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No Boundaries: The Erosion of Private Property Rights by Judicial Deference to Regulatory Overreach

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A fundamental precept of American law is the authority of the government, in the exercise of the police power for the protection of the health, safety, and welfare of the public, to regulate the conduct of individuals in the use and management of their property. In judicial review of legislative decisions, this is embodied in the familiar rule that a regulation will be upheld if rationally related to a legitimate governmental interest or purpose. In the specific area of land use regulation, a governmental decision will be upheld unless "clearly unreasonable, having no substantial relationship to the public health, safety, morals or general welfare." Thus, "as a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible."

The subjection of "property rights" to regulation for the public good is not debatable. However, the fact that such rights are subject to regulation does not mean that one can ignore "[t]he individual's right to retain the interests and exercise the freedoms at the core of private property ownership." In the language of Justice Holmes in *Pennsylvania Coal Company v. Mahon*, "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking." Embedded in this is the idea of "property" as the thing that is regulated—i.e., the baseline concept of "property" has to be determined before one can determine what is to be "regulated."

This article outlines a series of recent instances in which the California Supreme Court, and to a lesser degree, the United States Supreme Court, have seemingly adopted a view that bureaucratic objectives or legislative discretion actually *define* what constitutes "property," and have blurred the line between private property within the ownership and control of the owner and the legitimate scope of public regulation. In doing so, the courts have also introduced confusion as to how and what "property" is being regulated, and in the process, given undue attention to the needs of the government without giving due consideration to the notion of "property" or the rights that inure to the "owner" of property in the first instance.

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