dissent;\textsuperscript{112} while in his *Kaiser Aetna* opinion he cast aside precedent as "old, unhappy, far off things" and became an advocate of the ad hoc approach.\textsuperscript{113} Justice Blackmun showed a similar ambivalence in his choice of decisional approaches from his dissent in *Kaiser Aetna* to his dissent in *Loretto*. In *Kaiser Aetna* he used a precedential perspective and resolved the takings issue by a strict reading and application of the historical navigation servitude cases.\textsuperscript{114} But in *Loretto*, Justice Blackmun chastised the majority for "reach[ing] back in time" for their decisional framework and embraced the ad hoc "multi-factor balancing" approach.\textsuperscript{115}

Opinions must, of course, be used with care. One cannot always rely upon the opinions for an accurate picture of the decisional frameworks employed by the Justices. Nonetheless, the strong and pervasive divisions revealed in the opinions of the contemporary takings cases belie the existence of a suppressed, precisely drawn and shared decisional framework, even after one takes into account the lessons of legal realism.

The contemporary Court has exhibited a division in decisional frameworks. The difficult question remaining is whether these problems for modeling are restricted to the contemporary Court. Because certain features of the takings issue and the Court's processes account for the division, modeling is equally problematic, whether one looks to the Court of the past, present, or future.

**B. Relevant Features of the Takings Issue and the Court's Processes**

Certain features of the takings issue and the Court's processes account for the division in the ways in which the Court sees and decides takings cases. First, the Justices bring a mixed philosophical perspective to the takings cases. They cannot entirely escape the literal reading of the takings clause; a reading of the clause

\footnotesize{\textsuperscript{112} See note 73 supra and accompanying text.  
\textsuperscript{113} See note 86 supra and accompanying text.  
\textsuperscript{114} See notes 95-99 supra and accompanying text.  
\textsuperscript{115} See note 109 supra and accompanying text.}
which denies the legitimacy of sacrificing individual property interests in the pursuit of the public welfare. Yet each Justice also embraces to some degree a utilitarian reading of the clause which can legitimize the sacrifice of individual property interests. This mix can push a Justice in different directions and invoke entirely different sets of questions, all in the context of a single case. Second, the Justices each bring distinct life experiences to the Court and thus will see cases somewhat differently. Third, the cases which reach the Court will typically be the "hard cases" which pose the most difficult factual settings for the resolution of the takings issue. Finally, the modeler's problems are compounded by the Court's character as a group decisionmaking body composed of decisionmakers who enjoy a relatively high degree of autonomy.

I. Philosophical Perspectives

The takings cases of the twentieth century exhibit an apparent inconsistency. An obvious explanation for the inconsistency is found in the passage of time and the change in Justices, even within the limited temporal framework of the twentieth century. That the takings jurisprudence of the early twentieth century is in some ways different from the takings jurisprudence of the latter twentieth century is hardly startling.

Another part of the explanation of the inconsistency involves what has remained constant throughout the period, at least from the 1920s to date. The Justices' basic perceptions of the takings issue have been a mixture of a sense of the literal command of the language of the fifth amendment, that, no matter the public welfare gains, no individual's property is to be taken without compensation, and a sense of the desirability of government reallocation of property interests and recognition that some reallocation might be thwarted if compensation is demanded. The takings issue has thus been caught up in the uncertain and evolving status of private property in the twentieth century American welfare state.

The takings clause reads as a simple, straightforward impera-

116 See notes 3-5 supra and accompanying text.
117 The most dramatic example of a change in constitutional jurisprudence occurring within the twentieth century and attributable in part to a change in Justices is the rise and fall of substantive due process as a vehicle for the constitutional invalidation of economic regulation. See L. Tribe, American Constitutional Law 434-55 (1978). Professor Tribe suggests, however, that the Court is exhibiting a "recently reborn willingness to protect 'economic rights.'" Id. at 42 (Supp. 1979). See also R. McCloskey, The Modern Supreme Court (1972) (discussing the emergence in this century of the constitutional "civil rights" idea).
In its literal reading it expresses a principle which denies the legitimacy of individual sacrifice to achieve the greater good. In theory, the takings cases could be decided by reference to the philosophy of non-sacrifice. Governmental action which "takes" (in an ordinary language sense) "private property" (as defined by the protective reach of extra-constitutional law) would be a fifth amendment "taking." Difficult questions would arise at the boundaries of the definitional reach of the terms "take" and "private property." Nonetheless, the takings cases could be decided by reference to a philosophy which protects "property" and disavows the sacrifice of the individual.

The takings clause could also be interpreted by reference to some form of utilitarianism. In deciding whether a particular governmental incursion should be deemed a taking, the Justices could focus on the particular consequences expected to follow from their decision and act so as to maximize social utility. Although difficult questions would arise as part of the process of predicting consequences and comparing societal gains and losses, takings

---

119 U.S. Const. amend. V.

120 This mode of interpretation is much like that employed by Justice Rehnquist in his *Penn Central* dissent. See notes 72-75 *supra* and accompanying text. It is also essentially the approach embodied in the first element of Costonis's model.

121 The Court noted, but avoided, an interesting boundary question in Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). The federal Price-Anderson Act limited the liability of the nuclear energy industry in the event of a nuclear disaster to $560 million. 42 U.S.C. § 2210(b) (1983). The Act also provided for federal government contribution to the indemnity fund and a strict liability rule for compensation. *Id.* at § 2210(c). Plaintiffs challenged the constitutionality of the Act, asserting, *inter alia*, that in the event of a nuclear catastrophe their property would be destroyed without the assurance of just compensation. The boundary questions were whether the plaintiffs' interest in some future potential right to recover was "property" and whether the Act had "taken" the property. The Court avoided the issue by concluding that the Act did not withdraw any potential actions for a taking under the Tucker Act. "The further question of whether a taking claim could be established under the Fifth Amendment is a matter appropriately left for another day." 438 U.S. at 94 n.39. See also L. Tribe, *supra* note 117, at 44-45 (Supp. 1979).


123 See B. Ackerman, *Private Property and the Constitution* 41-70 (1977) (Ackerman's "utilitarian adjudication" of the takings cases).

124 Professor Michelman provides a utilitarian formula for adjudication. "The correct utilitarian statement, then, insofar as the issue of compensability is concerned, is that compensation is due whenever demoralization costs exceed settlement costs, and not otherwise." Michelman, *supra* note 10, at 1214-15 (emphasis in original).

125 For example, any utilitarian adjudication of a takings case which relied on the computation of demoralization costs would be inherently uncertain. Valuing the frustration felt by the property owner and her sympathizers, and projecting the losses due to the reluctance to invest in property because of the insecurity generated by an uncompensated reallocation of property rights are difficult even in the most straightforward contexts. Nonetheless, takings cases could be decided by reference to the utilitarian philosophy, with each Justice making their best guess as to the uncertain elements like demoralization costs.
cases could still be decided by reference to the utilitarian philosophy, a philosophy which seeks to maximize social utility and accepts the sacrifice of individual property interests.\textsuperscript{126}

A Justice with the pure literal sense of the clause could see a takings case from a dramatically different perspective than a Justice with the pure utilitarian sense of the clause. For example, if a comprehensive land use regulation is adopted by a community, some property owners will be denied proposed uses of their property, uses which would have been permitted before the regulation. Some of these property owners will not in fact receive any reciprocal benefits from the regulation. They will be true losers.\textsuperscript{127} If the losers challenged the regulation as a taking, the "literalist" Justice would ask whether the property owners had a "property" interest in the now prohibited uses of their land. If so, compensation must be paid, without regard to any utilitarian calculus. The "utilitarian" Justice would ask if this was an efficient sacrifice by the individual

\textit{But see Soper, On the Relevance of Philosophy to Law: Reflections on Ackerman's Private Property and the Constitution, 79 COLUM. L. REV. 44 (1979).} "On difficult moral and social issues, the utilitarian's task of toting up and comparing consequences so outweighs in practical importance the theoretical direction that only consequences count as to make that direction mostly useless." \textit{Id.} at 45.

