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The Brooding Omnipresence of Regulatory Takings: Urban Origins and Effects

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THE BROODING OMNIPRESENCE OF REGULATORY TAKINGS: URBAN ORIGINS AND EFFECTS

Essay

Michael Allan Wolf^{*}

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INTRODUCTION: TAKINGS FROM THE TOP

The concept of a regulatory taking, or technically “inverse condemnation,” made its first appearance on page ten of the very first issue of the *Fordham Urban Law Journal* in 1972, when New York Attorney General Louis J. Lefkowitz made the following observation in his lead article: “The courts have reduced the scope of [the *usque ad coelum*] doctrine, allowing an owner aggrieved by noise from overflights to recover damages for what is termed an inverse condemnation, while holding that the doctrine does not justify the granting of an injunction against overflights.”¹ That first article—

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1. Louis J. Lefkowitz, *Jamaica Bay: An Urban Marshland in Transition*, 1 FORDHAM URB. L.J. 1, 10 (1972).

Jamaica Bay: An Urban Marshland in Transition—is an early example of what we now call “urban environmental law,”² in which the author discussed public trust, wetlands protection, NEPA, public nuisance, and noise, air, and water pollution. He looked forward to federal protection for the bay, which became a reality on October 27 of the same year as the Gateway National Recreational Area.³

The tension between private property and the public interest was just below the surface of the text of Attorney General Lefkowitz’s article, much like the creatures clinging to life in the murky, polluted waters of the bay.⁴ Over the course of the next four decades, as all levels of government engaged in a growing and exceedingly diverse set of environmentally flavored land use regulations, this tension rose to the surface and began to dominate legal discussions—in legal briefs and court decisions, in the classroom, and in expert commentary, including, of course, in the pages of the *Fordham Urban Law Journal* itself.⁵

Metropolitan New York City was the geographic focus of Lefkowitz’s inaugural article, a reminder that “urban” and “environmental” are not necessarily distinct descriptors. The same city was the setting for two important and, I believe, regrettable Supreme Court decisions that set the stage for legal murkiness that lingers to this day.⁶ While many of the Court’s regulatory takings cases came to the justices from the nation’s coastal regions,⁷ the fact remains that the “brooding omnipresence”⁸ of regulatory takings is decidedly urban in its origins and continues to have many important implications in the field of urban law.

2. See, e.g., Nicholas A. Robinson, *Urban Environmental Law: Emergent Citizens’ Rights for the Aesthetic, the Spiritual, and the Spacious*, 4 FORDHAM URB. L.J. 467 (1976).

3. See Act of Oct. 27, 1972, Pub. L. No. 92-592, 86 Stat. 1308.

4. See, e.g., Lefkowitz, *supra* note 1, at 3–4 (“The effect of all this dumping, filling and outright pollution on Jamaica Bay’s once thriving shellfish industry has been predictably devastating.”).

5. See *infra* Table I and notes 98–109 and accompanying text.

6. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

7. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981).

8. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

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I. FROM SCRANTON TO THE BIG APPLE: CITY SETTINGS FOR THE REGULATORY TAKINGS DRAMA

We have Justice Oliver Wendell Holmes, Jr., the pride of Brahmin Boston, to thank for the term “brooding omnipresence” and for the jurisprudential curiosity we now call regulatory takings. The phrase first appeared in Holmes’s dissenting opinion in 1917’s *Southern Pacific Co. v. Jensen*,⁹ a dispute concerning the validity of New York’s “Workmen’s Compensation Act.”¹⁰ Justice Holmes observed that “[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified; although some decisions with which I have disagreed seem to me to have forgotten the fact.”¹¹ In 1922, Holmes’s seminal regulatory takings opinion in *Pennsylvania Coal Co. v. Mahon*¹² concerned a dispute over coal-rich land in Scranton, Pennsylvania—the 47th largest city in the United States according to the 1920 Census, with a population of over 137,000.¹³ Counsel for the city submitted several photographs to the Supreme Court depicting severe damage to houses, apartments, streets, a cemetery, and public buildings in Scranton caused by mine caves.¹⁴ While William Fischel has raised serious questions about the facts on and below the ground,¹⁵ it is indisputable that the case counsel presented to the Court involved the Kohler Act’s impact in an urban setting.¹⁶

For the next forty years, Holmes’s eminently unhelpful and precedent-deficient “too far” test lay dormant, at least as applied to cases involving regulation of real property.¹⁷ This period, of course,

9. *Id.*

10. 1914 N.Y. Laws 216–51.

11. *S. Pac. Co.*, 244 U.S. at 222 (Holmes, J., dissenting).

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

13. *Population of the 100 Largest Urban Places: 1920*, U.S. CENSUS BUREAU (June 15, 1998), <http://www.census.gov/population/www/documentation/twps0027/tab15.txt>.

14. Exhibits in Connection with Brief of the City of Scranton, Intervenor, Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922) (No. 549).

15. See WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 26 (1995) (“Surface damage . . . seems to have been episodic and limited; cities were not literally falling into the earth.”).

16. See *Pa. Coal Co.*, 260 U.S. at 394.

17. See, e.g., Charles M. Haar & Michael Allan Wolf, *Euclid Lives: The Survival of Progressive Jurisprudence*, 115 HARV. L. REV. 2158, 2165–66 (2002) (“[T]he majority opinion in *Pennsylvania Coal* apparently had little impact on how the Court analyzed the legitimacy of regulations affecting the use and development of land in the years immediately following the issuance of the opinion.”). Between the year of the *Pennsylvania Coal* decision (1922) and the year of the *Penn Central* decision

included the heyday of early zoning cases from 1926 to 1928—even *Nectow v. City of Cambridge*¹⁸ and *Washington ex rel. Seattle Title Trust Co. v. Roberge*,¹⁹ which were landowner victories. In 1962, after toying with inverse condemnation in cases such as *United States v. Causby*²⁰ (low-flying aircraft), *Armstrong v. United States*²¹ (material liens), and *Griggs v. Allegheny County, Pennsylvania*²² (low-altitude flights), it looked as if the justices were prepared to revisit the constitutionality of land use regulation when they agreed to hear *Goldblatt v. Town of Hempstead, New York*,²³ an ultimately unsuccessful takings challenge to a New York suburb’s regulation of dredging and pit excavating. Today, *Goldblatt* is probably most notable because Mario Matthew Cuomo—the future New York governor (and current Governor Andrew Cuomo’s father)—was one of the attorneys listed on the appellee town’s brief.²⁴ *Mahon* was cited in passing, not even quoted,²⁵ and it would be another sixteen years until the Court dipped its toes into the regulatory taking waters.

(1978), the Court cited Justice Holmes’s opinion in only one case involving land use regulation. See *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590, 594 (1962) (holding that an ordinance that regulated excavation within the town limits was a valid exercise of the police power and not unconstitutional).

