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Requiem for Regulation

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C O M M E N T S

Requiem for Regulation

by Garrett Power

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I. Introduction

Since 1952, Cornell University Prof. Emeritus John W. Reps has taught, studied, and written about the planning of cities, suburbs, and farms.¹ The American Planning Association has recognized him as a planning pioneer.² He is perhaps the first scholar to recognize that the best way to understand planning's future is to study planning's past.³ In 1964, Professor Reps delivered the Pomeroy Memorial Lecture at the American Society of Planning Officials' annual conference.⁴

In a talk titled *Requiem for Zoning*,⁵ he made three salient points. First, he rejected the assumption that comprehensive zoning ordinances could provide maps that would draw bright lines putting everything, once and for all, in the proper place.⁶ Second, he urged that planners be legislatively vested with broad and flexible regulatory powers so as to permit them to guide the community toward shared social, economic, and environmental goals.⁷ Third, his faith in "judicial liberalism" left him assured that the U.S. Supreme Court would not stand in the way of discretionary and flexible land use planning.⁸

With the benefit of 50 years' hindsight, this Comment considers the prescience of Professor Reps' observations and predictions.

II. Analysis of the Changing Landscape

A. The Quiet Revolution in Land Planning

By the 1970s, most students of government had come to agree with Professor Reps that American society needed

more and better planning.⁹ According to the consensus viewpoint, free markets no longer had the answers for the overcrowded cities, stressed natural environments, and acute social problems. The national government needed to take command over water and air quality, and state and local governments needed top-down federal aid.¹⁰ All three levels of government must follow the example set by the social democracies of Western Europe and put in place regulations that would plan for a better society.¹¹

American governments had the constitutionally requisite powers. State and local governments were vested with a "police power" to promote "public health, safety, morals, or general welfare."¹² The federal government was vested with a more specific power to "regulate Commerce . . . among the several States."¹³ Any new regulations however, might deprive some private owners of their property rights and might deprive some capitalists of their "investment-backed expectations."¹⁴ And the U.S. Constitution prohibited all governments from "taking" private property¹⁵ or "impairing" contract rights.¹⁶ The Constitution even more sharply curtailed the regulatory power of the national government to matters of interstate trade.¹⁷ When would bold new plans for a Great Society not run afoul of the Constitution?

Supreme Court Justice Oliver Wendell Holmes Jr. had answered that question in the landmark 1922 case of *Pennsylvania Coal v. Mahon*.¹⁸ Therein he opined that when "the regulation goes *too far* it will be recognized as a taking."¹⁹ His statement, of course, begged the constitutional question: How far is too far?

Author's Note: I thank Casandra Mejias, a research fellow in the Thurgood Marshall Law Library, for outstanding editorial assistance.

1. John W. Reps, *John W. Reps Biographical Note*, <http://urbanplanning.library.cornell.edu/DOCS/jwrvita.htm> (last visited May 28, 2014).
2. *Id.*
3. *Id.*
4. John W. Reps, *Pomeroy Memorial Lecture: Requiem for Zoning*, in *PLANNING 1964: SELECTED PAPERS FROM THE ASPO PLANNING CONFERENCE* 56 (1964).
5. *Id.*
6. *Id.*; see also CONSTANCE PERIN, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA* (1979).
7. Reps, *supra* note 4, at 64.
8. *Id.* at 66.

9. See FRED BOSSELMAN & DAVID CALLIES, *COUNCIL ON ENVTL. QUALITY, THE QUIET REVOLUTION IN LAND USE CONTROL* (1971); OTIS L. GRAHAM, *TOWARDS A PLANNED SOCIETY* (1976); Charles Reich, *The Law of the Planned Society*, 75 *YALE L.J.* 1227 (1966).
10. *Id.*
11. *Id.*
12. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).
13. U.S. CONST. art. I, §8.
14. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 8 *ELR* 20528 (1978).
15. U.S. CONST. amend. V.
16. U.S. CONST. art. I, §10.
17. U.S. CONST. art. I, §8.
18. *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922).
19. *Id.* at 415 (emphasis added).

