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KENNETH SALZBERG*

The Dog That Didn't Bark: Assessing Damages for Valid Regulatory Takings

"Is there any other point to which you would wish to draw my attention?"

"To the curious incident of the dog in the night-time."

"The dog did nothing in the night-time."

"That was the curious incident," remarked Sherlock Holmes.¹

ABSTRACT

If land use regulations that go "too far" are really takings under the Fifth Amendment, one would expect there to be a large number of cases discussing the appropriate way to calculate the "just compensation" for those regulations that are otherwise valid. Oddly there are none. This article explores the reasons for that lack. The lack of any such cases and the problems with any such compensation remedy stem from the confusion in contemporary "takings" jurisprudence. In analyzing the hundreds of cases that discuss "regulatory takings," it becomes clear that the courts recognize that any remedy granting compensation for such "takings" would present more problems than it might solve. Most of this confusion would be resolved by treating "regulatory takings" as violations of the Due Process Clause rather than the Takings Clause.

INTRODUCTION

In a previous article,² I argued that the current lack of clarity in "takings" law is a result of the Supreme Court's disdain for land use

* Associate Professor, Hamline University School of Law. Thanks to the helpful comments of my colleagues at our faculty research colloquiums, and especially to Mary Jane Morrison and Tom Romero. Special and heartfelt thanks to my friend Tom Tolmasoff for helping me put my ideas into more or less readable form, and to my wife, Pat Price, for pushing me. Thanks also to my research assistants Jonathan Ozanne and Brian Niemczyk.

1. Sir Arthur Conan Doyle, *Silver Blaze*, in II THE ANNOTATED SHERLOCK HOLMES: THE FOUR NOVELS AND THE FIFTY-SIX SHORT STORIES COMPLETE 261, 277 (William S. Baring-Gould ed., 2d ed. 1967).

2. Kenneth Salzberg, "Takings" as Due Process, or Due Process as "Takings"?, 36 VAL. U. L. REV. 413 (2002). Consistent with the author's prior article, the author will be using takings without quotation marks when referring to traditional physical takings and "takings" with quotation marks to refer to regulatory takings.

regulations and its misguided campaign to use the Takings Clause of the Fifth Amendment³ to limit such regulations. This campaign has resulted in a body of law that is paradoxical, chaotic, and confused.⁴ I further argued that a proper—and more useful—analysis would involve application of the Due Process Clause of the same amendment⁵ to contested regulations. Such an analysis would establish a clear, logical, and valid basis for considering land use regulations; bad regulations would be struck down but would not garner compensation for the owner.

Not surprisingly, there has been no change in the Supreme Court's analysis of regulatory takings law notwithstanding the confusion the takings analysis perpetuates. The majority of cases in this area have been procedural rather than explanatory, and the explanatory cases have done little to clarify the muddle. The lower courts continue to use the Supreme Court's takings analysis as a template, struggling with the inevitable consequences of deciding cases on the basis of the Takings Clause rather than through due process. A practical problem arises out of such an approach: once regulations are found to impose a "regulatory taking," how do the courts proceed in determining just compensation, as seems to be required under the Fifth Amendment?

In an attempt to understand this problem, I investigated how the lower courts assess compensation for those otherwise valid regulations that they determine are "takings." I searched for cases where courts found that regulations that diminished the value of land were valid (that is, not violations of the Due Process Clause), yet nonetheless effected "takings" for which compensation was granted. I intended to critique the formulas the courts used for calculating the appropriate compensation.

Much to my surprise, I could find no such cases.

Evidently, courts are not granting compensation for "valid regulatory takings"; instead, landowners' demands for compensation are being met with other remedies. There seems to be no middle ground: the courts either strike a regulation down or uphold it without any discussion of possible measures for compensating valid regulatory takings. Just as in Sherlock Holmes' case of the dog that didn't bark, the judicial silence here is significant.

3. U.S. CONST. amend. V (1978) ("[N]or shall private property be taken for public use, without just compensation."). The Fifth Amendment Takings Clause is made applicable to the states and local governments through the Fourteenth Amendment. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 123 (1978) (citing *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239 (1897)).

4. See Salzberg, *supra* note 2, at 414 n.11.

5. U.S. CONST. amend. V ("nor be deprived of...property, without due process of law...").

Why the judicial silence on this issue? In order to approach this question, I first sketch the history of the idea of “regulatory takings” to provide essential background and briefly review the concept of real takings. I then proceed to describe the seven kinds of regulatory takings (or actions landowners allege are takings), including in that discussion the typical remedies the courts grant when they side with the landowners. I argue that most of these regulatory actions are not takings, but are rather violations of the Due Process Clause.

