The takings issue

constitutional limits on land-use control and environmental regulation

Robert Meltz, Dwight H. Merriam, Richard M. Frank.

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Dwight H. Merriam
Richard M. Frank

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To our wives,
Madeleine, Susan, and Connie,
and our children,
without whose unflagging patience and encouragement
this book could never have been written

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The Takings Issue

Contents

Foreword

As the authors of the twenty-five-year-old study of regulatory takings on which this book is modeled, we are pleased to write a foreword for such a thoughtful and readable successor. Translating the arcane "takings" jargon of judges into language that makes sense to the general reader has never been easy, but it is a much more massive challenge today than when we attempted it in 1973.

When we wrote *The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control* in 1973, we were writing in a virtual federal law vacuum. The U.S. Supreme Court had decided, in quick succession, *Pennsylvania Coal* (1922), *Euclid* (1926), and *Nectow* (1928), creating regulatory takings, validating the technique of zoning, then holding that zoning can violate the Fourteenth Amendment as applied. After thus holding zoning facially constitutional on the one hand, but susceptible of being unconstitutionally applied on the other, the court then abandoned the field to the states until its cryptic and bizarre 1974 decision in *Belle Terre* (appropriately, on April Fool's Day).

As we then observed, it was left to the states to interpret—and generally to erode—Holmes's regulatory taking doctrine over the succeeding half-century, sorting out what aspects of zoning, subdivision, and other land-use controls were legal, as well as when and why. Erode they did. As Part I and chapter 9 of our 1973 report recounted with painstaking detail, regulatory takings were virtually moribund by the time the Court reexamined the concept.

The landscape has changed dramatically. As recounted in *The Takings Issue: Constitutional Limits on Land-Use Control and Environmental Regulation*, the Supreme Court has issued an even dozen opinions on regulatory takings. In 1978 and 1980, the Court suggested standards for partial regulatory takings (*Penn Central* and *Agins*). In 1985, it erected a ripeness barrier to applied challenges to land-use regulations on takings grounds (*Williamson County*) and

reiterated its position in 1986 (*MacDonald, Sommer & Frates*). In 1987, it attempted to recharacterize Holmes's *Pennsylvania Coal* decision as "advisory" and raised the redoubtable "denominator issue" (*Keystone*). Also in 1987, the Court laid to rest any misconception over remedies for regulatory takings (*First English*), as foreshadowed in the famous Brennan dissent (*San Diego Gas & Electric*). Again in 1987 the Court presented us with the doctrine of unconstitutional conditions (nexus) (*Nollan*), to which it returned in 1994 to add proportionality (*Dolan*). In 1992 the Court gave us a categorical or "per se" rule on "total" regulatory takings, though with two exceptions (nuisance and background principles of a state's law of property) (*Lucas*). On top of these Supreme Court decisions, the Federal Circuit, in its relatively new role in adjudicating on appeal regulatory taking claims against the United States, has twice in the past ten years issued opinions on the nuts and bolts of such takings (*Florida Rock* and *Loveladies Harbor*).

It is fair to say that when the Supreme Court thus decided to jump back into takings and land-use controls, it largely ignored the common law of zoning created by the states. We may quibble about the whys and the wherefores, but we now have in 1998 a federal jurisprudence on regulatory takings—however incomplete or unsatisfying—that we simply did not have in 1973. It is one thing for judges to try cases and lawyers to comment in a vacuum created by a fifty-year hiatus. It is quite another to do so today. As we note below, takings litigation has exploded in the state courts, which must now consider these recent federal decisions. Whether under casual or detailed analysis, these decisions are all over the map.

State courts will have the central role, not only with respect to property and nuisance concepts and many other state law principles that are now part of federal regulatory takings law, but because the state courts are likely to be the forum for the bulk of takings litigation.

During the 1922–1973 period, state courts frequently invalidated regulations, and toward the end of that period one could barely discern a trend of judicial support for land-use regulations based on overall state or regional goals.

Twenty-five years later, however, Robert Meltz, Dwight H. Merriam and Richard M. Frank find an increasing tendency among the state appellate courts to uphold land-use and environmental regulatory programs (pp. 31, 555, *infra.*). State courts continue to discipline local regulatory practices, perhaps with more attention to procedural issues that provide equitable remedies than to outright

regulatory taking demanding monetary compensation. But the state appellate decisions have almost uniformly upheld the wetland, flood plain, and other resource protection programs administered among the states. (See Part V, *infra.*) This general proposition is consistent with our 1973 conclusion that the taking issue was qualitatively different when addressing broad environmental protection objectives carefully articulated by the states.