B. Constitutional Limitations on Regulations

By the three-quarter mark of the 20th century, a remarkable set of Supreme Court precedents had swollen the regulatory powers of governments while shrinking private rights to property and contract. The Court had given the regulators wide discretion. Consider the following:

In *Lewis v. Blue Point Oysters Cultivation Co.*, the U.S. Army Corps of Engineers (the Corps) dredged a shipping channel that destroyed a company's privately owned oyster grounds on the bed of Long Island Sound.²⁰ The Supreme Court's 1913 decision held that the U.S. Congress' dominant power over the nation's navigable waterways trumped private property rights.²¹

In *Village of Euclid v. Ambler Realty Co.*, an Ohio town enacted a building zone law that prohibited a landowner from making commercial business use of its main street property,²² which devalued the lot by two-thirds.²³ Ruling in 1926, the Court upheld the village's decision to create exclusively residential districts.²⁴ It concluded that "the validity of the legislative classification for zoning purposes [being] fairly debatable, the legislative judgment must be allowed to control."²⁵ Regulations are presumed to bear a "rational relation[ship] to the health and safety of the community"²⁶; the burden of proof is on the challenger to show that the regulations "go too far."²⁷

In the 1928 case *Miller v. Schoene*, the state of Virginia destroyed a landowner's ornamental cedar trees that harbored a plant disease and were infecting apple orchards in the vicinity.²⁸ The Court condoned the practice: "When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public."²⁹ When the public benefit from regulations exceeds the private loss, the Constitution guarantees no compensation.³⁰

In 1940, in *United States v. Appalachian Electric Power Co.*, the Court considered whether a federal agency had licensing authority over the location of a hydroelectric facility on a river running between two states.³¹ The first exercises of the Commerce Power had been designed to promote waterborne transport of goods.³² But by the 20th century, the Court recognized that the federal government was also empowered to regulate broader aspects of the nation's economy.

In *Berman v. Parker*, a District of Columbia urban renewal agency used its power of eminent domain to take the landowner's building as part of a slum clearance project.³³ The landowner objected that his building was not a slum,³⁴ and that it was to be retransferred after the clearance to the private ownership of another.³⁵ In 1954, the Court ruled for the government.³⁶ If just compensation is paid, then the government may take private property for any purpose it considers a public purpose.³⁷

These precedents set the stage for the 1978 landmark case of *Penn Central Transportation Co. v. New York City*.³⁸ The New York City Landmark Preservation Board had denied permission for Penn Central Railroad to build a skyscraper atop its historic Grand Central Station.³⁹ The loss to the railroad was approximately \$50 million.⁴⁰ The Court's opinion demonstrated the analysis to be employed when determining whether regulations go "too far."⁴¹ It engaged in "an essentially ad hoc factual inquiry" without any "set formula" and created a multifactor balancing test that considered the magnitude of the loss, the interference with investment-backed expectation, and the character of the government action.⁴² In the balance, the Court's majority determined that no unconstitutional taking of private property had occurred.⁴³

Associate Justice William Rehnquist dissented.⁴⁴ He simply observed that under the real property law of New York, air rights were a separable property interest, which the Board's ruling denied the railroad's right to sell.⁴⁵ From Justice Rehnquist's point of view, no amount of "ad hoc balancing" could rationalize away the taking of the air rights.⁴⁶

Post-*Penn Central*, there appeared to be no real obstacles—political or constitutional—to the creation of a well-planned, pollution-free society. Congress established national standards for "clean air"⁴⁷ and "clean water."⁴⁸ When the Nixon Administration's federal land use initiative⁴⁹ was left in the lurch by President Richard Nixon's resignation as he faced impeachment, state governments

20. *Lewis v. Blue Point Oysters Cultivation Co.*, 229 U.S. 82, 85 (1913).

21. *Id.* at 89.

22. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 383-84 (1926).

23. *Id.* at 384.

24. *Id.* at 392.

25. *Id.* at 389.

26. *Id.* at 391.

27. *Id.* at 389 (implying that a regulation would have to be arbitrary and beyond the bounds of reason to overcome presumption of validity).

28. *Miller v. Schoene*, 276 U.S. 272, 277 (1928).

29. *Id.* at 279.

30. *Id.* at 280.

31. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940).

32. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. 1 (1824); *Gilman v. City of Philadelphia*, 70 U.S. 713 (1865).

33. *Berman v. Parker*, 348 U.S. 26, 31 (1954).

34. *Id.* at 31.

