SUMMATION

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A few feet from the home of the *Ohana* Ryder in Kahalu'u, Hawaii, gentle waves inside the reef at Kaneohe Bay wash onto the beach the flotsam and jetsam from a million corners of the Pacific. Hawaiians speak of the *limu* line, the meandering, shifting line along the beach of bits and pieces of drift wood, jettisoned goods, and an occasional lost fishing float from Japan. In ancient times, the *limu* line marked the boundary of the *konohiki* lands, the Hawaiian chief's lands, which lay *mauka,* or shoreward.

The *limu* line shifts on the beach in a continual definition of the boundary between land and sea. The process is not random, but it is unpredictable, following the laws of the mother sea. We watch continually for its changes and its gifts from the sea. We only glimpse at this line from one year to the next, trying to understand the considerations that produced its latest drift. This disability is reminiscent of the shifting demarcation line between the permissible extent of the police power in land use cases and the excesses that even the United States Supreme Court seems now fascinated to follow and address. We often understand little of the unifying notions, if any, that would predict long-term movements of this police power *limu* line.

It is not easy to predict whether a given act at the margins of acceptability is within the power of a local planning agency; we never know where the police power ends. Given the varying formulations of the police power among the fifty states as well as the Supreme Court, what are the recognizable limits of the police power? Our confusion creates a genuine *limu* line, in which planners shrink from one margin, and developers pull back from the other, leaving between them an uncertain region.

That important boundaries in the law remain perennially uncertain is not necessarily unwise. As Holmes said, our Constitution is "an experiment, as all life is an experiment."[1] Most reforms are experimental, yielding to what the current majority identifies as its special vision. Using the police power to exact contributions of money or facilities from developers will undoubtedly continue in a world in which there exist scarce resources and a willingness to let others be first to commit their resources to the common good.

The speakers in this symposium have betrayed more uneasiness over fundamentals than one might have expected from so much experience. Their concern is not limited to the legal or constitutional underpinnings or the economic theories and competing demands that underlie a system of

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1. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

exactions. They raise questions of equities and fundamental fairness behind a now universal use of exactions in planning. No one anticipated that the conference would have such difficulty getting beyond this issue of fundamental fairness, yet uncertainty and unhappiness over the regressive uses of exactions were mentioned by Marlin Smith,[2] Charles Siemon,[3] and others.

As the study conducted by Bauman and Ethier demonstrates,[4] exactions are now a national phenomena. The figures suggest that 66% of communities use on-site exactions, 40% use off-site exactions, and 36% use impact fees. These statistics cover communities with a formal policy.[5] Adding the communities having informal or hidden policies—such as not acting on development requests until the developer comes forth with a kind of coerced volunteerism—increases the percentages to 58% for off-site exactions and 45% for impact fees.[6] Nearly 8% of the communities surveyed simply deposited the impact fees in their general treasury and did not commit the fees to ameliorate development's impact on existing services.[7]

These statistics are important, but there needs to be a test for a correlation between exactions and other indicators of exclusionary policies. Such a study may statistically demonstrate whether, as Siemon said, exactions are "the latest sheepskin for the wolf of exclusionary zoning."[8] Perhaps the conclusions drawn by Nicholas from a study of Florida municipalities[9] will build on Bauman and Ethier's study to demonstrate whether exactions are the tool of exclusion that Siemon suggests they are.[10]

The numbers, apart from percentages, are impressive and disturbing. California, which usually is singled out as the genesis of new forms of exclusion, is not solely responsible for the sweep of exactions across the country. The Bauman and Ethier study demonstrated, for example, that Midwest school exactions, at $1,044 per unit, slightly exceeded the average California exaction of $1,042 per unit.[11] The new willingness of the Midwestern States to join the rest of the country in imposing heavy penalties on development contradicts the theory many have shared, including Donald Connors, that it is the Coastal States that foment the latest ideas in land use.[12]

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2. *See* Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, LAW & CONTEMP. PROBS., Winter 1987, at 5, 28-29.

3. *See* Siemon, *Who Bears the Cost?*, LAW & CONTEMP. PROBS., Winter 1987, at 115, 118-26.

4. Bauman & Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, LAW & CONTEMP. PROBS., Winter 1987, at 51, 56-57, 60-61.

5. *Id.* at 59.

6. *Id.* at 61.

7. *Id.* at 58-59.

