Regulatory Takings: A Historical Overview and Legal Analysis for Natural Resource Management

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FOREWORD

We are a nation of laws, and the balance between the rights of the individual and the rights of society as a whole have been a major focus in the development of the legal foundation that underpins our society. In the context of our legal framework in the United States, power sharing between the government and the governed that began with the Magna Carta and English Common Law was significantly refined in the U.S. Constitution's guarantees of individual rights and freedoms. The original intent of the Constitution has now been further refined by two centuries of case law that have provided substantial clarification and interpretation.

As an extension of prevailing ethical standards, the law serves in part to regulate the behavior of individuals toward other individuals, holding together the fabric of peaceful, functioning society. In what has been termed "mutual coercion by mutual consent," we as individuals agree not to rob so that we ourselves might not be robbed, or to stop at a red light so that we might proceed through an intersection confident of our safety when the light is green. Disagreements over individual rights are often depicted as a vulnerable citizen up against the overwhelming power of a faceless bureaucratic government. Thanks to the protections in the Constitution, however, the "government" is still us. These disagreements are between individual citizens and the collective citizenry. They are about the extent to which we perceive a need to set standards for certain behaviors by our neighbors, and thereby agree to uphold those standards ourselves as individuals.

This tension between individual rights and the rights of society as a whole is inherent in our form of government, and the continuation of the debate is a sign that our democracy is still healthy and vigorous. The law is a living, dynamic institution. While it seldom reflect fads, it does continue to evolve to reflect changing social values and an advancing common code of moral and ethical behavior.

This discussion paper by Susan Stedfast chronicles the evolving interpretation in case law of the point at which governments' efforts to conserve natural resources and protect environmental quality for society as a whole incurs unfairly upon individual rights, thus becoming a "regulatory taking" deserving of compensation to the individual. Where this evolution is leading will be of major importance to the future of forest conservation in the United States. The forest land ownership pattern in the U.S. is unique among the developed countries of the world in that it is four-fifths private. Three-fifths of the nation's forest land is owned by individuals, who number in the millions. In addition to their value to their individual owners, these resources provide a variety of substantial and important public values--pure and abundant water, clean air, wildlife habitat, recreation opportunities, and a renewable supply of wood and fiber.

The laws of economics tell us that as a resource becomes more scarce it becomes more valuable. On private forest lands, all of these resources--those whose benefits accrue primarily

to the individual owner as well as those that accrue to society as a whole--are becoming more scarce and more valuable. This can be seen in declining habitat that threatens the continued existence of numerous species of animals and plants, and in the declining area available for growing wood as ecologically-sensitive public forest lands are withdrawn from intensive timber production.

And so the balancing act continues, and the courts will increasingly be turned to for guidance on the extent to which it is the civic duty of private forest landowners to protect scarce public values, and when the needs of society go beyond landowners' call of duty.

This discussion paper is intended as a reference resource, but also as a mechanism to help focus the debate on regulatory takings in natural resources conservation. It summarizes the major court cases relating to regulatory takings in environmental protection and natural resource conservation. It also helps to frame the issues at the center of the debate over what will be the appropriate balance between the rights of the individual and of society in a nation dedicated to democracy, and also to the stewardship of the natural resources and special places that have made this nation great, and defined the unique character of its people and culture.

The Pinchot Institute would like to thank the many individuals who provided advice and assistance in the preparation of this discussion paper. In particular, we would like to thank John Echeverria, Michael Gippert, James McElfish, and Eric Olson who provided technical review and guidance on the early drafts. We hope that this discussion paper will further inform and enrich a necessary and healthy debate that will help guide us all in addressing the growing challenges in conserving both our natural heritage and our democratic ideals.

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EXECUTIVE SUMMARY

This report examines court opinions relating to the issue of regulatory takings. Through this examination, factors and guidelines for application in regulatory takings cases are delineated. These factors and guidelines, summarized as follows, outline the relevant considerations for those who fear they have been subjected to a regulatory taking, as well as those who wish to steer clear of the accusation of having committed a regulatory taking.