35. *Id.* at 33.

36. *Id.* at 36.

37. *Id.*

38. 438 U.S. 104, 8 ELR 20528 (1978).

39. *Id.* at 117.

40. *Id.* at 118.

41. *Id.* at 124.

42. *Id.*

43. *Id.* at 137.

44. Justice Rehnquist's dissent was joined by Chief Justice Warren Burger and Associate Justice John Paul Stevens. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 138, 8 ELR 20528 (1978) (Rehnquist, J., dissenting).

45. *Id.* at 142.

46. *Id.* at 148-49.

47. Federal Water Pollution Control Act (Clean Water Act) Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. The Clean Water Act (CWA) is codified as amended at 33 U.S.C. §§1251-1387, ELR STAT. FWPCA §§101-607.

48. Clean Air Act (CAA), Pub. L. No. 88-206, 69 Stat. 322 (codified as amended at 42 U.S.C. §§7401-7671q, ELR STAT. CAA §§101-618.).

49. Land Use Policy & Planning Assistance Act, S. 268, 93rd Cong. (1973).

undertook their own “quiet revolution in land use control.”⁵⁰ State laws addressed the complex problems of reallocating responsibilities between state and local governments.⁵¹ At the local level, detailed zoning maps had been supplanted by development agreements.⁵² Negotiations between the local jurisdiction and the landowner contractually fixed the terms and conditions upon which projects may go forward.⁵³ The developer was contractually guaranteed project approval, while the locality benefitted from customized performance standards and assurances that infrastructure demands would be met.⁵⁴

C. The Planned Society Reconsidered

Ronald Reagan was elected president in 1980, taking office in 1981. In his Inaugural Address, President Reagan proclaimed that “government is not the solution to our problem, government is the problem.”⁵⁵ He blamed government regulations for the nation’s shortcomings.⁵⁶ Justice Rehnquist, the Court’s leading property rights activist, now found himself with an ally in the White House.⁵⁷ For the next 17 years, Justice Rehnquist would endeavor to muster a majority of Justices willing to reverse or ignore the pro-planning precedents.⁵⁸ He set out to curtail the federal Commerce Power and to require compensation to all property holders for all “regulatory takings” by all levels of government.⁵⁹

Justice Rehnquist had already had his first success in *Kaiser Aetna v. United States* in 1979.⁶⁰ In that case, the Corps’ effort to turn a privately owned tidal pond into a public aquatic park was declared unconstitutional.⁶¹ Private parties could once again assert property rights in the nation’s waterways. *Lewis* was not overruled, but it was forgotten.⁶²

In 1982, Justice Rehnquist forged a surprising collaboration when he joined a majority opinion authored by the liberal Justice Thurgood Marshall in *Loretto v. Teleprompter Manhattan CATV Corp.*⁶³ New York law authorized a cable television utility to place a transformer atop a landowner’s building, without permission.⁶⁴ Rather than subjectively balancing the public good against the

private loss, the Court ruled (and Justice Rehnquist agreed) that any governmentally ordered “permanent physical occupation” must be categorically compensable.⁶⁵ The *Penn Central* precedent was not overruled, but it was displaced by a bright-line rule of compensation in this situation.

In 1986, President Reagan elevated Justice Rehnquist to Chief Justice and appointed Justice Antonin Scalia as an Associate Justice.⁶⁶ At their investiture, President Reagan charged them both to use their seats on the Court to downsize and disempower governments at all levels.⁶⁷ Thereafter, Justices Scalia and Rehnquist worked together in an effort to convince at least three other Justices to join them in constitutionally curbing the planning powers of governments.

In 1987, in *Nollan v. California Coastal Commission*, a state commission had “leveraged its police power” by demanding the dedication of a public beachfront easement as the price for approval of a private landowner’s building permit application.⁶⁸ Writing for a five-Justice majority on a split Court, Justice Scalia strictly scrutinized the transaction and struck it down as an “out and out plan of extortion” in the absence of proof by the regulator that there was an “essential nexus” between the burden on the public from the proposed construction and the “kickback” mitigation exacted from the applicant.⁶⁹