8. Siemon, *supra* note 3, at 126.

9. *See* Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, LAW & CONTEMP. PROBS., Winter 1987, at 85, 95-100. (Nicholas uses statistics provided by FLORIDA DEP'T OF TRANSP. 1980 ANNUAL REPORT.)

10. Siemon, *supra* note 3, at 126.

11. Bauman & Ethier, *supra* note 4, at 60.

12. Address by Donald Connors, Symposium on Exactions: A Controversial New Source of Municipal Funds (Mar. 22-23, 1985) [conference hereinafter Exactions Symposium].

The Coastal States have absorbed the greatest demographic impacts and theoretically summon up the most inventive controls and barriers to development. If it is really true that the Midwestern States impose equal or higher burdens on development, anticipating where the next and latest antidemographic maneuvers will occur may have become more difficult.

If the issue addressed at this symposium had been the application of antitrust law to land use, no longer an outlandish notion, the authors would have tried to assimilate and integrate new decisions from the federal courts on the Sherman Act[13] and other antitrust laws. Under state land use law, no such commonality or interchange of decision exists among the several states. Each state jealously guards the right to make its own land use law, as though no experiences are shared and no common task to accommodate a forever restless population is faced. Even in acknowledged national or interstate issues, we have difficulty finding common ground for discussion or analysis except in terms of equities. When we examine the law underlying the equities, we have difficulty translating our ideas to one another. The cases of one jurisdiction gain little credit in another.

Inevitably, it is a mistake to refuse to discover a common law of demographic issues in land use. The demographic process is national, with controls in one major metropolitan area affecting lives and opportunities in the rest of the country. As in the national debate over acid rain, it is not just or sufficient to confine to one state the burden of meeting impacts generated elsewhere. We are a common people on a single vessel, and as Justice Cardozo taught us in *Baldwin v. G.A.F. Seelig, Inc.*, we shall "sink or swim together."[14]

Connors and High's article analyzes linkage, the process of requiring developers of facilities that produce new residents to supply new housing in appropriate numbers.[15] It may be heresy to suggest that linkage should not be treated as a species of exactions. This proposition cuts directly against the grain of Connors' theme. It is easy to incorporate the subject of linkage into a discussion of exactions because both concern housing or facilities coerced from a developer as a cost of doing business. Beyond the fact that linkage means dollars out of someone's pocket, linkage should be seen as the obverse of exactions. Exactions often discourage the formation of new housing and limit its local effects by making development pay a draconian share of its marginal impact on the community. Linkage suggests that one who generates an increased housing demand must satisfy a proportion, a fair share, of that demand. Linkage is thus not exclusionary, as are other exactions, but inclusionary. It acknowledges the connection between commercial development and increased housing demand.

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13. 15 U.S.C. §§ 1-7 (1982).

14. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935).

15. Connors & High, *The Expanding Circle of Exactions: From Dedication to Linkage*, LAW & CONTEMP. PROBS., Winter 1987, at 69.

When the west coast of the Island of Maui was first being developed at Kaanapali, linkage was routinely used to force builders of major tourist hotels, then going up in profusion, to supply housing for hotel workers. Those who resisted forcing builders to provide housing for the new Kaanapali workers were often the Hawaiians and other *kamaainas,* the old-timers. They knew from sad experience that as new housing went up, they were less likely to be employed. Most of them already had housing, and new housing would be made available to *haoles,* or newcomers, to take the *kamaainas'* places in the employment pool. From this example, it is clear that linkage and exactions are antagonistic notions. Present residents will favor exactions, often in amounts that penalize new housing more than they provide for its marginal demands on city services. Present residents may disfavor linkage when they realize the consequence of new housing stock—inviting *haoles* to take new jobs.

A few years ago, immediately before the case of *Construction Industry Association v. City of Petaluma*[16] got underway, a University of Michigan study analyzed how new employment opportunities are filled. New jobs are created in significant numbers, and are mainly filled by outsiders, not by those already in the labor pool.[17] Thus, the right to travel should be understood to play a role in housing policy. Jobs created in a major metropolitan area in significant numbers draw people into the metroplex. This movement often reflects opportunity for residents of depressed and declining regions to pull up stakes in search of prosperity. I hope we never witness a rebirth of the *Grapes of Wrath* mentality of walling out neighbors and fellow citizens, of discouraging the great migrations that have been our strength.