\textsuperscript{126} For example, applying the Michelman formula, whenever settlement costs exceed demoralization costs, compensation is not due, even though some property owners will suffer uncompensated losses. If this occurs, the uncompensated property owners are in a sense sacrificed for the greater good.

The adoption of zoning by a community provides an example of such sacrifice. Although some property owners will suffer diminution in both their rights and property values, the standard rule is "no compensation." The "no compensation" rule may be justified on the ground that the costs of determining the individual losses are far larger than the demoralization costs which may occur. \textit{See Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).} When a Euclidean zoning scheme is adopted by a community, some of the property owners are in a sense sacrificed to achieve the benefits of land use controls. \textit{See} note 127 \textit{infra} and accompanying text.

\textsuperscript{127} The property owner in \textit{Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)} (the case which established the federal constitutionality of zoning), appears to be an example of the true loser. The effect of the zoning ordinance which prescribed residential use for land which the owner had slated for industrial development was to diminish the value of the property by approximately 67-75\%. The Euclid site, however, was eventually rezoned and developed for heavy industry. By the early 1970's the area around the Euclid site had become a hodge-podge of land uses.

If you take a look at an aerial photograph of the area, you will find the following developments, each extending from Euclid Avenue north toward the railroad. First, a factory; then six blocks of single-family homes (five solid blocks, plus two more half-block strips at each end); then a shopping center; then a single street (two block fronts) of single-family residences; then another factory; then the Cleveland-Euclid boundary line, and a vacant block; then a 1100-unit garden apartment project; then two-and-a-half blocks (five block fronts) of residences; then another and larger factory, which is on the Euclid site. A more appalling jumble would be difficult to imagine, and this is the case which has been cited for years on the principle of protecting residential areas against the intrusion of commerce and industry.

\textit{N. Williams, 4 American Land Planning Law} 16-17 (1975).
property owners. The utilitarian would want to know whether the broadly shared welfare gains of the regulation exceeded the losses imposed on the losers. He would ask about the relative costs of discerning and paying off the losers versus the costs suffered if no compensation were paid.\(^{128}\) His concern would be to maximize the societal pie, whatever the property status of the individual interests sacrificed.\(^{129}\) Depending on the answers to these questions, the literalist and utilitarian Justices might reach the same conclusions.\(^{130}\) Yet even when they agreed as to the proper outcome, they would get there by different routes.

The Justices, however, do not fall into neat and pure philosophical categories. The instability in twentieth century takings jurisprudence arises not because the Court is composed simply of a mix of utilitarian and literalist Justices, but rather because each Justice has both a literal and utilitarian sense of the takings clause.\(^{131}\) Moreover, this mixed philosophical perspective is hardly surprising. Each philosophical perspective is an important part of our intellectual heritage.\(^{132}\) The significance of the mix is that it can push a Justice in opposite directions and raise different sets of questions,

\(^{128}\) For example, the utilitarian Justice might adopt a de minimis threshold. If the state widens a road and takes one square foot of land (other than in midtown Manhattan), the utilitarian Justice could conclude that the costs of discerning and paying compensation so overwhelm the demoralization costs that compensation ought not be paid.

\(^{129}\) The term "maximizing the pie" is borrowed from A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 (1985). The more precise Pareto or Kaldor-Hicks definitions of efficiency are unnecessary here.

\(^{130}\) These ideal types might agree on the necessity for compensation when the government physically appropriates a substantial parcel of land. Their rationales, however, would differ. The literalist Justice would rely on the obvious sacrifice of the individual property interests. The utilitarian Justice would rely on the significant demoralization costs that would result if the property owner were not compensated.

The Justices might disagree in the case of a government regulation which prohibited vehicular and air travel within a wilderness area, rendering virtually useless a private hunting camp within the area. See Michelman, supra note 10, at 1223-24. The literalist Justice might conclude that the regulation was a taking because it represented an attempt to sacrifice the individual interest for the conservation end. The utilitarian might disagree, concluding that the demoralization costs in this case were small relative to the costs of computing and paying just compensation.


\(^{132}\) The legal academic community's reception of J. RAWLS, A THEORY OF JUSTICE (1971), a work of moral philosophy by a Harvard philosophy professor, is a good indication of the current importance of the utilitarian and nonutilitarian philosophies. Rawls's book provides an alternative to utilitarianism which he describes as the "predominant systematic theory" for modern moral philosophy. J. RAWLS, supra, at vii. Rawls's own theory is "highly Kantian" in nature, propounded in a set of basic principles which do not depend on particular consequences for justification, and rejects the legitimacy of treating individuals as a means to some societal end. The legal academic community embraced the work. The American Association of Law Schools awarded the book the Coif Award in 1973 for the best "law book" written in the preceding three years.
all in the same case. Thus, the mixed perspective does not facilitate a single, precise decisional model.

Justice Holmes expressed the ambivalence in philosophical perspective in *Pennsylvania Coal Co. v. Mahon.* In *Mahon,* the coal company challenged Pennsylvania’s Kohler Act which prohibited mining which caused surface subsidence, despite the fact that the coal company had reserved the right to do so in its property transactions. Writing for the Court, Justice Holmes found an unconstitutional taking of the coal company’s property.

Justice Holmes spoke first of the utilitarian view. “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” Government hardly could go on to intervene in ways which we suppose increase social utility without imposing some degree of individual sacrifice. Later in the opinion, however, Justice Holmes expressed the literal sense of the takings clause. “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.” However large the social utility generated by a taking of property, the state must nonetheless pay the individual.

The ambivalent sense of the takings issue has been carried forward to the contemporary Court. In *Penn Central* Justice Brennan’s opinion projected a utilitarian sense. He stressed the benefits to New York of the preservation of Grand Central Station and the facts which mitigated the costs imposed on Penn Central. Nonetheless, Justice Brennan invoked the literal sense of the clause and

---

133 260 U.S. 393 (1922).
134 *Id.* at 414. For a recent attempt to understand the *Mahon* case, see Rose, Mahon Reconstructed: Why the Takings Issue is Still a Muddle, 5 S. Cal. L. Rev. 561 (1984). A modern Pennsylvania statute analogous to the Kohler Act, but applicable to the mining of bituminous coal, was recently challenged, *inter alia,* as a “taking.” See Keystone Bituminous Coal Ass’n v. DeBenedictis, 581 F. Supp. 511 (W.D. Pa. 1984) (statute upheld), aff’d, 771 F.2d 707 (3d Cir. 1985).
135 260 U.S. at 413.
136 *Id.* at 416.
137 Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law.


[T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central’s primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to
the illegitimacy of sacrifice: "[the takings clause] is designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole . . . . " Alternatively, Justice Rehnquist's dissent initially adopted a literal reading of the takings clause. Justice Rehnquist, however, embraced the reciprocity exception which contemplates a certain degree of individual sacrifice, presumably justified by some utilitarian sense of the matter.