In 1994, in *Dolan v. City of Tigard*, the regulator demanded dedication of a bicycle trail as the price of approval of an expansion of a hardware store.⁷⁰ Chief Justice Rehnquist, writing for a majority of five, conceded the nexus between the bike trail and increased business traffic, but added the requirement that the cost to the applicant be “roughly proportionate” to the burden that the requested activity would place on the public.⁷¹

In these two cases, Justices Rehnquist and Scalia had worked in tandem to turn the standard of constitutional review upside down. Under the *Village of Euclid* tradition, regulatory actions were presumed constitutional and could only be overturned if the challenger met the heavy burden of proving that the law had “no substantial relation to the public health, safety, morals, or general welfare.”⁷² As reconceived by *Nollan* and *Dolan*, police power exactions were constitutionally invalid unless the regulator could meet the burden of proving them to be justified.⁷³

The totality-of-the-circumstances test and balancing modes of analysis found in *Penn Central* were the

50. BOSSELMAN & CALLIES, *supra* note 9, at 1 (1971).

51. *Id.* at 319-20.

52. John J. Delaney, *Development Agreements Legislation: The Maryland Experience*, SB06 ALI-ABA 805, 811-12 (1996).

53. *Id.* at 811.

54. *Id.* at 812.

55. Ronald Reagan, First Inaugural Address (Jan. 20, 1981), in INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES FROM GEORGE WASHINGTON 1789 TO GEORGE BUSH 1989, 331, 332 (2008).

56. *Id.*

57. See Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 366-67 (2003).

58. *See id.* at 391.

59. *See id.* at 392.

60. *Kaiser Aetna v. United States*, 444 U.S. 164, 10 ELR 20042 (1979).

61. *Id.* at 181.

62. *Lewis v. Blue Point Oysters Cultivation Co.*, 229 U.S. 82 (1913).

63. 458 U.S. 419 (1982).

64. *Id.* at 421.

65. *Id.* at 441.

66. Johnsen, *supra* note 57, at 399.

67. Ronald Reagan, Former President of the United States, Speech at the Investiture of Chief Justice William H. Rehnquist and Associate Justice Antonin Scalia at the White House (Sept. 26, 1986), in ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007).

68. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 828, 17 ELR 20918 (1987).

69. *Id.*

70. *Dolan v. City of Tigard*, 512 U.S. 374, 380, 24 ELR 21083 (1994).

71. *Id.* at 391.

72. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

73. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591, 43 ELR 20140 (2013).

bane of Justice Scalia's jurisprudence. It was far better, he would say, for constitutional tests to take the form of clear and principled rules of decision; bright lines, and clear categories creating a "Rule of Law" rather than a rule of judges.⁷⁴

An opportunity for Justice Scalia to overrule *Penn Central* was presented in 1992, when certiorari was granted in *Lucas v. South Carolina Coastal Commission*.⁷⁵ South Carolina legislation had established a new setback line that was necessary to "prevent serious public harm," but which rendered Lucas' oceanfront building lots "value-less."⁷⁶ Justice Scalia was not successful in his effort to muster a majority willing to reject *Penn Central*'s balanced public-interest analysis altogether, but he was able to convince four other Justices to join him in creating an exception.⁷⁷ His opinion adopted the "bright-line" principle of law that regulations that deny "all economically beneficial or productive use of land" are categorically compensable.⁷⁸ Total takings are per se compensable.⁷⁹

The 2005 decision in *Kelo v. City of New London* found Justices Rehnquist and Scalia on the losing side of a split 5-4 decision reminiscent of *Berman*.⁸⁰ The majority opinion held that New London's power of eminent domain could be used to transfer property from one private person to another private person who, from the city's point of view, would use it for a more economically productive use.⁸¹ The dissent, in which Justice Rehnquist and Scalia joined, would have adopted the bright-line rule that eminent domain could not be used to implement the city's plans seeking purely economic benefits.⁸²

The majority opinion in *Kelo*, which legitimized the taking of private property for private economic development, was met with widespread outrage.⁸³ The public mood had turned against grand plans.⁸⁴ Forty-odd state legislatures imposed limits on exercises of the power of eminent domain⁸⁵ and President George W. Bush issued an executive order restricting use of the federal power.⁸⁶ State and federal elected officials (and the body politic) had lost faith in the ability of regulators to act in the public interest. Outside of the courtroom, the desirability of a "planned society" was in doubt.

