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A case could be made for the proposition that property rights have been in a state of more-or-less continuous decline for many decades, and that there is nothing to report on that front but more of the same. I do not agree. I believe that we have moved in recent years from a situation (characterized by conventional urban zoning) in which we generally encourage developmental rights, though recognizing they must from time to time be restrained, to one in which developmental activity has itself become suspect. As a result, we are in the midst of a major transformation in which property rights are being fundamentally redefined to the disadvantage of property owners.

Because this transition is, by and large, taking place without compensation, it has become commonplace for courts to describe what is occurring in conventional terms. The proliferation of recent historic preservation laws is routinely characterized, for example, as if it were nothing but a continuation of long-accepted zoning practices.[1] In fact, I submit, such laws and many others—wetlands and coastal protection,[2] open space

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1. *See, e.g.*, Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir.), *cert. denied*, 426 U.S. 905 (1975); City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13 (1964). One judge has recognized the phenomenon: "[L]egislatures and courts are adding a new dimension which may do violence to constitutional private property rights, for now we hold that a private property owner must make his property available without compensation for public view." First Presbyterian Church v. City Council, 25 Pa. Commw. 154, 360 A.2d 257, 263 (1976) (Kramer, J., concurring).

2. *See, e.g.*, Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972); Turnpike Realty Co. v. Town of Dedham, 72 Mass. 1303, 284 N.E.2d 891 (1972), *cert. denied*, 409 U.S. 1108 (1973). One feature of the California Coastal Act of 1976 is protection of environmentally sensitive habitat areas from any significant disruption in at least a 1000-yard zone inland of the mean high-tide line. CAL. PUB. RES. CODE §§ 30,103, 30,240(a) (West 1977). *Cf.* Buttrey v. United States, 690 F.2d 1170, 1177 (5th Cir. 1982) ("The government . . . has merely told Buttrey that . . . he must keep what he has without attempting to make it worth more."), *cert. denied*, 103 S. Ct. 2087 (1983).

zoning,[3] growth control[4] and the resurgent public trust doctrine[5]—mark a transition the full effects of which have hardly begun to be recognized or felt.

As good an example as any is the recent decision of the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*.[6] After dutifully reciting all the conventional cases in which regulation without compensation was sustained, the majority in effect concluded that the city's refusal to allow Penn Central to build a high-rise above Grand Central Station, which had been designated an architectural landmark, was indistinguishable from a half-century's land regulation and zoning cases.[7] Justice Rehnquist, in dissent, insisted that something importantly different was happening in *Penn Central*.[8] He was right, but he too failed to recognize the full significance of the majority's decision: Rejection of the very claim that there existed a private property right capable of being taken.

What made *Penn Central* an unconventional case? For one thing, the owner in that case was denied the opportunity to pursue an established business expectation, though the majority opinion denied it.[9] Building on air rights had become a conventional economic activity, and one in which many owners had invested great sums of money.[10]

Moreover, the case cannot be justified on the conventional "external harm" theory which is the source of most traditional property regulation.[11] It cannot be said, for example, that the proposed use was a nuisance-like activity that would intrude on the uses others were making of

3. *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255 (1980). One case taking a position contrary to that of the Supreme Court in *Agins* was later vacated. Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975), *vacated*, 417 F. Supp. 1125 (1976).

4. *See, e.g.*, Golden v. Planning Board, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed sub nom.* Rockland County Builders Ass'n v. McAlevey, 409 U.S. 1003 (1972); Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976); Steel Hill Dev., Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972).

5. *See* National Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983); City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 644 P.2d 792, 182 Cal. Rptr. 599 (1982), *cert. granted sub nom.* Summa Corp. v. California, 103 S. Ct. 1425 (1983); City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980); Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1968); *The Public Trust Doctrine in Natural Resources Law and Management: A Symposium*, 14 U.C.D. L. REV. 181 (1980).

6. 438 U.S. 104 (1978).

7. *Id.* at 128–35.

8. *See id.* at 138–53.

9. *See infra* text at 494–95.

10. *See Penn Central*, 438 U.S. at 116; Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *cert. denied and appeal dismissed*, 429 U.S. 990 (1976).

