12-1-1999

*Del Monte Dunes v. City of Monterey*: Will the Supreme Court Stretch the Takings Clause Beyond the Breaking Point?

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In recent years, the U.S. Supreme Court has restricted the ability of state and local governments to implement land use controls, wielding the Takings Clause of the Constitution as its weapon of choice. The Court has expanded the applicability of the doctrine far beyond claims concerning real property, to overturn legislation protecting employee health benefits, and to find unconstitutional programs providing legal services to low-income clients. This essay argues that this limiting of the government's ability to exercise its police powers has subverted the original purpose of the Takings Clause. A case now pending before the Supreme Court, Del Monte Dunes v. City of Monterey, could provide the opportunity to reevaluate this course of action, or it could enable the Court to further restrict local governments from exercising intelligent control of land uses. The author contends that the Court should restrict successful regulatory takings claims to those that meet already-established requirements of an actual physical occupation or to those regulations that usurp all economic viability.

INTRODUCTION

The United States Supreme Court has launched an assault on state and local land use controls in recent years, using the regulatory takings doctrine of the Constitution as its battering ram. In 1998, the Court broadened its offensive, employing the Takings Clause to overturn legislation protecting employee health benefits and to undermine

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funds for legal services benefiting low and moderate-income clients. This unwarranted inflation of the venerable takings rules is a reprise of the Court's abuse of the Due Process Clause early in this century. Unless checked, it will lead to the same judicial strong-arming of legislation designed to curb economic abuses that damaged the Nation in past decades. As with the straining of due process to invalidate legislation regulating working conditions and prices, the current abuse of takings doctrine appears to be similarly driven by a determination to infuse the Constitution with economic doctrines that should be irrelevant to constitutional law.

This essay will first examine the Supreme Court's two forays last year that expanded takings doctrine to challenge statutes outside the land use area in ways reminiscent of the *Lochner* era. It will then retrace the history of takings from its origins in land use regulation and roots in the power of eminent domain. This essay will end with an analysis of how the Court moved onto the wrong track and why it should apply the brakes.

I. *Eastern Enterprises: Using Takings Doctrine as a Substitute for Substantive Due Process*

*Eastern Enterprises v. Apfel* was a challenge by a former coal producer to a federal statute aimed at ensuring employee benefits to miners. This provision, the Coal Industry Retiree Health Benefit Act of 1992 (the Coal Act), was the careful, balanced product of negotiation ending decades of unrest in the coal fields. The Court itself acknowledged that historically "medical facilities were frequently substandard" and "health care available to coal miners and their families was deficient in many respects." Health care became "a critical issue in collective bargaining," leading to the establishment of employer-financed benefit funds.

As coal, once a mainstay of the Nation's economy, became less so, and employment and profits dwindled, these benefit funds often cut back their payments. "Orphan retirees" from defunct operating companies were left without benefits in many cases. A commission appointed by Secretary of Labor Elizabeth Dole, after hearings, rec-

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4 *Eastern*, 118 S. Ct. at 2137.
5 *Id.*
6 *Id.* at 2140–41.
ommended federal legislation creating a fund. This recommendation resulted in the enactment of the 1992 Coal Act. The Coal Act merged employee benefit funds established in 1950 and 1974 through collective bargaining into a combined fund, financed by coal operators, to provide "substantially the same" benefits to retired miners and their dependents as the earlier plans furnished. Retirees were to be covered by the operators who employed them.

Eastern Enterprises (Eastern) contributed more than $60 million to the 1950 fund and an earlier one. In 1965 it sold its mines to a subsidiary, which ran them until 1987. Pursuant to the Coal Act, Eastern was held by the Commissioner of Social Security, who administers the Coal Act, to be responsible for the retired miners it had employed up to 1966. The company sued, objecting to its retroactive liability on both substantive due process grounds and as a taking. Eastern's claim was essentially that this liability should be borne by current coal operators, even though those companies had not employed Eastern's retired miners. Both lower courts rejected these claims, largely on the basis of the 1986 Supreme Court decision in Connolly v. Pension Benefit Guaranty Corp., in which the justices had unanimously turned aside similar contentions.

Connolly upheld the Employee Retirement Income Security Act of 1974 (ERISA). That statute was enacted to curtail serious abuses of employees' pension funds. Amended in 1980, it established a government-run fund, the Pension Benefit Guaranty Corporation, to pay out benefits where pension plans had ended. Employers withdrawing from a multi-employer pension plan must pay their share of the plan's unfunded vested benefits, including those employers who withdrew within five months prior to enactment of the 1980 law.

Connolly sustained ERISA against a takings claim, just as an earlier decision had upheld it against a due process claim. These

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7 See 26 U.S.C. § 9703(b), (c), (f).
8 See id. § 9704.
9 See Eastern, 118 S. Ct. at 2143.
10 See id.
11 See id. at 2137, 2143.
12 See id. at 2143.
13 See id.
17 See id.
cases accepted that "[i]n the course of regulating commercial and other human affairs, Congress routinely creates burdens for some that directly benefit others." Following settled law upholding economic regulations of this nature since the 1930s as long as they have a rational basis, the Court in Connolly found "it would be surprising indeed to discover" a taking. The "assessment of withdrawal liability," it continued, was "not made in a vacuum, ... but directly depends on the relationship between the employer and the plan to which it had made contributions." As the Court in Eastern acknowledged, "[t]he governmental action at issue in Connolly was not a physical invasion of employers' assets; rather, it 'safeguard[ed] the participants in multi-employer pension plans by requiring a withdrawing employer to fund its share of the plan obligations incurred during its association with the plan."