D. The Roberts Court

The *Kelo* term also marked a changing of the guard on the Supreme Court. Upon the 2005 death of Chief Justice Rehnquist, Justice John Roberts was appointed the new Chief Justice. And by 2006, the reconfigured Roberts Court was perhaps the most conservative in decades.⁸⁷ A right-wing bloc of Justices (Roberts, Scalia, Clarence Thomas, and Samuel Alito) could be counted upon to vote in favor of private property rights and against government regulations in almost each and every case. But they still needed a fifth vote to finish the job of eliminating the liberal precedents left over from the 20th century. Justice Anthony Kennedy would often swing to the conservative side, but he could not always be counted upon.⁸⁸

For example, the Court had recognized in 1940 in *United States v. Appalachian Electric Power Co.* that "navigable waters [were] subject to national planning and control in the broad regulation of commerce granted the Federal Government."⁸⁹ The Corps had accepted that mandate (with the approval of the Supreme Court⁹⁰) and required its permission as a prerequisite to private excavation and filling projects that had any impact on the U.S. hydrological cycle.⁹¹ The Corps had effectively reconstituted itself as the federal land use control agency.

In the 2006 case *Rapanos v. United States*, a farmer had been found civilly liable for draining a marshy field without the Corps' permission.⁹² The drainage project was more than 11 miles away from the nearest navigable water course.⁹³ Justice Scalia, joined by Justices Roberts, Thomas, and Alito, authored the plurality opinion vacating the judgment on the ground that the Corps' jurisdiction only extended to wetlands with a continuous surface connection to a flowing waterway.⁹⁴ But the plurality opinion lacked the fifth vote necessary for a majority.⁹⁵ Justice Kennedy concurred in the result, but he proposed a "significant nexus" test that left the test of the territorial expanse of the Corps' jurisdiction in constitutional limbo.⁹⁶

The 2009 case *Stop the Beach Renourishment v. Florida Department of Environmental Protection* considered the constitutionality of a Florida law that rewarded owners of eroding oceanfront lots with government-funded beach replenishment, but took as a price the owners' lit-

74. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187-88 (1989).

75. 505 U.S. 1003, 22 ELR 21104 (1992).

76. *Id.* at 1008-09.

77. *Id.* at 1007.

78. *Id.* at 1117-18.

79. *Id.* at 1035.

80. *Kelo v. City of New London*, 545 U.S. 469, 35 ELR 20134 (2005).

81. *Id.* at 488-89.

82. *Id.* at 498.

83. Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. 2100, 2108 (2009).

84. *See id.* at 2120.

85. *See 50 State Report Card*, CASTLE COAL, http://castlecoalition.org/index.php?option=com_content&task=view&id=2412&Itemid=129 (last visited May 24, 2014).

86. Exec. Order No. 13406, 71 Fed. Reg. 36973 (June 23, 2006).

87. Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, July 25, 2010, at A1.

88. *See* Lisa K. Parshall, *Embracing the Living Constitution: Justice Anthony M. Kennedy's Move Away From a Conservative Methodology of Constitutional Interpretation*, 30 N.C. CENT. L. REV. 25, 28 (2007).

89. *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940).

90. *See United States v. Riverside Bayview Homes*, 474 U.S. 121, 16 ELR 20086 (1985); *but see* Solid Waste Agency of Northern Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 31 ELR 20382 (2001).

91. *Permits for Activities in Navigable Waters or Ocean Waters*, 40 Fed. Reg. 31320 (July 25, 1975).

92. *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006).

93. *Id.* at 720.

94. *Id.* at 739.

95. *Id.* at 719.

96. *Id.* at 787 (Kennedy, J., concurring).

toral rights to future accretions.⁹⁷ When the right wing of the Roberts Court (composed of Justices Roberts, Scalia, Thomas, and Alito) found that they were unable to garner the fifth vote needed to strike down the statute as a whole, they switched sides so as to qualify Justice Scalia to write the opinion. The Court held for the state on the basis of a misbegotten misunderstanding of Florida property law, and thereby avoided application of the dreaded *Penn Central* balancing test.⁹⁸