18. 277 U.S. 183, 188–89 (1928) (“That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained.”).

19. 278 U.S. 116, 121–22 (1928) (“[Section 3(c) of the zoning ordinance] purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home.”).

20. 328 U.S. 256, 266 (1946) (“Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.”).

21. 364 U.S. 40, 49 (1960) (“Neither the boats’ immunity, after being acquired by the Government, from enforcement of the liens nor the use of a contract to take title relieves the Government from its constitutional obligation to pay just compensation for the value of the liens the petitioners lost and of which loss the Government was the direct, positive beneficiary.”).

22. 369 U.S. 84, 90 (1962) (“Without the ‘approach areas,’ an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough.”).

23. 369 U.S. 590, 590–91 (1962).

24. See Brief for Appellee, *Goldblatt v. Town of Hempstead, N.Y.*, 369 U.S. 590 (1962) (No. 78), 1961 WL 101618.

25. *Goldblatt*, 369 U.S. at 594 (“This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation.”).

The ghost of Holmes's "too far" test was finally exhumed in *Penn Central Transportation Co. v. City of New York*,²⁶ in a problematic opinion written by one of the most liberal justices in the Court's long and distinguished history—Newark, New Jersey's William J. Brennan, Jr.²⁷ Joining Justice William Rehnquist's dissent was Chief Justice Warren Burger and the Court's newest member—Chicago's own John Paul Stevens. President Gerald Ford appointed Stevens to replace William O. Douglas, the uber-liberal that then-House Republican Leader Ford tried to impeach in 1970.²⁸ But, before we get to the exegetical excesses of *Penn Central*, we need to pause to consider the state of expert commentary and state court jurisprudence regarding regulations that might (or might not) amount to takings requiring compensation.

II. EXPERT COMMENTARY BEFORE THE FLOOD

One needs only the number of toes on one foot to count the leading, then-recent law review articles available to the many judges and lawyers at the time of the *Fordham Urban Law Journal's* founding, who were struggling to distinguish police power regulations of land use from uncompensated takings (and the number of digits on Homer Simpson's hand to count the number of authors of those articles). Here, in chronological order, is my list (which may well be too subjective to pass any empirical test): Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law* by Allison Dunham;²⁹ *Takings and the Police Power* by Joseph L. Sax;³⁰ *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* by Frank I. Michelman;³¹ *Taking or Damaging by Police Power: The Search for Inverse*

26. 438 U.S. 104, 152 (1978).

27. For details on Justice Brennan's life, see generally SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* (2010).

28. See, e.g., BRUCE ALLEN MURPHY, *WILD BILL: THE LIFE AND LEGEND OF WILLIAM O. DOUGLAS* 415–18, 430 (2003); Congressman Gerald R. Ford, House Republican Leader, Remarks Prepared for Delivery on the Floor of the U.S. House of Representatives (Apr. 15, 1970), available at <http://www.fordlibrarymuseum.gov/library/speeches/700415.pdf>.

29. Allison Dunham, Griggs v. Allegheny County *in Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63 (1962).

30. Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

31. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

Condemnation Criteria by Arvo Van Alstyne;³² and *Takings, Private Property and Public Rights* by Sax.³³ A few representative quotations from each article will help recreate the tone and substance of the takings conversation during the early 1970s.

Even as early as 1962, Professor Dunham, an established property scholar at the University of Chicago, referred to “a crazy-quilt pattern of Supreme Court doctrine on the law of expropriation.”³⁴ After reviewing the cases involving “Police Power Versus Eminent-Domain Power,”³⁵ he concluded, “The most that the Court has been able to develop as guiding principles are indications of some of the factors it considers relevant. The weight to be assigned to these factors in any given case has not yet been disclosed.”³⁶ Most unfortunately, this left the justices merely to “follow the Holmesian tradition of stating that property expectations may be damaged ‘to a certain extent’ but ‘if regulation goes too far it will be recognized as a taking.’”³⁷

Two years later, Joe Sax, a newly minted associate professor at the University of Colorado, came out of the gate with his first of two takings pieces in the *Yale Law Journal*. Like Dunham, Sax bemoaned the puzzling state of takings jurisprudence, noting that “the predominant characteristic of this area of law is a welter of confusing and apparently incompatible results.”³⁸ With the confidence and chutzpah of youth, Sax proposed what he called a “workable rule of law”³⁹ for distinguishing between regulations and takings. On the one hand, “when economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking.”⁴⁰ On the other hand, “losses, however severe, incurred as a consequence of government acting merely in its arbitral capacity are to be viewed as a non-compensable exercise of the police power.”⁴¹ Now, wasn’t that easy?

32. Arvo Van Alstyne, *Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*, 44 S. CAL. L. REV. 1 (1971).

33. Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

34. Dunham, *supra* note 29, at 63.

35. *Id.* at 73.

36. *Id.* at 81.

37. *Id.* (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

38. Sax, *supra* note 30, at 37.

39. *Id.* at 63.

40. *Id.*

41. *Id.*

In 1967, Michelman, recently promoted to full professor at Harvard, entered the fray with a piece published in the law review from his home school. This impressively dense piece would prove to be highly influential.⁴² What is often forgotten about *Property, Utility, and Fairness* is that the author chose not to engage in “efforts to arrive at a systematic restatement of the legal doctrine [à la Dunham], or to reformulate doctrine, redirect it, or overhaul it [à la Sax]”⁴³ In fact, what Michelman “counselled” in this piece was “a de-emphasis of reliance on judicial action as a method of dealing with the problem of compensation.”⁴⁴ If litigants, counsel, and the courts had heeded young Michelman’s advice, only my fellow legal historians and I would be talking about that relic once known as “regulatory taking.” Thanks to this groundbreaking article, takings scholars can all recite “that compensation is due whenever demoralization costs exceed settlement costs, and not otherwise.”⁴⁵ But just because we can use words to describe what is “fair” and “efficient” does not mean that we can rely on the courts to achieve those goals.

The next major offering from the legal academy was a 1971 article by University of Utah law professor Arvo Van Alstyne, who echoed the complaints of his predecessors regarding the sorry state of takings law: “With some exceptions, the decisional law is largely characterized by confusing and incompatible results, often explained in conclusory terminology, circular reasoning and empty rhetoric.”⁴⁶ With the benefit of hindsight, we can easily say, *plus ça change, plus c’est la même chose*. Despite those significant barriers, Van Alstyne chose to analyze “three broad categories of recurring situations in which claims of unconstitutional taking or damaging of private property, as a result of regulatory measures, have been repeatedly asserted.”⁴⁷ The three categories included regulation of personal property and activity, land use controls, and “[r]egulations requiring property owners to engage in specified conduct at their own expense, or to make prescribed contributions or expenditures for specified

42. See, e.g., Margaret Jane Radin, *In Tribute: Frank I. Michelman*, 125 HARV. L. REV. 896, 897 (2012) (“Little did I know at the time I first read it that *Property, Utility, and Fairness*, published in 1967, was Frank’s first big foray into the world of scholarship. It became one of the few such works with lasting impact.”).

