

# The Death of Regulatory Takings

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This symposium volume illustrates how regulatory takings doctrine—at least as applied in the classic dispute between domestic regulator and real property owner—has fallen into a well-defined pattern yielding predictable results. A decade ago, when these takings conferences began, academics routinely described takings law as a hopelessly confused field of law,<sup>1</sup> and litigators faced a slew of crucial and interesting legal questions in deciding how best to represent their clients. The situation is so different today that one is tempted to announce the death of regulatory takings.<sup>2</sup>

Some of the crucial questions confronting those who attended the first conference in 1998 included:

1. Most basically, what is the function of regulatory takings doctrine? Is the purpose to provide monetary compensation to those who have been unfairly singled out to bear economic burdens to advance some public goal? Or is the purpose to prevent government from regulating in an ineffective or unwise fashion? Or is it some combination of both?
2. Assuming that economic impact is an important, if not essential component of takings analysis, how is it to be measured? Is the “relevant parcel” the particular stick in the bundle of rights that is subject to a regulatory constraint, or is it some larger collection of the owner’s property interests? The more narrowly the relevant parcel is defined, the broader the scope of regulatory takings doctrine.
3. What is the scope of the “per se” test announced in *Lucas v. South Carolina Coastal Council*<sup>3</sup> and how does the test relate to

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1. See James E. Krier, *The Takings-Puzzle Puzzle*, 38 WM. & MARY L. REV. 1143, 1143 (1996–1997) (“Regulatory takings are widely regarded as a puzzle. . . . [T]he opening cliché in most of the scholarly commentary is that the law in this area is a bewildering mess.”).

2. Cf. GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

3. 505 U.S. 1003 (1992).

the Court's multi-factor analysis announced in *Penn Central Transportation Co. v. New York City*?<sup>4</sup> More specifically, how is the reasonableness of a claimant's investment expectations relevant in regulatory takings analysis, and what is the meaning and significance of the so-called "character" factor?

4. Finally, in determining whether or not a regulatory taking has occurred, is an explicitly temporary regulatory restriction fundamentally different in kind from a permanent or indefinite restriction on property use?

Today, the U.S. Supreme Court has provided clear—if not necessarily completely satisfying—answers to all of these questions.

First, in *Lingle v. Chevron U.S.A. Inc.*, the Supreme Court repudiated the often cited, if seldom applied, notion that a regulation constitutes a taking if it fails to "substantially advance a legitimate government interest,"<sup>5</sup> indicating that the focus of the takings inquiry is on the burdensomeness of a regulation rather than its rationality or effectiveness. *Lingle* involved a challenge to a complex rent control scheme in Hawaii designed to constrain the rent gasoline wholesalers could charge gasoline dealers for their stations. The lower courts struck down the statute under the Takings Clause on the ground that the law would likely fail to accomplish the stated goal of controlling retail gas prices. The Supreme Court reversed, observing that a regulatory takings case focuses on the "severity of the burden" imposed by a regulation, and that the substantially advances inquiry "reveals nothing" about the burden imposed by a regulation and therefore has no place in takings law.<sup>6</sup> The basic task in every regulatory takings case, the Court said, is "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."<sup>7</sup> By jettisoning one distinct line of takings analysis supported by prior Supreme Court precedent, and in the process honing what remains of the doctrine, "*Lingle* [brought] a remarkable coherence to the Court's confused regulatory takings doctrine."<sup>8</sup>

Second, in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,<sup>9</sup> the Supreme Court resolved that the parcel as a whole is the relevant unit for takings analysis. When a case involves a challenge to a regulatory use restriction, the Court ruled, the assessment of

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4. 438 U.S. 104, 138 (1978).

5. 544 U.S. 528, 548 (2005).

6. *Id.* at 542.

7. *Id.* at 539.

8. Robert G. Dreher, *Lingle's Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371, 372 (2006).

9. 535 U.S. 302 (2002).

economic impact focuses not on the restricted portion of the property, but on the entire parcel, which in a real estate context typically means the takings claimant's contiguous landholding.<sup>10</sup> While the Supreme Court had seemingly embraced the parcel-as-a-whole rule in 1978 in the *Penn Central* case, the Court's decisions in *Lucas* and *Palazzolo v. Rhode Island*<sup>11</sup> appeared to signal a willingness to reopen the issue. The Court's comprehensive and definitive resolution of the issue in *Tahoe-Sierra* should put the question to bed.