Next I consider the category of regulatory takings that is most germane to my argument: valid, non-total takings cases based on regulatory actions that go “too far.”⁶ These are the cases that should result in compensation if the takings template is applied. I then look at examples of takings cases that should have been decided by the “takings template”⁷ but were not. Finally, I examine some hypothetical remedies that would satisfy the takings template and suggest why they cannot work.

My conclusion is that courts are applying the takings template in regulatory cases with increasing frequency while ignoring the logical “takings” remedy of just compensation. Their silence is a tacit admission that compensation is the wrong remedy for bad regulations – that there is in fact no such thing as a “valid regulatory taking” that deserves “just compensation.”

THE CONFUSED IDEA OF REGULATORY “TAKINGS” AND ITS DISCONTENTS

Government seizure of property without compensation is expressly prohibited by the Fifth Amendment and made applicable to the states through the Fourteenth Amendment.⁸ In what are called “true” takings cases, a landowner alleges that the government has physically taken his or her property. If the landowner prevails, the remedy is “just compensation.” If the landowner loses and the court finds that the government did not take the property, there is of course no remedy for the landowner.⁹

6. This is a reference to Justice Oliver Wendell Holmes, Jr.’s remark in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 395, 414 (1922) (“[I]f a regulation goes too far it will be recognized as a taking.”).

7. See *infra* note 41 and accompanying text.

8. See U.S. CONST. amend. V.

9. On the other hand, in a similar type of case, when a landowner prevails on a claim that an action by the government deprived him of his property in violation of the Due Process Clause, the remedy is to invalidate the application of the regulation to that particular parcel.

For many years after the passage of the Bill of Rights, the Supreme Court decided very few cases under the takings clause. Those cases that were decided either agreed that the action of the government was a taking and ordered compensation to be paid¹⁰ or determined that the action was not a taking and dismissed the suit.¹¹ During the same period, regulations that affected the use of land, such as zoning, were also litigated but were decided under the Due Process Clause.¹² In those cases, if the Court decided that the regulation was in violation of the Due Process Clause, it either struck down the regulation or refused to allow it to be applied to the land in question.¹³

In the late twentieth century, however, there has been a politically motivated campaign to use the Fifth Amendment to fight governmental land use regulation.¹⁴ The professed justification for this campaign can be traced to Holmes (Oliver Wendell, not Sherlock). In 1922, Justice Holmes remarked in *Pennsylvania Coal Co. v. Mahon* that "if regulation goes too far it will be recognized as a taking."¹⁵ Although this

10. See *Pumpelly v. Green Bay Co.*, 80 U.S. 166 (1871). This case involved a state-authorized dam that flooded Pumpelly's property. *Id.* The Supreme Court ordered compensation to be awarded to Pumpelly for the loss of value of the flooded land. Although the state had not taken the actual title to the property, they had begun to use it. *Id.* This is an early example of what have come to be called "inverse condemnation" cases.

11. See *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (The regulation prohibited Goldblatt from continuing to operate his sand and gravel mine on his property in the city of Hempstead. The land had been mined since 1927 but had reached the water table, and the resulting lake presented enough danger to allow the court to conclude that the regulation was reasonable and not a taking.).

12. See *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926).

13. Two years after the *Euclid* case was decided, the court found that a zoning ordinance, as applied to the plaintiff's land, was arbitrary and unreasonable and forbade its application to the subject property. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

14. See Carl Pope, *Takings: The New Politics*, Speech to the Commonwealth Club, San Francisco, Cal. (June 31, 1995), available at <http://www.spectacle.org/196/takings.html> (last visited Dec. 10, 2005). See generally WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995).

15. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). In May 1921, the Pennsylvania legislature passed the Kohler Act. *Id.* at 412. This statute prohibited the mining of anthracite coal in any manner that may cause a home to deteriorate. *Id.* at 412-13. Prior to the enactment of this law, the parties executed a deed that conveyed the surface rights. *Id.* at 412. Under the police power, the court found that states have the ability to regulate property and cause a diminution in the value of that property by those regulations; however, the ability to regulate and diminish property values "must have its limits or the contract and due process clauses are gone." *Id.* at 413. The Court went on to find that in this situation, where a contract was executed prior to the enactment of the law, the court should invalidate the application of the law to the particular parcel and allow the mining to continue. *Id.* at 416.

remark was probably meant figuratively,¹⁶ the error in taking it literally has caused nearly as much trouble as the deliberate ignoring of the first clause of the Second Amendment.¹⁷

In *Mahon*, the Court addressed a Pennsylvania statute that prohibited coal companies from mining in such a way as to cause the overlying land to collapse. The Court struck down the statute as applied to Pennsylvania Coal but ordered no compensation. If the Court had applied the clause literally, rather than figuratively, it would have ordered compensation to be paid. Clearly the *Mahon* Court did not think that any property belonging to the Pennsylvania Coal Company had been confiscated by the State of Pennsylvania. If it had so believed, it would have ordered the lower court to take evidence on and compute the compensation due the coal company.

In the 1970s, for the first time in the 50 years since *Mahon* was decided, the Supreme Court began to take Holmes' "too far" remark as if it had been intended literally and began to call all cases where a regulation went too far "regulatory takings." In almost all of those cases, however, the remedy remained a due process violation remedy: striking down the regulation or refusing to allow it to be applied to the land in question. In the last 30 years the Court has decided a considerable number of land use regulation cases using this "takings template"¹⁸ without awarding compensation.

Once the Court began, ostensibly, to treat regulations that went "too far" as takings, an elaborate taxonomy of cases and exceptions was needed to fit the ultimate outcomes into the template. Compensation was still ordered in the "traditional" case where the landowner suffered a permanent physical invasion.¹⁹ Compensation was also the remedy in those cases where the regulation was found by the state court to have deprived the owner of all economically beneficial use²⁰ (except where the

16. See Louise A. Halper, *Tropes of Anxiety and Desire: Metaphor and Metonymy in the Law of Takings*, 8 YALE J.L. & HUMAN. 31 (1996).

17. See, for instance, a rather measured consideration of this issue in Akhil Reed Amar, *Second Thoughts: Enduring and Empowering The Bill of Rights in the Third Millennium*, 65 LAW & CONTEMP. PROBS. 103 (2002).

18. I use "takings template" to refer to the various criteria used to put land use regulations into one or the other of the categories of cases discussed in the "Seven Types of Takings" section of this article.

19. See generally *Hendler v. United States*, 952 F.2d 1364 (1991) (holding that the Environmental Protection Agency's requirement and subsequent placement of groundwater monitoring wells on private property constituted a physical taking and granting the lower court power to award damages); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (finding evidence of a taking when a cable was installed on a New York landlord's building and leaving the determination of compensation to the state court).

20. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

regulation prohibited a "nuisance like" activity²¹). In all other cases, the Court used the multiple factors identified in *Penn Central* to decide if the regulation was the "functional equivalent" of a real taking.²²

The "takings template" is notorious for its confusion and lack of clear rules. In a recent session, the Supreme Court, in a rent control case, again had to explain the template, ultimately remanding the case because the lower court had applied the template incorrectly.²³ The Court held that the lower courts were mistaken in deciding that the ordinance was a taking because "[it did] not substantially advance legitimate state interests."²⁴ This approach once again changes the criteria that the lower courts were seemingly required to apply in deciding "regulatory takings" cases.

The confusion over criteria for "regulatory takings" cases translates into confusion over the remedy in those cases. If a landowner loses on what has come to be called a "regulatory takings" claim, the ordinance or law is simply upheld, notwithstanding the diminution in the value of the land.²⁵ However, when the landowner prevails in such a case, instead of calculating what would be just compensation, as is consistently done in physical taking cases, courts simply invalidate the regulation—either in general or as applied to the land in question.²⁶ The

21. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

22. *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978). The factors laid out in *Penn Central* form the test used to determine whether a regulatory taking has occurred. *Id.* at 124. These factors include the evaluation of (1) the economic impact of the regulation on the landowner, (2) the extent to which the regulation has interfered with the landowner's investment-backed expectations, and (3) the character of the government regulation. *Id.*

23. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005). In *Lingle*, the Hawaii legislature passed a rent control ordinance applicable to gas station leases designed to ameliorate the high cost of gasoline in Hawaii. *Id.*

24. *Id.* at 2077. The lower court had found that the ordinance would not, in fact, have an effect on gas prices. The Supreme Court, in an opinion by Justice O'Connor, held that "the 'substantially advances' formula" (which had been mentioned in a line of cases beginning in 1980) is not an appropriate test for determining what constitutes a "taking." *Id.* at 2087.