In 1973, we speculated that "the strategy that would contribute most to a more equitable resolution of the taking cases would be simply to spend more time in the drafting of regulations and the presentation of facts supporting—or opposing—them. . . . [T]oo often these regulations take the form of sweeping prohibitions and blanket indictments of all development simply because no one has taken the time to study the problem in depth and work out a reasonable compromise between the needs of the environment and the rights of individuals." Meltz, Merriam, and Frank note that the current taking issue debate seems bound up in "absolute" positions (p. 10, *infra.*), which is not unlike the "blanket indictments" of an earlier time. The presentation of facts that can be understood in terms of rights of the individuals remains as difficult and critical today as in 1973. The misconception by the public of the taking issue, which we discussed in 1973, is still true today and often contributes to a disconnection between environmental science and policy that continues to cloud dialogue.

The most profound changes since 1973 are in the planning and regulatory processes themselves. For example, there is a closer link between planning and regulation, regulatory reform is improving administration and timing of decisions, and there is an increase in the use of market-oriented procedures such as mitigation banking and density transfer. Where these approaches are labor intensive, the shrinking public workforce may lead us to revisit the taking issue with the reinvention of many state regulatory programs.

In *The Taking Issue,* we reached a number of conclusions that were somewhat controversial at the time. First, our research suggested that the drafters of the Constitution never expected that the taking clause would be applied to *regulatory* takings. More comprehensive research by others has supported that suggestion, and in the *Lucas* decision the Court, in the majority opinion by Justice Scalia, conceded that "early constitutional theorists did not believe the Takings Clause embraced regulation of property at all." (See pp. 12–13, *infra.*). The *Lucas* court went on, of course, to uphold the

application of the takings clause to regulations because the line of cases headed by *Pennsylvania Coal* was so well established. The idea that the meaning of constitutional clauses should change as they were adapted to modern conditions is hardly revolutionary, having been a fundamental tenet of the Warren court. That it should be put forth by a justice who had long advocated "originalism" is somewhat more surprising.

A second assumption that we made back in 1973 was that the remedy in takings cases could be damages. Some of our colleagues hotly contested this point, arguing that when a regulation would amount to a taking, the remedy should simply be the invalidation of the regulation. But in the *First English* case the Court supported our assumption, holding that the constitution didn't prohibit takings but only takings without compensation, and therefore the remedy should be damages rather than invalidation.

We also pointed out, however, that it was very difficult to draw a clear distinction between the line of cases applying the taking clause to regulations and another line of cases applying substantive due process to regulations. The authors of this book suggest that this distinction remains puzzling (pp. 15–18, *infra.*), and the most recent opinion of the Supreme Court in which both clauses are discussed, *Eastern Enterprises v. Apfel*, 118 S.Ct. 2131 (1998), shows how badly the Court is split on the issue. Until this distinction is satisfactorily resolved, the issue of regulatory takings will remain, as the current authors point out, a field for widely varying speculation.

Fred Bosselman, Chicago, Illinois
David Callies, Honolulu, Hawaii
John Banta, Lake Placid, New York
September 2, 1998

Preface

Over two decades ago, a book called *The Taking Issue: An Analysis of the Constitutional Limits of Land Use Control* introduced America to a then little-known constitutional provision. That provision, tucked away at the end of the Fifth Amendment in the Bill of Rights, mandates that when private property is "taken" by government action for public use, just compensation has to be paid. *The Taking Issue*, written by Fred Bosselman, David Callies, and John Banta, and published in 1973 by the Council on Environmental Quality, provided a scholarly overview, based on the limited case law of the time, of how this constitutional safeguard constrains government regulation of private land use. The book further described possible future trends and strategies with a vision that has proved to be prophetic.