43. Michelman, *supra* note 31, at 1167.

44. *Id.*

45. *Id.* at 1215.

46. Van Alstyne, *supra* note 32, at 2.

47. *Id.* at 3.

public purposes”⁴⁸ Like Michelman, Van Alstyne saw little evidence that the courts were up to the task of bringing sense to this wide-ranging expanse of issues, so he recommended turning to elected lawmakers, as “it seems clear that the legislature has the capability for defining limits and providing remedial techniques which will strike a better balance than is now the case between the competing interests in social order and private justice.”⁴⁹

Also in 1971, Joe Sax, now a full professor at the University of Michigan, took another bite out of the Fifth Amendment apple in his second Yale piece in less than a half-decade⁵⁰—a stellar pair of journal placements then and now. What makes this accomplishment even more impressive was the author’s confession that he did not get it exactly right the first time around: “I am compelled . . . to disown the view that whenever government can be said to be acquiring resources for its own account, compensation must be paid.”⁵¹ Upon reconsideration, Sax “view[ed] the problem as considerably more complex.”⁵² Thankfully we don’t have to speculate as to the reasons why Sax was “compelled” to reconceive the concept.⁵³ The first, “external” reason was the development of an entirely new field, a field in which Sax’s words and ideas would have a profound impact for decades—modern environmental law: “Contemporary interest in environmental quality has spawned various attempts at property regulation, many of which actually or potentially collide with the takings provision.”⁵⁴ The second, “internal” reason, prompted by the first, was Sax’s realization that “the traditional view of property rights, which focuses solely on activities occurring within the physical boundaries of the user’s property” needed to be replaced “with a view founded on a recognition of the interconnectedness between various uses of seemingly unrelated pieces of property.”⁵⁵ Here’s the ultra-Saxy payoff: “Once property is seen as an interdependent network of competing uses, rather than as a number of independent and isolated entities, property rights and the law of takings are open for modification”⁵⁶—that is, the shift from Sax 1964 to Sax 1971.

48. *Id.* at 48.

49. *Id.* at 73.

50. *See* Sax, *supra* note 30.

51. Sax, *supra* note 33, at 150 n.5.

52. *Id.*

53. *Id.* at 150.

54. *Id.* at 149.

55. *Id.* at 150.

56. *Id.*

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There was a distinctively Coasean/Calabresian tone⁵⁷ to Sax redux: “[T]he goal of the system ought to be to identify that constituency which, if charged with the costs of accommodating the conflict, would have a large stake in a lower cost solution, and which is capable of organizing to cope with the problem.”⁵⁸ To this theoretical development, we can say: *encore plus ça change!*

At this point, one year before the founding of the *Fordham Urban Law Journal* and seven years before *Penn Central*, much of this regulatory takings discussion was not highly relevant to the work of the Supreme Court, a tribunal that, as noted previously, was basically out of the land use regulation business.⁵⁹ In the decade before the *Journal's* founding, there was an increasing flurry of activity in state courts owing to the growing acceptance of zoning, floodplain regulation, wetlands restrictions, and open space and historic preservation.⁶⁰ Many of these cases were discussed, catalogued, and

57. See, e.g., James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 440 (1995) (“Ronald Coase’s essay on *The Problem of Social Cost* introduced the world to transaction costs, and the introduction laid the foundation for an ongoing cottage industry in law and economics. And of all the law-and-economics scholarship built on Coase’s insights, perhaps the most widely known and influential contribution has been Calabresi and Melamed’s discussion of what they called ‘property rules’ and ‘liability rules.’”) (citing Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972)).

58. Sax, *supra* note 33, at 182.

59. See *supra* notes 24–26 and accompanying text.

60. See, e.g., *Dooley v. Town Plan & Zoning Comm’n*, 197 A.2d 770, 773 (Conn. 1964) (“[T]he change of zone to flood plain district froze the area into a practically unusable state. The uses which are presently permitted in the new zone place such limitations on the area that the enforcement of the regulation amounts, in effect, to a practical confiscation of the land.”); *Maher v. City of New Orleans*, 235 So. 2d 402, 406 (La. 1970) (“[A] review thereof does establish to our complete satisfaction the fact that the Maher cottage composed part of the elusive ‘tout ensemble’ of the Vieux Carre . . . and that it does have architectural value.”); *State v. Johnson*, 265 A.2d 711, 716 (Me. 1970) (“The application of the Wetlands restriction in the terms of the denial of appellants’ proposal to fill, and enjoining them from so doing deprives them of the reasonable use of their property and . . . is both an unreasonable exercise of police power and equivalent to taking within constitutional considerations.”); *Morris Cnty. Land Improvement Co. v. Twp. of Parsipanny-Troy Hills*, 193 A.2d 232, 234 (N.J. 1963) (“The fundamental question in this case is the constitutional validity of provisions of defendant township’s zoning ordinance which greatly restrict the use of swampland and have for their prime object the retention of the land substantially in its natural state, essentially for public purposes.”); *Nat’l Land & Inv. Co. v. Kohn*, 215 A.2d 597, 611 (Pa. 1965) (“If the preservation of open spaces is the township objective, there are means by which this can be accomplished which include authorization for ‘cluster zoning’ or condemnation of development rights with compensation paid for that which is taken.”).

criticized in the articles noted above,⁶¹ but again there was no coherence, no regularity, no predictability.

III. LIBERAL JUSTICES AND PRIVATE PROPERTY RIGHTS PROTECTION: A COMPLEX DYNAMIC

Things did not get better—in fact they got much worse—when the Court rendered its opinion in New York City’s favor in *Penn Central*. The Brennan majority’s ad hoc, multi-part, balancing test⁶² certainly was not necessary. The heart of the case was the Court’s attempt to fit landmark designation into the Euclidean zoning mode, which came with generous judicial deference.⁶³ That is why Justice Rehnquist opened his dissent by showing how few city landowners were targeted by designation and by stating that “[o]nly in the most superficial sense of the word can this be said to involve ‘zoning.’”⁶⁴

Even though the takings discussion was dictum, given that the landmark law fit comfortably under the police power umbrella,⁶⁵ Justice Brennan and his colleagues should have been more careful in

61. See, e.g., Sax, *supra* note 33 at 149 n.4.

62. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (“In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”) (citation omitted).

63. See, e.g., *id.* at 125 (“More importantly for the present case, in instances in which a state tribunal reasonably concluded that ‘the health, safety, morals, or general welfare’ would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests.”); *id.* at 131 (“Appellants concede that the decisions sustaining other land-use regulations, which, like the New York City law, are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a ‘taking.’”); *id.* at 133–34 (“Similarly, zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account. For example, the property owner in [*Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).] who wished to use its property for industrial purposes was affected far more severely by the ordinance than its neighbors who wished to use their land for residences.”).