Marlin Smith discloses that the legal basis of exactions is now well developed.[18] Although the California cases began to emerge in the mid-1960's, most of the cases he cites as evidence of exaction law around the country were decided the mid- to late-1970's and the 1980's. This area of land use law has developed very quickly, probably due to what Connors calls the expanding circle of exactions.[19] Swift development is also doubtless the product of the utility of exactions in replacing a number of other techniques that were more cumbersome or required more explicit statutory authority.

Smith's explanation of the history of exaction law and conditional zoning displayed the same uneasiness as did Charles Siemon's comments on the direction of the law.[20] Smith warns of the weakened and dangerous bridge from case to case that leads courts to validate further and more burdensome exactions without reconsidering the constitutional and equitable issues they present. He complains that courts seem content to reach only far enough to

16. 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd,* 522 F.2d 897 (9th Cir. 1975), *cert. denied,* 424 U.S. 934 (1976).

17. *See* J. LANSING, C. CLIFTON & J. MORGAN, NEW HOMES AND POOR PEOPLE: A STUDY OF THE CHAIN OF MOVES 28 (1969).

18. Smith, *supra* note 2, at 25.

19. Connors & High, *supra* note 15, at 83.

20. Siemon, *supra* note 3, at 121.

link up with the latest extension of the police power in the last case.[21] Thus, what passes for a solid bridge really rests on groaning timbers not meant to bear heavier and heavier loads.

Marlin Smith's and Charles Siemon's analyses rest on a commitment to stricter scrutiny of exactions, a demand on the courts that they look deeper at the impact on new residents and their rights of passage. Chief Justice Traynor illustrated this problem a number of years ago in *No Magic Words Could Do It Justice.*[22] He argued that we often invoke magic and familiar words from a host of past cases without looking behind the magic words to see if they still hold the power to charm.[23] Justice Holmes wrote that it was revolting to have no better justification for a rule of law than that it was laid down in the reign of Henry IV.[24] Chief Justice Traynor's corollary holds that it is no less revolting that a rule of law survives in words that have lost meaning.

Siemon recalls[25] that the now ten-year-old *Petaluma* decision offers an important argument for heightened scrutiny in the exaction field based on Judge Hand's decision in *The T.J. Hooper.*[26] *Hooper* was an admiralty case in which a storm off Cape Hatteras forced a tug to abandon its charge of barges and their cargoes. In the suit over the lost cargo, the tug owner claimed the storm was unanticipated.[27] The shipper replied that the tug should have been equipped with a radio, which would have provided ample warning of the storm to grant time to get the tug, barges, and cargo into harbor.[28] Radio was new in those days, and the tug owner argued that few, if any, tugs were equipped with receivers. Because negligence is defined as violation of a common standard, the tug owner argued that its adherence to the common practice of that time could not be negligence.[29] Judge Hand disagreed, stating:

> Indeed in most cases, reasonable prudence is in fact common prudence, but strictly it is never its measure. A whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required. There are some precautions so imperative that even their universal disregard will not excuse their omission.[30]

The provision of housing to facilitate the continuing redistribution of jobs and of the population that moves in search of those jobs has always seemed to me a precaution so imperative that even its universal disregard will not excuse its omission. How can we acknowledge that the right to travel—to migrate and resettle—is of paramount importance, but at the same time fail to protect the essential tools of migration—jobs and housing?

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21. Smith, *supra* note 2, at 29.
22. Traynor, *No Magic Words Could Do It Justice,* 49 CALIF. L. REV. 615 (1961).
23. *Id.* at 621-22.
24. Holmes, *The Path of the Law,* 10 HARV. L. REV. 458, 469 (1897).
25. Address by Charles Siemon, Exactions Symposium, *supra* note 12.
26. 60 F.2d 737 (2d Cir. 1932), *aff'g* 53 F.2d 107, 109 (S.D.N.Y. 1931).
27. 53 F.2d 107, 109.
28. *Id.* at 108-09.
29. 60 F.2d at 740.
30. *Id.*

Many participants in the planning and zoning game have mistakenly believed that planners are favored by keeping the outer limits of their powers as vague and elastic as possible, to the point where an end to the stretch is not easily discernible. The result is an anomaly. Planners possess very broad powers over land use, but are continually concerned that they do not know the limits of valid regulation. They feel victimized for not knowing within some reasonable parameters the limits of allowable activity, however distant the courts repeatedly reassure them the limits are.

There is a suggestion in this symposium that land use decision making is ready for a sea change, a new departure, in the way housing cases are decided. There are many good reasons to think that this is so.