11. *See Penn Central*, 438 U.S. at 144–46 (Rehnquist, J., dissenting).

their property.[12] Unlike the case in which an owner wishes to build a factory or to maintain a quarry in a residential neighborhood, Penn Central only asked to be allowed to do what its neighbors had already done, to construct a high-rise building. Neither can it be said—beyond the limits of so-called noxious uses or nuisances—that there was even a conflict between the uses Penn Central wanted to make of its property and those that its neighbors wanted to make of theirs.[13] Thus, *Penn Central* was not a case like *Miller v. Schoene,*[14] in which some choice had to be made between competing and incompatible uses, neither of which could be viewed as wrongful. This illustrates the distinctiveness of the *Penn Central* decision, because *Miller v. Schoene* has long been viewed as at the outer limit of permissible regulation.

Moreover, as Justice Rehnquist emphasized in his dissent, there was no plausible reciprocity of advantage in the case, a feature common to much traditional zoning.[15] Indeed, *Penn Central* is precisely the opposite of a reciprocity case; one landowner was prevented from doing something that all his neighbors had been permitted to do. And he was prevented not because he had done something wrongful or intrusive, but because he had done something admirable—he had built an architecturally distinguished building.

The most accurate way of looking at *Penn Central* is to say that the owner was required to continue conferring a benefit on his neighbors. The owner's situation in *Penn Central* resembles the situation of a landowner who has, up to the present time, refrained from building on his lot, thereby providing his neighbors a scenic amenity. Now he wishes to stop providing that benefit, and to use his property as his neighbors have already used their adjoining tracts. Yet the law requires him to continue bestowing amenity value upon his neighbors even though they have no similar obligation. How can such a result be explained or justified? That is the question Justice Rehnquist raised, and the majority opinion in the case provides no satisfactory answer.

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12. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (brickyard); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (sand and gravel mining).

13. Conflict rather than wrongfulness has always been the principal feature of regulatory cases. *See generally* Sax, *Taking, Private Property and Public Rights,* 81 YALE L.J. 149 (1971) (government regulation as conflict resolution); Sax, *Takings and the Police Power,* 74 YALE L.J. 36, 48–50 (1964) (regulatory cases better explained by incompatibility of uses than by external harm).

14. 276 U.S. 272 (1928) (no deprivation of property without due process of law by the state requiring destruction of ornamental cedar trees in order to avoid infecting apple orchards in the vicinity with cedar rust).

15. *See Penn Central,* 438 U.S. at 139–40 (Rehnquist, J., dissenting). The "reciprocity of advantage" concept was enunciated by Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

In the pages that follow I propose an explanation of why cases like *Penn Central* are being decided as they are. I argue that *Penn Central* and its companions do not turn on the compensation/no compensation issue, which has traditionally dominated legal thinking about property. Instead, they address the allocational function of property. Put as bluntly as possible my thesis is this: We have endowed individuals and enterprises with property because we assume that the private ownership system will allocate and reallocate the property resource to socially desirable uses. Any such allocational system will, of course, fail from time to time. But when the system regularly fails to allocate property to "correct" uses, we begin to lose faith in the system itself. Just as older systems of property, like feudal tenures, declined as they became nonfunctional, so our own system is declining to the extent it is perceived as a functional failure. Since such failures are becoming increasingly common, the property rights that lead to such failures are increasingly ceasing to be recognized. Thus, the interesting question in the *Penn Central* case is not why the owner failed to receive compensation, but why private ownership of Grand Central Station did not lead to the correct allocation, that is, to maintaining the property as an unobstructed, architecturally distinctive railroad station.

In speaking of the "correct" allocation, I mean to suggest no omniscience either on my part or that of the New York Landmarks Preservation Commission. Rather, I intend only to observe that in cases like *Penn Central* and many other modern situations such as open space preservation or coastal protection, there is widespread agreement that nondevelopment is the correct result, and widespread recognition that conventional bargaining between the owner and potential users of the property is not bringing about that result. I also mean to contrast the outcome in such cases with an earlier belief that demolishing old structures so as to allow vigorous new development was the right result. It is this difference rather than the question whether the owner is being compensated or not that is generating disillusionment with private developmental rights.