The Court likewise sustained the ERISA amendments as against due process and takings claims in 1993. But in Eastern, the Court changed its tack, finding the Coal Act provisions, in contrast to ERISA's, invalid. Justice O'Connor's plurality opinion concluded the Coal Act effected a taking. Justice Kennedy cast the fifth vote against the statute on substantive due process grounds.

What was different enough about the Coal Act to cause the Court to declare it unconstitutional—as it did hand-springs to distinguish Connolly and the other recent decisions upholding similar provisions? Justice O'Connor first noted that the financial impact of the Coal Act on Eastern was between $50 and $100 million. However, under prior precedent, monetary burden ought not to be a factor unless the Coal Act, under basic principles, deprives the company of all reasonable investment-backed expectations. Eastern made no such showing.

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19 Connolly, 475 U.S. at 223.
21 475 U.S. at 223.
22 Id. at 225.
25 See 118 S. Ct. at 2149.
26 See id. at 2137–53.
27 See id. at 2154–60 (Kennedy, J., concurring in part).
28 See id. at 2149.
Justice O'Connor pointed out that in *Connolly* and similar cases, the employers maintained a pension plan that later became subject to ERISA. But here, too, Eastern contributed to the pension funds in 1947 and 1950 and continued mining until 1965, employing the retirees the Coal Act required it to protect.

The Court made much of the claim that the Coal Act "reaches back 30 to 50 years to impose liability . . ." Justice O'Connor went on to condemn retroactive laws out of hand, relying mainly on precedents from another era, such as an 1811 New York case and the 1891 edition of the Commentaries of Justice Story. These artifacts, some dating from the early nineteenth-century vested rights age and some from the *Lochner* era, are strange implements indeed for a modern court to use, as if it wrote its opinions with quill pens. Surely the modern view of retroactive statutes is to uphold their validity where that is the legislative intent. The sole vestige of the ancient taboo against retroactivity is the maxim that in divining legislative intent, retroactivity is not to be inferred unless explicitly shown—a far cry from finding it anathema.

Ironically, Justice O'Connor sensibly rebuffed Eastern's substantive due process argument, relying on six decades of decisions "abandon[ing] the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believ[e] economically unwise." Yet the plurality distorted takings jurisprudence to reach that exact result. Laws imposing economic burdens as severe as those in *Eastern* have consistently been sustained against takings claims.

In a further irony, Justice Kennedy's opinion concurring in the judgment rejected the takings rationale but, in contrast to Justice O'Connor's approach, found the Coal Act violative of the Due Process Clause. As he correctly noted, there can be no taking where the Act

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30 See *Eastern*, 118 S. Ct. at 2149.
31 See id. at 2150.
32 Id. at 2151.
38 See id. at 2154-60.
“does not appropriate, transfer, or encumber” property at all, but “simply imposes an obligation to perform an act, the payment of benefits.”\textsuperscript{39} And the plurality’s view would “subject . . . States and municipalities to the potential of new and unforeseen claims in vast amounts.”\textsuperscript{40} Yet he concluded the Coal Act deprived Eastern of property without due process, using reasoning discredited since the Court abandoned its pre-1930s view of due process as a juggernaut in the path of economic regulation.\textsuperscript{41} As with Justice O’Connor, it was retroactivity that he felt rendered the Act invalid, since “the remedy created by the Coal Act bears no legitimate relation to the interest which the Government asserts in support of the statute.”\textsuperscript{42} The problem was that “Eastern was once in the coal business and employed many of the beneficiaries, but it was not responsible for their expectation of lifetime health benefits or for the perilous financial condition of the 1950 and 1974 Plans which put the benefits in jeopardy.”\textsuperscript{43} In short, according to this view, Congress could not hold the employer to account for the benefits which its own retirees earned and expected. This flies in the face of \textit{Connolly} and related decisions sustaining similar legislation, and of six decades of decisions holding “courts do not substitute their social and economic beliefs for the judgment of legislative bodies . . .”\textsuperscript{44} As Justice Kennedy himself had noted but a few years earlier, this expansive view of substantive due process “rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.”\textsuperscript{45}

As Justice Souter’s dissent in \textit{Eastern} points out, in the 1950s and 1960s “there was an implicit understanding on both sides of the bargaining table that the operators would provide the miners with lifetime health benefits”—an “understanding that kept the mines in operation and enabled Eastern to earn handsome profits . . .”\textsuperscript{46} All four dissenting justices agreed with Justice Kennedy that there was no

\textsuperscript{39} \textit{Id.} at 2154 (Kennedy, J., concurring).
\textsuperscript{40} \textit{Id.} at 2155.
\textsuperscript{42} \textit{Eastern}, 118 S. Ct. at 2159 (Kennedy, J., concurring).
\textsuperscript{43} \textit{Id.}
\textsuperscript{44} \textit{Ferguson}, 372 U.S. at 730.
\textsuperscript{46} 118 S. Ct. at 2160 (Souter, J., dissenting).
taking of property here. The Takings Clause— forbidding the governmental taking of “private property . . . for public use, without just compensation”—is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking. According to this view, the real issue was whether the Coal Act deprived Eastern of property without due process. As to that, “the record demonstrates that Eastern, before 1965, contributed to the making of an important ‘promise’ to the miners,” which, “even if not contractually enforceable, led the miners to ‘develop[p]’ a reasonable ‘expectation’ that they would continue to receive [retiree] medical benefits.” In short, in the four dissenters’ view, the Coal Act was not “fundamentally unfair or unjust” since “Eastern cannot show a sufficiently reasonable expectation that it would remain free of future health care cost liability for the workers whom it employed.”