- When presented with a regulatory taking claim, a court will first consider whether the claim before it is ripe for review. Has the party claiming a regulatory taking obtained a final decision from the relevant decisionmaking body and utilized available inverse condemnation procedures?
- Regulatory takings cases will be decided on a case by case basis: in general the outcome of no case is predetermined by the court's guidelines and the facts of each case must be considered.
- Generally the court will consider three factors: 1) the economic impact of the regulation on the owner's property; 2) the degree of interference with the owner's investment-backed expectations; and 3) the character of the governmental action alleged to have effected a regulatory taking.
- The court will consider a regulation's effect upon the owner's entire property, not simply portions thereof.
- A taking will always be deemed to have taken place where the governmental action involves a permanent physical occupation of property, regardless of whether the area occupied is small or is occupied by objects or individuals.
- A regulation which denies an owner of <u>all</u> economically beneficial or productive use of its land constitutes a regulatory taking. An exception to this guideline exists: the government may deny an owner all economically beneficial or productive use of its land if the uses prohibited are otherwise denied to the owner by other sources of law, such as state common law.
- An owner can obtain compensation from the government for the effect of a

regulation even if the regulation is subsequently invalidated, so long as the taking deprives the owner of all use of its property for a period of time. The compensation received would relate to that period during which the regulation was still in effect.

- Some regulatory taking guidelines and factors apply specifically to cases involving land use regulations:
  - A land use regulation does not result in a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of its land.
  - When a land use regulation involves exactions (e.g., the government requiring a landowner to dedicate a portion of its property to the public as a permit condition), the government must show 1) that a connection, an essential nexus, exists between the exaction imposed and the interest sought to be protected (in order for there to be a finding that the government is substantially advancing legitimate state interests), and 2) that the exaction imposed bears a reasonable relation to the legitimate state interests.
  - The government must, in order to make the two showings just described, engage in an individualized determination which evidences that the exaction in its nature and extent is related to the state interests to be protected.

INTRODUCTION

The past five years have witnessed a nearly explosive increase in the intensity of the public debate on how best to use our nation's natural resources. Already well-established are the national environmental groups, which have supported increased regulation and engaged in litigation for the enforcement of existing regulations. In these efforts, the environmental groups have sought to secure the public interest through the conservation and, in instances, preservation of natural resources. Newer to the scene is the Wise Use Movement, which seeks to represent the views of private landowners and businesspeople in the debate over natural resource policy. To represent these views, the Wise Use Movement advocates decreased regulation and the protection of private landowners' rights. Like the environmental groups, the Wise Use Movement focuses much of its energy on the legislative process in order to obtain policies, laws and regulations consistent with its positions.

No doubt the environmental groups draw inspiration for their ongoing efforts from the large number of environmental statutes enacted in the 1970s. These same statutes, however, have also likely functioned as a catalyst for the Wise Use Movement; each additional grant of governmental regulatory authority increases the possibility of undue regulatory activity. The additional regulatory authority granted by Congress in the 1970s includes that contained in the Coastal Zone Management Act, the Endangered Species Act, and the Clean Water Act.

The Coastal Zone Management Act of 1972 provides for, among other things, grants to state governments for the development and implementation of state coastal zone management programs. More specifically, the statute envisions land and water use planning and regulation, increasing the likelihood of coastal zone regulation and land use restrictions not always welcome by landowners within the zone. The Endangered Species Act of 1973 and its related regulations prohibit significant habitat modification or degradation which kills or injures an endangered species. The Endangered Species Act therefore provides another basis for regulation of property, which in turn may result in claims of unwarranted governmental interference. The Clean Water Act of 1977 expands section 404, enacted earlier as part of the Federal Water Pollution Control Act Amendments of 1972. Section 404 restricts the discharge of dredged or fill material into

navigable waters and authorizes the issuance of permits as exceptions to such restrictions. Conceivably a denial of a section 404 permit for the filling of a wetland could render a property economically useless to its owner and result in the restricted landowner bringing claims against the government.