Before turning to the reasons for the perceived allocational failure of traditional property, however, I want to comment briefly on the relationship between compensation and allocation. One might say that the ability of the public to avoid compensation significantly affects the allocation decision, for the simple reason that the public will want something (preservation of an historic structure, for example) much more if it is free than if it costs it millions of dollars. But the choice is not always that simple. For example, if a high-rise is not built above Grand Central Station, the public—whether or not it pays compensation to the owner—is foregoing the benefits that come from development. As the employer and welfare provider of last resort, it risks the loss of economic activity, of jobs and of

housing, losses not significantly felt by any individual. The public does not casually eschew the benefits of economic development. For this reason, one must view laws constraining development, such as historic preservation ordinances, as allocational choices that are not "free" to the community even when no compensation is paid the owner. Such decisions reflect changing public values, and not simply public avidity for obtaining free benefits.

Why are values changing, and why does the property system not automatically adapt to them? One important explanation may lie in the difference between the different kinds of benefits flowing from property—"exclusive" and "nonexclusive" consumption benefits. In a case of exclusive consumption (a residence or a shopping center, for example), virtually all benefits flow exclusively to those who occupy and use the land. In such a case, where there are no significant externalities, one expects the direct users to be able to organize, calculate and bid for the opportunity to enjoy those benefits. In general, the community as a whole is content to have the property allocated to whomever among such competing exclusive use bidders is willing to make the highest bid. The conventional property system is organized to facilitate such allocations, and such allocations only.

If, however, the "competitors" include those who benefit from maintenance of an existing historic building, the consumption is nonexclusive. That is to say, the number of people who will potentially benefit is much greater: Benefits are not limited to actual occupants; the nature of the benefits will differ among various people in the group; they are likely to be quite small as to any individual; and there is no way of assuring that every beneficiary will contribute, for benefits will flow to all potential beneficiaries whether or not they have contributed (the so-called free-rider problem).

Moreover, it is often particularly difficult for any individual to calculate the value of nonexclusive benefits to him. Such benefits often have a substantial uncertainty or "option element" to them. One may be confident that he will benefit from the presence of the building in some way (just as he benefits from the existence of many as-yet-unread books in the public library), but it is much more difficult to put a price tag on that value than to put such a price tag on his apartment or on a hamburger he consumes.

For all these reasons—diffuseness, smallness of individual interest, imperfect knowledge, differential values to a large number of people, and difficulty of pricing—the likelihood that nonexclusive consumers will organize to bid, and to bid the "right" price for such benefits, is doubtful.

Of course these very uncertainties also suggest reasons to lack confi-

dence in the intervention of government to allocate the land to a given nonexclusive consumptive use through a legal mandate. What I have said to this point seeks to demonstrate not that allocation through law, rather than through bidding, is necessarily right, but only that allocation through conventional bidding—whereby the maximization of profit to the owner is assumed to produce the correct allocation—is fraught with difficulties.

When nonexclusive consumption benefits are very small by comparison to exclusive consumption values, the traditional system of allocation functions well. But as nonexclusive benefits rise in importance, the capacity of traditional private property transactions to allocate satisfactorily diminishes, and in such circumstances one should not be surprised to see diminishing confidence in the property system as an engine of allocation.

Another element of nonexclusive consumption makes private allocation through the property system still more unreliable. This element is what has sometimes, in a different context, been called the bandwagon effect. This effect describes a situation in which the value of something to any given individual is itself dependent on whether it has value to others. To take a banal example, the value to me of some fashionable item, like designer blue jeans, is linked to the fact that others value it. The value of my consumption to me is determined by the praise, support, or envy that others yield me as a result of my consumption. This phenomenon has an important and serious implication for things like historic preservation or wilderness. Some of the value of such things doubtless lies in their capacity to stimulate feelings of national identity or cultural solidarity, and their value to any individual rises as they are embraced by the entire community as public values.

I may, for example, derive benefits from using the wilderness as a hiker, or some historic site as a visitor, but I may also derive some benefits from wilderness or historic preservation in some remote area I will never use or see, arising from the commitment of Americans to preserve wilderness as a community value. A commitment to wilderness (or to symbols of America's historic greatness) yields such value to any given individual only if the community as a whole treats it as important. And in such cases the evidence of such value is an act of commitment by the whole community, such as embracing the national policy of historic preservation, wilderness, the flag or any of a host of symbols of national character or identity.