25. See *Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981) (validating the constitutionality of the Surface Mining and Reclamation Act and finding no evidence of a regulatory taking); *Zeman v. City of Minneapolis*, 552 N.W.2d 548 (Minn. 1996) (finding no evidence of a taking and upholding an ordinance revoking rental licenses of landlords who allowed criminal activity to continue on their properties); *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281 (Minn. Ct. App. 1996) (upholding a city ordinance requiring relocation expenses to be paid to mobile home park tenants by owners who chose to close the park and denying any evidence of a taking).

26. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922). In *Mahon*, a deed conveyed the surface of a particular parcel of land but reserved the right to remove all the coal under the property. *Id.* at 412. In May 1921, the State of Pennsylvania passed an act commonly called

question then arises whether this sort of situation is actually a “taking” at all, since its remedy drastically diverges from the constitutionally mandated and long-established doctrine of just compensation in takings jurisprudence.

UNAMBIGUOUS CASES

To understand the taxonomy of regulatory takings cases, which I discuss below, it will be helpful to differentiate “regulatory takings” from the sort of takings they are not: real takings or denials of due process. While these two types of cases are important, and can also be controversial,²⁷ neither is the subject of this article, which is damages for “regulatory takings.”

Real Takings

Real takings involve situations where the government actually physically takes property from a private individual—for instance, when the state takes title to real property for a road or court house. Courts have long held that any physical expropriation, no matter how small, is a taking for which the state should be required to pay ‘just compensation’ to the ex-property owner.²⁸

The usual remedy in the case of a physical taking is to grant the landowner money damages, the measure of which is determined by the market value of the property taken. After payment of those damages, the government owns the property. This principle applies to a real taking of any interest in land, be it a present fee simple, a future interest in the title, a mineral right, or an easement. Thus, in *Loretto v. Teleprompter*

the Kohler Act. *Id.* The act essentially restricts mining of any anthracite coal that will negatively impact any structure. *Id.* at 413. This act would destroy any property rights that were conveyed in the deed. *Id.* The Court invalidated the act as applied to the property because the structure that would possibly be endangered by the mining was a private home, not a public building and, thus, there was little public interest or concern. *Id.* Additionally, the court found that the act did not further the police power of enhancing public safety; instead, it greatly restricted any use of the estate for mining and, thus, the court exempted the particular parcel from the act. *Id.* at 414.

27. See *Kelo v. City of New London, Conn.*, 545 U.S. ___, 125 S. Ct. 2655 (2005) (a recent controversial “public use” case).

28. *Loretto v. Teleprompter Manhattan CATV Corp.*, 453 U.S. 410 (1982). In that case, the City of New York required apartment building owners to allow cable companies to string wire over the roofs of their apartments. *Id.*

Manhattan CATV Corp., despite the small amount of property taken, the owner was compensated – in that case with payment of one dollar.²⁹

29. There is a rich and interesting literature on the question of just how such compensation is to be calculated, and on resolving the many inequities the doctrine generates. For example, how do we decide equitable compensation when land is taken for a freeway exit ramp? Does the owner of a small parcel, all of which is taken for the freeway exit ramp, get the market value of the whole parcel? Does the owner of a large parcel, a small part of which is taken for the exit ramp and the remainder of which increases substantially in value because of the location of the ramp, get nothing? Whether the second owner should get the same compensation as the first is a complicated and controversial question. Compare *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973) with *United States v. Fuller*, 409 U.S. 488 (1973), discussed in *United States v. 42.13 Acres of Land*, 73 F.3d 953 (9th Cir. 1996), where the court stated:

The United States took Almota's grain elevator, which was on land leased from a railroad. The government proposed to pay for the value of the elevator assuming Almota would lose its right to use the property when the lease expired in 7 1/2 years. Almota offered proof that, were it not for the condemnation, a willing buyer would pay something additional for the expectation that the railroad would renew the lease. The Court noted that an existing tenant usually has the inside track for a renewal, the landlord has an interest in keeping its property leased, and the government "may not take advantage of any depreciation in the property taken that is attributable to the project itself." The concurring Justices pointed out that Almota had agreed to bear the risk that the railroad would change its plans, but not that the government would condemn the property for another use. The Court therefore held affirmatively, on the question of, "whether, upon condemnation of a leasehold, a lessee with no right of renewal is entitled to receive as compensation the market value of its improvements without regard to the remaining term of its lease, because of the expectancy that the lease would have been renewed."