As the level of regulation aimed at protecting natural resources and the environment has increased, so has the number of individuals and entities impacted. Thus, in the debate over the best use of natural resources, we hear the voices of not only the environmental groups and the Wise Use Movement but also the voices of large industrial corporations, regulatory agencies, federal, state and local governments, as well as those of interested citizens who rely upon natural resources for income or for recreational opportunities. A recurring issue in the debate is the appropriate level of government regulation of natural resources. Environmental groups have proposed maintaining or increasing current levels of regulation, while the Wise Use Movement favors decreasing current levels or eliminating regulation. A variety of intermediate positions are espoused by others involved in the debate. The debate is also intensified by the assertion made by some that in many instances the level of regulation to which a landowner is subject is so high that an unconstitutional taking has occurred.

The debate over the appropriate level of regulation raises additional issues with long-term implications of their own. If the level of regulation is such that landowners often claim an unconstitutional taking, costly and time consuming litigation will likely follow. Similar litigation will ensue to the extent that landowners who disfavor environmental regulations contest the enforcement of such regulations. To the extent that courts decide in favor of landowners challenging regulations, the effectiveness of regulation for management of natural resources will decrease. However, to the extent that landowner claims are found invalid, it is the landowners' efforts and resources that will have been wasted.

As a better understanding of what may amount to an unconstitutional regulatory taking will assist all of those involved in the debate over determination of an appropriate level of regulation, a reexamination of regulatory takings case law is needed. Recent court decisions on this issue further accentuate the need for a fresh look at regulatory takings case law. The following is intended as a survey and analysis of existing regulatory takings case law for use by

resource managers, policymakers, private landowners, activists, and interested citizens alike.

BACKGROUND

What Is a Taking?

The Fifth Amendment to United States Constitution provides, in part, "nor shall private property be taken for public use, without just compensation."[1] Each of the terms contained in the provision (property, taken, public use, just compensation) is subject to interpretation and has been analyzed in court decisions. Most takings cases center upon the question of whether a taking of property has indeed occurred. Generally, for the purpose of the Fifth Amendment, property may be taken in two ways. The government may intrude directly on private property and take possession of it, or the government may so limit or regulate the use of the property that the effect is the same as if the government had actually taken possession of the property. Takings by the second method are described as regulatory takings.

Note that while a court may conclude that the government has engaged in a taking, not all takings are unconstitutional. It is the absence of just compensation which makes a taking unconstitutional. Landowners can obtain compensation for a taking in one of two ways. If his or her property is taken by direct intrusion, the government should initiate a condemnation proceeding in court. In the course of this proceeding, the appropriate level of compensation will be determined and ordered paid by the government to the landowner. If the government does not initiate a condemnation proceeding, or if the landowner believes that a taking has occurred because of undue regulation, the landowner may initiate an inverse condemnation proceeding. As with the condemnation proceeding, in an inverse condemnation proceeding the appropriate level of compensation will be determined and ordered paid by the government to the landowner.

[1] U.S. Constitution, amend. V.

Purpose and Effect of the Takings Clause

The Fifth Amendment, which contains the takings clause, was added to the Constitution in 1791 along with nine other amendments. These amendments, also known as the Bill of Rights, were adopted as limitations on the powers of the federal government. Having recently engaged in a revolution to overthrow British control in the country, Americans were wary of granting excessive power to the new federal government. Through the takings clause, they rendered it impermissible for the federal government to take property without paying just compensation to the landowner. While the takings clause was initially adopted as a limitation on the powers of the federal government, the U.S. Supreme Court has since declared that the clause also applies to state governments. The takings clause became applicable to state governments through the adoption of the Fourteenth Amendment in 1868, which prohibits states from denying a person the privileges he or she enjoys as a citizen of the United States (including just compensation for the taking of private property).[2]