64. *Id.* at 139 (Rehnquist, C.J., dissenting).

65. See, e.g., *id.* at 135 (“This is no more an appropriation of property by government for its own uses than is a zoning law prohibiting, for ‘aesthetic’ reasons, two or more adult theaters within a specified area, or a safety regulation prohibiting excavations below a certain level.”) (citation omitted).

the terms they employed in key passages of the decision. After all, the essence of constitutional lawmaking is the written word. Most worrisome was the majority's repeated use of the words "substantial" and "substantially," as, for example, when the Court observed that "[i]t is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a *substantial public purpose*,"⁶⁶ when the Court identified *Pennsylvania Coal* as "the leading case for the proposition that a state statute that *substantially furthers* important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking,'"⁶⁷ or, most problematically, when the majority concluded that "the restrictions imposed are *substantially related* to the promotion of the general welfare."⁶⁸

Justice Brennan would live to regret these usages nine years later, when Justice Antonin Scalia, in his opinion for the majority in *Nollan v. California Coastal Commission*⁶⁹ asserted, in opposition to Justice Brennan's stinging dissent, that the Court's "verbal formulations in the takings field have generally been quite different" from those used in due process and equal protection challenges.⁷⁰ While Justice Brennan asserted that "[i]t is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State 'could rationally have decided' that the measure adopted might achieve the State's objective,"⁷¹ Justice Scalia demurred, throwing in for good measure a quotation from his opponent:

We have long recognized that land-use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," *Agins v. Tiburon*, 447 U.S. 255, 260 . . . (1980). See also *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 . . . (1978) ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose").⁷²

66. *Id.* at 127 (emphasis added).

67. *Id.* (emphasis added).

68. *Id.* at 138 (emphasis added).

69. 483 U.S. 825 (1987).

70. *Id.* at 834 n.3.

71. *Id.* at 843 (Brennan, J., dissenting) (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)).

72. *Id.* at 834.

Also unfortunate was the *Penn Central* majority's treatment of *Village of Euclid, Ohio v. Ambler Realty Co.*⁷³ (a facial challenge to zoning resolved on due process and equal protection grounds) as if it were a takings case,⁷⁴ a practice that would be replicated time and again,⁷⁵ including the majority opinion in *Nollan*.⁷⁶ Moreover, the author would be remiss in failing to point out that regulatory takings scholarship appeared to have only a minimal impact on the Court's ruling in *Penn Central*, the chief example being a curious reworking of a Michelman phrase ("distinct [later 'reasonable'⁷⁷] investment-backed expectations"⁷⁸)—without attribution.⁷⁹

In *Penn Central*, Justice Brennan, a longstanding hero to those on the ideological left, was not just humoring those colleagues who had a strong attachment to private property rights in order to garner their votes in favor of historic preservation. As a member of the Supreme Court of New Jersey from 1952 until his elevation to the nation's highest tribunal in 1956⁸⁰—an important geographical and temporal setting in the development of American zoning law—Justice Brennan participated in several influential zoning decisions. In *Katobimar Realty Co. v. Webster*,⁸¹ for example, while the majority struck down

73. 272 U.S. 365 (1926).

74. See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131 ("Appellants concede that the decisions sustaining other land-use regulations . . . uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking'" (citing *Vill. of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926))).

75. See, e.g., *Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 645 (1993); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1066 (1992) (Stevens, J., dissenting). There are dozens of state and lower federal court opinions that repeat the error. See, e.g., *Rith Energy, Inc. v. United States*, 270 F.3d 1347, 1349 (Fed. Cir. 2001); *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381, 394 (1988); *Bd. of Zoning Appeals, Bloomington, Ind. v. Leisz*, 702 N.E.2d 1026, 1030 (Ind. 1998).

76. See *Nollan*, 483 U.S. at 834–36.

77. *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

78. *Penn Central*, 438 U.S. at 127.

79. See Barton H. Thomson, Jr., *The Allure of Consequential Fit*, 51 ALA. L. REV. 1261 (2000). Professor Thomson has noted, that "[t]he Supreme Court's current preoccupation in the takings arena with 'investment-backed expectations' . . . actually stems from a misreading of Frank Michelman's landmark 1967 article," *id.* at 1291, explaining that "Michelman coined the term to explain why the taking of a mere subset of property might require compensation, not as a general explanation for when a governmental regulation should be found to be a taking," *id.* at 1291 n.160.

80. See, e.g., *William J. Brennan, Jr.*, OYEZ, http://www.oyez.org/justices/william_j_brennan_jr (last visited Oct. 21, 2013).

81. 118 A.2d 824 (N.J. 1955).

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a local government's experiment with noncumulative zoning,⁸² Justice Brennan dissented, choosing in this instance to defer to the expertise of local officials:

New Jersey has witnessed a marked and salutary change in the judicial attitude toward municipal zoning over the past decade. Long overdue recognition of the legitimate aspirations of the community to further its proper social, economic and political progress, and of the propriety of requiring individual landowners to defer to the greater public good, have replaced the narrow concepts held by former courts. Present-day decisions rightly give maximum play to the philosophy underlying our constitutional and statutory zoning provisions that localities may decide for themselves what zoning best serves and furthers the local public welfare, subject only to the rule of reason forbidding arbitrary and capricious action.⁸³

There was a limit to this deference, however, as illustrated by the Supreme Court of New Jersey's decision in *Reid Development Corp. v. Parsippany-Troy Hills Township*.⁸⁴ In that decision, a unanimous court (including Justice Brennan) disapproved of the local government's attempt to abuse its discretionary authority, concluding that "the extension of the [publicly owned] water facilities was plaintiff's [Reid's] right; and it was an abuse of discretion to use the grant as a means of coercing the landowner into acceptance of the minimum lot-size restriction upon his lands, however serviceable to the common good."⁸⁵

That same tension between the judge's obligation to defer to the other government branches when they operate in their areas of expertise and the judge's obligation to protect individuals from abuse of state power is reflected in Justice Brennan's *Penn Central* opinion, warts and all. The predominant tone of the majority opinion was deferential, situating landmark designation with more familiar forms

82. *See id.* at 832 ("We are here concerned with the exclusion of a retail commercial use from a light industrial zone, in an area where such use is in keeping with the environment, if not indeed with the permissible light industrial uses. This is not a question of 'liberal' zoning, but of zoning comporting with the constitutional rights of private property and the equal protection of the laws."). For a discussion on noncumulative zoning, see CHARLES M. HAAR & MICHAEL ALLAN WOLF, *LAND USE PLANNING AND THE ENVIRONMENT: A CASEBOOK* 162-63 (2010); DANIEL R. MANDELKER, *LAND USE LAW* 5-43 (5th ed. 2003).