In such a case, even if a number of individuals could organize to bid for preservation and could outbid other potential users, that bid would not necessarily measure the whole value of preservation. Preservation may be more valuable to me simply because there is a community-wide commitment to preservation. Thus, for example, French people value their his-

toric chateaux not only for their beauty, but also because the nation has "adopted" them as symbols of national greatness. Such benefit valuation can only be expressed through the instrumentality of the political community, which in practice means through government. Thus, the participation of the government using a legal mandate may serve not only as a device to identify the bidding value for a nonexclusive use, but also as a device for expressing a kind of value in addition to the sum of all purely individual uses or benefits.

As nonexclusive consumption values rise in importance, and the capacity of the property system to make correct allocations thereby diminishes, it seems inevitable that we begin to ask ourselves why we allow those private property rights to exist which increasingly produce unwanted results. At least as to land, where property rights are assigned by the public in the first instance (and putting aside those things that are more or less entirely the product of an individual's own creative efforts, such as a symphony or a poem), the assignment of property rights presupposes that private ownership would routinely produce socially desirable use allocations.

We assigned property to private owners in the undeveloped West, for example, because we assumed that the uses they would make of the property—settlement, security of the frontier, development of railroads, farms and mines—would maximize net social benefits. Had we not believed that the allocations brought about by private ownership would produce such results, it hardly seems likely that such rights would have been created. The application of a new kind of water right for the arid West in place of traditional riparian rights pointedly illustrates this assumption.[16] One may also test it against the current debate over the proposed sale of public lands remaining in federal ownership.

It is, I suggest, precisely because it is widely believed that the highest and best use of much of that land lies in its retention for nondevelopmental, nonexclusive uses, such as public recreation, wilderness and wildlife habitat, that there is strong resistance against selling it into private ownership. If it is believed that private ownership likely will not, for the reasons I have suggested above, sufficiently allocate the land to such nonexclusive uses, it is only to be expected that private rights will not be established.[17]

The difficulty with land already patented into private ownership, of course, is one of fairness to the owners in the face of changing values, and I shall have something to say about that later. What I wish to empha-

16. *E.g.*, Lux v. Haggin, 69 Cal. 255, 10 P. 674 (1886); Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

17. *See infra* note 37 and accompanying text.

size, however, is not the compensation issue, but the growing conviction that for substantial areas of land the content of private ownership rights that we have long relied on is misallocating the land, and that what was long viewed as exceptional (government intervention to allocate correctly) is becoming commonplace. This change cannot help but impose enormous pressure upon our conception of the role that private ownership in land should play.

We have already seen some remarkable transformations, of which the rise of historic preservation ordinances is but one example. The perceived dominating importance of nonexclusive uses of shoreline has already given rise in the last decade to a greatly revived public trust doctrine.[18] In that instance, the path of a judicially led transformation was paved by a long—though largely moribund—tradition of government retention of public rights in submerged shoreland that were never transferred into private ownership. The tradition was often ignored in the mid-nineteenth century, especially in places like California, where vast acreages of submerged shoreline were passed into private ownership to encourage development.

At the time, the private ownership of these lands seemed absolute. As the need for nonexclusive uses of the lands rose in the last decade, and as the availability of such lands shrank, we witnessed some remarkable judicial pyrotechnics. For instance, recent California Supreme Court decisions have redefined the nature of the grants made by the legislature in the 1860's,[19] questioned longstanding property rights in water,[20] and explicitly reversed previous decisions holding that absolute private rights had been granted,[21] thereby reinstating the public right of nonexclusive use on the inventive theory of implicit reservations in grants made more than a century ago.

However shocking such results may be to conventional legal sensibilities, they reveal a trend that is equally obvious in a range of other areas. That trend is exemplified not only by *Penn Central* but also by contemporary decisions upholding open space, coastal and wetland zoning.[22]

Nonexclusive consumption benefits have always existed. Why should they be less in harmony with the property system now than they were in the past? The reasons, I suggest, are two, both related to the developmen-

18. *See supra* note 5.

19. City of Berkeley v. Superior Ct., 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327, *cert. denied*, 449 U.S. 840 (1980).