II. Phillips: Taking Property That Isn’t Property

Eastern showed four justices ready and willing to distort the venerable takings doctrine, designed to safeguard property from government confiscation, into a weapon to destroy an enactment to ensure health benefits—in the process beating a plowshare into a sword. In Phillips v. Washington Legal Foundation, with the addition of Justice Kennedy, a majority of the Court actually showed its readiness to wield that sword against a target even further removed from the traditional subjects of takings decisions.

Phillips was a challenge to Texas’ Interest on Lawyers’ Trust Account (IOLTA) program. IOLTA programs in 49 states make the interest earned by clients’ funds held by lawyers available to finance legal services for low-income persons in need of representation. The interest in question is earned on funds invested for such short periods that the bank’s charges exceed the interest earned. The plaintiffs in Phillips, including a Texas attorney and client, contended the program took clients’ property—the interest—without just compensa-

47 See id. at 2161–63.
48 U.S. Const. amend. V.
49 Eastern, 118 S. Ct. at 2163 (Breyer, J., dissenting) (quoting First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987) (emphasis omitted)).
50 Id. at 2165 (Breyer, J., dissenting).
51 Id. at 2168.
53 See id. at 1927–28. The state without an IOLTA is Indiana. See id. at 1928, n.1.
tion. The Supreme Court, in a 5 to 4 decision, ruled the interest to be property within the meaning of the Takings Clause. Since the principal involved was concededly the client's property, the Court concluded the interest was as well, since under Texas law "interest follows principal." This was so even though Texas law does not adhere to the "interest follows principal" rule in income-only trusts and in distributing marital assets. The Court concluded the IOLTA interest was property even though it had previously rejected a takings claim in *Andrus v. Allard* by holding that "anticipated gains ha[ve] traditionally been viewed as less compelling than other property-related interests."

*Andrus* upheld a provision of the Eagle Protection Act that forbade the sale of eagle feathers, even those from birds lawfully killed before the Act took effect. The Court described "loss of future profits [as] a slender reed upon which to rest a takings claim." That reed has somehow grown in two decades into a steel cable.

The Court in *Phillips* remanded the case to the Fifth Circuit to decide whether the Texas statute amounts to a taking of the interest—already found by the Court to be property.

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, dissented. (These were the same four justices who dissented in *Eastern.*) Justice Souter maintained that the interest cannot be considered the client's property since under Texas law it must be paid into the IOLTA fund. Whether something is "property" under the Constitution is a matter of state law, where the state is accused of depriving the owner of it. Here, state law provides that the interest is not the client's property. Further, the property issue may not be divorced from the takings issue, for if "within the meaning of the Fifth Amendment, the IOLTA scheme had not taken the property recognized today, or if it should turn out that the 'just compensation' for

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54 See id. at 1926.
55 Id. at 1931–32.
56 Id. at 1926–27.
59 *Andrus*, 444 U.S. at 66.
60 See 118 S. Ct. at 1934.
61 See id.
62 See id.
63 See Board of Regents v. Roth, 408 U.S. 564, 577 (1971) (whether teacher's right to position is "property" is a question of state law).
64 See *Phillips*, 118 S. Ct. at 1934.
any taking was zero, then there would be no practical consequence for purposes of the Fifth Amendment in recognizing a client's property right in the interest in the first place . . . .65 In this view, the takings issue is interwoven with the property issue, since the Takings Clause only requires just compensation for property taken, and none is likely to be owed.

Justice Souter noted that the test to determine a taking is whether government has deprived the owner of all reasonable investment-backed expectations or has physically seized tangible property.66 Neither occurred here. No property was seized in a physical sense, and there was no economic impact since the interest was by definition offset by the short duration of the account, the bank's service charges, or both.67 Only such accounts are covered by IOLTA in the first place.68 The interest is not considered income of the client by the Internal Revenue Service. And, as Justice Souter notes, the client could not earn any net interest even if IOLTA did not exist, so it is hard to see how a client is entitled to "just compensation"—the only relief available to remedy a taking.69 Unless, like Gogol's trickster Tchitchikov, one can profit by selling dead souls, there simply is no property to be taken here and therefore no taking.

As Justice Breyer's dissent pointed out, the majority took the view that the value of what is taken is not what the owner actually lost but rather what he or she might in theory have gained.70 This would mean that if riparian rights were taken to build a dam, the owner must be paid not the value of the rights taken but "the value of the electricity that the dam would later produce"—a result at odds with every takings case on point.71

Other courts that have examined this issue have taken the sensible approach of the Phillips dissenters. For instance, in Cone v. State Bar of Florida,72 the Eleventh Circuit held, as to an identical fund:

[T]here was no taking of any property of the plaintiff. Standing alone, her deposit in the IOTA account could not earn anything.