This ambivalence in philosophy can also be seen, perhaps most obviously, in Justice Marshall's opinion in Loretto. The opinion initially conveys a literal sense of the takings clause: the per se rule governs, particular consequences and the societal benefit calculus are irrelevant. On the other hand, Justice Marshall reaffirms the ad hoc test for regulatory incursions, a test which in cases like Penn Central is used to implement a distinctly utilitarian analysis.

The mixed senses of the takings clause reflected in the opinions can also be seen in the societal value framework. We would be reluctant to deny a utilitarian sense of the takings clause because we would not wish to forego the increase in social utility which we believe flows from governmental intervention, including intervention profit from the Terminal but also to obtain a "reasonable return" on its investment.

Id. at 136.

138 Id. at 123.

139 The fifth amendment provides in part: "nor shall private property be taken for public use, without just compensation." In a very literal sense, the actions of [New York City] violated this constitutional prohibition. Before the city of New York declared Grand Central Terminal to be a landmark, Penn Central could have used its "air rights" over the Terminal to build a multistory office building, at an apparent value of several million dollars per year. Today, the Terminal cannot be modified in any form, including the erection of additional stories, without the permission of the Landmark Preservation Commission, a permission which [Penn Central], despite good-faith attempts, [has] so far been unable to obtain.

Id. at 141-42 (Rehnquist, J., dissenting) (emphasis in original; footnote omitted).

140 Even where the government prohibits a noninjurious use, the Court has ruled that a taking does not take place if the prohibition applies over a broad cross section of land and thereby "secure[s] an average reciprocity of advantage." It is for this reason that zoning does not constitute a "taking." While zoning at times reduces individual property values, the burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the zoning will be benefited by another.

Id. at 147 (Rehnquist, J., dissenting) (emphasis in original; citation omitted).

141 "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention." Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

142 "[N]o 'set formula' exist[s] to determine, in all cases, whether compensation is constitutionally due for a government restriction of property. Ordinarily, the Court must engage in 'essentially ad hoc, factual inquiries.'" Id. (quoting Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1918)).
which by the utilitarian calculus ought to proceed without compensation. We would also be reluctant to ignore a literal sense of the clause because the institution of private property is still taken seriously. The mix and ambivalence about the proper philosophical foundation for the interpretation of the takings clause exhibited by the Court is mirrored by our own mix of values. So long as we and the Court feel this mix, the takings cases will be difficult to manage and model.

2. Personal Variables

Academics from the political science field ("political behavioralists") have written much about the decisionmaking process of the Court. Although the work differs in its hypotheses and methodologies, certain common assumptions are evident, assumptions which are inconsistent with the idea of modeling.

Political behavioralists apply social science theories to the Court. They attempt to validate that application by some form of empirical study, typically a correlation between some variable and particular Justices' votes in particular categories of cases. Political behavioralists tend to express their methodology in quantitative terms. Some political behavioralists find their particular variable within the four corners of the opinions. For example, a behavioralist might hypothesize a correlation between the presence of a labor union as a party in a case and a particular Justice's decision in those

143 Noncompensatory land use regulation is a pervasive governmental action justified by a perceived increase in social utility, yet a gain bought with the sacrifice of certain individuals' property interests. Even those who question the wisdom of land use regulation typically do so in part on utilitarian grounds, questioning the actual efficiency of the regulation. See, e.g., Krasnowiecki, Abolish Zoning, 31 SYRACUSE L. REV. 719 (1980).


146 For a descriptive summary of methodology, see W. Murphy & C. Pritchett, supra note 145.
cases. The variable might, however, be found outside the opinion. For example, some behavioralists look to off-the-bench statements of values and hypothesize a correlation between those expressions of particular values and decisions in particular categories of cases. Similarly, some behavioralists seek to link a Justice's social background with his decisions.

Although the behavioralists' work differs in methodology and hypotheses, they each see the Court as composed of nine distinct decisionmakers. By observing data, composed essentially of the Court's decisions and variables such as off-the-bench expressions of values, they attempt to correlate particular variables to decisions by particular Justices. While the behavioralists choose different variables, the variables are all in a sense "personal" to the individual Justices. "Personal variables" are those which will inevitably vary to some degree from Justice to Justice. The social background of the Justices will vary, as will their attitudes toward labor unions or their off-the-bench expressions of values. Although the behavioralists disagree as to the relevant variables, their work is founded on the idea of understanding the differences in the decisional processes among the individual members of the Court. Thus, the basic premises of the behavioralists are wholly inconsistent with the notion that the Court, as a unitary decisionmaking body, is susceptible to a single model for any particular set of cases, including the takings cases. For the behavioralists, any single de-

150 "[My concern is] with the socio-psychological dimension of formal decisionmaking behavior of this small, political elite group. [The] primary concern is with the motivations which lead individual members of this small group to choose, in their conjoint voting behavior, to select certain alternatives rather than others." G. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR 11 (1959).
151 See, e.g., G. SCHUBERT, THE JUDICIAL MIND, supra note 145 (individual political attitudes as variable); W. MURPHY, THE ELEMENTS OF JUDICIAL STRATEGY (1964) (individual tactics and strategies); Grossman, supra note 149 (social backgrounds).
152 The Justices, while individuals bringing different life experiences, attitudes, and value systems to the Court, are far from a random cross-section of American society. They are all members of an interpretive community with a tradition, structure, and admission process which makes the Justices more alike than unlike, at least in some senses. See, e.g., G. SCHUBERT, THE JUDICIAL MIND, supra note 145, at 13 (noting the influence of the commonalities of "legal training of Justices, the institutional traditions of the Court, and the defined procedures [of the Court]"); Brest, Interpretation and Interest, 54 STAN. L. REV. 765, 770-71 (1982) (noting the racial, gender, and socio-economic homogeneity of the "legal interpretive community"). Nonetheless, the residual differences will yield differing perceptions of the "hard cases" they must decide. See note 154 infra and accompanying text.
153 Glendon Schubert, probably the most respected of the political behavioralists, has
cisional model for the Court would be conceivable only if it were a composite of the distinct models for the individuals who make up the Court.

The work of the behavioralists is some evidence of the enormous difficulty in truly understanding the decisionmaking processes of individual Justices. Decades of work by thoughtful scholars has produced a rich set of hypotheses, yet no single knock-down behavioralist theory exists.\(^\text{154}\)


Schubert's work has focused on the correlation between the political attitudes of the individual Justices and their decisions. His own expression of the nature and significance of his work is revealing:

As anything and everything that I have written surely will attest . . . the attitudes of judges like, I presume, those of other persons have an important bearing upon their choices in regard to certain types of decisions. So also do social relationships and interaction, the quantity and quality of information relied upon to define the decisional issues, estimates of the probable implications of outcome alternatives, beliefs about one's institutional role obligations, concern for the cultural image that one will leave as his judicial trace, a host of largely unexplored biological variables (ranging from temporary but acute physical illness to senescence), and a variety of environmental and cultural variables. It is not impossible, I believe, that the day may come (although I do not anticipate it in the present century) when an operationalized dynamic causal model of human decisionmaking, capable of being applied to the policy choices of Supreme Court Justices, will be available to political scientists (or whatever may then be called persons who do such work). But in the meantime, while more modest operations seem feasible and appropriate to our limited competence as behavioral scientists, it may not be inapprise to proceed incrementally, to see what can be learned about individual classes of the variables that seem relevant to the ultimate definition of a more adequate (and complicated) model.