20. National Audubon Soc'y v. Superior Ct., 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

21. City of Berkeley v. Superior Ct., 26 Cal. 3d at 532, 606 P.2d at 372, 162 Cal. Rptr. at 337.

22. Perhaps the most notable case is Just v. Marinette County, 56 Wis. 2d 7, 201 N.W.2d 761 (1972). *See also supra* note 2.

tal use of property. First, the more development proceeds, the more the stock of such benefits (coastal access, historic structures, wilderness) declines. Second, and even more important, values are changing, so that the quantum of benefits from developmental activity (both exclusive and nonexclusive consumption benefits) is perceived as being less than it formerly was, while simultaneously the perceived benefits flowing from nondevelopmental, nonexclusive consumption are sharply increasing.

The building of the railroads, the irrigation of the arid West, the electrification of rural areas, the growth of great cities, even the belching steel mills of Pittsburgh or Gary, idealized America on the march, putting the world on wheels, serving as the breadbasket and the arsenal of democracy. Such images were at least as powerful as the current imagery of the wilderness or of our historic heritage. The nonexclusive consumption benefits of a symbolic sort that flowed from these activities were in harmony with conventional exclusive consumption benefits that flowed to users and builders. The profits that came to landowners in allocating property to development automatically brought in their wake a sense of common purpose to a public enlivened by an idea of progress tied to development. The developmental rights of property owners were truly an engine pulling us where we wanted to go.

Plainly, that animating sense of progress has declined. The change might best be analogized to the mining of a valuable mineral. At first, the richest lodes are mined, and the productive output is very great per acre of land disturbed. As time goes on, the miner must move on to less and less concentrated ores, more and more land must be disrupted, and more energy must be expended to get the same level of output. Over time the benefits of developmental activity diminish, while the costs increase. Our sense of progress diminishes.

One might also say generally of developmental activity that the most important needs are taken care of first. As time passes the sense of accomplishment associated with new uses diminishes. Constructing suburban shopping centers or producing instant cameras cannot be expected to generate the enthusiasm that went with building transcontinental railroads. Those few contemporary activities that do excite us—the space program or the development of the computer—are little involved with controversies over resource use.

Of course, the transformation I have been describing is neither uniform nor unidirectional. Some development is still perceived as essential, as in a recent case where a long-established Detroit community, "Poletown," was destroyed to make way for a new General Motors plant.[23] Such ex-

23. Poletown Neighborhood Council v. City of Detroit, 410 Mich. 616, 304 N.W.2d 455 (1981). *See also* Barbian v. Panagis, 694 F.2d 476 (7th Cir. 1982).

amples are likely to be particularly notable in periods of economic difficulty such as we have been experiencing in the last few years. And, of course, some developmental activity, such as maintaining the supply of energy resources, is needed to sustain existing uses. An economy devoted to sustenance, however, is more likely to generate interest in the techniques of continuity, durability and sustained yield than in large-scale development and expenditure of resources.

There is yet a third way of understanding the ongoing transformation in the content of property rights. Social coherence demands evidence and symbols of common purpose, self-worth and solidarity. As developmental activity ceases to provide those things and we are much less persuaded that "America is on the march," we turn to other things. We seem to be turning to symbols of stability, of links with our past. History is an obvious outlet for such values. So, though less obviously, is the interest in ecology, a science focused on the stability and continuity of natural systems. It may be that as growth and development seem to become less valuable guides for future well-being, those things that speak to sustenance, continuity, adaptation and evolutionary change rise sharply in value.[24] All the sorts of laws to which I referred earlier appear in various ways to speak to these themes: historic preservation, to the continuity of the social order; wetland and coastline regulation, to the sustaining marvel of productivity in the shorelands and estuaries; growth control, to the maintenance of viable communities seen as threatened by explosive and disorienting growth.

It is notable, in regard to the law of urban land use, that one sees increasing emphasis in judicial opinions on the value of community stability as a basis for restrictive laws, as compared with earlier nuisance-type justifications. In the much quoted *Belle Terre* case,[25] the Supreme Court upheld family-only zoning in language that at first seems faintly archaic. It spoke of "family values, youth values, and the blessing of quiet seclusion[,] . . . a sanctuary for people."[26] Reliance on such values seems not at all out of place when considered in terms of the transformation I have been describing.

