INTRODUCTORY ESSAY

GOVERNMENT TAKING OF PRIVATE PROPERTY FOR PUBLIC USE

by Stephen R. McAllister

Going back for centuries in English and American law, there has been a high regard for property rights. As William Blackstone (1765) observed, the “third absolute right, inherent in every Englishman, is that of property .... The original [right] of private property is probably founded in nature.” Furthermore, Blackstone observed that so “great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.” Similarly, at the Constitutional Convention, Alexander Hamilton described “the security of Property” as one of the “great “objects] of Gov[ernment].” Madison wrote, “that alone is a just government which impartially secures to every man, whatever is his own.” Property rights have always been important to Americans.

On the other hand, governments long have been deemed to have the inherent sovereign power to exercise eminent domain—the power to appropriate private property and devote it to governmental purposes, uses that might include building a school, a highway, a prison, or a hospital, for example, or creating a public park or other public facilities. In pre-constitutional America, some states exercised such power without necessarily even compensating the landowners whose property was taken, while other states required that government pay for appropriated private property. There was not necessarily a consensus in America on these questions prior to the ratification of the Constitution and Bill of Rights.

The Bill of Rights, however, strongly and clearly adopts the rule that government must pay a fair price for any private property that it takes for public use. Indeed, the Fifth Amendment expressly protects citizens’ rights in private property from governmental confiscation – known as a “taking” – unless two constitutional requirements are met: (1) the property must be taken for “public use”; and (2) the government must pay “just compensation” for the property. The precise language of the Fifth Amendment’s Takings Clause is that “nor shall private property be taken for public use without just compensation.”

This unit focuses on two legal issues that have arisen under the Takings Clause, both of which have proven difficult to resolve and sources of public controversy. The question that the first two cases in the unit address is: When, short of government physically occupying or seizing private property, does government regulation of private property amount to a “taking” that implicates the Fifth Amendment’s protections? Commonly referred to as a “regulatory taking” claim, rather than actual
physical occupation by the government – the latter of which is treated as a per se taking – answering the question of when the regulation of private property amounts to a “taking” for constitutional purposes is much more difficult than might at first be apparent. As discussed below, the Supreme Court has wrestled with that question for almost 100 years, and has not been able to provide a clear answer or a single test.

Nineteenth century decisions of the Supreme Court took the view that the Takings Clause applied only to a “direct appropriation” of private property, Legal Tender Cases (1871), or at a minimum the functional equivalent of dispossessing a private owner of the property, Transp. Co. v. Chicago (1879). Twentieth century cases continued to recognize that basis for a taking. For example, in United States v. Causby (1946), the Court found a taking that required just compensation when the federal government operated a military airbase next to a farm, with the result that the constant aviation activity significantly interfered with the farmer’s ability to raise chickens (the chickens kept killing themselves by flying into walls when the airplane noise scared them!) and even to live on the property. Another modern example is Loretto v. Teleprompter Manhattan CATV Corp. (1982), in which the Court found a per se taking when the government authorized television cable lines to be run across the rooftops of privately-owned buildings, even though the intrusion was minimal and caused no real interference with use of the properties. The Court emphasized that actual physical occupation of land on a permanent basis by the government, no matter how small or slight, is a taking.

In early cases, the Supreme Court also recognized that governments may regulate the use of private property without being required to pay compensation for a “taking” if the regulation was designed to prevent a serious public harm, such as a use of the property that could cause harm to other citizens, Mugler v. Kansas (1887). A critical turning point under the Takings Clause was the Supreme Court’s decision in Pennsylvania Coal Co. v. Mahon (1922), a case involving a claim by a coal company that government had taken the company’s property by requiring the company to leave pillars of coal in its underground mines in order to lessen the risk that neighboring lands might subside or be adversely affected by nearby coal mines. In Mahon, Justice Holmes argued that government could not have unlimited power to redefine the legal rights of private property owners or else the Takings Clause could be rendered meaningless. Instead, Justice Holmes articulated the now firmly entrenched constitutional principle that “While property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.”