Third, *Tahoe-Sierra* also marked a sharp tilt in favor of the multi-factor *Penn Central* analysis and away from the more automatic takings rule of *Lucas*. The Court said that “[o]ur polestar... remains the principles set forth in *Penn Central*,”<sup>12</sup> and confined the *Lucas* test to the situation where regulation results in a “complete elimination of value.” It is the rare, bordering on apocryphal, case when a regulation renders property valueless. Indeed the Supreme Court in *Lucas* appeared skeptical about the finding by the trial court in that case that the regulation made the property valueless. Thus, after *Tahoe-Sierra* the *Lucas* rule might not even properly apply to the *Lucas* case itself and is, regardless, virtually meaningless in practice. The upshot is that in the future nearly all takings litigation will occur under the *Penn Central* framework. This in turn means that the analysis in future takings cases must take into account the reasonableness of the owner's investment expectations (was the regulation already in place when the claimant purchased the property, was the purchaser on notice that new regulations were on the horizon?) as well as the character of the regulation (was the regulation designed to restrict harmful activity, is the regulation targeted at one or a few owners or does it apply to many in the community)?<sup>13</sup>

Fourth, again in *Tahoe-Sierra*, the Court resolved that a temporary restriction is qualitatively different from a permanent or indefinite restriction on the use of real property. The Court reasoned that the parcel-as-a-whole rule must apply not only to the metes and bounds of the property, but to the temporal dimension as well. Because a regulation that is expressly temporary in nature restricts only a part of a property interest over time, it is unlikely to rise to the level of a taking.

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10. See *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451 (Mass. 2006) (concluding that takings analysis should employ a rebuttable presumption that a claimant's contiguous commonly owned property defines the relevant parcel), *cert. denied*, 167 L. Ed. 2d 321 (2007).

11. 533 U.S. 606, 617 (2001).

12. 535 U.S. at 336, quoting *Palazzolo*, 533 U.S. at 633.

13. See John Echeverria, *Making Sense of Penn Central*, 23 UCLA J. ENVTL. L. & POL'Y 171 (2005).

The articles in this symposium largely confirm the newly settled character of takings law by avoiding a discussion of these foundational issues. The same conference held a half-dozen years ago was replete with learned debates about the legitimacy of the substantially advance test, the appropriate definition of the relevant parcel in takings cases, and the other basic issues discussed above. Those questions no longer preoccupy takings scholars because they have been asked and answered. Therefore, many of the articles in the current volume look beyond the paradigmatic domestic takings challenge to land use regulations, and instead consider what might be described as the outer frontiers of takings law.

Robert Meltz and Richard Frank, co-authors of a leading book on takings law,<sup>14</sup> respectively offer up-to-date summaries of regulatory takings doctrine generally, and of California takings law. The article by Robert Meltz, *Takings Law Today: A Primer for the Perplexed*, provides an encyclopedic yet concise description and analysis of the major substantive issues likely to arise in regulatory takings litigation. This piece will serve as an invaluable tool for those seeking an introduction to regulatory takings law, and even “[t]akings mavens may find it useful as a checklist for missed arguments.”<sup>15</sup> Richard Frank’s companion piece, *The Dog that Didn’t Bark, Imperial Water, I Love L.A., and Other Tales from the California Takings Litigation Front*, offers a more impressionistic update of takings law in California. The piece highlights the important decisions in *Regency Outdoor Advertising, Inc. v. City of Los Angeles*,<sup>16</sup> rejecting a billboard operator’s claim to a property right to have its advertising seen by passing motorists, and *Allegretti & Co. v. County of Imperial*,<sup>17</sup> rejecting the controversial theory that a regulatory restriction on the use of water should be treated as a per se taking.

Professor Andrea Peterson offers a counterpoint to my theme of predictable normalcy in regulatory takings doctrine by suggesting that the sharp distinction drawn by the Supreme Court’s recent decisions between physical occupations and regulatory restrictions is fundamentally incoherent. In *The False Dichotomy Between Physical and Regulatory Takings Analysis: A Critique of Tahoe-Sierra’s Distinction Between Physical and Regulatory Takings*, she argues that there is no basis, either in principle or in the Supreme Court’s prior decisions, for a sharp distinction between these two categories of alleged takings. She further argues that in resolving both kinds of cases the courts should focus on the

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14. ROBERT MELTZ, DWIGHT H. MERRIAM & RICHARD M. FRANK, *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND-USE CONTROL AND ENVIRONMENTAL REGULATION* (1999).

15. Robert Meltz, *Takings Law Today, a Primer for the Perplexed*, 34 *ECOLOGY L.Q.* 307 (2007).

16. 39 Cal. 4th 507 (2006).

17. 42 Cal. Rptr. 3d 122 (Ct. App. 2006), *cert. denied*, 127 S. Ct. 960 (2007).

purpose of the government action, and in particular on the property owner's blameworthiness.

Four articles focus on takings issues on the shore and on the high seas. Professor Joseph Sax, in his speech *Reflections on Western Water Law*, identifies water as "a new central battlefield for the definition of property rights,"<sup>18</sup> and uses it to explain why, as a matter of theory, our society has generally chosen to impose the costs of transitions in social values on people even if they have been caught up in such transitions through no fault of their own. Meg Caldwell and Craig Segall, in *No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access Along the California Coast*, identify several policy imperatives suggested by the prospect of sea level rise, including stronger regulation of new coastal development and greater controls on applications to armor the coast, and offer some thinking on how likely takings challenges would be analyzed.