One could point to many examples of this change that reflect a shifting emphasis even within the confines of the Standard State Zoning Enabling Act,[27] the model for conventional state laws that provide authorization for

24. *See, e.g.*, J. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS (1980).

25. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

26. *Id.* at 9.

27. STANDARD STATE ZONING ENABLING ACT (U.S. Dep't of Commerce 1924). The Act is no longer in print in its original form as a publication of the U.S. Department of Commerce, but it is reprinted in revised form in full in MODEL LAND DEV. CODE app. A (Tent. Draft No. 1, 1968).

local zoning. The most familiar language of that law, and the part most relied upon in the past, spoke to nuisance-type problems: "to lessen congestion . . . ; to secure safety from fire, panic, and other dangers; to promote health . . . ; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage . . . and other public requirements."[28] For many years, the standard cases drew upon that nuisance-like language. In the leading zoning case of *Village of Euclid v. Ambler Realty Co.*,[29] for example, the Supreme Court used the example of a pig in the parlor instead of the barnyard.[30] At one time billboard control was said to be justified because thieves and rapists could hide behind the signboards.[31] In those days, development itself was viewed as the benefit and goal, and any constraints on developmental activities were thought to be exceptional. Use-separation zoning was probably viewed mainly as a means to facilitate—rather than to constrain—maximum development of the community as a whole.

Today one finds the promotion of nonexclusive benefits cited as a goal in itself—a very significant change. Where once aesthetics were thought an insufficient justification for zoning, today the Supreme Court easily accepts aesthetic regulation of billboards, and Justice Rehnquist can say, as he did in his dissent in the *Metromedia* case, "the aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community."[32] Similarly, the Court has recently noted—with no discussion or difficulty—that open space zoning substantially advances legitimate governmental goals, recognizing, though not deciding, that such regulation may impose very substantial constraints on the totality of property that would be developed.[33] It accepted the California legislature's determination to prevent the "unnecessary conversion of open space land to urban uses."[34]

Movement away from the nuisance justification for zoning in favor of concern about neighborhood character, seeing the community as a common, reflects a shift from primary concern with exclusive consumption

28. *Id.* § 3.

29. 272 U.S. 365 (1926).

30. *Id.* at 388.

31. "[T]he evidence also shows that behind these obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under public gaze; they offer shelter and concealment for the criminal while lying in wait for his victim . . . ." St. Louis Gunning Advertisement Co. v. City of St. Louis, 235 Mo. 99, 137 S.W. 929, 942 (1911), *appeal dismissed,* 231 U.S. 761 (1913).

32. Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 570 (1981) (Rehnquist, J., dissenting).

33. Agins v. City of Tiburon, 447 U.S. 255 (1980).

34. *Id.* at 261 (quoting CAL. GOV'T CODE § 65,561(b) (West Supp. 1979)).

(with its connotations of individualization and privatization) to nonexclusive consumption (with its connotations of community and shared values). Even where important individual rights are at stake, as in cases involving the first amendment, one finds the Supreme Court, both in the billboard case[35] and in the adult theatre zoning case,[36] evincing great sympathy for the importance of maintaining community stability and character. As one begins to see urban and suburban land use less through the lens of individuals who have bought isolated tracts that need protection against intrusions from outside, and more as situations in which one has acquired a package of common amenities—such as quality schools, quietude, low levels of crime and the like—the values of nonexclusive consumption and of commonly enjoyed benefits come to the fore.

To be sure, none of this is entirely new, and it could be argued that even the most traditional zoning of a half-century ago was always more community-oriented than its nuisance-type justification implied. It may be that we are only now seeing the final result of a situation in which belief in free-wheeling development and individualism on the one hand, and the interest in community and what I have called nonexclusive consumption benefits on the other, are finally reaching an unresolvable tension. With this change the importance of protection and preservation becomes greater, relatively speaking, than that of development. Historic preservation looms larger than an additional high-rise; the coastline as a public amenity becomes more significant than the coastline as a commodity to be divided up and given over to exclusive housing development.