For the past 90 years, the Supreme Court has wrestled with the question of when
government regulation of private land has gone “too far.” An important decision in this line of cases is Penn Central Transp. Co. v. New York City (1978), in which the Supreme Court upheld a New York City ordinance that limited the development or alteration of historically significant buildings. When the owners of Penn Central station sought to build a massive multi-story building on top of the station and were denied permission by New York they sued, arguing that restricting their ability to develop their property and obtain a return on their investment was a “taking.” The Supreme Court rejected the claim, concluding that in spite of the limitation on development the owners of Penn Central still could use the property in many valuable ways. The Penn Central decision is often noted for the proposition that the Court has no “set formula” for determining when the Mahon line of regulation that “goes too far” has been crossed. Instead, the Court typically has applied an “essentially ad hoc, factual” inquiry.

Two cases in this unit, Nollan v. California Coastal Comm’n (1987) and Lucas v. South Carolina Coastal Council (1992), illustrate the concept of a “regulatory taking,” and the principles the Supreme Court applies in such cases. In each case, you will see that the government had plausible and legitimate reasons for regulating coastlines, which are necessarily a limited and valuable resource in this country. At the same time, the government regulation had potentially severe effects on the rights and expectations of the citizens who owned and purchased private properties along ocean coastlines.

The second question the unit addresses follows the first: If there is a “taking” for purposes of the Fifth Amendment, is the government devoting the private property to a “public use”? There is no sliding scale under the Fifth Amendment that would, for example, allow government to expand the purposes for which it takes property if government pays more than just compensation. Rather, no matter how much government is willing to pay, the Takings Clause precludes the government from utilizing its power of eminent domain if the taking is not for a “public use.” Thus, the definition of “public use” is an important constitutional question.

In Calder v. Bull (1798), Justice Samuel Chase wrote that it “is against all reason and justice, for a people to entrust a Legislature with” the power to enact “a law that takes property from A. and gives it to B.” For a long time, the “public use” limitation was understood to require that the government actually use the property it was taking, for example to build a road, a school, a hospital, a prison, or other government facilities. No one would seriously question that such purposes are within the meaning of “public use” as used in the Takings Clause.

But what if government takes private property because that property is run down, impoverished, deteriorating, or blighted and the government plans to redevelop the property to more valuable “private” uses? In other words, what if government seeks to transfer lower value properties to private developers who will construct new buildings, perhaps drawing in new business and new residents, as well as increasing the government’s property tax revenues as a consequence of the property becoming more valuable? Ultimately, this question has proven difficult and controversial for the Supreme Court.

“While property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.”
The Court first addressed these issues in *Berman v. Parker* (1954), a case in which the Court upheld a redevelopment plan targeting a blighted area of Washington, D.C. where most of the housing was beyond repair. Part of the plan included the building of new streets, schools and public facilities, but the plan also provided that much of the property would be leased or sold to private parties for redevelopment. The Court unanimously held that the plan involved a “public use” because the plan, as a whole, served public purposes. Then, in *Hawaii Housing Authority v. Midkiff* (1984), the Court unanimously upheld a Hawaii statute that (with just compensation) redistributed private property among private owners in order to reduce the concentration of land ownership in Hawaii. The Court concluded that the redistribution served a public purpose.

There is no longer unanimity on this question in the Supreme Court, as the third case in this unit demonstrates. In *Kelo v. City of New London* (2005), a sharply divided Supreme Court concluded that redeveloping a “distressed” municipal neighborhood was a “public use” that justified a city in taking private property and transferring that property to others for redevelopment. *Kelo* involved a debate between the Justices about the meaning of “public use,” with the majority equating that term with “public purpose,” as did *Berman* and *Midkiff*. The dissenters, in sharp contrast, argued that “public use” means just that – the government must “use” the property. Thus, transferring property to other private owners such as developers was not a “public use.”