65 Id. at 1935 (Souter, J., dissenting).
67 See Phillips, 118 S. Ct. at 1934-36.
68 See id. at 1929 (citing Texas IOLTA Rule 6).
69 See id. at 1934-36.
70 See id. at 1937.
71 Id. at 1939 (Breyer, J., dissenting).
72 819 F.2d 1002 (11th Cir. 1987).
By combining all such deposits, interest income has been created which was not within the legitimate expectations of the owner of any one of the principal amounts.73

Yet the Phillips majority's conclusion that this phantom interest is the client's "property" steers the Court toward the far less convincing conclusion that the property has been "taken."74 Even if the interest is deemed property, a historically and analytically accurate look at the Takings Clause shows that the state has not "taken" such property in a constitutional sense. The client simply did not have any reasonable investment-backed expectation of receiving the interest. As discussed in the next section, this is borne out by an overview of the Supreme Court's decisions on takings for over a century.

III. TAKINGS DECISIONS: EITHER PHYSICAL INVASION OR DEPRIVATION OF REASONABLE EXPECTATIONS

The genesis of the takings doctrine is in the Fifth Amendment's requirement that private property be taken only "for public use" and for "just compensation,"75 applicable to state action through the Fourteenth Amendment.76 As early as 1887 in Mugler v. Kansas,77 a brewer argued that his property had been taken in effect, if not in title, by a state law barring the manufacture or sale of alcoholic beverages. The Court, in an opinion penned by Justice Harlan, rebuffed the plaintiff's claim that an otherwise valid exercise of the state's police power had effectively taken his brewery.78 As the Court noted, the prohibition statute had made brewing an unlawful activity—tantamount to a public nuisance. Over three decades later, Justice Holmes, in the landmark Pennsylvania Coal Co. v. Mahon,79 first used the takings

73 Id. at 1007; see also Petition of Minn. State Bar Ass'n, 332 N.W.2d 151, 158 (Minn. 1982) ("There simply is no 'property' now in existence that would be taken."); Matter of Interest on Trust Accounts, 402 So.2d 389, 395 (Fla. 1981).
75 U.S. CONST. amend. V. Beyond the scope of this essay lies the intriguing issue as to the extent to which a taking through eminent domain has been held to be for a public use. See generally Berman v. Parker, 348 U.S. 26 (1954) (taking of prospering retail store for urban renewal upheld as for public use); Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (acquiring land by state to sell to resident tenants upheld as a public use); Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) (city acquiring land to give to auto assembly plant upheld as a public use).
76 See U.S. Const. amend. XIV.
77 123 U.S. 623 (1887).
78 See id. at 668–70.
79 260 U.S. 393 (1922).
doctrines to overturn a state statute depriving the owner of underground coal mining rights of all ability to use those rights. The statute, enacted to prevent the subsidence of surface land when coal was mined below, barred all mining by the owner of subsurface rights underneath a dwelling. Justice Holmes relied heavily on the fact that the statute made it “commercially impracticable to mine,” which “has very nearly the same effect for constitutional purposes as appropriating or destroying it.”

But he aptly noted in oft-quoted dicta that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.”

From these principles—that a taking only occurs when all reasonable value is removed—takings precedents followed. As early as Village of Euclid v. Ambler Realty Co., decided on the heels of Pennsylvania Coal, the Court upheld a zoning ordinance though it assertedly deprived a developer of three-quarters of the value of its parcel. Hadacheck v. Sebastian sustained a local law closing a brickyard in a residential district despite its removing seven-eighths of the value of the tract.

In Penn Central Transportation Co. v. City of New York Justice Brennan, writing for the Court, definitively spelled out the criteria for a taking through excessive regulation. Noting that no “set formula” exists, he nonetheless examined the leading cases and found the test to be whether the regulation deprives the owner of all reasonable investment-backed expectations. A mere reduction in the value of the land is plainly not sufficient to trigger a takings claim. The Court in Penn Central held the city’s denial of permission to build an office tower atop New York’s Grand Central Terminal, a historic landmark, was not a taking since it left the owner with the parcel intact, which was found to be capable of earning a reasonable return. Thus the owner’s reasonable investment-backed expectations were not destroyed. The Court went on to reject the owner’s claims that

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80 See id. at 412–13.
81 Id. at 414.
82 Id. at 413.
86 See id. at 124.
87 See id. at 130.
its air rights had been taken and that the landmark law was unconsti-
tutional as spot zoning.\textsuperscript{88}

Likewise, \textit{Keystone Bituminous Coal Ass’n v. De Benedictis}\textsuperscript{89} used the same standard to sustain a state statute designed, like the one in \textit{Pennsylvania Coal}, to prevent subsidence. The modern statute, how-
ever, allowed the subsurface owner to mine up to half the coal.\textsuperscript{90} Therefore it did not deprive the owner of all investment-backed ex-
pectations. In addition, the Court in \textit{Keystone} relied on the state’s strong showing of need for the regulation based on safety—a showing that was absent in \textit{Pennsylvania Coal}, which was a suit between the surface and subsurface owners, to which the state was not a party.\textsuperscript{91}

Thus a powerful series of precedents was built up over exactly a century, from \textit{Mugler} to \textit{Keystone}, in support of land use controls, even those significantly reducing the value of property, and rejecting takings claims as long as residual value remains with the owner. Recent state decisions have reflected these principles, and have properly relied on the owner’s knowledge of the regulation at the time of the purchase. For example, in \textit{Gazza v. New York State Department of Environmental Conservation}, a takings claim was denied by New York’s Court of Appeals where the owner bought property that was subject to regulations controlling wetlands at the time he purchased the parcel.\textsuperscript{92}