"*Waterlocked*": *Public Access to New Jersey's Coastline*, by Timothy M. Mulvaney and Brian Weeks, explores how New Jersey courts have used the public trust doctrine to protect public access rights, explaining that because the doctrine represents a "background principle" of state property law, its enforcement has not given rise to meritorious takings claims. Finally, Professor Josh Eagle explains how longstanding notions of public rights in fish and other wildlife have supported plenary government authority over fishing in the Exclusive Economic Zone. However, pointing to the Magnuson-Stevens Fishery Conservation and Management Act, he also explains that preserving government's constitutional authority to regulate is hardly a guarantee that government will regulate well.

Professor Peter Menell, the Director of the Berkeley Center for Law and Technology, critically examines the efforts of property rights advocates, led by Professor Richard Epstein, to defend an absolutist conception of property rights in the field of intellectual property. *The Property Rights Movement's Embrace of Intellectual Property: True Love or Doomed Relationship?* concludes that, for a host of legal, economic, and political reasons, a strong property rights regime is ill suited to the needs of a dynamic, resource-sensitive intellectual property system. Ironically, he concludes that the rise of intellectual property disputes, like recent water resource conflicts, is likely to highlight the complexity and interdependence of property systems generally.

Professor Nicole Garnett's article, *Planning as Public Use*, examines the Supreme Court's decision in *Kelo v. City of New London*, which, notwithstanding the significant public controversy it generated, offered "nothing surprising" by upholding the use of eminent domain for

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18. Joseph Sax, *Reflections on Western Water Law*, 34 *ECOLOGY L.Q.* 299, 301 (2007).

economic development.<sup>19</sup> Professor Garnett focuses on one of the novel aspects of the decision—the suggestion that the exercise of eminent domain in the context of a “comprehensive plan” should provide greater assurance that a taking actually serves a “public use.” She provides a preliminary, skeptical assessment of whether planning will reduce the dignitary harms associated with eminent domain, help reveal disguised private takings, or improve the likelihood that economic redevelopment projects will succeed.

Two articles, one by Professor J. Peter Byrne and another by Professor William D. Araiza, explore legal fields in which one might expect to see greater activity in the wake of the recent narrowing of regulatory takings doctrine: due process and equal protection. In *Due Process Land Use Claims After Lingle*, Professor Byrne explains that *Lingle* expressly directs those who wish to challenge the wisdom or efficacy of government action to sue under the Due Process Clause rather than the Takings Clause. At the same time, he observes that *Lingle* may not herald a boom in due process land use cases, particularly in federal court, because “*Lingle* actually may be more important for reemphasizing the need for federal deference to zoning judgments than in rejecting the Takings Clause as a textual basis for review.”<sup>20</sup> He concludes that state courts may be more able and willing than federal courts to use due process review to enhance judicial supervision of local land use decision making.

In *Irrationality and Animus in Class-of-One Equal Protection Cases*, Professor Araiza explores the implications of what he calls the Supreme Court’s “overly generous” holding in *Village of Willowbrook v. Olech*,<sup>21</sup> that an individual can state a viable “class of one” equal protection claim merely by asserting that the government treated him or her differently from comparable individuals and that the treatment was irrational. While concluding that the concern that *Olech* would open litigation floodgates has proven to be overblown, he argues that the Court should eventually reconsider *Olech* and relocate irrationality class-of-one cases in due process jurisprudence.

Paul Kibel explores one aspect of perhaps the fastest growing, most unsettled, and least understood kind of regulatory taking litigation—claims for compensation under the investor-protection provisions of the North American Free Trade Agreement and other similar regional and bilateral trade agreements. *Grasp on Water: A Natural Resource that Eludes NAFTA’s Notion of Investment* explains how the pervasiveness

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19. Nicole Garnett, *Planning as Public Use*, 34 ECOLOGY L.Q. 435, 435 (2007).

20. J. Peter Byrne, *Due Process Land Use Claims After Lingle*, 34 ECOLOGY L.Q. 461 (2007).

21. 528 U.S. 562 (2000).

of international investment and the fluidity of investment vehicles may create a large new body of takings law that will differ in certain respects from U.S. takings law. Focusing on investor-state claims involving water resources, Kibel examines whether the term “investment” allows for recognition of the same kinds of limitations on private rights in water resources that are recognized under U.S. law.

Finally, Professor Nancy A. McLaughlin discusses the land protection tool of conservation easements, which typically are established on a voluntary basis, in exchange for some level of public payment, and at least ostensibly to accomplish some perpetual conservation purpose. *Conservation Easements: Perpetuity and Beyond* examines what happens when circumstances change and easement restrictions need to be lifted or modified. Professor McLaughlin argues that easements should be treated like any other charitable asset subject to equitable charitable trust principles. She also observes that the goal of permanent protection is not appropriate in all cases and calls for more discriminating use of the easement tool in the future.

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With the resolution of most of the fundamental questions that, until recently, plagued this field of law, it is likely that both scholars and the courts will continue to shift attention to the implications of takings claims in unconventional contexts. The articles in this symposium volume effectively reflect the current state and future direction of the takings issue. The organizers of this conference are grateful to the authors for all of their thoughtful and diligent work, and to the editors of *Ecology Law Quarterly* for accepting the challenge of bringing this work to print.