Among the legion of reasons why people are fed up with government is the decline of procedural due process. Process may be the essence of liberty, but fair process, due process, seems to be the first principle discarded by a land use bureaucracy which has been told repeatedly that its functions are so important that the judiciary will not scrutinize its actions by a standard more strict than limited review.[31] Most developers will take their losses from land use authorities with good grace, by either reshaping their projects to meet government's objections or going elsewhere. More litigation, expensive and unproductive to both sides, arises out of anger and frustration over arrogance and unfairness in processing land use applications than from down-zoning, conditional zoning, or outright refusal to approve a project in any form.

A return to procedural due process suggests an increasing role for the courts. Yet, in housing cases, New Jersey's *Mount Laurel* experience[32] suggests that courts are, in Pete Seeger's words, "waist deep in the big muddy."[33] It is very troubling to see how deeply and with what resources the New Jersey courts invested themselves in the process of determining which town gets what "fair share" of housing demand. We should be profoundly uneasy at this replacement for the freedom of choice of the people who will live in those communities.

Magic words offer no comfort. They open the way for decisions supplied for the moment, for political comfort, or for the sake of hidden prejudices or inadequacies. Take four examples from land use: taking versus regulation; privilege versus right; tax versus fee; close nexus versus reasonable relationship. We never know, except on the facts of each case and the biases of its judges, whether we are on one or the other side of these unhelpful distinctions. In each case, significant resources are wasted briefing and arguing essentially meaningless choices—all to draw the shade before the court flips a coin or indulges unspoken prejudices.

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31. For a discussion of the limited review given local economic regulations see Siemon, *supra* note 3, at 119-20.

32. Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (Mt. Laurel I), *appeal dismissed*, 423 U.S. 808 (1975); Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (Mt. Laurel II).

33. Seeger, *Waist Deep in the Big Muddy*, (Melody Trails 1967).

In *Petaluma,* the Ninth Circuit suggested that the relationship between the builders and their consumers, the home buyers, was too fleeting to vest the builders with standing to represent the home buyer's interests.[34] We may suppose the court decided there was no close nexus between the two interests. Surely, however, the builders and their consumers showed an absolute community of interest against the legislation in question. Whatever other distinctions exist between builders and those who buy their houses, the Petaluma plan and its restrictions on housing supply bound the two groups in a common effort. It is curious that the Supreme Court would permit bar owners to litigate the rights of their patrons to view topless dancing,[35] but the Ninth Circuit refuses to permit parties united in economic and social values to litigate the important issues of a growth limitation plan.

The underlying economic issues of this symposium are presented in William Fischel's article.[36] He asks whether the right to profit from development in any community is owned by the currently politically active residents in the community.[37] Is the right to control and profit from development to be decided on the basis of those present and voting?

Professor William Alonso of the University of California helps answer this question in an article entitled *Urban Zero Population Growth.*[38] Alonso's entrancing point was that, in analyzing a city like Petaluma trying to retain its small town character (one of the touchstones of the Petaluma Plan), it is inappropriate to consider the city's present platting or boundaries.[39] Rather, Alonso focuses on the "real city," the resources of the surrounding metropolitan area that are open to the citizens of the city.

Someone from Petaluma with a serious heart problem does not go to a cardiologist in Petaluma because no cardiologists practice there. If the problem is serious enough, he goes to the University of California Medical Center in San Francisco for the services of some of the best physicians in the world. Residents of Petaluma who love opera or the symphony do not go to the Petaluma Opera House, but to San Francisco to hear Luciano in *Aida* or *La Boheme.* Many of us who pretend we live in small, suburban communities have the benefit of the resources of a metropolitan area. We earn urban wages in cities such as San Francisco, San Raphael, Richmond, or Berkeley, not the wages we would earn if we worked in Petaluma. These metropolitan resources yield access to facilities that could not possibly be made available unless we had "borrowed size," as William Alonso called it, to call upon.[40] Given that suburban communities benefit from the resources of nearby metropolitan areas, should not the process of determining the costs of new

34. Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897, 904 (9th Cir. 1975).
35. *See* Doran v. Salem Inn, 422 U.S. 922 (1975).
36. Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis,* LAW & CONTEMP. PROBS., Winter 1987, at 101.
37. *Id.* at 101.
38. Alonso, *Urban Zero Population Growth,* DAEDALUS, Fall 1973, at 191.
39. *Id.* at 193-94, 200.
40. *Id.* at 200.

growth take into consideration that the people in the community already possess the borrowed size of the region? Borrowed size is an unpriced good; it has no dollar value, but unquestionably exists.