While this body of law developed, a parallel line of cases found takings where government had physically invaded an owner’s prop-
erty. This sort of taking does not require the loss of all reasonable use. If property is physically invaded, government must pay for the proportion of the parcel it has seized. In \textit{United States v. Causby}, overflights of military aircraft that reduced the value of a chicken farm constituted a taking by physical invasion, even though the farm could be used for other, less lucrative, purposes.\textsuperscript{93} The government was obliged to compensate the owner for the reduction in value caused by the overflights. \textit{Causby} has been extended to holding mu-
nicipal airport operators liable for commercial aviation overflights\textsuperscript{94} and to a local law requiring apartment-house owners to permit cable

\textsuperscript{88} See id. at 132.
\textsuperscript{89} 480 U.S. 470 (1987).
\textsuperscript{90} See id. at 470–72.
\textsuperscript{91} See id. at 474.
\textsuperscript{93} 328 U.S. 256, 261 (1946).
television operators to affix their equipment for only a nominal charge.95

The courts show particular concern where the government regula-
tion interferes with an owner's right to exclude others. Kaiser Aetna
v. United States set aside a condition attached to a United States
Army Corps of Engineers permit authorizing the dredging of the
mouth of a privately-owned lagoon in Hawaii.96 The agency insisted
that the permit allow public access to the lagoon. The Court found the
condition amounted to a taking, which enabled the public to navigate
in the owner's previously-private waters. Similarly, New York's Court
of Appeals ruled, relying in part on Kaiser Aetna, that a local law
barring the demolition of single-room occupancy apartment buildings
and requiring their owners to restore these apartments to habitable
condition constituted a taking since it interfered so greatly with the
"owners' fundamental rights to possess and to exclude . . . ."97 Judge
Bellacosa presciently dissented, pointing out that "[e]ighty-five years
after Lochner, we observe property rights, like the contract rights of
that bygone era, being exalted over the Legislature's assessment of
social policy"—a "policy choice [that] belongs to the elected officials
who enacted the law."98

Any doubt whether a regulatory taking was compensable ended in
1987 when the United States Supreme Court in First English Evan-
gelical Lutheran Church v. County of Los Angeles held the Fifth
Amendment requires payment of just compensation.99 This decision
overruled state court rulings that a successful owner was only entitled
to have the offending regulation set aside.100 The view that regulatory
takings should be compensable was the subject of intense criticism,101
but is now accepted as gospel. The critics feared that requiring states
and municipalities to pay for land use controls deemed unconstitu-
tional would inhibit them from adopting such regulations102—a fear
unwarranted at the time and certainly not borne out by events since.

98 Id. at 1072 (Bellacosa, J., dissenting).
100 See, e.g., Agins v. City of Tiburon, 598 P.2d 25 (Cal. 1979); Fred F. French Investing Co. v.
101 See Norman Williams Jr. et al., The White River Junction Manifesto, 9 VT. L. REV. 193,
102 See id.
In addition to decisions involving real property, the Supreme Court has examined regulations of personalty likewise challenged as takings. In *Andrus v. Allard*, as noted above, the Court upheld a statute that prohibited the selling of eagle feathers, including those from eagles taken before the statute was enacted. Sustaining the law, the Court noted it did not deprive the owners of all reasonable use or economic expectations since they could continue to exhibit the feathers for a fee. It based its ruling on decisions from the Prohibition era sustaining statutes that barred the sale of alcoholic beverages purchased before those laws took effect.

Several years after *Allard*, however, in *Hodel v. Irving*, the Court found a taking where Congress provided that the shares of Native American tribe members holding less than a two percent interest in their tribe’s property, or earning less than $100 per year for their owners, would escheat to the tribe. Although the Court (O’Connor, J.) found “dubious” the tribe members’ investment-backed expectations, since the shares were nearly all acquired by descent, it nonetheless sensibly found a taking of the owners’ interest since “the character of the Government regulation here is extraordinary.” As with the denial of the ability to exclude others in *Kaiser Aetna*, “the right to pass on property—to one’s family in particular—has been part of the Anglo-American legal system since feudal times . . . [and] a total abrogation of these rights cannot be upheld.” The Court distinguished *Allard*, in which the rights had not been extinguished, only limited.

Interestingly, Justice Scalia, joined by Chief Justice Rehnquist and Justice Powell, concurring, believed the case “indistinguishable” from *Allard*, and that “our decision effectively limits *Allard* to its facts.” This plainly seems erroneous since, as the majority noted, this statute interfered with a basic attribute of property ownership—the right to devise it—and the one in *Allard* did not. But with Justice Scalia’s...
concerne in *Hodel*, we can discern the beginnings of the expansion of the takings doctrine that was to bear fruit in *Eastern* and *Phillips*.

**IV. NOLLAN, LUCAS AND DOLAN: HAS THE TAKINGS DOCTRINE EXPANDED?**

Three major Supreme Court decisions in the last twelve years have shown the Supreme Court's zeal to expand the takings doctrine. While all three reached appropriate results, language in these opinions might, unless limited by future decisions, open the takings door wider than the Framers of the Constitution intended.

*Nollan v. California Coastal Commission* found a taking where the state conditioned a permit to develop a shoreline lot on the owners allowing the public an easement across their beachfront. California considers its entire shore an environmentally critical area, and in 1976 created a Coastal Commission with authority to regulate development along its shorefront. The Nollans purchased property between two coastal state parks. In order to implement the state's constitutional provision ensuring public access to its coasts, the Commission conditioned the permit sought by the Nollans to build a residence on their allowance of an easement for the public to cross their beachfront in order to walk from one park to the other.