As I noted earlier, one sees precisely the same sort of changes occurring in the management of the public lands. What were once viewed as tracts largely to be parcelled out to timber companies and grazing and mining interests are more and more perceived in terms of opportunities for public recreation, for wildlife protection and reserves, and for archeological and paleontological sites.[37]

I might note that the transition I have been describing is by no means limited to land use. The change away from enchantment with the virtues of productivity is also revealed in such small things as a resurgent interest in the activities of artisans and in folklore, folk art and Native American culture and its artifacts. In art and architecture, there has been a decline of interest in the chrome and glass modernity that symbolized the industrial era at its apex. It is no longer so obvious that traditional communities

35. Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981).

36. Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

37. *See* J. Sax, The Claim for Retention of the Public Lands (to be printed in RETHINKING THE FEDERAL LANDS (S. Brubaker ed. (forthcoming)) (copy on file with the *Washington Law Review*).

should be cavalierly displaced for a new dam. When an energy boom town imposes itself upon an older community, that transformation is no longer seen as pure progress; much more often it is seen as a tragedy, though often still as an inevitable one. The disenchantment with urban renewal's community-destroying aspects is just an older example of the sort of attitudes that today are giving rise to the historic preservation movement in many cities.

What all this suggests is a transition in which an ever greater proportion of our well-being is realized in the form of shared wealth, or things that are nonexclusively consumed, rather than in the form of privatized or exclusive-consumption wealth. It seems a paradox that such changes should be occurring simultaneously with the blossoming of the "me" generation and the highly privatized gratification that goes with it. Perhaps the simultaneous rise of community-based nonexclusive benefits is a compensating substitute for the loss of more traditional social values focused around one's work and the more tightly-knit family.

Even where some of the output of nonexclusive consumption is privatized, as with the goods of artisans, such values require collective effort to maintain traditional cultures and communities.[38] As we are already seeing, more attention is paid to assuring the quality of community-wide amenities, and less to simply increasing the stock of private, exclusive-possession goods. This means that developmental rights will increasingly give way to protection of community-wide amenities.

I want finally to say something about the question that has traditionally most concerned lawyers: the problem of compensation. If owners are to lose developmental rights, should they not be compensated for that loss? At one level, there is an easy, descriptive answer. They are losing such rights and, as the various categories of cases to which I have been referring demonstrate, they are usually not being compensated.[39] Obviously, a number of such owners are being sharply disappointed, by conventional standards, in their expectations. Legislatures are alert to the problem, and in many cases (such as historic preservation and inclusionary zoning) mitigating benefits are being provided, though they fall far short of full compensation. Among these are tax abatements, density bonuses, and transferable development rights. We are in a transitional state and legislatures are using these devices to ease the pains of transition.

38. *See* Sax, *In Search of Past Harmony*, NAT. HIST., Aug. 1982, at 42.

39. I do not mean to suggest that owners are never compensated. *See, e.g.*, Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, *cert. denied and appeal dismissed*, 429 U.S. 990 (1976). I merely suggest that noncompensation is increasingly frequent. *See* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978); cases cited *supra* note 2.

It also has to be recognized that the unwillingness to compensate property owners reflects a desire to bring about some redistribution, though it is redistribution of a peculiar sort. In withdrawing developmental rights (as opposed to existing uses), the legislatures and the courts are in fact leaving in place some long-existing uses, such as open space, coastal access, recreational opportunities, and historic structures. What is changing is not the quantum of de facto nonexclusive benefits, but the quantum of rights to destroy those benefits. Public privileges, long enjoyed, are becoming public rights.[40]

One justification for such redistribution is sometimes made explicit in the cases, as it was in the New York Court of Appeals decision in *Penn Central*.[41] It is simply that so much of the value that inures to property owners is itself the product of public investment in what we call infrastructure (transportation, utilities, etc.), rather than the product of individual enterprise, that the equitable claim owners have is really not so great. This, too, is understandable in a society that is increasingly attuned to land as community rather than as an amalgam of isolated, individualized tracts. And it is, of course, a recognition by the courts of the old saw that property owners grow rich in their sleep.

