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# Ten Years of Takings

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No area of property law has been more controversial in the past decade than takings. No aspect of constitutional law more sharply poses the dilemma about the legitimate powers of the regulatory state than the just compensation question. No question concerning constitutional property is more intractable than what sorts of government regulatory actions constitute uncompensated "takings" of private property.

Limitations of space, not to mention my own ambivalence about many of the issues, prevent me from developing a complete normative theory of the proper scope of the Takings Clause.[1] My aim here is vastly more modest: to outline the basic contours of regulatory takings law for the benefit of the law teacher who knows next to nothing about the topic but who wants to know what all the fuss is about. I will confine my attention to the Supreme Court's takings cases, although some very interesting and significant takings decisions have emerged from state courts and lower federal courts (particularly the Federal Circuit).

## The Pre-1987 Scene

The place to begin is the Big Picture, circa 1986, a year before the Court decided a quartet of cases that altered the landscape of takings law. The upshot of those cases and the Court's subsequent decisions is widely thought to have been the turning of the Takings Clause of the Fifth Amendment into a major constraint on government power and the most important constitutional protection of economic interests. Just how much change has occurred, though, remains to be seen.

First, a word about the Supreme Court's methodology. Commentators have attacked the Court's pre-1987 takings analysis for its excessive informality.[2] While "essentially ad hoc, factual inquiries,"[3] to borrow Justice Brennan's description, tended to dominate, the Court's method did not entirely lack

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1. For one such normative theory that suffers from no ambivalence whatsoever, see Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (Cambridge, Mass., 1985).
2. See, e.g., Susan Rose-Ackerman, Against Ad Hocery: A Comment on Michelman, 88 Colum. L. Rev. 1697 (1988).
3. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

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formality. The Court generally structured its analysis according to three discrete questions: Has the state taken the plaintiff's property? If so, did it do so in order to serve some public purpose? If so, has the state made just compensation for the property that it has taken? By far, the most intractable problems arise under the first question, but we need to pay some attention to the other two as well.

### *The Public Use Requirement*

Under the Fifth Amendment, the state may legitimately exercise its eminent domain power to take someone's property even *with* compensation only if it does so for some public purpose. A compensated condemnation of property for private purposes is unconstitutional.

How much does this public use requirement restrict the state's eminent domain power? The short answer is "very little." As Thomas W. Merrill has said, "most observers today think the public use limitation is a dead letter."[4] The Supreme Court's 1984 decision in *Hawaii Housing Authority v. Midkiff*[5] supports that view. There the Court unanimously upheld a Hawaii statute authorizing tenants in developments of five acres or more to condemn their landlord's interest and acquire a fee simple estate. It specifically concluded that the statute satisfied the public use requirement, reasoning that the statute was aimed at "[r]egulating oligopoly and the evils associated with it."[6] The test that the Court used provides little, if any, basis for invalidating condemnations on public use grounds: "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose," Justice O'Connor said, "the Court has never held a compensated taking to be proscribed by the Public Use Clause."[7] While commentators, including Merrill, have proposed interesting and at least plausible theories of the public use requirement that would add some teeth to it, there seems little prospect that the picture will change. Basically, this means that we can largely ignore the requirement.

### *"Just Compensation"*

Turning to the third question, the Supreme Court has held that "just" compensation does not necessarily mean full compensation. Judge Posner recently explained the settled meaning:

> "[J]ust compensation" has been held to be satisfied by payment of market value . . . . Compensation in the constitutional sense is therefore not full compensation, for market value is not the value that every owner of property attaches to his property but merely the value that the marginal owner attaches to *his* property.[8]

4. The Economics of Public Use, 72 Cornell L. Rev. 61, 61 (1986).
5. 467 U.S. 229 (1984).
6. *Id.* at 242.
7. *Id.* at 241.
8. Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988).

The reason usually given for not measuring compensation by the owner's personal value is that there are insuperable "practical difficulties" in doing so.[9] Commentators have proposed alternative methods of dealing with these problems,[10] but there's little likelihood of change here.

### *Has "Property" Been "Taken"?*

We come, then, to the fundamental question: has the state taken some property from the complaining owner? In the modern regulatory state this question becomes most embarrassingly difficult and most politically charged in the context of government actions that nominally are mere regulations, that is, exercises of the police power, for which there is no compensation requirement. So the law of takings today has become virtually synonymous with what are called "regulatory takings."

In *Pennsylvania Coal Co. v. Mahon,*[11] the case that first created the regulatory-taking doctrine, Justice Holmes said that a purported exercise of the police power becomes a taking when it "goes too far."[12] The Court has not made much progress in specifying the limits of regulatory takings since *Penn Coal,* but it has made *some* headway.

Until 1987 there were only two categories of regulations that triggered per se rules: permanent physical occupation and nuisance abatement. According to the first rule, a per se taking occurs when the regulation authorizes the state or someone acting with its authority to occupy the owner's property physically and permanently. Regardless of how slight the occupation, how trivial the effect, or how compelling the need for the state's action, such actions are always takings, the Court held in 1982 in *Loretto v. Teleprompter Manhattan CATV Corp.*[13] The Court, speaking through Justice Marshall, stated that its rule was quite narrow, and, until recently, it has been. The occupation must be direct, and it must be permanent. This is why, in *PruneYard Shopping Center v. Robins,*[14] the Court had earlier (and unanimously) held that there was no taking when a state law required a mall owner to permit members of the public to enter the mall for the purpose of distributing leaflets. The state-authorized occupation, although direct and physical, was only temporary. The upshot was that the category of per se physical takings was quite narrow, occupying a very small corner of regulatory takings law.

The other per se category concerns regulations designed to control a public nuisance. Government actions of this sort are never takings, the theory being that the range of legally protectable behavior that ownership confers on

9. See United States v. 564.54 Acres of Land, 441 U.S. 506, 511 (1979).

10. See, e.g., Merrill, *supra* note 4, at 82–85, 90–92; Robert C. Ellickson, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls, 40 U. Chi. L. Rev. 681, 736–37 (1973).

11. 260 U.S. 393 (1922).

12. *Id.* at 415.

13. 458 U.S. 419 (1982).

14. 447 U.S. 74 (1980).

persons does not include the power to harm the public.[15] When the state acts to abate such property uses, it does not take any property right that the owner had in the first place. As a number of commentators have pointed out, many harm-abating regulations can just as easily be viewed as public-benefit-conferring, in which case the per se rule does not apply.[16]

The nonphysicalist branch was a different matter. Ever since the Court's seminal 1978 decision in *Penn Central Transportation Co. v. City of New York*,[17] no per se rule determined when a regulatory taking occurred. *Penn Central* involved the designation by the New York City Landmark Preservation Commission of Grand Central Terminal as a historical landmark. Under the Landmark Preservation Law, the effect of the designation was to require the building's owner, Penn Central, to obtain the commission's permission before making any changes in the building's exterior architectural features. Penn Central applied for permission to construct a multistory office building atop the terminal, and the commission said no (characterizing the proposed design as "an aesthetic joke"). Penn Central sued, arguing that the denial constituted an uncompensated taking of property. The Supreme Court disagreed. The Court characterized its methodology in dealing with nonphysical regulatory takings as "essentially ad hoc, factual inquiries." It focused on three factors: the "character of the governmental action"; the extent to which the action interferes with what the Court calls "distinct investment-backed expectations"; and the degree of diminution in value.[18]

Joseph William Singer has succinctly summarized the gist of the first factor:

> The "character of the government action" concerns the issue of whether the regulation is more closely analogous to a physical invasion or seizure of a core property right or to a general regulatory program affecting numerous parcels and designed to protect the public from harm by adjusting the benefits and burdens of economic life to promote the common good.[19]

There was some indication in the Court's *Penn Central* opinion that the harmful character of the conduct proscribed by the regulation was no longer important, or at least less important. As we will see, though, that turned out to be a false signal.

The "distinct investment-backed expectations" factor derives from Frank Michelman's justly famous article, "Property, Utility, and Fairness."[20] The idea is essentially one of protecting the owner's reliance interest. A taking is more

15. See, e.g., Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972).

16. The classic discussion of this dilemma remains Frank Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1196–98 (1967).

17. 438 U.S. 104 (1978).

18. *Id.* at 124.

19. Property Law: Rules, Policies, and Practices 1228 (Boston, 1993). For a thorough analysis of the "character of government action" factor, see Jeremy Paul, The Hidden Structure of Takings Law, 64 S. Cal. L. Rev. 1393, 1433–92 (1991).

20. See Michelman, *supra* note 16, at 1223.

likely to be found where the regulation interferes with an investment that the owner has already made, relying on some preexisting regulatory arrangement, rather than some future investment opportunity. This factor had not appeared in the Supreme Court's analysis in the 1978 *Penn Central* case, but since then it has played a prominent role.[21]

The third factor is the degree to which the regulation causes a diminution in the value of the owner's property interest. Two problems have plagued this test from the time when the Court first introduced it in *Penn Coal.* First, what is the property interest, the denominator of the fraction? Second, how much diminution is too much?[22] Until recently, however, neither of these problems had much practical significance, since between 1922 and 1991 the Supreme Court had never found a taking on the basis of diminution in value.[23]

The upshot of all this is that, as of 1987, the Takings Clause posed only a very limited threat to the state's regulatory power. Specialists in public law subjects like constitutional law and administrative law could largely afford to ignore it.

## 1987—A Takings Revolution?

The Big Picture began to change in 1987, although, as I will argue, there is reason to doubt that a "revolution" has occurred in takings jurisprudence. Three major doctrinal developments in the Court's post-1987 takings jurisprudence warrant special attention. These are the rise of conceptual severance; the broadening of the physical occupation factor; and the emergence of a new per se rule in *Lucas v. South Carolina Coastal Council.*[24]

### *The Rise of Conceptual Severance*

"Conceptual severance," a term first coined by Margaret Jane Radin,[25] refers to the idea that each incident or set of incidents of ownership in the bundle of rights itself constitutes a fully protectable property interest. If accepted, this idea obviously would enormously broaden the reach of the Takings Clause. Conceivably, *every* regulation which does not fit into a properly defined nuisance exception could be viewed as a taking under this theory.[26]

Earlier decisions of the Supreme Court had pretty clearly rejected conceptual severance.[27] The 1987 cases sent mixed signals about its future. On the

21. See, e.g., Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211 (1986); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Kaiser Aetna v. United States, 444 U.S. 164 (1979).

22. For a thorough discussion of these problems, see Carol M. Rose, *Mahon* Reconstructed: Why the Takings Issue Is Still a Muddle, 57 S. Cal. L. Rev. 561, 566–69 (1984).

23. Jesse Dukeminier & James E. Krier, Property, 3d ed., 1198 n.29 (Boston, 1993).

24. 505 U.S. 1003 (1992).

25. The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings, 88 Colum. L. Rev. 1667, 1676 (1988).

26. Indeed, this is the gist of the argument put forward in Epstein, *supra* note 1.

27. See, e.g., Andrus v. Allard, 444 U.S. 51 (1979); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

one hand, *Keystone Bituminous Coal Association v. DeBenedictis*[28] pretty clearly rejected conceptual severance: "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety."[29] But two other decisions from the same term indicated that the Court was indeed prepared to apply the conceptual-severance technique. In *Hodel v. Irving*,[30] the Court struck down a federal statute which provided that upon the death of the owner of an excessively fractionated undivided ownership share in tribal Indian lands allotted to individuals, the interest shall not pass to the deceased owner's devisees or heirs but instead shall escheat to the tribe whose land it originally was.[31] Characterizing the statute as a total restriction on the power to control the disposition of property at death, the Court ruled that it constituted an uncompensated and therefore unconstitutional taking of property. The right to pass on property at death, the Court said, is among "the most essential sticks in the bundle of rights that are commonly characterized as property."[32]

The other case in which the Court employed the conceptual-severance technique is *First English Evangelical Lutheran Church v. County of Los Angeles*.[33] There the Court held that a landowner was entitled to damages in an inverse-condemnation action when an ordinance temporarily deprived the owner of all economically viable use. The ordinance, while not stating any durational limit, was rescinded after it was judicially declared to be an unconstitutional taking. The rescission, the Court held, did not deprive the owner of its right to recover damages for the period of time when the ordinance was in effect. Temporary takings, Chief Justice Rehnquist reasoned, have the same status as permanent ones because for the period in question they *are* permanent. This is *temporal,* or durational, as distinguished from *functional* conceptual severance. The bundle of rights is sliced into temporal shares, each of which is a whole "thing." As Frank Michelman has pointed out, this "establishe[s] a major new beachhead in takings jurisprudence for conceptual severance."[34] It does not take a great deal of effort to imagine the same technique—dividing into discrete segment ownership interests that are formally undivided—being used to extend the functional version of conceptual severance much more broadly than the Court did in *Hodel v. Irving,* in effect repudiating its disavowal of conceptual severance both in *Penn Central* and in *Keystone Bituminous Coal Association,*[35] decided the same term as *First English.* The Court has not yet

28. 480 U.S. 470 (1987).

29. *Id.* at 497 (quoting Andrus v. Allard, 444 U.S. at 65–66).

30. 481 U.S. 704 (1987).

31. The purpose of this statute was to facilitate prudent leasing and management of Indian land by reconsolidating multiple small fractionated interests. Without such reconsolidation, Congress felt, efficient management and use of the land would likely be frustrated by coordination problems.

32. *Irving,* 481 U.S. at 716 (quoting *Kaiser Aetna,* 444 U.S. at 176).

33. 482 U.S. 304 (1987).

34. Frank Michelman, Takings, 1987, 88 Colum. L. Rev. 1600, 1617–18 (1988).

35. *Keystone,* 480 U.S. at 496–98; *Penn Central,* 438 U.S. at 130–31.

taken that step, and perhaps it will not do so. It could fairly easily distinguish *First English* from the more typical situation by relying on an interpretation that Michelman has offered. According to Michelman, what was crucial to the decision in *First English* was the fact that the ordinance, as enacted, had an indefinite duration and, therefore, *would* have effected a total taking without any offer of compensation. "Such behavior on the part of government," Michelman says, "is (by hypothesis) unconstitutional and lawless."[36]

Nonetheless, I do not think that we ought to dismiss out of hand any likelihood that the present Court will extend its use of conceptual severance. As Michelman emphasized, the majority in *First English* included Justice Brennan, the author of three opinions explicitly rejecting conceptual severance. The majority also included Justices White, Blackmun, and Marshall. None of those four justices is on the present Court, and at least some of their replacements may well be more favorably disposed to extending the reach of conceptual severance. At least three members of the Court now can probably be counted as firm conceptual-severance supporters: Chief Justice Rehnquist and Justices Scalia and Thomas. Justice O'Connor used conceptual severance in *Irving* and might be inclined to apply it again under the right circumstances. That leaves us just one short of a conceptual-severance majority. Stay tuned.

### *The Broadened Physical Occupation Factor: The* Nollan-Dolan *Doctrine*

The second major post-1987 development concerns the physical-occupation factor. The Supreme Court has sent several signals indicating that it may be prepared to expand somewhat the physical-occupation category of regulatory takings. The most important of these signals is the development of the *Nollan-Dolan* doctrine.

The doctrine concerns a practice that has been quite common in cities throughout the country in recent years—exactions. Exactions are concessions that cities extract from landowners who wish to change the use of their land in some way and are required to obtain the city's permission to do so. The typical scenario involves an application for a development permit which the city conditions on the landowner's agreeing to dedicate a portion of the land to some public use. The ostensible purpose of the exaction is to minimize the negative externalities of the proposed development.[37] Clearly, though, the increased popularity of exactions reflects the fact that few cities today can afford to pay for public dedications of private land.

In *Nollan v. California Coastal Commission*,[38] decided in 1987, the Court for the first time imposed a requirement that there be an "essential nexus"

36. Michelman, *supra* note 34, at 1619.

37. On exactions, both generally and in relation to the *Nollan-Dolan* doctrine, see Douglas T. Kendall & James E. Ryan, "Paying" for the Change: Using Eminent Domain to Secure Exactions and Sidestep *Nollan* and *Dolan*, 81 Va. L. Rev. 1801 (1995); Stewart E. Sterk, *Nollan*, Henry George, and Exactions, 88 Colum. L. Rev. 1731 (1988).

38. 483 U.S. 825 (1987).

between the purpose of an exaction and the purpose that would be served by denying the requested development permit.[39] Then, in 1994, the Court in *Dolan v. City of Tigard*[40] added to this doctrine the further requirement that a rough proportionality exist between the exaction and the expected impact of the proposed development. The city has the burden of proving that this proportionality exists.

The two requirements have cast doubt on the viability of exactions generally. Commentators have suggested that the doctrine will be a means for constitutionalizing a wide variety of disputes between local governments and landowners concerning land development and severely limiting the flexibility of local governments to regulate land use in the public interest.[41]

All this may yet come to pass, but there are reasons to think that the reach of the new doctrine is more limited. Both cases involved exactions that authorized the public to enter private land over which the owners had previously had an unlimited right to exclude. In *Nollan,* the California Coastal Commission required the owners of beachfront property to permit the public to cross their private stretch of beach, located between two state parks. The requirement in effect exacted a public easement of way, an action that if done directly clearly would have required compensation. In *Dolan,* the city conditioned a permit to expand the owner's store and parking lot on dedicating a portion of the land to the city for the purposes of creating a pedestrian and bicycle path and a flood control greenway. As in *Nollan,* the exaction would have had the effect of restricting the landowner's power to exclude the public. Both decisions, then, reflect—as Frank Michelman has said with respect to *Nollan*—"the talismanic force of 'permanent physical occupation' in takings adjudication."[42] To date, there has been no indication that the Court would apply the same heightened scrutiny where the government condition does not interfere with the landowner's right to exclude.[43]

Further evidence that the Court seems not prepared to launch a massive expansion of the physical occupation category, subject to a rigid per se rule, is its 1992 decision in *Yee v. City of Escondido.*[44] That case involved a mobile home rent control ordinance. California state law restricts the ability of owners of mobile home parks to order, while a rental agreement is still in effect, the removal of a mobile home upon its sale. The combined effect of that law with a local rent control ordinance, the park owner argued, was to constitute a taking by physical occupation. The Supreme Court disagreed, emphasizing that there was no "compelled physical occupation" here. It is, the Court said, the "element of required acquiescence [that] is at the heart of the concept of

39. *Id.* at 837.

40. 512 U.S. 374 (1994).

41. See Note, Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution, 102 Harv. L. Rev. 992, 992–93 (1989).

42. Michelman, *supra* note 34, at 1608 (footnote omitted).

43. See Eric T. Freyfogle, The Owning and Taking of Sensitive Lands, 43 UCLA L. Rev. 77, 87 n.41 (1995).

44. 503 U.S. 519 (1992).

occupation."[45] The exactions involved in *Nollan* and *Dolan* were both of the type that could easily be viewed as "required acquiescence" of just that sort, but many other municipal exactions cannot. It seems unlikely, then, that the *Nollan-Dolan* doctrine will put an end to that practice.

*Another Categorical Rule (Sort Of):* Lucas *and Total Economic Deprivations*

The final development is the one that has received the greatest public attention. It may also be the one that has the least practical effect. In *Lucas v. South Carolina Coastal Council,*[46] the Court concluded that environmental regulations that deprive the landowner of all economically viable use are per se takings unless the intended use constitutes a public nuisance under what the Court called "relevant background principles." Writing for the majority, Justice Scalia said: "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[47] In other words, the state, to avoid a compensation obligation, must locate some land-use prohibition existing in the historical common law of nuisance, and must link that prohibition with the use proscribed by the challenged regulation.

There are a host of problems with Justice Scalia's analysis, as several commentators have effectively pointed out.[48] The point that I wish to emphasize here is that *Lucas's* categorical rule may not amount to all that much if it is confined to the unusual circumstance of a judicial finding of fact that the regulation deprived the owner of *all* economically viable use and if the Court does not broaden that circumstance through a more extensive use of the conceptual-severance technique. The real significance of *Lucas* may be less its practical effect than the signal it sends regarding the current Court's desire to remold takings law along more formal lines. The Rehnquist Court seems increasingly impatient with the open-ended balancing approach of *Penn Central. Lucas* and *Dolan* may indicate that the Court is responding to calls from some commentators for "a good dose of formalization."[49]

* * * * *

Is it fair to characterize the Court's post-1987 takings decisions as constituting a "revolution" in takings jurisprudence? Probably not. The basic structure and substance of the doctrine have remained largely intact. But clearly things are changing. Structurally, the doctrine is becoming increasingly formalized.

45. *Id.* at 527 (quoting FCC v. Florida Power Corp., 480 U.S. 245, 252 (1987)).

46. 505 U.S. 1003 (1992).

47. *Id.* at 1027 (footnote omitted).

48. For trenchant criticisms of *Lucas,* see Freyfogle, *supra* note 43, at 118–27; William W. Fisher III, The Trouble with *Lucas,* 45 Stan. L. Rev. 1393 (1993); John A. Humbach, Evolving Thresholds of Nuisance and the Takings Clause, 18 Colum. J. Envtl. L. 1 (1993).

49. Rose-Ackerman, *supra* note 2, at 1700.

Substantively, the new formality has enhanced the role of the Takings Clause in restricting the power of state and local governments. Once a backwater of constitutional law, the Takings Clause has emerged as one of the Rehnquist Court's main tools for constructing the minimal state. No one interested in public law can afford any longer to ignore it.