Effect of the Due Process Clause

In addition to containing the takings clause, the Fifth Amendment also contains the due process clause, which provides "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[3] The Fourteenth Amendment, which applies to the states directly, contains an almost identical due process clause. It should be emphasized that, in early cases, the Supreme Court generally determined the constitutionality of regulations by applying the requirements of one of these due process clauses. It was not until the 20th century that the Court increasingly assessed regulations with regard to the requirements of the takings clause. Under takings clause analysis, if the regulation is found unconstitutional, the government is (as noted above) required to pay compensation. Under due process analysis, if the regulation is

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[2] The Supreme Court stated in Penn Central Transportation Company v. City of New York, 438 U.S. 103, 122 (1978), "the Fifth Amendment . . . of course is made applicable to the States through the Fourteenth Amendment, see Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897) . . . ."

[3] U.S. Constitution, amend. V.

found unconstitutional, it is invalidated. Despite this distinction, the Court has often cited due process analysis cases as precedent in deciding takings clause analysis cases. As a result, the line between the two types of analyses has been blurred. In addition, the earlier due process cases not only demonstrate the Court's initial attempts to deal with regulation but also elucidate the Court's later regulatory takings decisions. For these reasons, due process analysis cases as they relate to the issue of regulatory takings will be considered in this paper.

Interpretation of the Takings Clause

As the United States Supreme Court itself has admitted, "[t]he question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty."[4] The Supreme Court has decided takings cases on a case by case basis, examining the circumstances of each individual case to determine whether a taking has occurred. Nonetheless, as successive takings cases have been decided, the Court has delineated factors to be considered in making case by case determinations. It may be questioned, however, whether the Court has applied these factors consistently. In addition, as with many areas of the law, new factors and guidelines, as enunciated by the Court, are often not susceptible to prediction. Despite all of this, a review of regulatory takings case law does discern some general rules for those seeking to assert a takings claim, as well as those seeking to avoid such assertions. The following serves as a survey of the sometimes meandering road that is the Court's regulatory takings jurisprudence and attempts to provide some sense of the Court's current direction on the issue of regulatory takings.[5]

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[4] Penn Central, 438 U.S. at 104.

[5] This report will address primarily the court opinions of the U.S. Supreme Court, which, as the highest court in the United States, develops, through its opinions, precedent binding upon all other courts in the United States.

EARLY CASES

Regulations Upheld as Exercise of Police Powers

Challenges to government regulation were evident even in the 19th century. However, in the most often cited cases from this period the challenges failed and the regulations were upheld as valid exercises of the police powers by state governments.

Munn v. People of Illinois

As early as 1876, we have an example of a private business owner bringing a claim of unconstitutional regulation to court. In *Munn v. People of Illinois*,[6] a court found that Munn had operated a public warehouse without a license in violation of an Illinois statute. Following the state court's judgment in Munn's case, he claimed the statute, which required licenses as part of a regulatory scheme to fix maximum prices for the storage of grain in warehouses, was unconstitutional. The ensuing court case was ultimately appealed to the U.S. Supreme Court.

Munn asserted that, among other provisions, the Illinois statute violated the Fourteenth Amendment's due process clause. The Court found that the General Assembly of Illinois had committed no violation of the U.S. Constitution by its enactment of the regulatory statute. The Court stated two bases for its decision: 1) the police powers; and 2) the public nature of Munn's business.

As to the police powers, the Court reflected upon the formation of the United States noting that the people granted to the government the power to act "as they deemed necessary for the common good and the security of life and property."[7] As a result, "[w]hen one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain."[8] Citing the maxim *sic utere tuo ut alienum non laedus* (use your own so as not to harm others), the Court addressed the issue of

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[6] Munn v. The People of the State of Illinois, 94 U.S. 113 (1876).

[7] Id. at 124.