83. *Katobimar*, 118 A.2d at 832 (Brennan, J., dissenting).

84. 89 A.2d 667 (N.J. 1952).

85. *Id.* at 671.

of land use regulation such as zoning.⁸⁶ Nevertheless, Justice Brennan's serious invocation in *Penn Central* of the Holmesian notion that regulations can, under certain circumstances, result in unconstitutional takings would signal—as would others of his opinions that directly confronted local government overreaching and illegality⁸⁷—that there were important libertarian values at stake in need of protection.

Justice Brennan's concerns about local governments riding roughshod over the rights of private property owners became crystal clear in his influential dissent in the 1981 decision, *San Diego Gas & Electric Co.*⁸⁸ In his dissent, Justice Brennan took the time (and several pages) to weave a strong argument for the compensability of regulatory takings, noting that to the property owner an onerous regulation is the same as outright condemnation by eminent domain.⁸⁹ After the Court's 2005 decision in *Lingle v. Chevron U.S.A. Inc.*,⁹⁰ we refer to this as being “functionally equivalent.”⁹¹

86. *See, e.g.*, *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 133 (1978) (“[T]here is no basis whatsoever for a conclusion that courts will have any greater difficulty identifying arbitrary or discriminatory action in the context of landmark regulation than in the context of classic zoning or indeed in any other context.”).

87. *See, e.g.*, *Cnty. Commc'ns Co. v. Boulder*, 455 U.S. 40, 43, 57 (1982) (answering “no” to the question of “whether a ‘home rule’ municipality, granted by the state constitution extensive powers of self-government in local and municipal matters, enjoys the ‘state action’ exemption from Sherman Act liability”); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 523 (1981) (Brennan, J., concurring) (“San Diego’s billboard regulation bans all commercial and noncommercial billboard advertising with a few limited exceptions” (footnote omitted)); *id.* at 528 (“I would invalidate the San Diego ordinance. The city has failed to provide adequate justification for its substantial restriction on protected activity.”); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978) (“Local governing bodies, therefore, can be sued directly under [42 U.S.C.] § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers.” (footnote omitted)).

88. 450 U.S. 621 (1981).

89. *Id.* at 652 (Brennan, J., dissenting) (“From the property owner’s point of view, it may matter little whether his land is condemned or flooded, or whether it is restricted by regulation to use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it.”).

90. 544 U.S. 528 (2005).

91. *Id.* at 539 (“Although our regulatory takings jurisprudence cannot be characterized as unified, these three inquiries . . . share a common touchstone. Each aims 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.”).

Nor was Brennan the only hard-left justice to listen to the siren song of inverse condemnation and regulatory takings.⁹² One year after *San Diego Gas*, Baltimore's civil rights icon, Justice Thurgood Marshall (who had joined Brennan's dissent) authored the Court's six-member majority opinion in another Big Apple special—*Loretto v. Teleprompter Manhattan CATV Corp.*⁹³ To Marshall and the five other justices forming the majority, this case was simple—in its long history, the Court had “invariably found” that “a permanent physical occupation of real property” was a taking.⁹⁴ In this case, the physical invasion was effected by a cable television installation that eventually made the landlord's building (and an adjoining structure) “cable-ready.” Marshall's opinion, which seemed simply to build on a long line of precedents cited by Michelman and other takings commentators,⁹⁵ planted three seeds that, in others' hands, blossomed into takings trouble.

First, the *Loretto* Court introduced the notion of a *per se* taking.⁹⁶ A decade later, in *Lucas v. South Carolina Coastal Council*,⁹⁷ Justice Antonin Scalia would follow Marshall's lead by “recognizing” a second categorical taking (total deprivation of what some still call, based on a term used in the *Penn Central* oral argument,⁹⁸

92. We should also remember that, on occasion, William O. Douglas included private property owners under the ample umbrella he constructed to protect individual liberties. *See, e.g.*, *Chongris v. Corrigan*, 409 U.S. 919, 920 (1972) (Douglas, J., dissenting) (“It is a nice question when police power comes to an end as a justification for public taking of private property.”); *Griggs v. Allegheny Cnty., Pa.*, 369 U.S. 84, 90 (1962) (“Respondent in designing [the glide path for a runway] had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough.”); *United States v. Causby*, 328 U.S. 256, 261 (1946) (“If, by reason of the frequency and altitude of the flights, respondents could not use this land for any purpose, their loss would be complete. It would be as complete as if the United States had entered upon the surface of the land and taken exclusive possession of it.”(footnote omitted)).

93. 458 U.S. 419 (1982).

94. *Id.* at 427.

95. *See, e.g., id.* at 427 n.5 (citing Michelman, Dunham, and other commentators).

96. *See, e.g., id.* at 435 n.12 (citation omitted) (“The dissent objects that the distinction between a permanent physical occupation and a temporary invasion will not always be clear. This objection is overstated, and in any event is irrelevant to the critical point that a permanent physical occupation *is* unquestionably a taking. In the antitrust area, similarly, this Court has not declined to apply a *per se* rule simply because a court must, at the boundary of the rule, apply the rule of reason and engage in a more complex balancing analysis.”).

97. 505 U.S. 1003 (1992).

98. *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 n.36 (“The city conceded at oral argument that if appellants can demonstrate at some point in

“economically viable” use).⁹⁹ Second, *Loretto* opened the door for future challenges to a wide range of regulatory activity, such as (to cite two New York City examples) residential rent control¹⁰⁰ and Single Room Occupancy (SRO) conversion restrictions¹⁰¹ that appeared to involve a government-compelled occupation by the public. Third, by focusing on physical occupation (while ignoring the favorable economic impact of the challenged regulation), the Court made conceivable a new type of taking—exactions takings, such as in *Nollan* and *Dolan v. City of Tigard*.¹⁰² In those controversial decisions, landowners who were granted permission to *enhance* the value of their parcels—permission that could have easily and constitutionally been withheld—were able to prove that when the government practically “gave,” it illegally “took.”¹⁰³

the future that circumstances have so changed that the Terminal ceases to be ‘economically viable,’ appellants may obtain relief.”).

99. See *Lucas*, 505 U.S. at 1015–16 (“The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation ‘does not substantially advance legitimate state interests or *denies an owner economically viable use of his land.*’” (citations omitted) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980))). Unfortunately for advocates and judges seeking clarity in this muddled field, Justice Scalia did not settle on one usage to describe the extent of a *per se* deprivation, but instead varied his language: “all economically beneficial or productive use,” *id.* at 1015, “all economically beneficial use,” *id.* at 1027, “deprivation of all economically feasible use,” *id.* at 1016 n.7, “no productive or economically beneficial use,” *id.* at 1017, “economically idle,” *id.* at 1019, and “eliminate all economically valuable use,” *id.* at 1028.