As environmental and other land-use controls expanded during the 1970s and 1980s, the frequency with which landowners challenged these controls increased in tandem. Beginning in the late 1970s, the U.S. Supreme Court began an ambitious effort to develop a coherent, workable body of doctrine in the regulatory takings area, culminating in groundbreaking decisions in 1987, 1992, and 1994 that attracted media coverage on a par with the Court's more traditional high-visibility cases. At the same time, a growing "property rights movement" seized on the takings issue as the constitutional backbone for their limited-government agenda, pressing the issue in courts and legislatures alike and making the takings issue a household phrase.

Today, the rate at which property owners are filing "taking" lawsuits against government seems to be at an all-time high, and federal, state, and local regulators routinely include takings implications as one factor to be weighed in considering actions that affect private land. Though government continues to win the large majority of such

suits, the landowner victories have generated political pressures that magnify their immediate effect.

With this burst in judicial activity came an almost complete transformation of the takings jurisprudence that existed when the original work was written. Principles known in embryonic form in 1973 are today greatly elaborated and, on occasion, formalized. Back then, for example, we knew only that a regulation affected a taking if it went "too far"; now, we have the three-factor balancing test and absolute rules for "total takings" and "physical takings." Other principles, completely unknown then, are now on the short list of major takings law concerns. Once, for example, there were no rules for evaluating whether the dedication and exaction conditions imposed on development permits were takings; today, such conditions must meet requirements for nexus with a permit's purpose and proportionality with a development proposal's impact. And, of course, the range of government programs against which this proliferating body of law may be invoked has itself burgeoned.

This changing situation pointed to the need for a revision of the first book. To be sure, the supernova status of the takings issue already has caught the attention of a legion of law review article and book writers. However, because of selective focus, narrow target audience, or obvious partisan slant, none of these articles and books seemed to fulfill the need for a comprehensive analysis/commentary on takings law—accessible to nonlawyer and lawyer alike. And so, *The Taking Issue* redux.

In stepping into the formidable footsteps of the original authors, we considered hewing to the general organization of their book, but quickly realized that the changes in law and policy since 1973 were too great. Our book, therefore, is an entirely new effort, not just an update. At the same time, it seeks to retain the style and "feel" of its forebear, and to emulate its objectivity and scholarship. Most important, we have attempted, wherever possible, to maintain *The Taking Issue*'s admirable quality of being a comfortable read for the nonlawyer planner, while still being informative for the practicing attorney. Put away your legal dictionary.

The federal, state, and local aspects of the takings issue, cumulatively too vast for any one person to cover, suggested a three-author collaboration—with each having a concentration of experience at one of the three levels of government and all having broad exposure to the great variety of interests and parties in land-use matters. At the same time, we sought the balance that comes from different kinds of

takings-related legal practice—private versus government, development-oriented clients versus government clients. Thus, Rob Meltz's career has had a federal government focus, chiefly advising Congress with the nonpartisan Congressional Research Service on Capitol Hill. Dwight Merriam brings to the book his long experience as a private practitioner representing developers, opposition groups, environmental and conservation organizations, and governments. And Rick Frank is a senior assistant attorney general with the California Department of Justice, where he defends that state in takings litigation, and a part-time law professor at the University of California at Davis and at the Lincoln Law School in Sacramento.

Of course the opinions expressed in this book are the authors' alone, and do not necessarily reflect those of their employers. The authors thank each other for what we each brought to this effort. We became a little like the "odd triple." Rob was the organizer, taskmaster, and quasi-academic, who was constantly cleaning up loose ends. This book was his idea, and its completion has been largely driven by the force of his efforts. Dwight, as a private law firm attorney who has represented all interests in this area in his 20 years of practice, kept our feet firmly planted on the ground with what the takings issue really means in practical terms. Rick's experience as a trial and appellate lawyer and integrator of federal, state, and local law enabled his two cohorts to reach new insights and rounded out the book in a way that otherwise could not have been done. How could you write a land-use book without a Californian anyway? We are fortunate to have had the opportunity to work together.

Finally, we are grateful to the U.S. Supreme Court for declining (without even being asked) to decide any land-use takings cases over the past four years, other than the relatively narrow *Suitum v. Tahoe Regional Planning Agency* (decided in 1997). This respite from the series of thunderbolts unleashed by the Court through *Dolan v. City of Tigard* (decided in 1994) allowed the authors time to contemplate a momentarily nonmoving target.