[8] Id. at 124.

regulatory statutes stating that the social compact "authorize[s] the establishment of laws requiring each citizen to so conduct himself, and so use his own property as not unnecessarily to injure another."[9] The Court concluded that this social compact provided the source and basis for the police powers. Pursuant to these powers, the Court found that government may regulate how individuals act toward one another and how they use their property. The Court further noted the existence of many regulatory statutes and the Court's conclusion that none had been adjudged in violation of "constitutional prohibitions against interference with private property."[10]

In finding that the Illinois statute was not unconstitutional, the Court also took into account the nature of Munn's business. He charged fees to the public for the storage of grain in his Chicago warehouses where the grain of different owners was mixed together. Because of this, the Court concluded that Munn's business was one in which the public had an interest, and accordingly, the private property used by Munn in his business was "'affected with a public interest'".[11] The Court analogized Munn to innkeepers, bakers, ferrymen and other common carriers. Of common carriers, the Court stated that they "exercise a sort of public office, and have duties to perform in which the public is interested."[12] Furthermore, the Court stated "when private property is devoted to a public use, it is subject to public regulation."[13] With this, the Court contrasted the hypothesized dissimilar situation of the government unconstitutionally compelling individuals to put their private property to uses in which the public had an interest.

In short, the Court upheld the Illinois statute because Munn's business was affected with a public interest (and therefore subject to regulation) and because the regulatory statute was a

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[9] Id. at 124.

[10] Id. at 125.

[11] Id. at 126 (quoting De Portibus Maris, 1 Harg. L. Tr., 78).

[12] Munn at 130.

[13] Id. at 130.

valid exercise of the state police powers.

Mugler v. State of Kansas

The case of *Mugler v. State of Kansas*[14] is another from the 19th century in which the Supreme Court relied upon state police powers to uphold a regulatory statute. The facts of *Mugler* parallel those of the *Munn* case. Mugler constructed and operated a beer manufacturing establishment. After he had operated this brewery for a number of years, the Kansas legislature enacted a statute which: 1) prohibited the sale of intoxicating liquors; and 2) declared all places where intoxicating liquors were manufactured or sold nuisances and ordered them closed. Mugler was found guilty of violating this statute but claimed that the Kansas statute violated the Fourteenth Amendment including its due process clause. The decision in *Mugler*, however, differs notably from that of *Munn* insofar as Mugler's property was deemed a nuisance and the use to which it was put noxious.

The U.S. Supreme Court considered Mugler's claim but upheld the Kansas statute. In this case, the Court discussed further the states' police powers. As described by the Court, the states are empowered to regulate all internal matters relating to moral and political welfare. This power is so broad that it is within the authority of the states to destroy property. Citing earlier cases as support for its conclusion,[15] the Court explained that the states may "protect the health, morals, and safety of their people by regulations that do not interfere with the execution of the powers of the general government, or violate rights secured by the constitution of the United States."[16] The Court also noted that its opinion in the *Munn* case supported its decision in this case. "As was said in *Munn v. Illinois*, 94 U.S. 124, while power does not exist with the whole people to control rights that are purely and exclusively private, government may require 'each citizen to do conduct himself, and use his own property, as not unnecessarily to

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[14] Mugler v. State of Kansas, 8 S. Ct. 273 (1887).

[15] Gibbons v. Ogden, 22 U.S. 1 (1824); Beer Co. v. Massachusetts, 97 U.S. 25 (1877) (state law prohibiting manufacture and sale of intoxicating liquors upheld).

[16] Mugler at 296.

injure another.'"[17]

Although the Court discussed the breadth of the police powers, it is also delineated its limits. Acknowledging that the role of devising measures necessary for the protection of the public welfare belongs to the legislature, the Court emphasized "[i]t does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state."[18] Despite their police powers, there are constitutional limits which the legislatures cannot exceed. The Court indicated that, in order for regulatory measures to fall within these limits, a legislative measure and its provisions must bear a "substantial relation"[19] to the public good sought. Nonetheless, acknowledging once again the breadth of the police powers, the Court stated "every possible presumption is to be indulged in favor of the validity of a statute."[20] Applying the standard of substantial relation, the Court upheld the Kansas regulatory statute upon its conclusion that the statute was "fairly adapted"[21] to the goal of protecting Kansas communities from the ill effects of excessive alcohol consumption. In doing so, the Court conceded that it would defer to the Kansas legislature's determination of the need for such regulation.