\(^{154}\) Legal scholars have also stressed the significance of personal variables in judicial decisionmaking. A recent example is Richard Danzig's article on Justice Frankfurter and the "compulsory flag salute" cases. See Danzig, Justice Frankfurter's Opinions in the Flag Salute Cases: Blending Logic and Psychologic in Constitutional Decisionmaking, 36 Stan. L. Rev. 675 (1984). Danzig demonstrates how Frankfurter's cultural background played a large part in how the Justice saw and decided those cases. Danzig's most striking and compelling point is his explanation of the significance of personal variables by reference to the act of imagination:

First, I believe that the act of imagining a case is a prerequisite to judging it. The circumstances in a case do not unfold before a judge's eyes; the pivotal issues are
A tremendous amount of work has addressed the question of the Court's decisionmaking generally. This work, while not focusing on the takings cases, is grounded in the idea that individual Justices will not operate according to a single common decisional framework. The work of the political behavioralists and others who have studied the decisionmaking process thus negates, explicitly or implicitly, the idea of a single decisional model for the takings cases.

3. Process Features

Certain basic features of the Court's processes make a single, precise, predetermined model for the takings cases unlikely. First, the takings cases which reach the Court are likely to be the "hard cases" for which modeling is particularly ill-suited. Second, the Court is a decisionmaking body composed of individual decisionmakers who enjoy a relatively high level of autonomy, a decisional context ill-suited for modeling.

The relevance of the "hard cases" feature is best explained by sketching the analogy between modeling and statute drafting. A model for the takings issue would function somewhat like a statute, for it would consist of predetermined and explicit principles which are not self-evident; their resolution is not predetermined. A judge is asked to use the information he is given to conceive what has happened and what is likely to happen as a result of his judgment. To decide [the flag salute case], Justices Stone and Frankfurter (and their colleagues whom I have not discussed) had to imagine children in schools and their relations with their peers, their parents and their teachers. They had to imagine how a regulation came into being and how it might be repealed. They also had to imagine what the implications of their decision might be for minority groups, for freedom of religion, for the development of children, and for the country's ability to create a unified population that might have to mobilize for war. I anticipate that similar acts of imagination are required and accomplished in other major constitutional litigation. Second, I believe that this study reinforces the hypothesis that, particularly in the Supreme Court of the United States, these acts of imagination are often personal. In envisioning what has happened, a Supreme Court Justice does not see witnesses, nor does he (at least typically) read through extended transcripts. Each advocate now normally has only a half-hour for oral argument and about the same amount of a Justice's reading time to convey what he thinks is important. In all but the rarest of cases, little of that time is devoted to building a richly textured description of the facts and circumstances at issue. In such situations, the Justices naturally fall back on their own experience. Moreover, in looking beyond the case before him, each Justice reflects the values and priorities he has developed over a lifetime, most especially those made salient by the circumstances at the time of decision.

Id. at 719-20. Although Danzig might not put it this way, the problem with modeling the Court's decisionmaking is that, while each Justice has imagination, the Court itself has no imagination.

would ostensibly shape the decisional process in future cases.\textsuperscript{155} The process of creating a model for the takings issue would resemble, in some features, the process of drafting a code or statute. In drafting a statute, the legislator must recall past and current disputes and imagine future disputes to which the proposed statute might apply. This process of recall and imagination permits the intelligent construction of a statute. To assure a rational foundation, the legislator should test the proposed statute against certain hypotheticals. If the proposed statute yields “appropriate” outcomes in these hypothesized cases, it passes the test.\textsuperscript{156}

When a statute is well conceived, the basic features of the vast majority of cases to which it will be applied will have been imagined. For this majority of cases, the statute “works” in the sense that the ends of its drafters can be achieved.\textsuperscript{157} Inevitably, cases will arise which fall under the statute, but present features not imagined by the drafters. These odd cases will, nonetheless, sometimes be sensibly solved by the statute’s framework. This is a happy coincidence. Sometimes the odd case will present factual features which suggest that the sensible decision is not the one apparently dictated by the statute. These cases could be thought of as the “hard cases” under the statute.

Hard cases can be resolved by a court in one of two ways. The

\textsuperscript{155} There are of course important differences between a model and a statute. Most notably, judges would typically feel restrained when required to decide a case governed by a statute. When faced with a case to which a model applied, the sense of restraint would typically be less. After all, the model is merely the creation of the scholars or the judges themselves. Disappointing the scholars or changing one’s mind about the model seems less troublesome than defying the legislature. That is not to say that a judge faced with a statute is necessarily and wholly confined in decisionmaking. See Gilmore, Formalism and the Law of Negotiable Instruments, 13 Creighton L. Rev. 441, 458-60 (1979) (discussion of the specific example of the courts’ “disemboweling” of the code governing negotiable instruments). See generally G. Calabresi, A Common Law for the Age of Statutes (1982) (a discussion of the continuing role for the common law in the current age of proliferating codification). Moreover, a judge may feel some commitment to a model, particularly one which she has publicly expressed.


\textsuperscript{157} The statute may not “work” in the sense of achieving the right or best outcome. Moreover, the statute may not work even in the sense of achieving the drafters’ ends if a judge chooses to interpret the statute disingenuously. For the most part, however, the imagined cases will be handled as the drafters have foreseen.
TAKINGS JURISPRUDENCE

statute might be faithfully applied, notwithstanding the injustice or foolishness of the outcome. Alternatively, the statute might be "interpreted" so as to achieve the sensible outcome. Either way, so long as the hard cases remain a relatively small part of the statute's business, the statute can continue to work. When, however, the hard cases begin to grow in number, the statute will be threatened. A statute which in the majority of cases leaves judges with a choice between a bad outcome or a disingenuous interpretation is likely to be redrafted.

A Justice who seeks to resolve the takings issue by use of a model is faced with problems similar to that of the statute drafter. The Justice must recall and imagine takings cases to which the model might apply. If the model is well conceived, the vast majority of government incursions which raise the takings issue will be sensibly reconciled by the principles of the model. Inevitably, though, some of the future takings cases will not have been imagined in all relevant factual features, and some of those cases will be hard cases which move the Justice in directions contrary to the model's dictates. When that happens, the Justice will be faced with the choice between a troubling outcome or deciding outside the confines of the model. One would expect and hope that the Justice would take the latter choice.

As long as the hard cases are only a very small minority of the cases governed by the model, the model would be a valuable piece of theory. If, however, the hard cases overwhelm the ordinary

---

158 Chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 1301-1330 (1982), provides a good example of the problem of unimagined "hard cases." Chapter 13 was created for the purpose of facilitating the repayment of creditors of insolvent debtors through court approved plans for repayment, typically over an extended period of time. The initial statutory enactment unwittingly opened the door for the filing of what came to be known as "zero payment" or "de minimis" plans. These plans contemplated no, or virtually no, payments to the unsecured creditors, directly contrary to the assumed purposes of Chapter 13. See, e.g., Dye, An Overview of Chapter 13—Its Uses and Abuses, 43 MONT. L. REV. 35 (1982); Donohue, Anatomy of a Chapter 13, 97 BANKING L.J. 623 (1980); Note, Good Faith, Zero Plans and the Purposes of Bankruptcy Code Chapter 13: A Legislative Solution to the Controversy, 61 B.U.L. REV. 773 (1981). The statutory provisions were eventually redrafted to address the problem. See 11 U.S.C. § 1325 (Supp. II 1984).