Id. at 956. On the same day *Almota* came down, the Supreme Court went the other way in *United States v. Fuller*, 409 U.S. 488 (1973). In *Fuller*, a rancher raised cattle on land different parts of which he owned in fee simple, leased from the state, and licensed from the federal government under revocable Taylor Grazing Act permits. *Id.* The federal government condemned some of the fee simple land. *Id.* The dispute was over whether fair compensation for the fee simple land should include the increased value of the fee land on account of the grazing permits. *Id.* The grazing permits of course increased the practicality of raising cattle on the fee lands. *Id.* The Court held that the government did not have to "pay for that element of value based on the use of respondent's fee lands in combination with the Government's permit lands." *Id.* at 493. The principle was that "the Government as condemnor may not be required to compensate a condemnee for elements of value that the Government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain." *Id.* at 498. The Court expressly noted that "we do not suggest that such a general principle may be pushed to its ultimate logical conclusion." *Id.* at 492. See, e.g., Christopher A. Bauer, *Government Takings and Constitutional Guarantees: When Date of Valuation Statutes Deny Just Compensation*, 2003 BYU. L. REV. 265; Marilyn F. Drees, *Do State Legislatures Have a Role in Resolving the "Just Compensation" Dilemma? Some Lessons from Public Choice and Positive Political Theory*, 66 FORDHAM L. REV. 787 (1997); Roger Clegg, *Reclaiming the Text of the Takings Clause*, 46 S.C. L. REV. 531 (1995). These, however, are not "regulatory takings" issues and thus are not addressed in this article.

Due Process Violations

Due process violation cases are sometimes referred to as takings cases because using a “takings” framework seems more current than spelling out why the regulation in question violates the Due Process Clause.³⁰ However, unlike more conventional “regulatory takings” cases, the landowners in these cases are not arguing that the regulations diminish the value of their property too much, even if the regulations are otherwise rational and valid. Instead, the landowners argue that there is something unfair or arbitrary about the regulations, or that they regulate an area over which the government does not have any valid regulatory power.³¹ In this sort of case, the first line of attack for the landowner is to challenge the regulation generally,³² without relying on its specific application to her individual property.³³ A famous example of a facial attack on a landuse regulation is the case of *Village of Euclid, Ohio v.*

30. See Salzberg, *supra* note 2, at 435.

31. These are the factors that determine whether a landowner’s rights under the due process clause have been violated.

32. See *Hodel v. Va. Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 294 (1981). In *Hodel*, the appellees facially challenged the Surface Mining Control and Reclamation Act, without reference to a specific parcel of property affected by the act. *Id.* at 295. The Court was reluctant to entertain facial challenges to regulatory ordinances and statutes because the very nature of takings jurisprudence is an “ad hoc, factual inquiry” that is specific to each particular parcel. *Id.* However, it did examine whether the mere enactment of the act constituted a taking. *Id.* In this analysis, the Court noted that “[a] statute regulating the uses that can be made of property effects a taking if it ‘denies an owner economically viable use of his land.’” *Id.* at 296. The Court found that the act did not take away all viable uses of the land because it only prohibited mining near certain locales and did not “categorically prohibit surface mining,” and thus there was no taking. *Id.* See also *Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (holding that the enactment of a zoning regulation limiting the permitted number of residential lots did not constitute a facial taking as the ordinance was designed to prohibit the ill effects of urbanization and provide for the “careful and orderly” development of the city); *Pennell v. San Jose*, 485 U.S. 1 (1988) (denying a facial attack on a rent control ordinance).

33. See *Hodel*, 452 U.S. at 294–95. Facial attacks on regulations by landowners are seldom successful. See, e.g., *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 495 (1987). In *Keystone*, coal companies brought a facial attack on the Subsidence Act, claiming that the overall act inhibited their ability to mine coal. *Id.* at 478. The Court noted the difficulty in deciding facial attacks in regulatory takings cases because the inquiry into a regulatory takings case is highly fact-specific with regard to a particular piece of property and in facial attacks there are no individual parcels to examine. *Id.* at 494. The Court went on to note that the only review that it could undertake was an examination of whether the “mere enactment” of the Act constituted a taking. *Id.* The test used in this analysis is whether the “statute regulating the uses that can be made of property effects a taking...[and] denies an owner economically viable use of his land.” *Id.* at 495. The Court acknowledged that this type of challenge would be an “uphill battle.” *Id.* See also, e.g., *Hodel* 452 U.S. at 295–96.