Robert Meltz
Dwight H. Merriam
Richard M. Frank
May 28, 1998

A Note to the Nonlawyer:

How to Read Legal Footnotes

The reader without legal training may be unfamiliar with the legal citation form used by lawyers, which this book adopts. Following are a few pointers to understanding this form.

The numbers. Every legal citation (of a court decision, law review article, or treatise) has several numbers in it—for example, the U.S. Supreme Court's decision in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 107 (1978). The number before the publication name (abbreviated "U.S.") is the volume; the number immediately after, the page number on which the case, law review article, or treatise begins. In this example, the reference is to volume 438 of the publication "United States Reports," which includes the *Penn Central* decision beginning at page 104. If there is a third number following the page number (here, "107"), that is the precise page of the cited item on which our text assertion relies. Finally, the number in parentheses is the date of the court decision, or the date of publication, as appropriate.

The publication names. Lawyers use a highly abbreviated reference style, so that footnote length doesn't overwhelm their law review articles and court opinions (it may anyway). In this book, we have spelled out more than is customary for the names of law reviews—using, e.g., "Harvard" instead of the usual "Harv." to reduce confusion. We did not do so, however, for the names of case reporters and note a few illustrations below. For case decisions from the federal courts, the citations may reference:

Publication:	*Reports decisions of the:*
U.S.	U.S. Supreme Court
S. Ct.	U.S. Supreme Court
F.2d or F.3d	U.S. Courts of Appeals
F. Supp.	U.S. District Courts
Fed. Cl.	U.S. Court of Federal Claims (renamed in 1992)
Cl. Ct.	U.S. Claims Court (created in 1982, predecessor to U.S. Court of Federal Claims)
Ct. Cl.	U.S. Court of Claims (original federal claims court, predecessor to both the U.S. Claims Court and the U.S. Court of Federal Claims)

For state court decisions the basic format is the same, except that they are often reported in two or more publications. For example, in California watch for:

Cal. 3d or Cal. 4th	California Supreme Court
P.2d	The regional (multistate) reporter that includes California Supreme Court opinions
Cal. App. 3d or Cal. App. 4th	California Courts of Appeal (official reporter)
Cal. Rptr. or Cal. Rptr. 2d	California Courts of Appeal (unofficial reporter)

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Even with the authors' diverse points of view, it was plain that the universe of takings-law views today subsumes still additional vantage points. As a result, we actively sought the thoughts and criticisms of others, and wish to thank: Michael Berger, partner, Berger & Norton, P.C., Santa Monica, California; Robert Best, president, Pacific Legal Foundation, Sacramento, California; Brian W. Blaesser, partner, Robinson & Cole LLP, Boston, Massachusetts; David Brower, research professor, University of North Carolina; David Coursen, attorney-adviser, U.S. Environmental Protection Agency Office of General Counsel; John DeGrove, director, Florida Atlantic University/Florida International University Joint Center for Environmental and Urban Problems, Fort Lauderdale, Florida; John Echeverria, visiting professor, Georgetown University Law Center, Washington, D.C.; Helen Edmonds, associate, Pierce Atwood, Portland, Maine; Gideon Kanner, counsel, Berger & Norton, P.C., and professor emeritus, Loyola Law School, Los Angeles, California; Richard Lazarus, professor, Georgetown University Law Center, Washington, D.C.; R.J. Lyman, assistant secretary of environmental affairs, Commonwealth of Massachusetts; Dennis Machida, executive officer, California Tahoe Conservancy; Elizabeth Merritt, counsel, National Trust for Historic Preservation, Washington, D.C.; Douglas Porter, president, The Growth Management Institute, Chevy Chase, Maryland, and a planning and development consultant; Thomas E. Roberts, professor of law, Wake Forest University of Law; Joseph Sax, professor, Boalt School of Law, University of California at Berkeley; Glenn Sugameli, counsel, National Wildlife Federation, Washington, D.C.; and the many talented lawyers in the California Department of Justice. Many others have shared their insights with us as well; we apologize for not naming them all.

Those upon whose toil this book is founded include the following

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Part I

Introduction

Chapter 1

The Path to the Present

Twelve simple words: "[N]or shall private property be taken for public use, without just compensation." Undoubtedly, this "Takings Clause," at the end of the Fifth Amendment of the Bill of Rights, has in the past two decades become the central constitutional restriction on the power of government to acquire or restrict private property rights. Almost all state constitutions have similar edicts.