100. See *Harmon v. Markus*, 412 Fed. App’x 420, 422 (2d Cir. 2011) (summary order) (“Here, the Harmons argue principally that the [New York City Rent Stabilization Law] effects permanent physical occupation of their property on the ground that it affords their tenants ‘rights and protections having attributes of fee ownership.’” (quoting Brief for Plaintiffs-Appellants at 14, *Harmon v. Marcus*, 412 Fed. App’x 420 (2d Cir. 2011) (No. 10-1126-CV), 2011 WL 494370, at *13)).

101. See *Seawall Assocs. v. City of New York*, 542 N.E.2d 1059, 1065 (N.Y. 1989) (“We conclude that Local Law No. 9 has effected a *per se* physical taking because it ‘[interferes] so drastically’ with the SRO property owners’ fundamental rights to possess and to exclude. The law requires nothing less of the owners than ‘to suffer the physical occupation of [their] [buildings] by third [parties].’” (quoting *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 836 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-36 (1982))).

102. 512 U.S. 374 (1994).

103. As the Court explained in its most recent regulatory takings decision, “In [*Nollan* and *Dolan*,] we held that a unit of government may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government’s demand and the effects of the proposed land use.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2591 (2013).

Justice Stevens, a jurist often identified with the ideological left like his colleagues Brennan and Marshall, stood firmly for private property rights protection as well, at least early in his tenure on the high court. Justice Stevens began his takings “career” by joining fellow Republican-appointee William Rehnquist’s opinions in dissent in *Penn Central* and (a year later, in 1979) for the Court in *Kaiser Aetna v. United States*.¹⁰⁴ Decades later in his long and distinguished membership on the Court, Stevens penned a devastating critique of property rights activism in 2002’s *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.¹⁰⁵ Between these two bookends, the reader of Justice Stevens’s opinions can perceive this distinguished jurist’s frustration with some colleagues’ attempts to add muscle to Holmes’s skeletal “too far” formulation. Indeed, Justice Stevens even penned the 1987 opinion that challenged Holmes’s concepts on the same turf—Pennsylvania coal mining.¹⁰⁶

This author’s personal favorite among the Stevens regulatory takings opus is his dissent in *Nollan*, featuring the following passage:

I write today to identify the severe tension between that dramatic development in the law and the view expressed by Justice Brennan’s dissent in this case that the public interest is served by encouraging state agencies to exercise considerable flexibility in responding to private desires for development in a way that threatens the preservation of public resources. I like the hat that Justice Brennan has donned today better than the one he wore in *San Diego*, and I am persuaded that he has the better of the legal arguments here. Even if his position prevailed in this case, however, it would be of little solace to land-use planners who would still be left guessing about how the Court will react to the next case, and the one after that. As this case demonstrates, the rule of liability created by the Court in *First English* is a shortsighted one. Like Justice Brennan, I hope that “a broader vision ultimately prevails.”¹⁰⁷

As a former fellow traveler with the Court’s pro-takings wing, Justice Stevens could sympathize with Brennan’s dilemma. It is unfortunate that, during the end of his last Term on the Court, Justice Stevens chose to recuse himself in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,¹⁰⁸ for we all

104. 444 U.S. 164 (1979).

105. 535 U.S. 302 (2002).

106. See *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987).

107. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825, 867 (1987) (Stevens, J., dissenting) (citation omitted).

108. 130 S. Ct. 2592 (2010).

would have benefited from his insights regarding the private property right movement's latest Golem—judicial takings.¹⁰⁹ That might have been *some* swan song!

IV. COURTS AND COMMENTARY: FORTY YEARS OF REGULATORY TAKINGS SCHOLARSHIP IN THE FORDHAM URBAN LAW JOURNAL

Inspired by the Gotham takings twins—*Penn Central* and *Loretto*—the Supreme Court—especially the growing conservative bloc¹¹⁰—decided a growing number of regulatory takings challenges during the childhood, adolescence, and early adulthood of the *Fordham Urban Law Journal*. While many of the cases have resulted in government victories,¹¹¹ there have been some significant wins for private property rights advocates.¹¹² Accompanying, prodding, and analyzing this growing body of law not only in the high court but in state and lower federal tribunals, has been a mushrooming library of legal scholarship. The pages of this highly respected law journal over its forty-year run have featured an impressive array of regulatory takings pieces by professors, students, and others, as noted in Table 1.

109. See *id.* at 2602 (plurality opinion) (“If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.”).

110. For a provocative survey of property rights cases in the high court that relies on Justice Harry Blackmun’s papers, see Richard J. Lazarus, *The Measure of a Justice: Justice Scalia and the Faltering of the Property Rights Movement Within the Supreme Court*, 57 HASTINGS L.J. 759 (2006).

111. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Tahoe-Sierra Pres. Council v. Tahoe Reg’l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Andrus v. Allard*, 444 U.S. 51 (1979).

112. See, e.g., *Ark. Game & Fish Comm’n v. United States*, 133 S. Ct. 511 (2012); *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999); *Babbitt v. Youpee*, 519 U.S. 234 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. S.C. Coastal Council*, 483 U.S. 825 (1992); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

TABLE 1

REGULATORY TAKINGS SCHOLARSHIP IN THE
FORDHAM URBAN LAW JOURNAL

- Mary Spearing, Note, *Landmark Preservation: The Problem of the Tax-Exempt Owner*, 3 FORDHAM URB. L.J. 123 (1974).
- Richard Wolloch, Note, *Penn Central v. City of New York: A Landmark Landmark Case*, 6 FORDHAM URB. L.J. 667 (1978).
- Constance W. Cranch, Comment, *The Regulation of Rental Apartment Conversions*, 8 FORDHAM URB. L.J. 507, 534–39 (1980).
- Samuel A. Turvey, Comment, *Beyond the Taking Issue: Emerging Procedural Due Process Issues in Local Landmark Preservation Programs*, 10 FORDHAM URB. L.J. 441 (1982).
- John Martinez, *Reconstructing the Takings Doctrine by Redefining Property and Sovereignty*, 16 FORDHAM URB. L.J. 157 (1988).
- Ross B. Lipsker & Rebecca L. Heldt, *Regulatory Taking: A Contract Approach*, 16 FORDHAM URB. L.J. 195 (1988).
- Judith A. Gilbert, *Tenements and Takings: Tenement House Department of New York v. Moeschen as a Counterpoint to Lochner v. New York*, 18 FORDHAM URB. L.J. 437 (1991).
- R.S. Radford, *Book Review, Land Use Regulation and Legal Rhetoric; Broadening the Terms of the Debate*, 21 FORDHAM URB. L.J. 413 (1994) (reviewing Dennis J. Coyle, *Property Rights and the Constitution: Shaping Society Through Land Use Regulation* (1993)).
- William Michael Treanor, *Takings Law and the Regulatory State: A Response to R.S. Radford*, 22 FORDHAM URB. L.J. 453 (1995).
- Daniel William Russo, Note, *Protecting Property Rights with Strict Scrutiny: An Argument for the “Specifically and Uniquely Attributable” Standard*, 25 FORDHAM URB. L.J. 575 (1998).
- Robert W. DiUbaldo, Comment, *A Second Take: Re-Examining Our Regulatory Takings Jurisprudence Post-Tahoe*, 30 FORDHAM URB. L.J. 1949 (2003).
- Jane B. Baron, *Winding Toward the Heart of the Takings Muddle: Kelo, Lingle, and Public Discourse About Private Property*, 34 FORDHAM URB. L.J. 613 (2007).
- Laura J. Hatcher, *The Odyssey of Palazzolo: Public Rights Litigation and Coastal Change*, 36 FORDHAM URB. L.J. 849 (2009).