159 As a hypothetical example of the limits of imagination, suppose that Justice Holmes and the other Justices joining in his Mahon opinion had intellectually embraced the "noxious use" principle which permitted the regulation or abolition of uses of property which generated substantial negative externalities. Prior to the Mahon case it is hard to believe that any of them might have imagined such a case, even in its basic features. See notes 133-36 supra and accompanying text. In Justice Holmes's case the hypothetical is probably flawed because of his apparent uneasiness about the "noxious use" idea. See A. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS 228-29 (1957).

160 In some instances the choice between a troubling outcome and deciding outside the model can be a difficult one. If the model is promulgated by the Court as its model for decision, and if in a particular case the outcome under the model is clear, a decision obviously made outside the model will generate its own set of costs.
cases, the model will face the same fate as the statute. This is precisely the nature of the Court's predicament, as most of their takings cases will be hard cases.

Some forms of governmental intervention affecting property interests fit a basic factual pattern for which the judicial outcome is well established or widely assumed. For example, in today's takings jurisprudence a modest depression of fair market value arising from the application of an ordinary zoning scheme is assumed not to be a taking. The permanent, physical appropriation of a significant parcel of land for some public purpose is assumed to be a taking. These ordinary cases are unlikely to be litigated to the Court because the probability of a particular outcome is perceived as approaching one. Given the staggering costs of litigating up through the Court, expending resources to push the ordinary case through the litigation process would normally be irrational. Moreover, to the extent ordinary cases are sometimes taken into the litigation process, the Court's discretion in selecting cases will winnow out at least some of them. The Court, generally speaking, has little interest in expending its resources to say something that everyone believes they already know. Thus, although ordinary cases can slip through, they are the exception and not the rule.

As a rule, the Supreme Court will decide the hard cases. For example, *Ruckelshaus v. Monsanto Co.*, a recent case in which the Court held that the Environmental Protection Agency's (EPA's) disclosure of Monsanto's trade secrets as part of the pesticide licens-

---

161 Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), initially established the proposition. Subsequent cases have reaffirmed the proposition. See, e.g., Park Ave. Tower Assoc. v. City of New York, 746 F.2d 135 (2d Cir. 1984) (inability of owners to receive reasonable return on their investment did not in itself amount to an unconstitutional taking as a matter of law), cert. denied, 40 Eastco v. City of New York, 105 S. Ct. 1854 (1985); Schafer v. City of New Orleans, 743 F.2d 1086, 1089 (5th Cir. 1984) (“Every regulation of the use of property, permanent or temporary, restricts the owner's freedom and may affect the value of his property.”). Each of these recent cases cited *Euclid* as controlling authority.

162 See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), and cases cited therein.


ing process was a taking, presented a factual setting which, in terms of the Court’s takings jurisprudence, was new. The Court had not previously encountered a taking challenge to the federal pesticide licensing scheme. Alternatively, *Kaiser Aetna* presented the navigation servitude problem, the setting of several takings cases, but with the special features of estoppel and a large private investment which created the conditions of navigability.\(^\text{166}\)

A model could be constructed which accounts for the vast majority of governmental incursions which affect property interests.\(^\text{167}\) The problem is that the Court does not decide the vast majority of such potential disputes. The Court decides an infinitesimally small subset of takings disputes, a subset composed almost entirely of hard cases, and therefore a subset ill-suited for modeling.

This “hard cases” feature is of course applicable to litigated cases generally. Professor Priest expressed the point in an article which examined the nature of litigated cases generally:

> As long as the parties’ expectations are rational, disputes for which their estimates of success conflict will be those for which true uncertainty exists, given whatever the underlying substantive basis of the law is. Disputes litigated to judgment will be those selected by the parties because of the high level of uncertainty that attends their resolution. As a consequence, litigated decisions, viewed alone, will make the substantive basis of the legal system appear indeterminate. It will be difficult to infer stable and coherent aspects of the legal system from cases whose consistent feature is indeterminacy.\(^\text{168}\)

The point applies with equal if not greater force to the Court’s docket.

Finally, the court is composed of nine relatively autonomous decisionmakers. To succeed as positive theory, any model would have to be adopted by nine persons, each of whom is essentially free to reject the model.\(^\text{169}\) No formal mechanism for imposing the

---

\(^{166}\) See notes 83-102 *supra* and accompanying text.

\(^{167}\) Costonis’s model might be just such a model. The taking status of most governmental incursions could be accurately accounted for under his model. Most of the incursions resulting in permanent physical occupations which would be understood to be takings could be rationalized under the model as failing the “use-dependency” element. *But see* note 37 *supra* and accompanying text. Governmental incursions in the form of the regulation of uses of property which are assumed not to constitute takings could be rationalized as satisfying the “use-dependency” and “pure takings” elements, particularly if the regulations primarily threatened the financial interests of the property owner.

\(^{168}\) Priest, *supra* note 163, at 416.

\(^{169}\) The Justices constitute a small decisionmaking body. In any such body charisma and leadership may influence a decision. Justices are not isolated from the influence of others. *See, e.g.*, Murphy, *Courts as Small Groups*, 79 HARV. L. REV. 1565 (1966). Nonetheless, they enjoy a high degree of autonomy and freedom from coercion of the more formal sort. In this sense, they are “essentially free” to reject the model.
model exists. As previously discussed, each of these decisionmakers brings a different life experience to the Court, a life experience which will influence the particular facts and values which that person finds significant in any particular case. It is unrealistic to expect that each of these autonomous decisionmakers will adopt, or be persuaded to adopt, a common decisional model.

The contemporary Court exhibits a split in decisional frameworks in the takings cases which makes modeling of that Court seem hopeless. The explanation for this untidiness is likely to apply equally to the future Court. So long as the Justices bring a mixed philosophical perspective to the takings cases, they will see these cases in fundamentally divergent ways. Yet the mixed philosophical perspective is only part of the problem for the modeler. The personal variables which will affect how a Justice sees a takings case will differ, even if the Court is populated by Justices who all identify with one side of the political spectrum. Finally, the modeler must operate in a world of hard cases and autonomous decisionmakers, a world where the facts of the case push and splinter the Court, while no simple and effective mechanism for imposing coherence and uniformity exists.

III. Formalism

Modeling of the Court's takings jurisprudence is unlikely to fulfill its positive theoretical aspirations. The model's normative aspirations would also seem to go the way of the positive ones. If modeling cannot succeed as positive theory, it seems odd to talk of modeling as good or bad normative theory.

Modeling of the takings issue is, nonetheless, an idea which can affect takings jurisprudence, however flawed it might be as positive theory. The modeler peddles a set of assumptions about the basic nature of the Court's interpretation of the takings clause. These assumptions, if accepted, determine in part the intellectual ground rules of the debate on the takings issue. Over time, the debate will affect the face of our takings jurisprudence. Thus, modeling must be reviewed critically, not simply by reference to its ostensible functions, but as a potentially powerful idea.

The power of modeling is in its propagation of a formalistic sense of the takings clause. The term "formalism" requires careful definition because it has been used by different people and for dif-

170 See notes 145-54 supra and accompanying text.  
171 See note 154 supra.  
172 The obvious example is the performance of Earl Warren, the Chief Justice, as contrasted with the expectations of the man who appointed him to the Court. B. SCHWARTZ, supra note 49, at 125.
Formalism, as used here, is a matter of both style and substance. Formalism is a style of speaking about constitutional decisionmaking, a style which implies a particular substantive sense of constitutional interpretation. As style, formalistic theorizing uses apparently objective, abstract principles which dictate the proper resolution of constitutional cases in a more-or-less deductive manner. This style implies a sense of constitutional interpretation in which decisions are made by the Justices from a perspective outside their particular life experiences and value framework. The formalistic theory itself is advanced as though it too sprang from a source apart from its author’s value framework. Formalism is thus an expression of the possibility of constitutional decisionmaking outside the battleground of ideology.\(^\text{174}\)

\(^{173}\) Karl Llewellyn used the term “Formal Style” to describe a type of judicial decisionmaking.