The Takings Clause plays out in two procedurally distinct contexts—opposite sides of the same coin. One, the original historically, is called a condemnation proceeding (though not related to condemning buildings for health or safety purposes). Here, the government concedes it is taking the property, formally invoking its sovereign power of eminent domain as the plaintiff in a lawsuit against the property or property owner. Condemnation is used when there is no doubt that a taking is involved—when, for example, the government wants to put a highway or transmission line across private property. Usually the only seriously contested issue is how much the government must pay for the property as "just compensation."

"Takings actions," the topic of this book, are the mirror image of condemnation. They are of more recent vintage. In this instance, the government encroaches upon a property interest but emphatically *denies* any taking. Hence, it falls to the property owner to file against the government a "taking" or "inverse condemnation" action seeking compensation for an unacknowledged exercise of eminent domain. Such actions typically arise when there is doubt as to whether a taking has occurred, as with use restrictions on property

or, perhaps, a short-lived physical invasion. A taking trial has not one, but two, key issues to resolve: Was there a taking? If so, how much compensation is due? Takings actions are far more likely than condemnation actions to be lightning rods; they have a David (property owner) versus Goliath (government) aspect to them.

The rise of the takings issue to celebrity status has been quite dramatic. Once a throwaway in first-year law school classes on property, the issue now garners headlines in newspaper real estate sections when a state or federal high court merely agrees to hear a case. A galaxy of reporters and TV cameras typically wait on the U.S. Supreme Court plaza after a land-use/takings case is argued, to record the postmortems of oral-argument counsel and others. Here, and later when a decision is rendered, partisans zealously seek to give the case a self-serving spin.

So, as used in the Takings Clause, what is meant by a "taking" of property? We have centuries of Anglo-American law to inform the clause's reference to "property." And we have a generally workable "fair market value" standard, invoked by the courts in the large majority of takings and condemnation cases, to give content to "just compensation." But what, pray tell, is a "taking"? Is it possible to give enduring content to this protean word, embodied in principles both general and clear? Can we move beyond a simplistic "I know one when I see one."?[1]

The answer that we hope will emerge from this book is that we can—to a point. But to have any feel for the current standards of takings law and its future possibilities, lawyers, planners, and property owners should have some notion of where the law has been.

A Brief History

Modern takings law has evolved on the heels of the rise of government-imposed land-use control in this country. It is not our purpose to question this ascending curve of government involvement (though toward the end of the book we urge a shift in approach); it seems evident that in one form or another, such involvement is called for by the corresponding upward curves of population growth, urban/suburban

[1]The analogy to Justice Potter Stewart's famous remark about obscenity—"I know it when I see it"—is irresistible. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

expansion, and the impact of technology on society. When constantly rising demands and impacts intersect with a necessarily finite land base, someone must step forward with solutions. When that someone is a government entity, takings law imposes a precondition—"just compensation"—on the most intrusive of such solutions.

The seeds of the regulatory takings concept were sown when, in the early 20th century, the country's emergence from laissez-faire economics and the increasing competition between incompatible land uses in a growing nation proved an irresistible invitation to state and local governments. Government first responded in targeted fashion—prescribing for buildings such parameters as maximum height, property-line setbacks, and the materials and methods of construction, and excluding offensive enterprises from residential sections. While government had long imposed such restrictions, the pace now accelerated. Beginning in the second and third decades of this century, these selective restrictions evolved into comprehensive municipal zoning, an approach that prescribed both building characteristics and permitted uses for *all* land within the jurisdiction.

These developments of almost a century ago piqued the Supreme Court's interest, giving rise to a host of land-use decisions from 1900 to the late 1920s. Almost all these decisions upheld the government,[2] but in the Promethean case that gave us the concept of "regulatory taking," and in a later municipal zoning challenge, the Court raised a red flag of constitutional caution.[3]

Having given land-use controls this qualified blessing, the Supreme Court then departed the area for the next half-century. With only one exception, the Court appeared uninterested in regulatory impositions on landowners during this time, and certainly did not feel any need to

[2]In chronological order: Welch v. Swasey, 214 U.S. 91 (1909) (building height limitations); Reinman v. Little Rock, 237 U.S. 171 (1915) (ban on livery stables); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (ban on brick manufacturing); Walls v. Midland Carbon Co., 254 U.S. 300 (1920) (ban on manufacture of carbon black); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (comprehensive zoning); Gorieb v. Fox, 274 U.S. 603 (1927) (building setback lines); and Miller v. Schoene, 276 U.S. 272 (1928) (requirement that infected trees be cut down).