The course of takings scholarship, in the pages of this journal as elsewhere, was subject to unanticipated ebbs and flows, much like the law in the Supreme Court, as illustrated by the evolution of Justice Stevens's takings jurisprudence. Even before the Supreme Court's reinvigoration of regulatory takings in *Penn Central*, student commentators Spearling and Wolloch addressed the ways in which historic preservation pitted private rights against the public good.¹¹³ Interest in the constitutional implications of historic preservation remained keen even after the Court spoke, as illustrated by Turvey's 1982 exploration of potential procedural due process vulnerabilities.¹¹⁴ Cranch's exploration of the constitutionality of condominium conversion moratoria, a controversial local government program in the 1970s and early 1980s, included analysis of the regulatory takings issues.¹¹⁵

After an eight-year hiatus, during which the Supreme Court (in cases such as *San Diego Gas*) failed to directly confront the question of whether property owners affected by regulatory takings (like those whose properties are taken by the affirmative exercise of eminent domain itself) are entitled to just compensation in the form of monetary relief, the justices presented three important substantive decisions in 1987: *Nollan v. California Coastal Commission*,¹¹⁶ *First English Evangelical Lutheran Church v. County of Los Angeles*,¹¹⁷ and *Keystone Bituminous Coal Ass'n v. DeBenedictis*.¹¹⁸ These three decisions, the first two victories for the private property rights movement, provided ample fodder for academic debates over the nature, extent, and implications of regulatory takings. During the following year, the pages of the *Fordham Urban Law Journal* featured a fascinating pair of articles: Martinez's "first step toward reconstruction of existing takings doctrine along functional lines,"¹¹⁹

113. Mary Spearling, Note, *Landmark Preservation: The Problem of the Tax-Exempt Owner*, 3 FORDHAM URB. L.J. 123 (1974); Richard Wolloch, Note, *Penn Central v. City of New York: A Landmark Landmark Case*, 6 FORDHAM URB. L.J. 667 (1978).

114. Samuel A. Turvey, Comment, *Beyond the Taking Issue: Emerging Procedural Due Process Issues in Local Landmark Preservation Programs*, 10 FORDHAM URB. L.J. 441 (1982).

115. Constance W. Cranch, Comment, *The Regulation of Rental Apartment Conversions*, 8 FORDHAM URB. L.J. 507, 534-39 (1980).

116. 483 U.S. 825 (1987).

117. 482 U.S. 304 (1987).

118. 480 U.S. 470 (1987).

119. John Martinez, *Reconstructing the Takings Doctrine by Redefining Property and Sovereignty*, 16 FORDHAM URB. L.J. 157, 194 (1988).

and Lipsker and Heldt's proposed contract strategy as "a more clearly defined and more easily applied approach to the regulatory takings problem."¹²⁰ Unfortunately, and despite the best efforts of these creative commentators, the confusion among, and engendered by, the justices continues to this day.

In the 1990s, journal contributors and their readers shifted the focus to the history and ideology informing the Takings Clause and the police power. Gilbert wonderfully explored the litigation establishing the constitutionality of the New York Tenement House Act of 1901, despite the onerous financial burden the law allegedly placed on landlords.¹²¹ The profound ideological gap between regulatory takings advocates and skeptics was dramatically illustrated by Radford's generally favorable review of an attempt to address "the existing pro-regulatory bias in the [private property rights] literature."¹²² This review prompted Fordham law professor (and future dean) William Michael Treanor to respond by pointing out that "[t]here is a critical threshold problem with using this text [the Takings Clause] to require compensation for regulations: the language of the Clause doesn't apply to regulations at all."¹²³ Russo's Note proposed a more demanding standard for exactions cases like *Nollan* and *Dolan*, arguing that increasing the protections for property owners would be consistent with the framers' intent and with the political realities of local government regulation.¹²⁴

The new century brought no clarity to the takings issue, only new wrinkles and complications. The most recent regulatory takings contributions to this journal were all bold attempts to make sense, and address the wider implications, of the Court's decisions in

120. Ross B. Lipsker & Rebecca L. Heldt, *Regulatory Taking: A Contract Approach*, 16 FORDHAM URB. L.J. 195, 260 (1988).

121. See Judith A. Gilbert, *Tenements and Takings: Tenement House Department of New York v. Moeschel as a Counterpoint to Lochner v. New York*, 18 FORDHAM URB. L.J. 437 (1990); see also *Tenement House Dep't v. Moeschel*, 72 N.E. 231 (N.Y. 1904), *aff'd*, 203 U.S. 583 (1906) (per curiam).

122. R.S. Radford, *Land Use Regulation and Legal Rhetoric: Broadening the Terms of the Debate*, 21 FORDHAM URB. L.J. 413, 415 (1994) (reviewing DENNIS COYLE, *PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION* (1993)).

123. William Michael Treanor, *Takings Law and the Regulatory State: A Response to R.S. Radford*, 22 FORDHAM URB. L.J. 453, 457 (1995).

124. See Daniel William Russo, Note, *Protecting Property Rights with Strict Scrutiny: An Argument for the "Specifically and Uniquely Attributable" Standard*, 25 FORDHAM URB. L.J. 575, 599 (1998) ("By requiring that land use exactions be specifically and uniquely attributable to the projected impact of the new development, individual private property rights will be restored.").

Palazzolo v. Rhode Island,¹²⁵ *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*,¹²⁶ and *Lingle v. Chevron U.S.A. Inc.*¹²⁷ Frustrated by the Court's insistence on distinguishing partial (*Penn Central*) from total (*Lucas*) takings, DiUbaldo would shift the focus to the loss experienced by the property owner.¹²⁸ Baron argued convincingly "that the Court was far more effective in *Lingle* than it was in *Kelo* [*v. City of New London*]"¹²⁹ in engaging directly with public unease about the relationship between government and private property,¹³⁰ and contemplated the possible impact these 2005 decisions would have on redevelopment projects.¹³¹ Hatcher's timely article illustrated how the *Palazzolo* story "suggests that the ethics of litigating coastal takings cases may be complicated by the possibilities of natural disasters and sea level change."¹³² In the wake of the Court's conflicting set of opinions in *Stop the Beach Renourishment* regarding the legitimacy of the notion of judicial takings, we can anticipate that in the courts and in the pages of this journal, sea-level change and climate change accommodation strategies will be the new regulatory takings battleground.¹³³

V. URBAN REGULATORY TAKINGS: A GROWTH INDUSTRY FOR COURTS AND COMMENTATORS

What effects has this city-inspired body of law had on the field of urban law, and what can we expect in the future? To date, regulatory takings law has been used to challenge urban elements such as, but by

125. 533 U.S. 606 (2001).