The Formal Style is of peculiar interest to us because it set the picture against which all modern thinking has played—call it, as of the last eighty or ninety years, “the orthodox ideology.” That picture is clean and clear: the rules of law are to decide the cases, policy is for the legislature, not for the courts, and so is change even in pure common law. Opinions run in deductive form with an air or expression of single-line inevitability. “Principle” is a generalization producing order which can and should be used to prune away those “anomalous” cases or rules which do not fit, such cases or rules having no function except, in places where the supposed “principle” does not work well, to accomplish sense—but sense is no official concern of a formal-style court.

K. LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 38 (1960). Llewellyn used the term as a point of contrast for the “Grand Style,” a style he sought to promote. For the judge of the Grand Style, a precedent had to be tested by reason, principles had to make patent sense, and “policy,” in terms of prospective consequences of the rule under consideration, comes in for explicit examination. \(\text{Id.}\) at 36.


\(^{174}\) The sense of formalism evoked here is related to the definition found in Unger, The Critical Legal Studies Movement, 96 HARV. L. REV. 561 (1983):

By formalism I do not mean what the term is usually taken to describe: belief in the availability of a deductive or quasi-deductive method capable of giving determinate solutions to particular problems of legal choice. What I mean by formalism in this context is a commitment to, and therefore also a belief in the possibility of, a method of legal justification that can be clearly contrasted to open-ended disputes about the basic terms of social life, disputes that people call ideological, philosophical, or visionary. Though such conflicts may not be entirely bereft of criteria, they fall far short of the rationality that the formalist claims for legal analysis. The formalism I have in mind characteristically invokes impersonal purposes, policies, and principles as an indispensable component of legal reasoning. Formalism in the conventional sense—the search for a method of deduction from a gapless system of rules—is merely the anomalous, limiting case of this jurisprudence.

\(\text{Id.}\) at 564. Unger’s “formalism” focuses on the justification of the solutions offered for the problems of legal choice.

Unger uses formalism as part of an effort to discredit certain ways of thinking about legal issues and to bring about a new way of thinking which will facilitate change in the law, change generally consistent with a leftist political agenda. In this article, the term “formal-
This Part of the article argues that the basic assumptions of modeling imply a formalistic sense of the takings clause; demonstrates the formalistic character of Costonis's model, as an example; and finally, discusses the costs of formalism.

The would-be modeler of takings jurisprudence will come to the task with certain articles of faith. First, the modeler believes in the possibility of models. He must see the takings cases as either decided by, or susceptible to decision within, a model. Second, the modeler believes in the desirability of models. The modeler abhors ad hoc resolutions and embraces the coherence of the model. In this regard the modeler longs for something more than a simple understanding of the important considerations and ideas common to most takings cases. He searches for the greater order and tidiness of the model. The model, once found or created, is justified by its apparent coherence. It can be used to sweep away the “ad hocery.” For the modeler this will be justification enough.

The modeler will find in the takings jurisprudence an irresistibly unruly target. Although other constitutional law areas seem to embody inconsistency, the opinions in the takings cases actually proclaim the unruly character of takings jurisprudence by the repeated references to ad hoc resolution. The modeler armed with the articles of faith will create a model which ostensibly imposes order and coherence, but functionally acts to mask the deep conflict underlying the cases. The model offered will be justified by its prima facie coherence and its touted house-cleaning function. The justification for the model is likely to stop there. In the takings ju-
risprudence, where the ideological conflict is fundamental and intense, the suppression of the inherent ideology in the model is the obvious path to coherence. Thus the modeler is likely to propose a model which both masks the ideological conflict underlying the cases and purports to be justified by considerations outside that conflict. In this way a modeler is likely to be a peddler of the formalistic sense of the takings issue, whatever the precise form of model proposed.

These points can be demonstrated by reference to Costonis’s model which embodies formalism both in its form and proffered justification. The model is quasi-deductive in form in the sense that the solutions purportedly flow from the answers to predetermined, abstractly-phrased questions. When the questions are answered, the solution springs forth in a deductive-like fashion. Costonis implicitly assumes that each Justice will work within, and wholly within, the model. Differences in ideology and life experience among the Justices are all swept away. Moreover, what little justification is offered for the model is carefully drawn outside the ideological clash. Costonis projects a value-neutrality to his model.

Costonis’s model is composed of four abstract questions to be applied in each case which raises the takings issue. The same questions apply whatever the nature of the government intervention or the property interest threatened. Navigation servitude cases are resolved in the same way as historic preservation cases. Factual elements outside the model’s focus are irrelevant. For example, the private investment and estoppel feature of Kaiser Aetna would be disregarded as outside the model. The model seeks to impose order in a broad and abstract way, casting aside anomalous factual features and pigeonholing cases in the expansive "takings conceptual drawer." Thus, the solution to all takings questions follows in a quasi-deductive, formalistic way from the answers to the model’s questions.

Costonis advances the model as a value-neutral takings theory unlike other theories which he suspects are "by-products of the authors’ particular substantive values." Nonetheless, his model, like the theories he criticizes, is inevitably an expression and ordering of certain values. An element-by-element review of the model provides a framework for identifying this ordering.

The first element, the presumption of a taking, is a distinct value choice. The obvious alternative not chosen is the presump-

177 See Costonis, supra note 6, at 469 (description of the model).
178 See note 181 infra and accompanying text.
179 See notes 14-26 supra and accompanying text.
180 See notes 91-94 supra and accompanying text.
181 Costonis, supra note 6, at 527 n.245.
tion of no taking. As soon as Costonis decides to use a presumption, he is inevitably faced with a value choice. Assuming that the presumption is a meaningful feature of the model, that it will make a difference in at least some cases, the choice between a presumption of taking or no taking is a choice between the basic welfare and indemnity values. When the taking presumption is chosen, the indemnity value is advanced to some extent over the welfare value.

The second element, the use-dependency issue, is a very powerful part of the model. The model demands some connection between the government's purpose and the actual or intended use of the property affected. A negative answer to this issue ends the inquiry. Costonis identifies a "just share" principle as the underlying theoretical foundation for his second element. If the linkage between purpose and use is found, the loss to the property owner is simply his "just share" of the costs of living in a civilized society. If not, the property owner has been unfairly singled out.

One way to understand the value choices inherent in this second element is to reconsider the navigation servitude cases by reference to this element. In the navigation servitude cases, the use-dependency element is not satisfied. The government's purpose is to facilitate interstate navigation. The property owner's use has nothing to do with this purpose; the property owner is singled-out because his property is located on or adjacent to navigable waters. Applying the model's second element, a navigation servitude incursion would ordinarily be deemed a taking.

In fact, the Court has shifted back and forth on the navigation servitude/takings issue, sometimes invoking the hornbook rule that loss attributable to the imposition of the servitude is not a taking, other times talking of special factual considerations and finding a taking in the imposition of the servitude. In this latter set of cases the Justices often seem influenced by their sense of the expectations of the property owner. Where the particular facts somehow supported the owner's expectation of no governmental interference, the Court found a taking. Where no special circumstances were involved, just the ordinary disappointment of the riparian owner, the Court has been less likely to find a taking.