Ambler Realty Co.,³⁴ in which the U.S. Supreme Court first upheld a city's power to impose zoning regulations in general.³⁵

A second line of attack for a landowner is to challenge the specific application of the regulation.³⁶ Here the landowner is not asking the court to invalidate the entire regulation, but to forbid its application to her particular parcel of land. For example, a landowner might appeal a denial of a variance, arguing that the zoning ordinance that forbids building closer than 15 feet from a street should not apply to her lot because the lot is narrower than most. The claim is not that a 15 foot setback requirement is irrational or invalid in general, but rather that it creates a hardship to the particular owner.³⁷

In this type of case, the court must determine whether the regulation is a denial of the landowner's due process of law because it unfairly burdens her use of the land. If the court finds this is true, the remedy is to strike down the regulation as applied to the particular land in question.³⁸ If no due process violation is found, the controversy may still be considered under a takings clause analysis.³⁹

34. 272 U.S. 365 (1926).

35. *Id.* See also *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872 (9th Cir. 1987). Lacking standing to challenge the enactment of a zoning ordinance, the plaintiff was forced to facially challenge the act or allege that the "mere enactment" of the ordinance constituted a taking. *Id.* at 877. To make a successful facial attack on a regulation, a plaintiff must show that (1) the regulation does not substantially advance legitimate state interests or (2) it denies an owner economically viable use of his or her land. *Id.* The plaintiff bears the burden of showing that all economically viable uses are prohibited on the land; this task is an "uphill battle." *Id.* Because the availability of a variance and other special uses might allow other economically beneficial uses of the property, the court upheld the regulation as valid in its entirety. *Id.*

36. *Id.* at 876. In *Lake Nacimiento*, the Ranch owned property along the lake that was zoned as Recreational. *Id.* at 874-75. The county later enacted a zoning ordinance that changed this designation to Rural Lands. *Id.* The Ranch requested a change in the zoning to allow 800 of its acres be zoned back to Recreational; however, this request was denied. *Id.* The Ranch challenged this zoning as applied to its property as a governmental taking in violation of the Fourteenth Amendment; however, the court found that its takings claim was not yet ripe. *Id.* at 877. See also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1009 (1992) (noting that the petitioner did not challenge the overall enactment of the Beachfront Management Act, but solely the application of the act to his property).

37. See *Town of Bass Lake v. Sawyer County Bd. of Appeals*, 685 N.W.2d 173 (Wis. App. 2004).

38. Substantive due process claims have been analyzed in the following cases: *PFZ Properties, Inc. v. Rodriguez*, 739 F. Supp. 67, 72 (D.P.R. 1990) (stating that in order to prove a substantive due process claim, political discrimination or "fundamental procedural irregularity" must be shown); *Collins v. City of Harker Heights*, 503 U.S. 115, 130 (1992) (holding that the deprivation of liberty was not done in an arbitrary manner and, thus, the substantive due process claim failed). However, arguing for substantive due process protection in the area of regulatory takings can be hazardous to a landowner, as the standard of review greatly favors the regulating authority. See *Pace Res., Inc. v.*

SEVEN TYPES OF TAKINGS AND THEIR AMBIGUITIES:⁴⁰ “REGULATORY TAKINGS”

The Supreme Court’s introduction of the “takings template” into cases involving land use regulation has caused a great deal of counterproductive ambiguity and controversy.⁴¹ Far too many kinds of cases now are called takings cases. As I, and many others, have said, this area is “paradoxical, muddled, chaotic, confused....”⁴² To make some sense of this confused and ambiguous state of affairs, we should try to sort out the various types of “takings” cases courts have dealt with.

There are seven types to consider, but only the last can really be considered appropriate for monetary compensation under the “takings template.”

Total Regulatory Takings

In total regulatory takings cases, if the claim is upheld, the court will impose one of three remedies: (1) enjoin the application of the

Shrewsbury Twp., 808 F.2d 1023, 1034 (3d Cir. 1987) (denying substantive due process claim); *ABN 51st St. Partner v. City of N.Y.*, 724 F. Supp. 1142, 1150 (S.D.N.Y. 1989) (denying substantive due process claim on ordinance that inhibited restoration of building); *Lemke v. Cass County*, 846 F.2d 469 (8th Cir. 1987) (affirming decision of district court that there were no substantive due process claims based on the denial of a rezoning application).