The Court, in an opinion written by Justice Scalia, found a compensable taking. Although the owners were plainly not deprived of all reasonable investment-based expectations, the state had imposed a condition that grossly interfered with their right to exclude others—"one of the most essential sticks in the bundle of rights that are commonly characterized as property." As the Court noted, had the state simply required the Nollans to furnish an easement, instead of making it a condition of the permit, the state would clearly have had to pay for it. Constitutionally, the situations were the same.

The Commission could have imposed a height limit or similar restriction, or even prohibited building entirely, short of denying the Nollans all economically viable use. But, the Court stated that the "constitutional propriety disappears, however, if the condition substi-

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112 See *Nollan*, 483 U.S. at 827.
114 See *Nollan*, 483 U.S. at 828.
115 *Id.* at 831 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).
116 See *id.*
tuted for the prohibition utterly fails to further the end advanced as
the justification for the prohibition." In other words, the state may
not eliminate that "essential nexus" between its goal and the condition
imposed. In short, if the state "wants an easement across the Noll-
ians' property, it must pay for it."119

Nollan clearly turned on the physical invasion demanded by the
Commission. It is perhaps arguable that the Court meant to inflate
the newly-enunciated nexus requirement into a rule that would apply
to all claimed takings. But this seems unlikely. The Court aptly relied
on Loretto and Kaiser Aetna to find a taking based on the agency's
order authorizing trespasses by outsiders onto the owners' prop-
erty. Conceivably a purely regulatory taking, without the invasive
feature that permeated Nollan, might also lack the required nexus—for
example, a restriction on use utterly unconnected with the statu-
tory purpose. A zoning regulation might be construed to require all
houses to be painted blue, for instance. But such a requirement would
likely be set aside as irrational in any event. The Nollan nexus re-
quirement, to the extent that it adds an additional mandate for gov-
ernment, seems to apply only to regulations that cross the Rubicon
and compel physical invasion.

The Court in Lucas v. South Carolina Coastal Council answered
a question left open by earlier decisions: may a state justify a regula-
tory taking depriving the owner of all economic value by relying on
the need to protect public safety? Actually, Pennsylvania Coal
implicitly held it may not, finding a taking even though a law that
removed all economic use was enacted to safeguard dwellings from
subsidence if the coal below them was mined. But that decision was
made in 1922, in the infancy of land use regulation. Since then, an
abundance of controls have been adopted, ranging from essentially
esthetic requirements like historic landmark protection and boards of
architectural review, to those mandated by health or safety.

The statute in Lucas was in the latter camp. It forbade construc-
tion of any permanent habitable structure on South Carolina's beach-
front areas, because of concerns over coastal erosion and flooding in

117 Id. at 837.
118 Id.
119 Nollan, 483 U.S. at 842.
120 See id. at 831–32.
122 See supra note 54 and accompanying text.
123 See 505 U.S. at 1021–22.
that hurricane-prone venue. Lucas, who purchased two beachfront parcels two years before the statute was enacted, contended the state’s denial of permission to build on those lots deprived him of all reasonable investment-backed expectations and thus constituted a taking. The trial court so found.\(^{124}\) However, the South Carolina Supreme Court ruled that although the act denied the owner all reasonable economic value it was nonetheless not a taking since it constituted a use of the state’s police power “to enjoin a property owner from activities akin to public nuisances.”\(^{125}\) The United States Supreme Court thus had to determine whether a valid distinction existed between laws to protect esthetic values as in *Penn Central* or socially desirable public access as in *Nollan* and those aimed at curbing “harmful or noxious uses.”\(^{126}\)

The Court ruled that in the uncommon case of a regulation actually depriving the owner of all reasonable investment-backed expectations, the governmental entity must compensate the owner for the taking unless the limit on development “inhere[s] in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”\(^{127}\) In such a case, where the state could have enjoined the use under common-law principles, the owner takes subject to that restriction and is not entitled to compensation. In all other situations, though, a regulation denying all reasonable economic value constitutes a taking whether enacted to provide a public benefit or to curb a noxious or harmful use. As the Court noted, these are simply two ways of describing the police power—in effect, two sides of the same coin.\(^{128}\)

On remand, the South Carolina Supreme Court predictably, and properly, ruled that common-law doctrine could not have barred all development of Lucas’s shorefront lots. He recovered the full market value of the parcels.\(^{129}\)

*Lucas* eminently makes sense. An alternative ruling would compel the courts to engage in hair-splitting distinctions between legislation aimed at furnishing benefits and laws designed to prevent harms. Further, this would merely encourage states and localities to employ

\(^{124}\) See *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 896 (S.C. 1991) (recounting trial court award to Lucas of $1,232,387.50 as just compensation for the regulatory taking).

\(^{125}\) *Lucas*, 505 U.S. at 1022.

\(^{126}\) Id. at 1004.

\(^{127}\) Id.

\(^{128}\) See *id.* at 1022–26.

semantics to shoehorn regulations into the latter category—avoiding the harm of destroying a historic landmark, for example, instead of providing the benefit of safeguarding its existence. Where a property owner's total economic value is obliterated, it matters little whether the state was fostering a public good or averting public harm.