*Kelo* provoked strong, negative responses from more than 40 states. Some responses have been statutory, with state legislatures enacting laws to limit the grounds on which government can exercise its power of eminent domain. Other responses have been judicial, with state supreme courts interpreting their state constitutions to adopt a narrower definition of “public use” than the definition the Supreme Court endorsed in *Kelo, Berman* and *Midkiff*. The result is that many states provide greater protection to private property owners than the Constitution requires. Notably, as *Kelo* and the public reaction to the decision make clear, property rights are just as important to Americans today as they were at the Founding.
Case Background

Concerned about increasing development along the California shoreline, the California Coastal Commission sought to protect public views of the beaches. James and Marilyn Nollan wished to replace a small (521-square-foot) beachfront bungalow with a 1,674-square-foot home. The much larger house would block public view of the beach from the street. Property use restrictions required that, before a property owner could receive a permit for new construction, s/he must agree to allow the public permanent use of the beach through an easement on the property. The easement would have allowed beach-goers to pass over a strip of land on Nollan’s private beach in order to access the public beaches. The Nollans argued that this restriction on their property use was a taking requiring just compensation under the Fifth and Fourteenth Amendments.

Six years later the Court would hear a similar case: Dolan v. Tigard. Florence Dolan wanted to pave the parking lot and enlarge her store in the city’s busy commercial district. A creek ran across a corner of Dolan’s property. Before it would grant a permit to Dolan to improve her property, the City Planning Commission required her to dedicate a portion of the lot along the creek for two purposes: 1. a public greenway that would minimize potential flooding, and 2. a public pedestrian/bicycle pathway to relieve traffic congestion in the central business district.

In each of these cases, the Supreme Court was asked to decide whether the regulations imposed on property owners amounted to a “taking” of their property. If so, the Fifth Amendment requires that they be paid for the property that was taken.
**DOCUMENT A**

*Magna Carta Excerpts (1215)*

28. No constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefore, unless he can have postponement thereof by permission of the seller.

30. No sheriff or bailiff of ours, or other person, shall take the horses or carts of any freeman for transport duty, against the will of the said freeman.

31. Neither we nor our bailiffs shall take, for our castles or for any other work of ours, wood which is not ours, against the will of the owner of that wood.

39. No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

1. List some types of property protected in the *Magna Carta*.

2. According to these passages, if the King’s officers take property from an individual, what must also happen?

3. This document is from 1215. What does this reveal about the importance of property rights in Western Civilization?

**DOCUMENT B**

*Blackstone’s Commentaries on the Laws of England (1765)*

So great ... is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road ... were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land.

1. According to Blackstone, under what conditions may government take private property for the general good of the community?
**DOCUMENT C**

The Fifth Amendment (1791)

No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

1. What protections for private property are listed in the Fifth Amendment of the U.S. Constitution?

2. Are these protections meant to secure the rights of individuals (in the same way that other amendments protect freedom of religion, freedom of speech, etc.,) or are they meant to secure the collective rights of communities (i.e. those who would benefit from the government taking the property)?

**DOCUMENT D**

James Kent, *Commentaries on American Law, Volume 2* (1827)

There are many cases in which the rights of property must be made subservient to the public welfare. The maxim of law is that a private mischief is to be endured rather than a public inconvenience. On this ground rest the rights of public necessity.

...It undoubtedly must rest in the wisdom of the legislature to determine when public uses [such as building a road through farmland] require the assumption of private property, and if they should take it for a purpose not of a public nature, as if the legislature should take the property of A., and give it to B., the law would be unconstitutional and void.

1. Put in your own words Kent’s statement that, “There are many cases in which the rights of property must be made subservient to the public welfare. The maxim of law is, that a private mischief is to be endured rather than a public inconvenience.”

2. What example is given of public use?

3. What non-example of public use is given?
**DOCUMENT E**

*Kaiser Aetna v. U.S. (1979)*

In this case, we hold that the “right to exclude,” so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation... Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond while petitioners’ agreement with their customers calls for an annual $72 regular fee.

1. What is the “right to exclude”?

2. What is the main idea of the majority opinion in *Kaiser Aetna v. U.S.?*

**DOCUMENT F**

*Loretto v. Teleprompter Manhattan CATV Corp. (1982)*

...We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve.

Teleprompter’s cable installation on appellant’s building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building’s exterior wall.

1. What is the main idea of the majority opinion in *Loretto v. Teleprompter Manhattan CATV Corp.?*
The Nollans’ Bungalow and New Home

1. What is the condition of this bungalow?

2. How would the building of the two-story, larger new home on this property affect the ability of the public to see the beach from the street?
Nollan v. California Coastal Commission (1987)

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.

We have repeatedly held that, as to property reserved by its owner for private use, “the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property.”