The Court also decided that Mugler's claim included an allegation that application of the Kansas statute to him, and in particular the decrease in value of his brewery due to the prohibition of the manufacture and sale of intoxicating liquors, constituted a taking of property for public use without compensation or due process of the law (in violation of the Fifth and Fourteenth Amendments). The Court found that no such violations occurred. The Court reiterated that all property is used subject to the limitation that its use not injure others. "A prohibition simply upon the use of property for purposes that are declared, by valid legislation,

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[17] Id. at 296.

[18] Id. at 297.

[19] Id. at 297.

[20] Id. at 297.

[21] Id. at 297.

to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."[22] Thus, despite the devaluation of Mugler's property, the Court did not find the statute to effect an unconstitutional taking. In reaching this conclusion, the Court emphasized that the legislation did not interfere with Mugler's control or use of his property for lawful purposes; the restriction on the use of his property applied only to a forbidden use.

In upholding the Kansas statute and finding that Mugler's constitutional claims were not valid, the Court stated "[t]he exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law."[23] Accordingly, the Court's basis for upholding the statute was the conclusion that the state had properly exercised its police powers. Similarly, these same powers justified the limitations place on Mugler's use of his property, particularly since that use was now judged by the legislature to be a noxious use.

Hadacheck v. Sebastian

The case of *Hadacheck v. Sebastian*[24] is consistent with *Munn* and *Mugler*, as it upheld a regulatory statute because of the states' police powers. The facts of *Hadacheck* are very similar to those of *Mugler*. Hadacheck owned property on which he operated a brickyard. He was found guilty of violating a Los Angeles ordinance, which prohibited the operation of brickyards within the city limits. Hadacheck contested the judgment against him and argued before the U.S. Supreme Court that the ordinance violated the Fourteenth Amendment and that his property had been taken without just compensation in violation of the Fifth Amendment.

In support of his claims, Hadacheck explained that when he purchased the property on which he operated the brickyard, that area had not yet been annexed by the city and that he did

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[22] Id. at 301.

[23] Id. at 301.

[24] Hadacheck v. Sebastian, 36 S. Ct. 143 (1915).

not expect at that time that the property would later be situated within city limits.[25] He alleged that his property if used as a brickyard was worth $800,000 but only $60,000 if used for residential purposes. Hadacheck also claimed that he purchased the property because it contained a bed of clay suitable for brickmaking, that the property was no longer suitable for residential purposes due to excavations, and that brickmaking must take place at the site of a clay bed. He added that he invested in expensive machinery to operate the brickyard. Lastly, Hadacheck argued that the operation of his brickyard was not a nuisance under state law. To counter Hadacheck's arguments, the city government claimed that fumes, dust and other byproducts of the brick manufacturing had made some residents in the area ill. In addition, the government alleged that the ordinance did not "'entirely deprive [Hadacheck] of his property and the use thereof'".[26]

In this 1915 case, the Court took an expansive view of the scope of the police powers, describing them as "one of the most essential powers of government,--one that is the least limitable."[27] The Court acknowledged that in instances the exercise of these powers may seem harsh in its effect on individuals, "but the imperative necessity for [their] existence precludes any limitation upon [them] when not exerted arbitrarily."[28] As to the harshness claimed by Hadacheck (due to the fact that he had purchased the property and purchased and operated brickmaking equipment assuming that the property would not be annexed by the city and become subject to its ordinance prohibiting brickyards), the Court stated that he had no vested interest in the non-annexed condition of the area in which he bought his property; the allowance of such interests would obstruct changes necessary for societal progress.