Finally, it is worth noting—and this may explain why the Supreme Court in *Penn Central* rejected the claim of investment-backed expectations—that we are already so far along in diminishing developmental rights that owners are viewed, in important respects, as already on notice. Anyone today who holds, or wishes to buy, historical properties, wetlands or coastal lands, or who plans developments in developing suburbs (to take but the most obvious examples), knows or should know that his opportunities for old-fashioned development are far from clear. Even such conventional strategies as acquiring property with the expectation of obtaining a rezoning for denser development have now been put in question in a number of states as a result of the so-called *Fasano* doctrine.[42]

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40. *See* Sax, *Liberating the Public Trust Doctrine From Its Historical Shackles*, 14 U.C.D. L. Rev. 185 (1980). A good illustration is provided by the beach access cases. *See, e.g.*, Gion v. City of Santa Cruz, 2 Cal. 3d 29, 465 P.2d 50, 84 Cal. Rptr. 162 (1970); State *ex rel.* Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969); Seaway Co. v. Attorney Gen., 375 S.W.2d 923 (Tex. Civ. App. 1964).

41. Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 332, 366 N.E.2d 1271, 1275, 397 N.Y.S.2d 914, 918 (1977) ("Of primary significance, however, is that society as an organized entity, especially through its government, rather than as a mere conglomerate of individuals, has created much of the value of the terminal property."), *aff'd*, 438 U.S. 104 (1978).

42. In Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973), the Oregon Supreme Court shifted the burden of proof by abandoning the traditional presumption of validity and requiring the county to justify zoning changes. 507 P.2d at 29. Justice Stevens, dissenting in Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976), asserts that it is reasonable to expect zoning changes to be granted freely. *Id.* at 682 (Stevens, J., dissenting) ("The expectancy that particular

Surely canny owners must be learning to hedge their bets; the whole structure of expectations is in the process of change. It would be fascinating to learn, for example, whether at the time the plans for the development atop Grand Central Station were first put forward the developers thought about the possibility of a denial based on historic preservation, and whether their plans incorporated a hedge for that possibility.

In any event, the path of noncompensation seems rather clearly set, and it is becoming clearer not only that there will be less development, but also that owners will play a less central role in determining where the development that is allowed will take place. Because more land will be devoted in part to nonexclusive (and thus largely non-profit-producing) consumption, the corollary observation is that what development is to be allowed will more often be determined publicly rather than privately. Because developmental opportunities will be scarcer, those that continue to exist are likely to be extremely profitable. One already sees this phenomenon in operation in communities that have elaborate growth management plans, such as Montgomery County, Maryland, where some areas are designated for greenbelt and agriculture, others for low density, and still others for high density development.[43] The same sort of thing can be seen in places like Adirondack Park in New York,[44] on the federal public lands,[45] and in the California Desert Conservation Area.[46] Elaborate land use planning schemes have zoned all of these areas for a variety of nondevelopmental and developmental uses.

A major problem I see ahead is one of controlling the potential for what Professor Hagman called "windfalls" in those limited areas where development will be concentrated.[47] To move in this direction we are going to have to come to terms with the prospect that planning (a word Americans don't much like), rather than property, is going to be a principal engine of social benefit production in the future, and that public (nonexclusive) rather than privatized (exclusive) benefits are going to loom

changes consistent with the basic zoning plan will be allowed frequently and on their merits is a normal incident of property ownership.").

43. *See* D. GODSCHALK, D. BROWER, L. MCBENNETT, B. VESTAL & D. HERR, CONSTITUTIONAL ISSUES OF GROWTH MANAGEMENT 309–27 (1979) (describing the Montgomery County Plan). A good example of restrictive rural zoning can be found in the "Rural Zone" regulations of the Montgomery County, Md., County Code. *See id.* at 318–21.

44. For an example of substantial restriction on development, see N.Y. EXEC. LAW § 805(3)(g) (McKinney 1982).

45. See, for example, Federal Land Policy and Management Act, 43 U.S.C. § 1712(c)(3) (1976), which gives priority to the protection of areas of critical environmental concern.

46. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, THE CAL. DESERT CONSERVATION AREA, FINAL ENVTL. IMPACT STATEMENT AND PROPOSED PLAN (1980).

47. D. HAGMAN & D. MISCZYNSKI, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (1978).

much larger in long-term resource planning. These changes will not be easily assimilated in American thought and the American legal system. But the die is cast, and I see no evidence to suggest that the emerging pattern I have here tried to describe will not continue in its current direction.