[3]Respectively, Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (bar on development of mineral estate effected taking), and Nectow v. City of Cambridge, 277 U.S. 183 (1928) (as applied to plaintiff's land, zoning ordinance did not advance police power purposes; hence, violated due process).

articulate more concrete standards.[4] The principal reason for this hands-off approach was jurisprudential: the Supreme Court's abandonment, in the late 1930s, of the close constitutional scrutiny of economic regulation that had characterized the first decades of the century.[5] Given the new hands-off approach, it was only natural that takings challenges to regulatory control of property should be disfavored. Then, too, in the 1950s and 1960s the Warren Court focused on other parts of the Bill of Rights, concerned with individual liberties.

Meanwhile, out of the glare of national attention, the state courts in this period were actively examining the implications for land-use controls of this new idea of regulatory takings.[6] The expanding state and local government presence in the land-use area encouraged this judicial exploration.

In the decade from 1970 to 1980, the Supreme Court returned decisively to the arena of local land-use controls—first with a pair of substantive due process decisions,[7] then with two more laying out for the first time a set of regulatory takings standards and criteria of wide applicability.[8] The contrast with the inactivity of the preceding

[4]The one exception is Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). Other, *non*-regulatory land-use cases during this fallow period deserve brief mention. In Berman v. Parker, 348 U.S. 26 (1954), the Court examined whether an urban renewal project satisfied the "public use" demand of the Takings Clause. During the 1930s, the Supreme Court displayed repeated interest in appropriation/physical taking issues raised by federal treatment of Indian lands. *See, e.g.,* Chippewa Indians v. United States, 305 U.S. 479 (1939).

[5]Particularly offensive to political conservatives and libertarians is the decision in United States v. Carolene Products, 304 U.S. 144, 152 (1938), and its much-debated footnote 4. There, the Court suggested two tiers of scrutiny under substantive due process: an extremely lenient one for "ordinary commercial transactions" (presumed by commentators to include property rights) and a "more searching" one for laws directed at political activity or minorities. *See generally* DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION 42–43 (1993); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT 132–34 (1992).

[6]Fred Bosselman et al., *The Taking Issue.* Written in 1973, it provides an invaluable survey of the case law of the prior decades.

[7]Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding local ban on households of unrelated persons); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (invalidating local ban on households of persons not closely enough related).

[8]Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Agins v. City of Tiburon, 447 U.S. 255 (1980).

decades was striking, though the pendulum swing had been foreseen. Writing in 1956, Justice Frankfurter said: "Yesterday the active area in this field was concerned with 'property.' Today it is 'civil liberties.' Tomorrow it may again be 'property.'"[9]

What had happened to revive the Supreme Court's interest? First, after World War II, state and local governments began increasingly to enlist land-use controls in the service of objectives not easily characterized as abatement of common-law nuisances—that is, not readily considered prevention of threats to public health, safety, or comfort. Public concern about historic preservation, open space preservation, greenways, public beach access, growth control, vulnerable floodplains, and undesirable neighbors fueled much of the new generation of "thou shalt nots." To these were added, in the 1960s and 1970s, federal and state environmental restraints protecting wetlands, coastal zones, barrier islands, alluvial valley floors, endangered species, lands unsuitable for surface mining, and so on. These new generations of controls, embodying some novel societal goals, undoubtedly raised the judicial eyebrow. Preserving ecosystems, in the contemporary mainstream ethic that courts inevitably reflect, does not rank with zoning adult bookstores out of residential neighborhoods.

Second, the Supreme Court in the 1970s and 1980s was moving to the right, becoming more interested in using the Takings Clause to set bounds on governmental intervention in the foregoing areas.

By the late 1970s, then, two critical factors were simultaneously present: the objective need for the Court to undertake the development of a new body of constitutional doctrine, and the will on the Court for it to do so. The confluence of these factors ushered in an era that continues today, one in which the consistent characteristic of the Supreme Court's land-use takings cases has been a search for principles, standards, and, in a few instances, hard-and-fast rules.