The most recent in the trio of takings decisions regarding land use controls, Dolan v. City of Tigard,130 like Nollan, dealt with a physical invasion—this time in the context of a mandated dedication of a strip of land. As a condition of a permit sought by the landowner to increase the size of her hardware store, the city's planning commission required that she dedicate about a tenth of her parcel for flood drainage and a path for pedestrians and bicyclists.131 This directive, like the condition attached to the permit in Nollan, compelled the owner to open up a portion of her property to the public. The Court annulled the required dedication as not roughly proportionate to the city's twin goals of avoiding construction in the flood plain and encouraging the use of bicycling as an alternative to automobile traffic. But it emphasized "the loss of her ability to exclude others."132 As in Nollan, the Court characterized that ability as "one of the most essential sticks in the bundle of rights" called property.133 The city plainly could have achieved its flood-control goal by simply restricting construction in the flood plain area of the Dolan parcel. As for reducing traffic, the city's finding that a bikeway "could offset some of the traffic demand" was surely insufficient to warrant requiring the owner to allow strangers to traverse her property.134 As with Nollan, if the city wanted an easement it should pay for it.

Nollan and Dolan are certainly correct if limited to mandated easements or similar dedications. Though each decision contains broad language as to the required nexus and rough proportionality, the courts should resist the temptation to apply those doctrines to conventional land use regulation—cases without the oppressive public easements required in those situations. Only in the most extraordinary cases should a land use control that does not amount to a physical invasion be set aside as not linked to the governmental goal, or grossly disproportionate to it. In those unusual situations the time-honored

131 See id. at 377.
132 Id. at 393.
133 Id. (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).
134 Id. at 395.
requirement that a land use regulation must have a rational basis, that it "substantially advance legitimate state interests,"\textsuperscript{136} should suffice to overturn controls that lack that basis.

V. \textit{Del Monte Dunes: Time to Limit the Inflation of Taking}

A suit now before the United States Supreme Court, \textit{Del Monte Dunes at Monterey, Ltd. v. City of Monterey},\textsuperscript{136} furnishes an opportunity for the Court to curb its expansion of takings doctrine, and to clarify some issues of procedure and proof. If wrongly decided, \textit{Del Monte Dunes} could wreak havoc with state and local land use regulation.

The city denied a permit to build a large residential complex on a shorefront site, because of the proposed development's impact on the habitat of an endangered species of butterfly and the city's concern over public access to the coast, as in \textit{Nollan}.\textsuperscript{137} The state later purchased the parcel for $800,000 more than the developer had paid for it in 1984.\textsuperscript{138} The developer nonetheless sued in federal court, asserting a taking as well as due process and equal protection violations.\textsuperscript{139} Since the action was brought under § 1983 of the Civil Rights Act of 1964, the plaintiff sought a jury trial.\textsuperscript{140}

The jury awarded damages on the taking and equal protection claims. The district judge dismissed the due process claim.\textsuperscript{141} The Ninth Circuit affirmed,\textsuperscript{142} and the Supreme Court granted certiorari. Since the court below upheld the propriety of a jury trial, sustained the jury verdict as "reasonable," and applied the "rough proportionality" standard of \textit{Dolan} to a land use regulation that did not compel a dedication or comparable physical invasion, the Court has before it a trio of issues capable of dangerously inhibiting zoning and environmental land use controls.\textsuperscript{143} The jury issue is, however, less likely to recur since takings claims against state and local regulations are not

\textsuperscript{137} 95 F.3d 1422 (9th Cir. 1996), \textit{cert. granted}, 118 S. Ct. 1359 (1998).
\textsuperscript{138} See \textit{id. at} 1425.
\textsuperscript{139} See \textit{id. at} 1432.
\textsuperscript{139} See \textit{id. at} 1425.
\textsuperscript{140} See 42 U.S.C. § 1983 (1994); \textit{Del Monte Dunes}, 95 F.3d at 1425–27.
\textsuperscript{141} \textit{See Del Monte Dunes}, 95 F.3d at 1425.
\textsuperscript{142} See \textit{generally id.}
\textsuperscript{143} \textit{Id. at} 1429–30.
normally brought in federal court, and states generally do not provide jury trials in takings cases.\textsuperscript{144}

There is no basis in either history or legal principle for jury trials of taking claims. Under the Seventh Amendment, preserving the right of jury trial in "[s]uits at common law" in the federal courts, parties are entitled to a jury if "the right . . . existed under the English common law when the [a]mendment was adopted" in 1791.\textsuperscript{145} This is determined with respect to the particular cause of action, or, if it did not then exist, an "appropriate analog[y]."\textsuperscript{146} At common law, juries never decided whether a taking by eminent domain was necessary for a public use, as mandated by the Fifth Amendment.\textsuperscript{147} This was so because condemnation was a special proceeding, not an action at common law.\textsuperscript{148} In contrast, the issue of just compensation was, and is, triable by a jury.\textsuperscript{149}

Since the time a taking, or inverse condemnation, has existed as a claim, its propriety has been decided by courts, not juries. No jury was employed in \textit{Penn Central}, \textit{Lucas}, \textit{Loretto}, \textit{Goldblatt}, \textit{Nollan}, \textit{Agins}, \textit{Dolan}, \textit{Eastern}, or \textit{Phillips}. This is so because in the end, takings doctrine is an offshoot of eminent domain—not a determination of just compensation.