The navigation servitude cases show that it is possible to de-

182 "Under the just share principle, the taking determination depends upon whether a linkage exists between the purpose of a measure and the use of the affected property establishing that the proprietor has not been unfairly singled out to bear losses that should be distributed among the public generally." Costonis, supra note 6, at 486-87.

183 See note 87 supra.


cide the takings issue without strict reliance on a use-dependency principle. The point is not that use-dependency is wrong or irrelevant to takings jurisprudence. The Court has invoked use-dependency in some takings cases. Nonetheless, the navigation servitude cases demonstrate that it is possible to construct a takings jurisprudence which does not rely so absolutely on the idea of use-dependency. Thus, the construction of the model with its use-dependency element is a value choice.

The third element of Costonis's model asks, "Does this measure infringe more severely upon the property taken than is required to achieve its intended goals?" This element focuses on the impact of the governmental action, but solely from the government's perspective. It seeks to determine whether the government is using a heavier hand than is needed to accomplish its goals. Although the third element is a plausible analytic tool, an obvious alternative can be found in the opinions of some of the twentieth century takings cases. These cases, like the third element, reflect a concern for the impact of the government's action. In the Mahon opinion, Justice Holmes discussed the impact of the challenged statute in terms of the destruction of the coal company's entire

---

186 Costonis asserts that the use-dependency test derives from the "clothed with a public interest" idea of Munn v. Illinois, 94 U.S. 113 (1876). Costonis, supra note 6, at 487 n.99. In Munn, a state statute fixed the maximum charges for storage fees in grain warehouses. The warehouse owners challenged the statute under the commerce clause and the fourteenth amendment. Justice Waite rationalized the constitutionality of the statute by concluding that the public had an interest in the use of the property; the grain warehouses had become "clothed with a public interest." 94 U.S. at 133-36.

The difficulty with the "clothed with a public interest" idea is in setting its limits, a point first noted in Justice Field's dissent in Munn. Id. at 136-54 (Field, J., dissenting). The idea reappeared from time to time. See, e.g., Wolff Packing Co. v. Court of Industrial Relations, 262 U.S. 522 (1922). Justice Sutherland used the idea as part of an opinion by which the Court struck down a New York statute which prohibited the resale of theater tickets at more than a 50 cent premium (Justice Sutherland asserted that theaters were not clothed with a public interest). See Tyson & Brother v. Banton, 273 U.S. 418 (1927). Justice Holmes wrote an angry dissent characterizing the idea as a "fiction." [T]he notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. Lotteries were thought useful adjuncts of the State a century or so ago; now they are believed to be immoral and they have been stopped. Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed it did not need the Eighteenth Amendment, notwithstanding the Fourteenth, to enable a State to say that the business should end. Mugler v. Kansas, 123 U.S. 623. What has happened to lotteries and wine might happen to theatres in some moral storm of the future, not because theatres were devoted to a public use, but because people had come to think that way.

Id. at 446 (Holmes, J., dissenting). The Court has made little use of the label "clothed with a public interest" in recent times.

187 See note 19 supra and accompanying text.
property interest. In *Penn Central*, Justice Brennan focused on the impact of the landmark preservation law on Penn Central’s property holdings. Although both the model and the cases share an attention to the impact of a governmental incursion, the model gauges the acceptability of the impact by reference to the government’s need, while Justices Holmes and Brennan focus on the impact from the property owner’s perspective. Costonis’s model asks whether the impact is greater than needed to accomplish the government’s end. Justices Holmes and Brennan ask whether the impact is greater than we should expect to be borne by the property owner.

By choosing to characterize the second and third elements this way, Costonis makes a choice for certain values and thereby for certain constituencies. His second and third elements are choices which tend to favor those property owners who are able to attack the use-dependency linkage. Property owners whose use or proposed use can be easily and obviously linked to the government’s end are losers.

The fourth element of Costonis’s model determines the weight of the government’s burden in overcoming the presumption of a taking or, in Costonis’s alternate characterization, the degree of judicial scrutiny of the government’s decision to proceed without paying compensation. Costonis analogizes this element and its effect to the “tiers of review” concept of the equal protection cases. If the property owner’s dominion interest is threatened by a governmental incursion grounded in a less well-recognized police power end, the appropriate level of judicial review is analogized to “strict scrutiny.” Because strict scrutiny review in the equal protection setting almost always results in invalidation, a governmental incursion which posed the “dominion interest versus a less well-recognized end” conflict would presumably be a taking under the model. At the other extreme, the combination of a purely financial interest threatened by a governmental incursion grounded in a well-recognized and significant police power end triggers the “rationality review” analog. In the equal protection arena this form of review almost always results in a validation of the legislation.

---

188 [The statute] purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding the plaintiffs . . . . To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).
189 See notes 64-71 supra.
190 See note 25 supra and accompanying text.
191 See note 25-26 supra and accompanying text.
192 Id.
Thus, the property owner who can assert only a financial loss resulting from the government's pursuit of a well-established end presumably will not be entitled to compensation under the model.

The fourth element of the model is a distinct ordering of values with distinctly different meanings for various sorts of property owners. While the idea of dominion does seem to be part of our culture and, thereby, part of legal decisionmaking in the takings cases, Costonis chooses to elevate this particular feature to a position of transcendent importance.\textsuperscript{193} To subordinate the financial interest to the dominion interest is a distinct value choice. Moreover, governmental incursions which trigger the takings issue can threaten a set of interests, including interests in dignity, community, and political participation.\textsuperscript{194} To choose dominion as the most significant interest in each and every takings case is a choice which begs for some explanation and justification.

In summary, Costonis's “value-neutral” model reflects a distinct set of value preferences. Dominion comes to center stage. The property owner with only financial interests at stake has little hope of compensation, however dramatic the loss from his individual perspective, and the use-dependency element cuts like an analytic knife through the takings jurisprudence.

Costonis has offered a model which reflects value choices and ordering. He makes both the positive and normative claim for the model, which he calls “a principled, coherent predicate for judicial management of compensation practice under the takings clause.”\textsuperscript{195} Nonetheless, what little justificatory argument he offers makes no direct appeal to the particular value preferences expressed in the model. Instead, he focuses on the coherence promised by the model and other formal features of his construct.

Costonis argues that his model will provide the sense of coherence now lacking in the Court's ad hoc approach.\textsuperscript{196} He presumes that the integrity of the takings decisions and thus the integrity of

\textsuperscript{193} See Costonis, \textit{supra} note 6, at 499-500.

\textsuperscript{194} Although Costonis asserts that the “dominion interest is not monolithic but rests on a variety of values,” he nonetheless chooses the dominion interest from among a set of alternative interests or combination of interests which can be threatened by a governmental incursion related to one's property. See Costonis, \textit{supra} note 6, at 518. It is this choice which begs justification.

\textsuperscript{195} See note 12 \textit{supra}.

\textsuperscript{196} [L]itigants, professional observers, and society as a whole deserve assurance that whatever value judgments are ultimately necessary to transform a debate into a decision proceed from a coherent framework. . . . The integrity of individual takings decisions, in short, depends less on the actual outcomes as such than on the consistent, even-handed application of a coherent decisional approach over time. As presently constituted, the multifactor balancing test cannot provide this assurance.

Costonis, \textit{supra} note 6, at 524.
the Court depend on the outside world's perception of a commonly shared, coherent decisional model. Actual outcomes become less important than appearances.