If the Commission attached to the permit some condition that would have protected the public’s ability to see the beach notwithstanding construction of the new house – for example, a height limitation, a width restriction, or a ban on fences ... imposition of the condition would also be constitutional.

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition [granting access to people already on the beach] utterly fails to further the end advanced as the justification for the prohibition [protecting public view of the beach from the street]. When that essential nexus is eliminated, the situation [is completely different]. ...In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use, but an out-and-out plan of extortion.

[It is] the [Coastal] Commission’s belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its “comprehensive program,” if it wishes, by using its power of eminent domain for this “public purpose,” ... but if it wants an easement across the Nollans’ property, it must pay for it.

1. Why did the Court rule that the condition imposed on the Nollans’ building permit without just compensation was unconstitutional?

2. Why does the Court refer to property rights as a “bundle”?

3. What is your opinion on the ruling? Was the condition the Coastal Commission placed on the permit a taking? Explain.
Nollan v. California Coastal Commission (1987), Dissenting Opinion

The Court’s [ruling] ... is based on the assumption that private landowners in this case possess a reasonable expectation regarding the use of their land that the public has attempted to disrupt. In fact, the situation is precisely the reverse: it is private landowners who are the interlopers. The public’s expectation of access considerably [pre-dates] any private development on the coast. Article X, § 4, of the California Constitution, adopted in 1879, declares:

“...No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws ... so that access to the navigable waters of this State shall always be attainable for the people thereof.”

It is therefore private landowners who threaten the disruption of settled public expectations. Where a private landowner has had a reasonable expectation that his or her property will be used for exclusively private purposes, the disruption of this expectation dictates that the government pay if it wishes the property to be used for a public purpose. In this case, however, the State has sought to protect public expectations of access from disruption by private land use. The State’s exercise of its police power for this purpose deserves no less deference than any other measure designed to further the welfare of state citizens...

The result is that the Court invalidates regulation that represents a reasonable adjustment of the burdens and benefits of development along the California coast....

I dissent.

1. Why does this dissenting Justice cite the California constitution in his opinion?
**Dolan v. City of Tigard (1993), Majority Opinion**

Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred.

We think a term such as “rough proportionality” best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.

The difference to petitioner, of course, is the loss of her ability to exclude others. As we have noted, this right to exclude others is “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”

...We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner’s proposed new building.

[T]he city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner’s development reasonably relate to the city’s requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway “could offset some of the traffic demand ... and lessen the increase in traffic congestion.”

1. Compare the first paragraph of this excerpt with the first paragraph of the excerpt from the majority opinion in *Nollan v. California Coastal Commission* (Document H). How do they reveal why the cases are similar?

2. Summarize the Court’s reasoning in this case.

3. Combining the reasoning from this ruling with the Court’s decision in *Nollan v. California Coastal Commission* (Document H), how would you summarize the Court’s interpretation of what constitutes a “taking” under the Fifth Amendment?
Dolan v. City of Tigard (1993), Dissenting Opinion

In our changing world one thing is certain: uncertainty will characterize predictions about the impact of new urban developments on the risks of floods, earthquakes, traffic congestion, or environmental harms. When there is doubt concerning the magnitude of those impacts, the public interest in averting them must outweigh the private interest of the commercial entrepreneur. If the government can demonstrate that the conditions it has imposed in a land use permit are rational, impartial and conducive to fulfilling the aims of a valid land use plan, a strong presumption of validity should attach to those conditions. The burden of demonstrating that those conditions have unreasonably impaired the economic value of the proposed improvement belongs squarely on the shoulders of the party challenging the state action’s constitutionality. That allocation of burdens has served us well in the past. The Court has stumbled badly today by reversing it. I respectfully dissent.

1. Compare and contrast this understanding of property rights with those expressed in Documents A-D.

KEY QUESTION

Why are property rights sometimes referred to as a “bundle of sticks”? 

DIRECTIONS

Read the Case Background and Key Question. Then analyze the Documents provided. Finally, answer the Key Question in a well-organized essay that incorporates your interpretations of the Documents as well as your own knowledge of history.
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Graphing Property Rights

For each document or case listed on the table above, assign a score on a scale of 1-10, showing to what extent property rights were supported.