In finding that the application of the Los Angeles ordinance to Hadacheck did not constitute an unconstitutional taking, the Court also discussed its earlier decision in *Reinman v.*

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[25] Hadacheck's conviction took place following the annexation by Los Angeles of an area which included his property.

[26] Hadacheck at 144.

[27] Id. at 145.

[28] Id. at 145.

Little Rock.[29] At issue in *Reinman* was a prohibition on livery stables. As with Hadacheck, Reinman had invested in property based upon conditions existing at the time of purchase, but, due to a subsequent ordinance, the value of the property fell. Reinman argued that the city had unconstitutionally declared what was otherwise a lawful business a nuisance. In its decision for the *Reinman* case, the Court conceded that Reinman's business was not a nuisance in and of itself, but that the legislature could determine that a such a business under certain circumstances is a nuisance and declare it such by law. The police powers enabled the government to do so. However, the Court noted in *Reinman*, as it did in *Mugler*, that these powers are not without limits. The powers "could not be exerted arbitrarily or with unjust discrimination."[30] Finding no arbitrariness or discrimination, the Court in *Reinman* found that the city had not acted unconstitutionally as alleged by Reinman.

The *Reinman* decision was described by the *Hadacheck* court as illustrative of the breadth of the police powers. In determining whether the government had exceeded these powers in *Hadacheck*, the Court stated "[w]e must accord good faith to the city in the absence of a clear showing to the contrary . . . ."[31] Deciding that the city had exercised its police powers without exceeding their limits, the Court found that no constitutional violation had taken place.

Perley v. State of North Carolina

Four years after deciding *Hadacheck*, the Court was again presented with a case in which one party claimed that the regulatory statute at issue was constitutionally infirm. In *Perley v. State of North Carolina,*[32] Perley had been indicted for violation of a North Carolina statute aimed at the protection of watersheds. Specifically, the statute provided that the process of removing timber from land within 400 feet of a watershed, held by a city or town for the

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[29] Reinman v. Little Rock, 237 U.S. 171 (1914).

[30] Hadacheck at 146.

[31] Id. at 147.

[32] Perley v. State of North Carolina, 249 U.S. 510 (1919).

purpose of supplying water to the city or town, must include the removal from within 400 feet of the watershed of all tree-tops, boughs and other commercially undesirable portions of the trees harvested. During Perley's trial, it was found that the city of Asheville, North Carolina held land as a watershed and that Perley owned standing and fallen timber within 400 feet of that watershed. The trial court found Perley guilty of violating the North Carolina statute and fined him $300. This decision was affirmed by the state supreme court.

In the ensuing appeal before the U.S. Supreme Court, Perley claimed, as he had earlier done, that the North Carolina statute was unconstitutional. He asserted that the statute violated the Fifth and Fourteenth Amendments by abridging his privileges and immunities as a U.S. citizen, depriving him of his property with due process, and denying him equal protection of the laws. The Court considered Perley's claims and found them to be without merit. In doing so, the Court emphasized that property and property rights "necessarily are subject to some exertions of government."[33] In addition, the Court focused upon the purpose of the North Carolina statute-- to reduce the risk of fire and the related damage to watersheds. "'Tree-tops, boughs, and laps' left upon the ground may not of themselves be a nuisance; but they may become dry, and the more quickly and certainly so from the denudation of the land of its trees, and therefore become a source of fires and the perils and damages of fires."[34] The Court also noted that the judgment of the state that such risks existed was expressed in the statute. Thus the Court found that it was without basis to agree with Perley "that the statute is not proportionate in its regulation nor that its application to defendant['s] property is arbitrary and unconstitutional."

The Genesis of Regulatory Takings

Just three years after it upheld government regulation against constitutional challenge in *Perley*, the Court issued an opinion in *Pennsylvania Coal Company v. Mahon.*[35] It is in *Pennsylvania Coal* that the Court, for the first time, found that a regulatory taking had occurred.

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[33] Id. at 513.

[34] Id. at 514.

[35] Pennsylvania Coal v. Mahon, 43 S. Ct. 158 (1922).