Justice Scalia's strategy seems clear enough. If the public-interest balancing test in *Penn Central* cannot be overturned, it nonetheless can be avoided. And by his dicta, Justice Scalia planted the seed of precedent that every oceanfront owner has a littoral right to accretions that is a separable property interest.⁹⁹ Justice Scalia opined that once the "bundle of rights" that constitutes property is broken, each separate right is entitled to separate constitutional protection; every taking becomes a total taking that is per se compensable under the *Lucas* rule.¹⁰⁰ Since Justice Scalia's dicta were not dispositive of the case, the left wing of the Court (composed of Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan) seems not to have taken notice.¹⁰¹

In 2013, in *Koontz v. St. Johns River Water Management District*, Justice Kennedy joined the right-wing bloc of Justices to create the majority of five in an opinion authored by Justice Alito.¹⁰² A permit applicant had engaged in negotiation with the regulator concerning the terms and conditions upon which a project might go forward.¹⁰³ The applicant offered to mitigate environmental effects of his development proposal by deeding a conservation easement, but the regulator wanted more, demanding a reduction in the project size and some off-site improvements.¹⁰⁴ Negotiations broke down, and the permit was denied.¹⁰⁵ The applicant filed suit alleging a "regulatory taking."¹⁰⁶

Under the leading 20th century precedent of *Village of Euclid*, permit denials are presumed valid.¹⁰⁷ To prove a rejection unconstitutional, the applicant would have the burden of proving that "on balance" under the "totality of the circumstances" the regulator's demands went "too far."¹⁰⁸ Few if any property owners could meet the burden of proof imposed by the *Penn Central* test.

Justice Alito took a different view of the Constitution. He glommed onto the *Nollan/Dolan* precedents and considered the breakdown of negotiations as, in effect, the issuance of a permit with conditions attached.¹⁰⁹ Under those precedents, the burden of proof was switched to the regulator who was required to prove an "essential nexus" and "rough proportionality" between its negotiating demands and the environmental impact of the proposed development.¹¹⁰ The Court remanded the case for a determination of whether the regulator had imposed an "unconstitutional condition."¹¹¹

The *Koontz* case may have a profound effect on land use regulation. Nowadays, site-specific development agreements have replaced zoning maps as the favored means of public land use control.¹¹² Negotiations between the local jurisdiction and the landowner contractually fix the terms and conditions upon which a project may go forward.¹¹³ Such agreements benefit the developer with a contractual guarantee of approval, and benefit the locality with customized performance standards and assurances that infrastructure demands will be met.¹¹⁴ But when negotiations fail, the Court may, under the *Koontz* holding, second-guess the legitimacy of the conditions proffered by the government and then require the government to pay damages if the conditions go "too far."

III. Fifty-Year Retrospective

In 1964, Professor Reps conducted a "requiem for zoning."¹¹⁵ He urged that land use controls imposed by the bright lines on the zoning maps be erased and replaced by flexible discretionary public regulations that would guide the community toward a planned society of livable communities with affordable housing, adequate infrastructure, clean water and air, preserved landmarks, sustained resources, and environmental justice.¹¹⁶ He expressed "naïve faith" that a liberal judiciary would have no constitutional objections.¹¹⁷

Now, 50 years later, Professor Reps' observations and predictions seem to be both right and wrong. Old-fashioned zoning has been buried in a shallow grave. Today's land use is controlled by multiple, often overlapping permits at the federal, state, and local levels. The Corps asserts a broadly defined jurisdiction over the waters of the United States, state governments mandate clean water and clean air and protect wetlands, and local governments demand building permits and exact fees and in-kind contributions from developers.

97. *Stop the Beach Renourishment v. Florida Dep't of Env't. Prot.*, 560 U.S. 702, 40 ELR 20160 (2010).

98. *Id.* at 732-33; see also Garrett Power, *Property Rights, the "Gang of Four" & the Fifth Vote: Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection (U.S. Supreme Court 2010)*, 21 WIDENER L. REV. 627 (2012).

99. *Stop the Beach Renourishment*, 560 U.S. at 708.

100. *Id.* at 713.

101. *Id.* at 742-45.

102. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591, 43 ELR 20140 (2013).

103. *Id.* at 2592-93.

104. *Id.*

105. *Id.* at 2591.

106. *Id.* at 2593.

107. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

108. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 8 ELR 20528 (1978).

109. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596, 43 ELR 20140 (2013).

110. *Id.*

111. *Id.* at 2603.