39. *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 288 (Minn. Ct. App. 1996). An ordinance requiring relocation expenses to be paid to mobile home tenants by the park owners if the park were closed was challenged as applied to the park owned by Mildred Collins and her husband William T. Collins. *Id.* at 284–85. In examining this regulation, the court noted that when “legislation is not based on a suspect class and does not infringe on a fundamental right, it need only be rationally related to a legitimate governmental purpose in order to withstand federal equal protection or substantive due process challenges.... Legislation will fail rational basis review only when it rests on grounds irrelevant to the achievement of a plausible governmental objective.” *Id.* at 288. The court held that the legislation advanced the substantial governmental interest of protecting mobile home tenants and thus did not violate the equal protection or due process clauses of the Constitution. *Id.* The court went on to note that the rational basis test only requires the ordinance to be supported by specific known facts or those that could be reasonably inferred. *Id.* at 289.

40. WILLIAM EMPSON, *SEVEN TYPES OF AMBIGUITY* (2d ed. 1947).

41. See generally Andrew S. Gold, *The Diminishing Equivalence Between Regulatory Takings and Physical Takings*, 107 DICK. L. REV. 571 (2003); Anthony Saul Alperin, *The “Takings” Clause: When Does Regulation “Go Too Far”?*, 31 SW. U. L. REV. 169 (2002); F. Patrick Hubbard, Palazzolo, Lucas, and Penn Central: *The Need for Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 NEB. L. REV. 465 (2001); Glenn P. Sugameli, *Lucas v. South Carolina Coastal Council: The Categorical and Other “Exceptions” to Liability for Fifth Amendment Takings of Private Property Far Outweigh the “Rule,”* 29 ENVTL. L. 939 (1999).

42. See Salzberg, *supra* note 2, at 414 n.11.

regulation to the particular plot of land, (2) require the state to change the regulation, or (3) require the state to buy the land. The first and second results are due process remedies. The third is a genuine taking remedy: the state takes the title and the landowner receives monetary compensation. *Lucas* was settled using the latter remedy. The state bought the land from Lucas and later sold it to a construction company, which built a house on the lot. Ironically, soon after the house was finished, the beach on which the house was built "suffered a 'temporary erosion episode'" and is still in danger of being destroyed by a large storm.⁴³

Nuisance-Like Regulatory Takings

Nuisance-like regulatory takings cases are typically those in which a local government has passed regulations prohibiting dangerous or offensive uses of land. In such cases, if the court finds that the activity prohibited was in the nature of a nuisance, the court will uphold the regulation. The court must decide if the landowner had the right, under the state's common law, and perhaps also under the state's statutory law, to carry out the prohibited activity at all. If a neighbor could have stopped the regulated use in a private lawsuit, then the landowner did not have the right to engage in that activity to begin with, and the regulation has not taken anything away from the landowner that the landowner had in the first place. Since the landowner could have been stopped from engaging in the activity by a neighbor, the landowner is not harmed when a governmental regulation precludes such activity.⁴⁴

One famous case in this area dealt with the prohibition of brick yards or brick kilns in the City of Los Angeles.⁴⁵ The property owner, who had been operating a brick yard at the same location for seven

43. Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation?*, in *PROPERTY STORIES* 221, 239 (Gerald Korngold & Andrew P. Morriss eds., 2004).

44. See generally *Zeman v. City of Minneapolis*, 552 N.W.2d 548 (Minn. 1996). The court held that a taking did not occur upon the application of an ordinance that allowed for the revocation of a rental license when a landlord allowed criminal activity to fester in his apartment complex in violation of the ordinance. *Id.* The court found that the ordinance had the lawful objective of ridding the neighborhood of nuisances and criminal activity. The ordinance was merely a vehicle to ensure cooperation between landlords and city officials and thus did not effect a taking. *Id.* See also, e.g., *Mugler v. Kansas*, 123 U.S. 623 (1887); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (cases finding that regulated activities were nuisances or noxious uses of property and thus any proposed "taking" was not compensable under the Fifth or Fourteenth Amendment).