The justificatory argument which relies on appearances and not outcomes is consistent with formalism. As long as the Court's takings decisions appear to flow from a quasi-deductive decisional process, the integrity of those decisions will be preserved. Costonis presumes that integrity can be achieved only out of a publicly perceived, quasi-deductive decisional process, thereby ignoring the possibility that observers of the Court could perceive and accept an ad hoc approach which focused on the actual outcome rather than appearances. He also leaps to the idea that the important thing is to preserve the integrity of decisions, rather than considering the possibility that decisions might be wrong and in need of attack rather than preservation.\(^\text{197}\)

Costonis also justifies his model, in particular the fourth element, by analogy to the Court's decisions in other constitutional law areas, such as the first amendment cases, in which the depth of judicial scrutiny appears to move on a graduated scale depending on the type of expression in question.\(^\text{198}\) Costonis neither defends the graduated scale in its first amendment context nor explains why it should be carried over to the takings cases. Rather, he is satisfied to show that his model will make takings opinions look more like other sorts of constitutional law cases. The formalist's concern for tidiness within a given doctrinal compartment can also lead to tidiness and symmetry across doctrinal compartments. We can surely make the takings opinions look more like the first amendment opinions; the formalist, however, does not tell us why we would wish to do so.

Costonis concludes the body of his article with a suggestion that appears to be anything but formalistic:

I believe that each age must address the takings issue anew because perceptions of use-dependency, like those of the concept of property itself, are closely bound up with the age's overall political and social currents. . . . I have been careful throughout this Article to distinguish the instrumental question "How should courts manage litigation under the takings clause?" from the ultimate question "What is property?" To run the two questions together by conditioning a response to the first upon the definitive resolution of the second assures the unproductive am-

\(^\text{197}\) Costonis does of course attack one case, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). His attack, however, is based on the weaknesses in the Marshall opinion, and Loretto's inconsistency with the model. Costonis, supra note 6, at 506-22. He does not independently address the question of why the particular outcome in Loretto, viewed from the perspective of the actual parties, was wrong.

\(^\text{198}\) See note 25 supra.
bivalence and conflict that pervade current takings commentary.\textsuperscript{199}

This is, however, the ultimate formalist move. Costonis pretends to avoid the ultimate question of what is property. He pretends to speak only of the lesser and separate question of judicial management. But the questions cannot be separated. The Court's takings cases provide an answer to the question of what constitutes property. Property is that set of interests which at any given time are sheltered from the uncompensated-for reach of the majority.\textsuperscript{200}

The protected set of interests is determined by how courts manage litigation under the takings clause. Thus, the questions cannot be sensibly separated. Moreover, the ambivalence and conflict that results when we run these questions together is a reflection of the ambivalence and conflict in our basic sense of the nature and role of private property in the latter twentieth century. To pretend that the questions are separate and that the question of judicial management is somehow unrelated to the ultimate question is the most striking example of the formalist's cloak of value-neutrality.

The task remaining is to discern the harm, if any, in the propagation of a formalistic sense of the takings issue. The answer lies in the ways in which the takings debate may be circumscribed by modeling. The power of modeling is primarily in its formalistic assumptions. The assumptions, once accepted, do not dictate particular answers to particular takings cases, but they do determine the framework of the debate. For example, a critic who accepts the formalistic assumptions might nonetheless subject the Costonis model to a critique which challenged his positive claim. An analysis of the recent takings cases might suggest to the critic that the real model is somewhat different from Costonis's model.\textsuperscript{201} Yet as soon as the debate takes this turn, formalism has taken hold. Legal scholarship concerning takings jurisprudence thereby becomes a process of discovery and not creation. Arguments thereafter center around the language and decisions from which the model might be discovered, rather than arguing about the particular ideas and values which ought to be advanced. We would see theories as either vindicated or repudiated by reference to their predictive value, rather than by reference to the values they express. Positivism can become the prevailing philosophy and hard normative theorizing can slip away.\textsuperscript{202}

\textsuperscript{199} Costonis, \textit{supra} note 6, at 527-28.

\textsuperscript{200} See Reich, \textit{The New Property}, 73 \textit{YALE L.J.} 733 (1964).

\textsuperscript{201} See note 40 \textit{supra} and accompanying text.

\textsuperscript{202} Professor Gilmore expressed the point eloquently:

The vice of the formalistic approach to law, on the level of serious scholarship as on the level of political slogans and advertising campaigns, is that it leads to a
Even if the modeler engages in the normative quest for the right model, formalism persists. The insistence on the possibility and virtue of modeling will be part of the quest. Any justification of the proffered model is likely to turn on the model’s elegance, coherence, and other formal features. The model, after all, is merely a framework for decision. What the modeler likely misses (or intentionally obscures) is the way in which the framework for decision necessarily brings some things in and shuts some things out, thereby becoming a value choice.

Whether the modeler is on a positive or normative quest, or whether the modeler misses or obscures the inevitable value choices expressed in the model, the essential effects are the same. Modeling of the takings issue is an intellectual idea which has the power to affect future takings cases in sure, but unknowable, ways. The effect is sure in the sense that intellectual history informs us generally of the power of ideas. More specifically, the ideas expressed in the academic debate of the latter part of the twentieth century can become the accepted premises for decisionmaking in the takings cases of the twenty-first century. If the premises for decisionmaking are expressed in non-ideological terms, the perception of the cases will be different than it would be if the premises were to embrace explicitly the ideological-based choices posed in the cases. Differing perceptions are likely to lead the decisionmakers in different directions. The effect is uncertain in the sense that we cannot know now where we will actually go in our twenty-first century takings jurisprudence and where we might have gone with a different perception.

Every intellectual offering arises out of the author’s substantive value framework, whether the offering is a model for the takings issue or a critique of modeling. The essential value choice underlying this article is the assumption that better choices will be made in the takings cases if we acknowledge the ostensible incoherence in our takings jurisprudence and see the source of that incoherence in our continuing struggle to accommodate private property and pub-

disastrous overstatement of the necessary limits of law. In our own history, both in the late nineteenth century and in our own time, the proponents of the formalistic approach have included the search for theoretical formulas assumed to be of universal validity and the insistence that all particular instances should be analyzed and dealt with in the light of the overall theoretical structure. Solutions to problems are “right” if they conform to, “wrong” if they deviate from, that structure. The theoretical model itself quickly becomes frozen, so that what was “right” or “wrong” in 1870 must be equally “right” or “wrong” in 1920; what is “right” or “wrong” in 1970 will be equally so in the no doubt magical year of double twenty. The adept of formalism, once he has perfected his model (or borrowed one ready-made from an economist or a sociologist), becomes an advocate of stability and an enemy of further change.

lic welfare. When we see that the choices we make are ideological in nature, we are more likely to reexamine our basic positions and assumptions. This reexamination may make us less sure and thus less comfortable, but the choices we make in that reflective yet uncomfortable posture will be better than decisions made in the sureness and comfort of formalism.

IV. Conclusion

Takings jurisprudence is untidy and confused. It will probably remain so, notwithstanding the efforts of modelers and formalists. So long as the Justices retain the mixed philosophical perspective which tells them that individual sacrifice is both forbidden and essential, apparent inconsistency and confusion in the case law will persist. Moreover, the confusion will continue to be compounded by the fact that the Court is a decisionmaking body of nine autonomous human beings who are asked to decide hard cases.

Modeling of the takings issue, while purporting to give us coherence, actually conveys the formalistic idea that our solutions can be found somehow and somewhere apart from the ideological clash. That place outside the ideological clash does not exist. The takings cases represent choices for and against particular interests and people, choices made within the ideological clash of private property and public welfare. The danger of modeling and formalism is that it may let us pretend that these hard choices are somehow easier than they really are.