112. See Delaney, *supra* note 52.

113. *Id.* at 821.

114. *Id.* at 811-12.

115. See Reps, *supra* note 4.

116. *Id.* at 64.

117. *Id.* at 66.

During the first two-thirds of the 20th century, Professor Reps' faith in the Supreme Court was well-placed. Just as he had predicted, the "judicial liberalism" in these Court precedents had created a living Constitution that changed with the times.¹¹⁸ The Justices took it upon themselves to balance public benefits against private losses and approved bold government plans for a better society.

But in the years since then, the Court's judicial conservatives have sometimes shown renewed determination to curtail governmental activity in general, and to limit federal, state, and local planning in particular. As a result of their constitutional decisions:

- Physical occupations are per se compensable¹¹⁹;
- Total takings are per se compensable¹²⁰;
- When a regulator and a developer fail to agree, the regulator bears the burden of proving the reasonableness of its demands¹²¹;
- Regulations necessary to prevent a significant public harm are not excused from constitutional requirements of compensation¹²²;
- Private owners have protected property rights in the navigable waters of the United States¹²³;
- Federal land use controls only extend to lands connected to waterways.¹²⁴

And if the Roberts Court can find a fifth vote, it may soon be constitutional law that:

- The mode of analysis found in the landmark *Penn Central* decision (an ad hoc public-interest balancing test) is replaced with bright-line rules of compensability;
- The sticks in the "bundle of rights" in land are considered separately so that the regulatory denial of any stick is considered a "total taking" and is to be per se compensable;
- Exercises of the power of eminent domain are limited to situations where government itself intends to physically occupy the premises.

Professor Reps' 1964 "requiem for zoning"¹²⁵ was correct in its observation that the bright line on zoning maps, which promised to put everything and everybody in the proper place, was being supplanted by flexible public plans. The "zoners" were being replaced by planners vested with discretionary regulatory powers said to be necessary to create pollution-free communities with affordable houses, good schools, thriving commerce, and more than adequate public services.¹²⁶

But Professor Reps was wrong in his faith that the Court would not stand in the way of discretionary and flexible land use planning. Court decisions, coupled with the public outrage triggered by the *Kelo* holding, disempowered the planners. What better way to discourage planning than to require that governments compensate property owners for all of the private losses associated with its regulations? Now seems the time to compose a "requiem for regulation."

IV. Coda

The future of American planning remains in doubt. On the basic question as to whether to look to governments for the solutions to economic and social problems, the Roberts Court is divided into two equal blocs.¹²⁷ The laissez-faire bloc is headed by Justice Scalia, joined by long-time ally Justice Thomas and relative newcomers Chief Justice Roberts and Justice Alito. The pro-planning bloc is headed by Justice Breyer, who is joined by his long-time ally Justice Ginsberg and relative newcomers Justices Sotomayor and Kagan. Justice Kennedy moves back and forth between the two factions, often providing the decisive vote in 5-4 decisions.

While both sides may claim a "humble obedience to the Constitution,"¹²⁸ the real division seems ideological. The laissez-faire bloc wants to downsize government at whatever the cost; the pro-planning bloc looks to government for a solution to public problems. Only retirements, deaths, and appointments will tip the Court balance one way or the other.

118. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 8 ELR 20528 (1978).

119. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

120. *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 22 ELR 21104 (1992).

121. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591, 43 ELR 20140 (2013).

122. *Lucas*, 505 U.S. at 1118-22.

123. *Rapanos v. United States*, 547 U.S. 715, 36 ELR 20116 (2006).

124. *Id.* at 739.

125. Reps, *supra* note 4.

126. See Delaney, *supra* note 52.

127. See Greg Stohr, *Roberts Supreme Court's Partisan Split Shows New Justices Are Predictable*, BLOOMBERG, July 1, 2011, available at <http://www.bloomberg.com/news/2011-07-01/roberts-supreme-court-s-partisan-split-shows-new-justices-are-predictable.html>; David Paul Kuhn, *The Incredible Polarization and Politicization of the Supreme Court*, ATLANTIC, June 29, 2012, available at <http://www.theatlantic.com/politics/archive/2012/06/the-incredible-polarization-and-politicization-of-the-supreme-court/259155/>.

128. J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE* 46 (Geoffrey R. Stone et al. eds., 2012).