45. *Hadacheck*, 239 U.S. 394.

years, claimed that the regulation was a “taking” because it restricted that particular use of his property. The court concluded that the regulation was valid and no taking had occurred because operating a brick yard in the midst of a residential area was a nuisance.

The proper approach in such a case, no matter to what extent the theoretical value of the land is diminished by the regulation, is a finding that the regulation’s effect on the landowner is appropriate, and the landowner loses.

Invalid Regulations

In invalid regulations cases, the landowner argues that the regulation should not have been enacted. For example, the regulation could be too vague and uncertain to give the landowner enough notice of what she can or cannot do.⁴⁶ The landowner could also argue that the regulation, while valid on its face, is arbitrary and unreasonable when applied to a particular parcel of land.⁴⁷

The usual remedy here is for the court to invalidate the regulation or enjoin its application to the parcel. The landowner can then do what had been prohibited under the invalid regulation. This is the clearest example of using “takings” language to make what is essentially a due process argument.⁴⁸

Real Temporary Takings

Real temporary takings are actually a subset of physical takings. The foundational cases in this area are analytically quite straightforward. The framework for temporary takings cases comes from a number of World War II cases where the government took over private warehouses for the duration of the war.⁴⁹ Though the titles were not taken, possession of the properties was taken for a period of time. Since there is no relevant regulation at work here, but rather an actual appropriation of land, albeit for a limited time, this is not a regulatory taking⁵⁰ and these cases are correctly treated as real takings.

The remedy for temporary takings cases is clear. In the typical case, the owner gets his warehouse back and is awarded compensation

46. See *Anderson v. City of Issaquah*, 851 P.2d 744 (Wash. App. 1993).

47. The first case of this sort is *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

48. See *supra* notes 27–35 and accompanying text.

49. See, e.g., *United States v. General Motors Corp.*, 323 U.S. 373 (1945).

50. *Id.* at 378 (“Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.”).

for the period of time that the government had possession of the land, measured by the reasonable rental value for the length of time the owner did not have possession.⁵¹

Temporary Regulatory Takings

Temporary regulatory takings cases are another example of due process problems dressed up as takings. A regulation is struck down because it, or its application, violated the due process rights of the landowner. If the procedure to undo the regulation's application goes as it should, the court does not grant the landowner any remedy for the loss of the use of the property during the time the state is considering the application of the regulation to the land. However, sometimes this takes longer than it "should." The court has recognized that there is a normal procedure that a government entity must go through in order to overturn a regulation: hearings held, evidence gathered, repealing actions published in the appropriate media, and meetings scheduled by the relevant regulatory body. This process takes time, but if it takes too long, or if the government unit refuses to repeal the regulation, then that delay can make a case for a "temporary taking."⁵²

Monetary damages are granted in such cases. But granting compensation in addition to striking down the invalid regulation seems to be based on a penalty notion rather than a strict Fifth Amendment takings analysis, since compensation is only granted when the regulatory body takes too long to undo the invalid regulation. If the regulation were a real taking, we have seen from *Loretto* that it should be compensated, even if the taking were minimal. Because some diminution of value of the use of the land is allowed without compensation (if the period is short, and hence the value lost is small), granting compensation for the excess wait must be a penalty.

An example of this type of case is a zoning ordinance that forbids building a normal-sized house on an oddly shaped lot. Many

51. *Id.* at 382 ("The value of such an occupancy is to be ascertained, not by treating what is taken as an empty warehouse to be leased for a long term, but what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier.").

52. The first case in which the Supreme Court announced this doctrine was *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), in which Los Angeles County enacted a moratorium on building any structures in a canyon that had been flooded after a rainstorm that destroyed all the then-existing buildings. This case is another example of what is really an advisory opinion. *Id.* Upon remand, the California appellate court found that there had been no taking at all, temporary or otherwise. *First English Evangelical Lutheran Church v. County of L.A.*, 258 Cal. Rptr. 893 (App. 1989), *cert. denied*, 493 U.S. 1056 (1990).

zoning ordinances for residential districts limit how close houses may be built to the boundaries of the lot. For most lots of rectangular shape, these setback limits create few problems. However, in the case of an oddly shaped lot, a normal-sized house may need to be built closer to a boundary of the lot than is allowed under the ordinance. Normally, the landowner would apply for a variance and eventually, after a few months of hearings at various levels, get the variance, allowing the house to be built. But if the city is recalcitrant and does not allow the variance, the court may grant damages for the excess time the landowner had to wait. