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On the Status of Robbing Peter to Pay Paul: The 1987 Takings Cases in the Supreme Court

Richard F. Duncan

University of Nebraska College of Law, rduncan2@unl.edu

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On the Status of Robbing Peter to Pay Paul: The 1987 Takings Cases in the Supreme Court

TABLE OF CONTENTS

I. Introduction	318
II. The Takings Clause	319
III. Historical Development in the Supreme Court	322
IV. The 1987 Takings Cases	326
A. <i>Keystone</i>	326
B. <i>Hodel</i>	329
C. <i>First English</i>	330
D. <i>Nollan</i>	332
V. Conclusion	334

I. INTRODUCTION

Someone once observed that when you rob Peter to pay Paul, you always can count on the support of Paul. That is what the takings clause of the United States Constitution is all about—it is designed to prevent the many Pauls of the world from using their political power to take property from the Peters of the world. In fact, it is something of a misnomer to refer to the clause as the “takings” clause of the fifth amendment. We would be far more correct if we called it the “anti-takings” clause.

The first purpose of this commentary is to discuss the takings clause and its historical development in the Supreme Court of the United States. Then, the commentary will focus on the 1987 takings

* Professor of Law, University of Nebraska College of Law. This commentary is based upon remarks delivered by the author on March 17, 1988, as a Brendan Brown Lecture at The Catholic University of America School of Law. A short summary of the lecture will be distributed by the Washington Legal Foundation as part of its Legal Background series. The author wishes to acknowledge the University of Nebraska College of Law for furnishing financial support in the form of a Ross McCollum Summer Research Grant.

cases in the Supreme Court, and discuss whether they have restored some bite to the fifth amendment's protection of private property.

II. THE TAKINGS CLAUSE

Properly understood, the takings clause provides that the costs of government activity should be borne proportionately by the public at large, rather than disproportionately by an individual owner of private property. Seen in this light, the purpose of the clause is to resolve what, in my opinion, is *the* most important question of political organization—the relationship between the state, individuals, and private property. The result is the triumph of individual autonomy over collective authority, of enterprise and achievement over envy and resentment,¹ and of private property over confiscation. Thus, our Constitution vindicates the ancient maxim that a man is the king of his own castle or, to quote an old Irish proverb: "As long as I live I'll spit in my own parlor."²

Before going on to analyze this topic, I propose that we all commit what is considered by many constitutional commentators to be a heresy. My proposal is that we read each of the twelve words in the takings clause of the fifth amendment: "nor shall private property be

1. "There are two fundamentally differing foundations on which systems of morality have traditionally been based. One is pride of achievement; the other is the resentment felt against those who achieve by those who do not." R. SHEAFFER, *RESENTMENT AGAINST ACHIEVEMENT: UNDERSTANDING THE ASSAULT UPON ABILITY* 7-8 (1988). When the morality of achievement forms the basis of society, "civilizations flourish in commerce, in the arts, in science; they erect great monuments and are remembered by future times as magnificent eras." However, when the morality of resentment prevails, "civilizations decline and eventually perish." *Id.* at 8. Although Sheaffer's book is a polemic, it is one that often will cause the reader to think seriously about competing world views.
2. H.L. MENCKEN, *A NEW DICTIONARY OF QUOTATIONS* 985 (1942). Seen in this light, the takings clause serves as a constitutional constraint against rent-seeking behavior by political factions. See Brennan & Buchanan, *Is Public Choice Immoral? The Case for the "Nobel" Lie*, 74 VA. L. REV. 179, 188 (1988). The Federalist No. 10, written by James Madison, establishes that the Constitution was designed "to break and control the violence of faction." THE FEDERALIST NO. 10, at 77 (J. Madison)(C. Rossiter ed. 1961). The term "rent-seeking behavior" was introduced to economics by Anne O. Krueger. It refers to the efforts of individuals or groups to use political power and influence to expropriate the wealth of other groups or individuals. See TOWARD A THEORY OF THE RENT-SEEKING SOCIETY ix (J. Buchanan, R. Tollison & G. Tullock eds. 1980). See also Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 713 (1984). This, in turn, frequently results in resources being employed by the owners of the targeted wealth to avoid the proposed redistribution. It should be obvious that both those expenditures are deadweight social losses "so that the outcome of the process is necessarily a negative sum game—regardless of who wins the struggle." Epstein, *An Outline of Takings*, 41 U. MIAMI L. REV. 3, 18 (1986). See also Tullock, *Rent Seeking as a Negative-Sum Game*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 16-36 (J. Buchanan, R. Tollison & G. Tullock eds. 1980).

taken for public use, without just compensation."³

Now analyze those twelve words, and consider their relationship to any governmental activity that has an impact on private property. The challenged governmental activity might involve anything from the building of a new post office on Blackacre, to zoning laws, taxation, or even laws regulating how fast we may drive our automobiles. As Professor Richard Epstein has observed, when we analyze the validity of governmental activity under the takings clause, we need to focus on four fundamental questions:

1.) Does the governmental activity result in a taking of private property?

2.) If so, is the taking of private property for a public use?

3.) If so, has the property owner received just compensation for the property that has been taken? and

4.) If just compensation has not been paid, is there any governmental power which justifies the uncompensated taking?⁴

Let me propose two hypothetical cases to set the stage for the analysis.

First, consider the classic example of eminent domain, the physical taking of private property for governmental occupation. I own Blackacre and the state wishes to locate a new state office building thereon. However, I am unwilling to sell Blackacre at this time, so the state responds by exercising its power of eminent domain. The state condemns Blackacre, and pays me the fair value of the property. Unlike private individuals, the state may use its monopoly of force to compel the transfer of private property so long as it complies with the limitations set forth in the takings clause.

When we apply the four-step model of the takings clause to this transaction, we get clear answers.

Has there been a taking of private property? Clearly, yes. The state has physically expropriated Blackacre, my private property.

Was Blackacre taken for public use? Again, clearly yes. The state is using Blackacre as a governmental office building, clearly a public use.

Have I been paid just compensation? On these facts, clearly yes. I was paid the "fair value" of the property. There often will be questions in actual cases about what the property owner's damages are, but for our purposes we accept the assertion that I have been paid the appropriate amount.

Thus, the state has used its power to force a transfer of my private property, but it has done so in compliance with the takings clause.

3. U.S. CONST. amend. V.

4. R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 31 (1985).

The cost of land acquisition for this public enterprise has been borne proportionately by the public at large out of the state's revenues, rather than disproportionately by the private landowner.

Now consider a second hypothetical. A large eastern city decides to adopt a program to preserve privately owned buildings and landmarks of historical significance. Rather than purchase the buildings and maintain them as historic sites for the public, the city decides to require private landowners to maintain the properties as historic landmarks. Legislation is enacted that severely restricts the right of landowners to develop and improve their property and that places an affirmative obligation on them to maintain the exterior features of their buildings in good repair. How does this ordinance look under the four-step analysis?

Has there been a taking of private property? Unlike the first example, title and possession have not been expropriated by the city. However, the city has placed a severe burden on the right of landowners to use, develop, and enjoy their private property. *De facto*, the city has substituted itself for the private landowner with respect to the power to control how that private property is used. Surely the takings clause, one of the great, elastic provisions of the Bill of Rights, is broad enough to cover this thinly veiled confiscation of private property.

Is the taking for a public use? Certainly, the preservation of our culture for posterity is clearly a public function.

Has just compensation been paid? No, clearly not on the facts as I have stated them. The city has chosen to use its monopoly of force to compel private landowners to maintain their properties as public landmarks.

Since just compensation has not been paid, is there any governmental power that justifies the uncompensated taking? Is the normal use of private property for profit an illegal use of force or fraud subject to the police power of the state? Are private landowners under an obligation to maintain their properties as public monuments? If so, what is the source of this obligation and by what theory does it override the express constitutional protection of private property against uncompensated takings?

Finally, notice that this legislation, if allowed to stand, results in exactly the situation that the takings clause was designed to prevent. The costs of this public program for historic preservation are being borne disproportionately by the individual owners of the regulated property rather than proportionately by the public at large. Everyone in society benefits from this program, but only a few bear the costs.

How would the United States Supreme Court answer the issues raised by our hypotheticals?

III. HISTORICAL DEVELOPMENT IN THE SUPREME COURT

The Supreme Court case law on the takings clause has been anything but clear. This body of case law has been criticized, quite correctly in my opinion, as an incoherent, unprincipled, crazy quilt pattern of ad hoc determinations.⁵ Much of the confusion results from the historical distinction drawn by the Court between physical takings and regulatory takings. This confusion also results from the Court's inability to distinguish between the separate issues of whether property has been taken on the one hand, and whether just compensation was required on the other hand.

Physical takings involve governmental activity amounting to a physical invasion of all or part of privately held property.⁶ Here, the Court applies what amounts to a *per se* rule that such activity constitutes a compensable taking. For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*,⁷ a New York statute required all landlords to allow cable television facilities to be installed upon their rental properties in exchange for a one time payment of one dollar.⁸ The Supreme Court, in an opinion written by Justice Marshall, held that since the statute authorized a "permanent physical occupation" of private property, it was caught by the takings clause and required payment of just compensation.⁹

Professor Tribe, as always, speaking from the mainstream of constitutional opinion, criticized the *Loretto* decision in the following restrained and moderate manner: "This obsession with permanent physical invasions of even the most de minimis variety borders on fetishism."¹⁰ Perhaps his point was that since fetishism was involved, the case should have been decided under the unenumerated right of privacy. Regardless, *Loretto* makes clear that most physical invasions of private property trigger the takings clause and call for the payment of just compensation.

Regulatory takings, however, have received only minimal—some would say sub-minimal—scrutiny in the Supreme Court. Regulatory takings involve the government's efforts to regulate the possession, use, or disposition of private property.¹¹ This category of takings can take many forms. Common examples of regulatory takings are comprehensive zoning regulations, use restrictions, lot size restrictions,

5. See Rose, *Mahon Reconstructed: Why The Takings Issue Is Still A Muddle*, 57 S. CAL. L. REV. 561, 562 (1984); J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 403 (3rd ed. 1986).

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

7. *Id.*

8. *Id.* at 421.

9. *Id.* at 441.

10. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 603 (2d ed. 1988).

11. See R. EPSTEIN, *supra* note 4, at 100-01.

maximum height restrictions on improvements, rent control laws, and minimum wage laws. Much of the current confusion surrounding the status of regulatory takings dates back to Justice Holmes' famous statement in *Pennsylvania Coal Co. v. Mahon*,¹² that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."¹³ Normally, whether a regulation goes "too far" depends upon the extent of the diminution in value of the property resulting from the regulation.¹⁴

As Professor Rose has pointed out in her recent article on *Pennsylvania Coal*, Justice Holmes' test raised more questions than it answered. What does "too far" mean? Does a fifty percent diminution in the value of the regulated property amount to a taking? How about a seventy-five percent diminution? Is anything less than a total devaluation constitutionally permissible? Why isn't a taking of fifty percent, or twenty-five percent, or of one percent a taking?¹⁵

The courts have struggled with these and other questions in the sixty-some odd years that have passed since *Pennsylvania Coal* was decided in 1922. The result has been an unprincipled, ad hoc approach that has taken most of the bite out of the fifth amendment's protection of private property against regulatory takings. Under this approach, only the most extreme and totally arbitrary restrictions are captured by the takings clause. As one of the leading texts on constitutional law states:

So long as the zoning ordinance reasonably advances some arguable "police power" interest and does not literally transfer an existing property interest of the owner to the government or other parties, the zoning of property should not require compensation. Although the justices may "balance" public and private interests in these cases, it is assumed that the public interest will prevail unless a property use regulation enriches the government or public by regulations which terminate or eliminate the primary economic value of a property interest.¹⁶

Imagine if the Court were this insensitive when interpreting other provisions of the Bill of Rights. How far could government go in re-

12. 260 U.S. 393 (1922).

13. *Id.* at 415.

14. Justice Holmes put it this way: "One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id.* at 413.

15. See ROSE, *supra* note 5, at 566.

16. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 5, at 405-06. For a recent criticism of the two-tiered system of constitutional review, which affords much greater protection for so-called individual liberties than for economic civil rights, see Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397. Professor Miller concludes that perhaps the time has come for the Supreme Court to "re-examine the wisdom of 'see-no-evil, hear-no-evil' as the prevailing philosophy in economic regulation cases." *Id.* at 428.

stricting freedom of speech, freedom of the press, or privacy if the Court applied a similar level of sub-minimal scrutiny in these areas?

Even a young child knows that there is no distinction in principle between a physical taking and a regulatory taking. To my son, it makes no difference whether I physically take away his playdough, or merely forbid him to play with it. Either way, he has been deprived of his property, and he knows it.

Suppose I tell him that he may use his playdough only to form shapes that are aesthetically pleasing to me—I allow him to make busts of Adam Smith and Ronald Reagan, but not of dinosaurs or Garbage Pail Kids. Does this change the analysis of whether I have taken his property? Not in principle, only in degree. There has still been a taking, although my son's damages may be less than when the taking is absolute.

The same is true concerning governmental regulation of private property. Whether the restriction is small or large, it is a taking of private property that is captured by the takings clause. The size of the taking and the public purpose that animates the regulation go to the public use, compensation, and justification issues which should be addressed separately. When property with a value of one dollar is taken by governmental activity, the Constitution, as properly understood, requires one dollar of compensation to be paid; or, in the alternative, that the government justify its activity by demonstrating which compelling state interest trumps the fundamental right to possession, use, and disposition of private property.

If you are still unconvinced that there is no distinction in principle between a physical taking and a regulatory taking, try the following experiment. Ignore the regulation and develop your property. I guarantee you that it will not be long before the regulators use force to interfere with your use of your property.

Before discussing the 1987 cases, I want to analyze one of the landmark regulatory takings cases, *Penn Central Transportation Co. v. New York City*.¹⁷ The facts of *Penn Central* are remarkably similar to our hypothetical dealing with the landmark preservation ordinance. In 1965, New York City adopted the Landmarks Preservation Law which was designed to protect and preserve historic landmarks and neighborhoods from precipitate decisions to destroy them or to fundamentally alter their character.¹⁸ The law required an owner of a historic building to maintain the exterior of the building in good repair, and placed severe restrictions on the owner's right to alter the exterior architectural features of the building or to construct any exterior

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

18. *Id.* at 109.

improvement on the landmark site.¹⁹ To offset some of the burdens of landmark designation, the law allowed an affected landowner to transfer any unused development rights from landmark properties to other nearby parcels.²⁰

The Landmarks Preservation Commission refused to allow Penn Central to erect a high rise office building above Grand Central Station. The Commission justified its decision on aesthetic grounds, concluding that Penn Central's plan to balance a fifty-five story office building above Grand Central Station was "an aesthetic joke."²¹ The Court, in an opinion by Justice Brennan, held that the landmark restrictions did not effect a taking of Penn Central's property for three reasons:

- 1.) the law did not interfere with Penn Central's existing use of the property as a railroad terminal;
- 2.) it allowed Penn Central to obtain a "reasonable return" on its investment; and
- 3.) the transferable development rights helped mitigate the financial burdens imposed on Penn Central by the regulatory scheme.²²

With all due respect, the Court's analysis in *Penn Central* was seriously flawed. Whether a taking had occurred should have been determined by looking at what was taken by government, not at what the property owner was permitted to retain.²³ The fact that Penn Central was allowed to continue using its property as a profitable railroad terminal establishes only that the taking was partial; it does not establish that no taking occurred. Like my son in our hypothetical, Penn Central's fundamental right to develop its property was restricted by a rule requiring it to do so only in ways that are aesthetically pleasing to the community. Finally, note that the transferable development rights should have been relevant only to the issue of just compensation, not to the issue of whether a taking had occurred.

Professor Richard Epstein recently made another interesting point concerning these transferable development rights. In his book on the law of takings, he put it this way:

One peculiarity of *Penn Central* is that the air rights to be granted Penn Central were over eight properties, including the Biltmore Hotel, the Waldorf-Astoria, and the Yale Club, that Penn Central already owned. How, it must be asked, is the city in a position to grant these rights to Penn Central as compensation for its landmark preservation statute? To do this, the city must first own the rights, which it acquired not by purchase from Penn Central, but by

19. *Id.* at 111-12.

20. *Id.* at 113-14.

21. *Id.* at 117-18.

22. *Id.* at 136-37.

23. See *United States v. Causby*, 328 U.S. 256 (1946) which held: "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken." *Id.* at 261.

zoning. The city's compensation for the loss of air rights thus came from its prior uncompensated takings. It is as though A uses money stolen from B to pay B for property purchased from him thereafter.

This difficulty could be avoided by granting Penn Central air rights over structures it did not own, but only by substituting one embarrassment for another. The city would still have to acquire air rights over these properties, which it would do not by payment of compensation to their present owners, but by zoning. Note the irony. If zoning is mere regulation, then how can the state then convey air rights as compensation to Penn Central? To make TDRs work, we need a theory by which the air rights taken by the state through zoning become property only when they are conveyed by the state. The original confiscation is transparent if the air rights zoned away are then resold for cash, and the matter is not any better when these same air rights are used to acquire other property.²⁴

IV. THE 1987 TAKINGS CASES

Nevertheless, *Penn Central* was still "good law" as the Supreme Court, with a new Chief Justice, William Rehnquist, and a new Associate Justice, Antonin Scalia, geared up for its 1986-87 term. The year 1987 was a busy one for the takings clause in the Supreme Court. No less than seven takings cases were decided during the term, including at least four that may have a major impact on the status of personal economic liberties under the Constitution.²⁵

In the remainder of this commentary, I will give you a brief sketch of what the Court held in those four cases, and then share some preliminary observations on the future significance of those recent developments.

A. *Keystone*

The first significant takings case to be decided in 1987 was *Keystone Bituminous Coal Association v. DeBenedictis*.²⁶ The facts of *Keystone* were identical in all material respects with those of *Pennsylvania Coal*. Remarkably, although the *Keystone* Court was careful to avoid overruling Justice Holmes and his "too far" test in *Pennsylvania Coal*, it reached an opposite conclusion, and held that a Pennsylvania statute which prohibited coal mining that caused subsidence damage to certain buildings and dwellings did not constitute a taking of private property.²⁷

24. R. EPSTEIN, *supra* note 4, at 189-90.

25. See *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987); *Bowen v. Giliard*, 107 S. Ct. 3008 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987); *Hodel v. Irving*, 107 S. Ct. 2076 (1987); *U.S. v. Cherokee Nation*, 107 S. Ct. 1487 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232 (1987); *F.C.C. v. Florida Power Corp.*, 107 S. Ct. 1107 (1987).

26. 107 S. Ct. 1232 (1987).

27. *Id.* at 1251.

To understand the holding in *Keystone*, it is necessary to know that Pennsylvania recognizes three separate physical estates in real property—the surface estate, the mineral estate, and the support estate.²⁸ The owner of the surface estate, as you might expect, acquires the right to possess and improve the surface of real property. The owner of the mineral estate acquires the right to extract minerals from the property. The owner of the support estate has the right to control the removal or non-removal of the layer of coal and earth that supports the surface. Thus, when the owner of the mineral estate also owns the support estate, he has the right to extract coal without regard to whether it causes subsidence damage to the surface estate or any improvements thereon.

Many years ago western Pennsylvania property owners severed the mineral estates and the support estates from the surface estates of much of the land in that region. The coal mining companies typically acquired or retained both the mineral estate and the support estate. Thus, coal mining companies owned the right not only to extract coal deposits from the land, but additionally to do so without any liability to the owners of the surface estates for damages resulting from subsidence.²⁹

In 1966, the Pennsylvania Legislature passed a statute, the Subsidence Act, that prohibited mining that caused subsidence damage to cemeteries, certain public buildings, and dwellings used for human habitation.³⁰ The petitioners in *Keystone*, coal mining companies that owned both the mineral estates and the support estates in certain land affected by the Subsidence Act, brought a civil rights action to enjoin its enforcement. They claimed that the Act violated the takings clause because it completely destroyed their support estates in land affected by the Act, and required them to leave twenty-seven million tons of coal in the ground to provide surface support.

The Court, in an opinion by Justice Stevens, upheld the Subsidence Act against petitioners' takings claim. According to the majority in *Keystone*, the Subsidence Act did not effect a taking because it substantially advanced a legitimate state interest, and did not make it "impossible for petitioners to profitably engage in their business."³¹

Again, these observations of the Court go merely to the public use and just compensation issues, not to the issue of whether a taking occurred. The Subsidence Act confiscated the petitioners' support estates, and compelled them to leave twenty-seven million tons of coal in the ground to provide support to owners of the surface estates who

28. See *id.* at 1238.

29. *Id.* at 1238-39.

30. *Id.* at 1237.

31. *Id.* at 1242.

had expressly bargained away all claims to such support. Surely, this amounts to a taking of private property.

Remarkably, Justice Stevens brushed aside these arguments with a mere stroke of his pen. Said he: "The 27 million tons of coal do not constitute a separate segment of property for takings law purposes,"³² because the petitioners owned additional coal that was not restricted, and because the petitioners had failed to prove that they had been denied "economically viable use" of their coal mining operations.³³

Justice Stevens' refusal to recognize the twenty-seven million tons of coal as a separate segment of property for takings law purposes reminds me of the classic movie, "The Miracle on 34th Street," in which the main character was in court, and had to prove he was Kriss Kringle. Remember that one? Do you remember how he proved it? To prove his case, someone arranged to have the post office deliver the thousands of letters addressed to Kriss Kringle, or Santa Claus, to the courthouse. Bag upon bag of letters were deposited on the judge's bench, until he was practically buried under them. Wouldn't it be great if the coal companies did the same thing to Justice Stevens. Just imagine twenty-seven million tons of coal being dumped into his chambers! Do you suppose he would still find it so easy to deny its existence?

The Bill of Rights got off to a slow start in 1987 with the majority opinion in *Keystone*. There was, however, a powerful dissent in the case, authored by the Chief Justice, and joined by Justices Powell, O'Connor, and Scalia. That dissent perhaps foretold of better days ahead for free men and women.

In his dissent, Chief Justice Rehnquist first chided the majority for refusing to apply *Pennsylvania Coal* to the nearly identical facts of *Keystone*.³⁴ He then reached the merits, criticized the majority's distinction between "regulatory" takings and physical takings,³⁵ and concluded that the Subsidence Act constituted an unconstitutional taking of petitioners' property without just compensation. The Chief Justice summed up his views as follows: "Specifically, the Act works to extinguish petitioners' interest in at least 27 million tons of coal by requiring that coal to be left in the ground, and destroys their purchased support estates."³⁶ This realistic approach to the takings clause was the minority position in *Keystone*. However, its logic and consistency would soon attract a somewhat reluctant majority.

32. *Id.* at 1249.

33. *Id.*

34. "Examination of the relevant factors presented here convinces me that the differences between them and those in *Pennsylvania Coal* verge on the trivial." *Id.* at 1254 (Rehnquist, C.J., dissenting).

35. *Id.* at 1258.

36. *Id.* at 1261.

B. *Hodel*

Hodel v. Irving,³⁷ a regulatory takings case decided just two months after *Keystone*, can be read either as breaking new ground in the law of the takings clause, or as a classic example of results-oriented jurisprudence. Take your pick. As for me, I read it as a significant step toward personal economic liberty.

Hodel concerned an Act of Congress designed to ameliorate the problem of fragmented ownership of Indian lands held in trust by the United States.³⁸ As Indian lands passed from generation to generation, they became splintered, and some parcels literally had hundreds of owners, each with a tiny fractional share.³⁹ Thus, Congress acted to prohibit the passing on at death of small, undivided interests in Indian lands with the goal of helping future generations of Indians make more productive use of their ancestral lands.⁴⁰ The Indian Land Consolidation Act of 1983 provided that no undivided fractional interest in any tract of Indian land should descend by intestacy or devise, but instead should escheat to the tribe "if such interest represent[ed] 2 per centum or less of the total acreage in such tract and [had] earned to its owner less than \$100 in the preceding year."⁴¹

Note the very limited scope of the Act. It applied only to small, fractional interests in land, it did not interfere with an owner's beneficial enjoyment of the property during his lifetime, nor did it interfere with an owner's right to transfer the property *inter vivos*.⁴² The Act merely deprived an owner of the right to transfer a small fractional interest in property, upon death, to his heirs or devisees. It was only a partial interference with the right of disposition. Surely, in light of the recent decision in *Keystone*, a consistent approach to the takings clause would appear to call for a conclusion that the Act did not effect a taking of private property.⁴³

However, the Supreme Court invalidated the escheat provision as an uncompensated taking. Even more remarkable is the sudden conversion of Justice Stevens to the cause of economic civil liberties. Remember that just two months' earlier, in *Keystone*, Justice Stevens refused to recognize that twenty-seven million tons of coal constituted a protected segment of property under the takings clause. In *Hodel*,

37. 107 S. Ct. 2076 (1987).

38. *Id.* at 2079.

39. *Id.* For example, one tract of Indian land contains 40 acres and produces \$1,080 in annual income. It is valued at \$8,000. It has 439 owners, one-third of whom receive less than five cents and two-thirds of whom receive less than one dollar in annual rent. *Id.* at 2081.

40. *Id.*

41. *Id.* at 2079.

42. *See id.* at 2082.

43. *See Andrus v. Allard*, 444 U.S. 51 (1979) (statute prohibiting disposition of eagle feathers, not a taking).

however, he made a U-turn, and suddenly discovered that "[t]he Fifth Amendment draws no distinction between grand larceny and petty larceny."⁴⁴ Justice Stevens' statement echoes my own view of the taking clause. Small or large, complete or partial, long or short, shallow or deep, a taking is a taking.

I want to make one more point concerning Justice Stevens' concurrence in *Hodel*, because I don't want to leave you with the wrong impression. Clearly, he concurred in the judgment of the Court, but he did so on due process grounds, rather than under the takings clause. He concluded that the escheat provision violated the due process clause of the fifth amendment because it did not give the affected land owners a fair opportunity to consolidate their holdings by voluntary transfers in order to avoid its application. However, in most instances, regulations affecting property rights do not provide a "fair opportunity" for property owners to avoid application of the regulations. In *Keystone*, for example, the Subsidence Act specifically ignored the private ordering of the right of support. The State of Pennsylvania instead chose to appropriate by decree the power to control the surface support of certain tracts of mineral-laden land. So we still have to ask ourselves which Justice Stevens we believe—the pro-regulation, "police power hawk" in *Keystone*, or the champion of property rights, against both grand and petty governmental larceny, in *Hodel*.

C. *First English*

Less than one month after *Hodel*, the Court decided what is certain to be a landmark case in the law of takings. This case, *First English Evangelical Lutheran Church v. County of Los Angeles*,⁴⁵ concerned a church whose summer camp for handicapped children had been destroyed by a flood. Subsequently, the County of Los Angeles enacted a flood control ordinance that prohibited the construction of any building or structure on the property.⁴⁶ The trial court held that, under California law, a landowner may not maintain an inverse condemnation action to recover just compensation in a regulatory takings case.⁴⁷ Therefore, it granted a motion to strike the church's inverse condemnation claim.⁴⁸

The Supreme Court held that once it is determined a regulatory

44. *Hodel v. Irving*, 107 S. Ct. 2076, 2089 (1987) (Stevens, J., concurring).

45. 107 S. Ct. 2378 (1987).

46. *Id.* at 2381-82.

47. *Id.* at 2382 (citing *Agins v. Tiburon*, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980)).

48. *Id.* The trial court concluded that "compensation is not required until the challenged regulation or ordinance has been held excessive in an action for declaratory relief or a writ of mandamus and the government has nevertheless decided to continue the regulation in effect." *Id.*

scheme effects a taking, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."⁴⁹ In other words, the state cannot avoid its duty to pay compensation for the period during which the taking was effective by repealing or abandoning the regulation.

This holding is significant, because it raises the stakes for regulators in what some commentators have referred to as the "zoning game." If a regulation goes "too far," and thus effects a taking, it is no longer sufficient for the government to merely apologize and abandon the confiscatory regulation. Damages must be paid for the "temporary taking," and, at least when major real estate developments are concerned, these temporary damages can be significant.

Suppose, for example, that a local government zones Blackacre for single-family use only; however, the owner of Blackacre wishes to use the property for commercial purposes. The landowner challenges the restriction, and, after spending several years pursuing his claim before administrative bodies and in the courts, he establishes that the regulation is unconstitutional. May the local government merely repeal the regulation, or must it compensate the property owner for the temporary taking? Note that without a compensation remedy the property owner is at the mercy of the regulators. In a recent book, two commentators described the situation this way: "One common practice, if the municipality lost the decision, was to rezone the property . . . and in effect invite [the property owner] to bring another lawsuit. If, for example, the plaintiff wanted . . . [commercial zoning] for property zoned single-family (R-1), the municipality would reclassify the land to duplex (R-2)."⁵⁰ As still another commentator has observed, this game can continue for many years "until the property owner exhausts his patience, his sanity, his wealth, his time on earth, or all four."⁵¹

First English established that the game is changing and the free lunch has ended for regulators. Now, when a regulation effects a taking, just compensation must be paid for the period during which the taking was in effect.

This case is significant for a number of other reasons. First, it provides further evidence, following *Hodel*, that the distinction between physical takings and regulatory takings is eroding. For example, when seeking guidance on the question whether temporary regulatory takings require compensation, the *First English* majority looked to cases in which the government had physically appropriated property

49. *Id.* at 2389.

50. R. BABCOCK & C. SIEMON, *THE ZONING GAME REVISITED* 288 n.4 (1985).

51. Berger & Kanner, *Thoughts on The White River Junction Manifesto: A Reply To The "Gang of Five's" Views On Just Compensation For Regulatory Taking of Property*, 19 LOYOLA OF L.A.L. REV. 685, 734 (1986).

for some temporary period of time.⁵² Moreover, as Justice Stevens pointed out in his dissent, a straightforward application of the diminution in value test for regulatory takings would consider the duration of the taking as only one factor in the analysis of whether the regulation has gone "too far." The majority rejected this restrictive approach in favor of a *per se* rule—once it is determined that the restrictions on use go too far, and thus constitute a taking, the government may not relieve itself of the obligation to provide compensation by withdrawing the regulation. Second, the decision probably signals the end of the road for land use moratoria because almost by definition the typical moratorium would appear to constitute a temporary taking.⁵³

A third significant point concerning the potential impact of *First English* is that it is certain to alter the dialogue between regulators and property owners. Government officials will be reluctant to reach too far when regulating property because of the potential liability for temporary takings established by *First English*. Perhaps a spokesman for the National Association of Home Builders summed it up best when he said: "It's a terrific decision. This will have a deterrent effect on those governments that know they're going too far. They're going to be more careful now about enacting draconian land use regulations."⁵⁴

D. *Nollan*

Less than three weeks after *First English*, the other shoe fell with the Supreme Court's decision in *Nollan v. California Coastal Commission*.⁵⁵ James and Marilyn Nollan were owners of a small, beachfront lot in Ventura County, California. Their journey to the Supreme Court began when they applied to the California Coastal Commission for a coastal development permit that would allow them to demolish a small, run down bungalow, and replace it with a modern, three bedroom home. The Commission sought to impose an exaction on approval of the permit. This exaction would allow the Nollans to build their dream house subject to the condition that they grant and record an easement for a public right-of-way across their private beach. This

52. "In considering this question, we find substantial guidance in cases where the government has only temporarily exercised its right to use private property." *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378, 2387 (1987).

53. See R. BEST, NEW CONSTITUTIONAL STANDARDS FOR LAND USE REGULATION: PORTENTS OF NOLLAN AND FIRST ENGLISH CHURCH 11-12 (1987). This paper is available from the Pacific Legal Foundation, a public interest law firm which participated in *First English* as an amicus curiae.

54. *Top Court Deals Blow to Limits on Land Use*, Chicago Sun Times, June 10, 1987, at 12, quoted in, Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 HASTINGS L.J. 335, 337 (1988).

55. 107 S. Ct. 3141 (1987).

easement would allow the public lateral access between two public beaches, one of which was located to the north and the other to the south of the Nollans' private beach.

The Supreme Court, in a 5-4 decision, found this to be a taking, and invalidated the right-of-way exaction. Justice Scalia wrote a very strong majority opinion in which he criticized the Commission's scheme as effecting "an out-and-out plan of extortion."⁵⁶ Moreover, he clearly recognized that the development of private property is a right belonging to landowners, not a privilege or benefit granted by government.⁵⁷ Truly, a long neglected liberty has found a powerful new champion in Justice Scalia.

Significantly, the *Nollan* Court appears to have adopted a heightened level of scrutiny for land use regulations challenged under the takings clause.

As discussed earlier, the Court has, for quite some time, applied a minimal (or even a sub-minimal) standard of review in regulatory takings cases. Under that prior standard, the regulation was upheld so long as: 1) it reasonably advanced some arguable police power interest; and 2) it did not totally eliminate the primary economic value of the property.⁵⁸ *Nollan* dealt with the first of these requirements—the required connection between the ends and the means of the regulation. For example, the end or purpose sought to be advanced in *Nollan* was protection of the public's asserted right of "visual access" to the beach. The means employed to further this purpose was the exaction of a right-of-way easement over the Nollans' private beach.

Justice Scalia carefully examined the relationship between the ends and the means of the challenged regulation, and held that the means, the right-of-way exaction, did not substantially advance the ends of protecting visual access to the beach. He explained his conclusion as follows: "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house."⁵⁹ Thus, even though the easement did not greatly diminish the value of the Nollans' land, it could not be taken without compensation.

56. *Id.* at 3148.

57. *Id.* at 3146 n.2. *Nollan* thus presents a public analogy to the private law doctrine of duress of goods. Seen in this light, the choice imposed upon the Nollans by the Coastal Commission ("you may develop your property, so long as you grant us an easement for lateral access") is a close substitute for the choice given a robbery victim by a mugger who at gunpoint says "you may keep your diamond ring, if you agree to give me your money." See Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 40. As such, *Nollan* is "a case of coercion and not of trade." *Id.*

58. See *supra* note 16 and accompanying text.

59. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3149 (1987).

Moreover, Justice Scalia made it a point to warn regulators that the new standard was a substantive one that could not easily be circumvented by more skillful drafting of regulations. He put it this way: "We view the Fifth Amendment's property clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination."⁶⁰

Regrettably, the majority opinion did not provide a precise description of the new standard. In fact, the change seems to be more one of commitment than of language; the *Nollan* Court breathed new life and meaning into the long articulated standard that a land use regulation must substantially advance some legitimate state interest.⁶¹

As I read Justice Scalia's opinion, the Supreme Court has decided to take the fifth amendment seriously, and stop serving as a rubber stamp for land use restrictions. It is no longer sufficient for regulators to lip sync the words "health and safety" when restricting private property. The Court is now willing to scrutinize property regulations to insure that, to borrow a phrase from Justice Brennan's dissenting opinion, there is a "precise fit" between the regulation and the harm against which the regulation is directed.⁶² This is judicial activism as it was meant to be. The Court did not manufacture new constitutional liberties, it simply upheld its oath to vigorously enforce rights expressly embodied within the four corners of the Constitution.

IV. CONCLUSION

In conclusion, allow me to repeat the question posed at the beginning of this commentary. Have the 1987 takings cases restored some bite to the fifth amendment's protection of private property? To continue the metaphor, let me put the answer this way. The Supreme Court has removed the dentures from the cup and has put them back on. However, it is too early to tell whether the Court is willing to do more than nibble at the edges of the regulatory state.

I had hoped that the Court would use a recent challenge to San Jose's rent control ordinance as an opportunity to shed further light on its new approach to the takings clause. That case, *Pennell v. City of San Jose*,⁶³ concerned a rent control ordinance under which a landlord is automatically entitled to an annual rent increase of as much as eight percent; however, a hearing is required if the landlord wishes to in-

60. *Id.* at 3150.

61. *See id.* at 3146. Professor Epstein suggests that the *Nollan* Court "has abandoned the 'rational basis' test of prior land use cases . . . in favor of a standard demanding intermediate scrutiny of government restrictions." Epstein, *supra* note 57, at 38.

62. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3153 (Brennan, J., dissenting).

63. 108 S. Ct. 849 (1988).

crease the rent by more than eight percent and the tenant objects. At the hearing, the hearing officer is required to consider whether the proposed increase would cause "an unreasonably severe financial or economic hardship on a particular tenant."⁶⁴ The Court held that a facial attack on the hardship provision under the takings clause was "premature" because there was no evidence that the provision had ever been applied to reduce a proposed rent increase.⁶⁵

Thus, the Court ducked the merits and, once again, demonstrated its determination to deal with takings challenges on a case by case, "as applied" basis. However, *Pennell* is significant in at least one respect. Justice Scalia wrote a scathing dissent in which he reached the merits, and concluded that the tenant hardship provision was an unconstitutional attempt "to establish a welfare program privately funded by those landlords who happen to have 'hardship' tenants."⁶⁶

So what do the 1987 takings cases teach us about the current status of the law of takings in the Supreme Court?

We know from *Hodel* and *First English* that the distinction between physical takings and regulatory takings is beginning to erode. However, we do not know whether the Court will adopt the logical conclusion that the "too far" test is unsupportable and that even small regulatory takings are caught by the takings clause.

We know from *First English* that once it is determined that a regulation effects an unconstitutional taking just compensation must be paid for the period during which the regulation was in effect. Therefore, government may not relieve itself of the obligation to provide compensation for a temporary taking by withdrawing the regulation.

We know from *Nollan* that the Supreme Court clearly recognizes that the development of land is an intrinsic right of ownership, not a privilege or benefit which may be granted or withheld at the whim of government. We also know from *Nollan* that the Court appears to have adopted a heightened standard of review in regulatory exaction cases. However, we do not have a clear picture of the substantive terms of the new standard. Nor do we know whether it will be applied generally in regulatory takings cases.

We know that Justice Scalia has emerged as a forceful champion of economic civil rights, but we do not know whether he will be able to build a lasting consensus on the Court around these issues.

Perhaps the practical significance of the 1987 takings cases was best summed up by Robert K. Best, a lawyer who heads up Property Rights Litigation for the Pacific Legal Foundation, and who was involved in both the *Nollan* and *First English* litigation. Mr. Best said that

64. *Id.* at 854.

65. *Id.* at 856.

66. *Id.* at 863 (Scalia, J., dissenting).

although the practical ramifications of these cases will depend upon future developments in the courts, one thing is clear. The terms of the debate have changed. In early 1987, the question was: "How much further can government go in restricting property use and forcing property owners to fund community programs?" Following the 1987 Supreme Court cases, however, the debate has shifted its focus, and the question has become: How far must government retreat from the "excessive conduct of the past?"⁶⁷

As for me, I like the new debate much more than I did the old.

67. See R. BEST, *supra* note 53, at 2. On March 15, 1988, President Reagan issued an executive order calling on federal departments and agencies to comply with the recent Supreme Court takings cases. Executive Order 12,630 calls on government officials to "be sensitive to, anticipate, and account for, the obligations imposed by the Just Compensation Clause of the Fifth Amendment in planning and carrying out governmental actions." Exec. Order No. 12,630, 53 Fed. Reg. 8,859 (1988). A recent New York case construed *First English* and *Nollan*, and concluded that a New York City law regulating buildings containing single-room occupancy units violated the takings clause. See *Seawall Associates v. City of New York*, 138 Misc. 2d 96, 523 N.Y.S.2d 353 (Sup. Ct. N.Y. Co. 1987).