126. 535 U.S. 302 (2002).

127. 544 U.S. 528 (2005).

128. Robert W. DiUbaldo, Comment, *A Second Take: Re-Examining Our Regulatory Takings Jurisprudence Post-Tahoe*, 30 FORDHAM URB. L.J. 1949 (2003).

129. 545 U.S. 469 (2005). The implications of the hyper-controversial *Kelo* decision were the subject of an informative set of articles in issue four of volume thirty-eight of the *Fordham Urban Law Journal*. See Symposium, *Taking New York: Opportunities, Challenges & Dangers Posed by the Use of Eminent Domain in New York*, 38 FORDHAM URB. L.J. 963 (2011).

130. Jane B. Baron, *Winding Toward the Heart of the Takings Muddle: Kelo, Lingle, and Public Discourse About Private Property*, 34 FORDHAM URB. L.J. 613, 616 (2007).

131. *Id.* at 652–55.

132. Laura J. Hatcher, *The Odyssey of Palazzolo: Public Rights Litigation and Coastal Change*, 36 FORDHAM URB. L.J. 849, 850 (2009).

133. See, e.g., Michael Allan Wolf, *Strategies for Making Sea-Level Rise Adaptation Tools "Takings-Proof,"* 28 J. LAND USE & ENVTL. L. 157 (2013).

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no means limited to, historic preservation,¹³⁴ rent control,¹³⁵ condominium and co-op conversion,¹³⁶ rezoning,¹³⁷ airspace restrictions,¹³⁸ redevelopment,¹³⁹ amortization of nonconforming uses,¹⁴⁰ exactions,¹⁴¹ and inclusionary zoning.¹⁴²

In the future—a future that, thanks to a sharply divided Supreme Court’s property-rights friendly decision in *Koontz v. St. Johns River Water Management District*,¹⁴³ will most likely feature dramatically expanded application of *Nollan/Dolan*—we can anticipate regulatory, and perhaps even judicial, takings challenges to monetary exactions,¹⁴⁴ urban environmental controls such as green building requirements,¹⁴⁵

134. See, e.g., *United Artists’ Theater Circuit v. City of Philadelphia*, 635 A.2d 612 (Pa. 1993) (addressing the constitutionality of requiring theater owners to preserve the historic character of the theater’s interior and exterior under threat of criminal punishment).

135. See, e.g., *Federal Home Loan Mortg. Corp. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 83 F.3d 45 (2d Cir. 1996) (rejecting a takings-based challenge to rent control laws in New York City).

136. See, e.g., *Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir. 1991) (addressing regulation of condominium and co-op conversion in response to a takings argument by plaintiffs).

137. See, e.g., *William C. Haas & Co. v. City of San Francisco*, 605 F.2d 1117 (9th Cir. 1979) (upholding rezoning ordinances and other land use ordinances imposed by city).

138. See, e.g., *McCarran Int’l Airport v. Sisolak*, 137 P.3d 1110 (Nev. 2006) (holding that a height ordinance constituted a regulatory taking of the aerospace above plaintiff’s property and required compensation).

139. See, e.g., *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998) (addressing challenge to municipal relocation assistance ordinance).

140. See, e.g., *Board of Zoning Appeals v. Leisz*, 702 N.E.2d 1026 (Ind. 1998) (holding that a forfeiture of a nonconforming use of a rental property, based on the failure of a landlord’s predecessor to register the nonconforming use with the city, did not constitute a compensable taking).

141. See, e.g., *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996) (analyzing the use of impact fees to regulate developments and encourage certain types of land use under the concept of takings jurisprudence).

142. See, e.g., *In re Egg Harbor Assocs. (Bayshore Centre)*, 464 A.2d 1115 (N.J. 1983) (holding that inclusionary zoning policies requiring a fixed percentage of affordable housing did not constitute a compensable taking).

143. 133 S. Ct. 2586, 2603 (2013) (“We hold that the government’s demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money.”).

144. See *id.* at 2599 (“[W]e reject respondent’s argument and hold that so-called ‘monetary exactions’ must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.”); see also Mark Fenster, *Failed Exactions*, 36 VT. L. REV. 623 (2012).

145. See, e.g., Sarah B. Schindler, *Following Industry’s LEED: Municipal Adoption of Private Green Building Standards*, 62 FLA. L. REV. 285 (2010); Michael

and, in this increasingly ideologically supercharged legal atmosphere, government bailouts (such as Hank Greenberg's class action suit against the United States government¹⁴⁶). In other words, there will likely be ample material for at least four more decades in the life of this important, influential journal.

Allan Wolf, *A Yellow Light for "Green Zoning": Some Words of Caution About Incorporating Green Building Standards into Local Land Use Law*, 43 URB. LAW. 949 (2011).

146. See *Starr Int'l Co. v. United States*, in which the United States Court of Federal Claims held:

In its initial and amended complaints, Starr alleged that through the actions of (1) the imposition of the Credit Agreement on September 22, 2008 by which the Government obtained a 79.9% equity interest in American International Group, Inc. ("AIG"), and (2) the reverse stock split on June 30, 2009 by which shareholders were denied a separate vote, the Government effected a taking or illegal exaction of the property of shareholders in violation of the Fifth Amendment of the U.S. Constitution. In a prior opinion and order on the Government's motion to dismiss, the Court determined that Starr had sufficiently pled these two events as government actions allegedly requiring just compensation, although the Court made no determination as to the merits of such claims.

On December 3, 2012, Starr filed a motion for class certification and appointment of class counsel, with an accompanying memorandum. In its motion and memorandum, Starr proposed two classes, one for each of these government actions, that consist of the named plaintiff and other similarly situated individuals or entities whose property was allegedly expropriated After careful review, and for the reasons set forth below, plaintiff's motion to certify the classes and appoint class counsel is granted.

109 Fed .Cl. 628, 631–32 (2013) (citation omitted); see also Andrew Sajac, *AIG Seeks to Dismiss Greenberg's Challenge to U.S. Bailout*, WASH. POST., Apr. 9, 2013, at A10 ("AIG 'would face incalculable harm' to its brand, image and relationships with shareholders, customers, regulators and elected officials if the company joined a suit against the government brought by Greenberg's Starr International Co. Inc., AIG said in asking the U.S. Court of Federal Claims in Washington to uphold its decision not to join the litigation.").