Of even greater concern is the mischief that would result from jury determinations as to whether a taking occurred. Jury verdicts are apt to vary greatly, depending on subjective factors. In short, they lack the uniformity of judicial decisions. This may not much matter in personal injury cases, but takings claims typically involve land use regulations that apply to numerous parcels. Inconsistent judgments as to whether these controls amount to compensable takings will create enormous legal, political and economic problems. Municipalities may have to pay the owner of one parcel, but not another who is identically situated.

Worse yet, the Ninth Circuit felt obliged to uphold the jury's verdict as long as it was "reasonable."\textsuperscript{150} This does violence to the rule

\textsuperscript{144} \textit{Del Monte Dunes} was brought in federal court because when the suit was instituted in 1986, California's courts did not provide a forum to recover damages in takings cases. \textit{See First English Evangelical Lutheran Church v. County of L.A.}, 482 U.S. 304, 318–20 (1987) (instituting availability of damages).


\textsuperscript{148} \textit{See Bouton v. Potomac Edison Co.}, 418 A.2d 1168, 1170 (Md. 1980).

\textsuperscript{149} \textit{See Reynolds}, 397 U.S. at 19.

\textsuperscript{150} \textit{Del Monte Dunes at Monterey, Ltd. v. City of Monterey}, 95 F.3d 1422, 1430 (9th Cir. 1996), \textit{cert. granted}, 118 S. Ct. 1359 (1998).
that land use regulations should be sustained as long as they have a rational basis and do not deny all reasonable economic value. And finally, the court applied the "rough proportionality" test of Dolan where no dedication, physical invasion or similar exaction by government was compelled. The rough proportionality test, newly proclaimed in Dolan, has no applicability to a claim that a land use regulation deprives the owner of all economic value. It was not employed in Penn Central, Keystone or Lucas and should not be in Del Monte Dunes, where the owner voiced identical contentions to the ones in those cases. The Court in Dolan explicitly distinguished that case from its predecessors since in Dolan "the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city," tantamount to the easement demanded in Nollan.

Del Monte Dunes offers the means for the Court to limit Nollan and Dolan to interference with an owner's right to exclude strangers—the essence of property ownership. Conversely, should the Court affirm the Ninth Circuit Del Monte Dunes decision, it will overturn decades of takings decisions and severely subvert the ability of state and local governments to intelligently control land use. With enlightened planning and zoning to reduce sprawl, safeguard neighborhoods and respect environmental and historic concerns ever more essential, affirmation of the odd and mischievous Del Monte Dunes holding would be a major step backward.

VI. HAVE THE COURTS SUBVERTED THE TAKINGS CLAUSE'S INTENT?

Since Pennsylvania Coal in 1922, the courts have taken for granted that when government "goes too far" in regulating property, a taking has occurred. But, as Professor William Treanor has persuasively shown, the Takings Clause was intended to deal with actual takings by eminent domain, and not with regulations of property at all. James Madison's statements at the Constitutional Convention, as described by Treanor, "uniformly indicate that the clause only mandated compensation when the government physically took prop-

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151 See id. at 1425.
153 See Del Monte Dunes, 95 F.3d at 1422.
154 260 U.S. 393, 415 (1922).
Prior to the Constitution's passage, both the Crown and the states had seized private property voraciously and often without scruples as to its public use or the need to pay just compensation.

The only significant nineteenth century Supreme Court decision finding a violation of the Takings Clause, *Pumpelly v. Green Bay Co.*, involved a physical invasion of property caused by the flooding of the plaintiff's land pursuant to a state statute. *Mugler*, discussed earlier, specifically rebuffed a takings claim by a brewer who claimed a state prohibition law rendered his property worthless. According to Treanor, *Pennsylvania Coal*, largely recognized as the source of the takings doctrine, derived from Justice Holmes' view that "[s]ome small limitations of previously existing rights incident to property may be imposed for the sake of preventing manifest evil; large ones could not be, except by the exercise of the right of eminent domain." It is too late to seriously argue that the Takings Clause ought to be restricted to physical invasions and direct exercises of eminent domain. But surely its original intent should be a weighty element in determining whether it should be further expanded. Just as the Court cabined substantive due process challenges to property rights half a century ago, it is time for it to halt the inflation of takings doctrine as a latter-day equivalent.

**CONCLUSION**

The courts should strike an appropriate balance between owners' property rights and the responsibility of the state and local governments to control land use in order to avoid sprawl and safeguard water supply, wetlands and historic landmarks. Expanding the application of the Takings Clause to allow it to swallow legitimate uses of the police power—and notably, wielding the Clause against statutes like those in *Eastern Enterprises* and *Phillips* that do not involve real property at all—stretches far beyond any reasonable balance. It does violence to the intent of the Takings Clause and ignores decades of decisions consistently sustaining economic regulations as long as they have a rational basis.

While the Takings Clause should not "be relegated to the status of a poor relation," it likewise should not be the autocrat of the break-

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156 Id. at 791.
157 80 U.S. 166, 167 (1872).
158 See 123 U.S. 623, 635 (1887).
159 Treanor, supra note 155, at 799 (quoting Rideout v. Knox, 19 N.E. 390, 392 (Mass. 1889)).
fast table. Nearly a century ago Justice Holmes warned us that the "[C]onstitution is not intended to embody a particular economic theory, whether of paternalism . . . or of laissez faire."\textsuperscript{161} He added that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's \textit{Social Statics}."\textsuperscript{162} Nor did it enact Judge Richard Posner's law and economics.

\textsuperscript{162} \textit{Id.}