The Results of Two Decades of Supreme Court Effort

The lead-off case in the contemporary era of doctrinal development was *Penn Central Transportation Co. v. New York City*, decided in 1978 and still probably the most important single pronouncement in takings law.[10] In this and subsequent decisions, the Court made clarifying

[9]FELIX FRANKFURTER, OF LAW AND MEN 19 (1956).
[10]438 U.S. 104 (1978).

progress on multiple fronts. When is the landowner's taking claim ripe? Once ripe, what factors should be balanced in deciding whether, in "fairness and justice," government should have to pay? Are there instances where the usual multifactor balancing analysis can be dispensed with and a simpler "bright line" test invoked? Do exactions and dedication conditions imposed on the issuance of land development permits require a specialized approach to the takings question? And finally, given that a taking has occurred, what remedy does the Constitution mandate? Before the current era we had next to no idea what the answers were to these questions; now we at least have some.

So why isn't anyone happy? There has been no safer pursuit among commentators, even well into this period of doctrinal development, than lambasting takings law as incoherent. Says one writer: "[I]t is difficult to imagine a body of case law in greater doctrinal and conceptual disarray."[11] Another proposes that, for this and other reasons, the very construct of the regulatory taking be eliminated from constitutional law wholesale.[12] Justice Stevens has said that "[e]ven the wisest of lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence."[13]

The more extreme of these negative characterizations are overdrawn, we believe. Or at least an argument can be made that they implicitly ask too much. Takings law is confusing; indeed, maddening at times. But it is not without useful guidance, even in the large majority of cases where no bright-line rule has yet been provided. The real question is whether it is reasonable to ask for black-and-white certainty in this or any other area of constitutional law that applies to an infinitude of private circumstances and countervailing public interests, and that hews to a decisional standard as metaphysical as "fairness and justice." An argument can be made that takings cases are no more ad hoc or result oriented than many of those under the First and Fourth Amendments, or than decisions applying the doctrine of standing.

[11]Andrea Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Law Doctrine*, 77 CALIFORNIA L. REV. 1299, 1304 (1989).

[12]J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89 (1995) (argument "III").

[13]Nollan v. California Coastal Comm'n, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

What we now have from the Supreme Court is, for most government impacts on land, a collection of "factors [of] particular significance" to be weighed and balanced in an ad hoc, case-by-case fashion.[14] In the large majority of cases using this approach, the landowner loses. For a few special circumstances, we instead have "per se rules" that dispense with multifactor balancing and find takings based on one particular aspect of the government action's impact. Fortunate is the landowner who can convince a court that such an automatic-taking rule has been triggered in his or her case.

Some commentators discern a striving in the Court to find more such automatic rules and bemoan the loss of flexibility.[15] Others hold that the Court is not seeking to "formalize" takings jurisprudence and yearn for more bright-line tests.[16] Whichever view one holds, it is clear that the Court has not gone nearly as far as property rights partisans wish, or friends of regulation fear. This underlays the push for legislative relief by property rights activists. The decisions hailed by property rights partisans and property owners as paradigm-shifting victories—*First English*, *Lucas*, *Nollan*, and *Dolan*—do indeed confer greater protection of private property. But on any objective examination, they are also doctrinally cautious and often limited in application. To this day, the Supreme Court has never found a regulatory taking based on land-use restrictions in the absence of either a physical invasion or total deprivation of economic use.

Most certainly, property rights are enjoying an ascendancy of sorts, receiving more judicial scrutiny in some contexts than purely economic regulation.[17] But they have not yet taken a place alongside non-economic civil liberties (freedom of speech, association, religion, etc.) in the degree of judicial scrutiny and distrust of government that courts deem appropriate.[18] Government continues to enjoy ample room to regulate land use responsibly without significant chance of being made to pay.

[14]*Penn Central*, 438 U.S. at 124.

[15]Frank Michelman, *Takings 1987*, 88 COLUMBIA L. REV. 1600 (1988).

[16]Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUMBIA L. REV. 1697 (1988).

[17]*See, e.g., Nollan*, 483 U.S. at 834 n.3.

[18]To be sure, the Supreme Court recently said: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation. . . ." Dolan v. City of Tigard, 512 U.S. 374, 392 (1994).