If new residents are required to provide a host of new facilities, what of the fact, in what Nicholas calls "America in ruins,"[41] that America has built its cities in times past and has never maintained reserves to rehabilitate them? I may move into a community that has very substandard, worn out public facilities. Am I entitled, since I am forced to put in new facilities, to demand that the old residents contribute to a sinking fund to bring the old facilities up to date? They used those facilities before I arrived, and now I have to make do with facilities in ramshackle condition. How do we adjust equities between the *kamaainas,* the old-timers, and the newcomers? It is not enough, and will never be enough, to attempt an economic analysis of this process because it really rests on the simple human virtues of accommodation and generosity, in the spirit of welcoming others from around the country who have chosen, often in hard times, to move elsewhere in search of success or glory.

Courts must do what they do best, add a little poetry or spirituality to our constitutional system. Wisdom is not found in numbers. Within the spirit that motivates this country, there is the need to find that willingness that Justice Cardozo said was the genius of the American system—to "sink or swim together."[42] There is in the American spirit a willingness to be generous even when, on a strict cost-benefit analysis, there is no expectation that we will recover the help extended to others. It is the price civilized society pays to make room for new neighbors.

There will be resistance. I remember very well that when the *Petaluma* case was underway, those attending seminars asked, time and again, such questions as: How will Judge Burke's order against a recalcitrant city be enforced? How can Petaluma be made to undertake the planning needed to accommodate growth? How can we plan for the subterfuge that the city may now add to the subterfuge in the plan itself? The answer to those questions, a very difficult answer, probably lies in a story about Charles Lindberg I heard a few days ago:

> When Lindberg was preparing to fly the Atlantic, he went out to a dime store and bought a cheap map of the North Atlantic. He plotted his route in pencil across the trackless ocean to Ireland and on to Paris. One of his St. Louis backers caught sight of the map, folded up and stuck in Lindberg's back pocket. When he saw it, he said, "Slim, you must be crazy. You're about to do this terribly dangerous thing and you haven't planned for it well. You've got to call the flight off until your planning is done." Lindberg looked at him placidly and replied, "Time to stop plannin' and start riskin'.

It is often easier, less antagonistic, and less erosive of the relationship between courts and local government for courts to intervene once, decisively,

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41. Nicholas used this terminology at the conference conducted in connection with this issue. Address by James Nicholas, Exactions Symposium, *supra* note 11. In his article, Nicholas cites a book entitled *America in Ruins.* Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence,* LAW & CONTEMP. PROBS., Winter 1987, at 85, 85 n.1.

42. Baldwin v. G.A.F. Seeling, Inc., 294 U.S. 511, 523 (1935).

to state the law, than to permit a whole series of cases to abrade and ultimately destroy by continuous oversight the relationship between courts and local government. If in *Mt. Laurel,*[43] the court had simply outlawed antidemographic planning on the basis of the right to travel, the endless and maddening effort to oversee the establishment of a fair share quota for each city might never have begun.

In closing, I suggest that it is pernicious that we seek to find room in state law to circumvent the law of the Supreme Court. It strikes me that if Justice Brennan reads the *White River Junction Manifesto,*[44] as I suspect he will, and if he learns that it is not in his power to overturn Holmes in *Pennsylvania Coal v. Mahon,*[45] his reaction will be, "Just watch me!" There is little that one can say to a current majority of the Supreme Court more apt to make them determined to do something than to say that they cannot do it.

Courts at their best often invite us to be better than we are. As my Hawaiian friends would say, the courts' best function is to make us *aloha kekahi i kekahi,* which simply means to love one another and to make each other welcome "with plenty *aloha.*"

As Sir Desmond Heap reminds us, this might be the time to say that, with the Bard, our revels now are ended.[46] Because I come from the Pacific Slope and have a special love for my dear *ohana* out in Hawaii, I would prefer to say it my own way: *Ha ina mai ana Kapuana,* our song is ended.

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43. Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (Mt. Laurel I), *appeal dismissed,* 423 U.S. 808 (1975); Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983) (Mt. Laurel II).

44. Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto,* 9 VT. L. REV. 193 (1984).

45. 260 U.S. 393 (1922).

46. Heap, *The British Experience,* LAW & CONTEMP. PROBS., Winter 1987, at 31, 34.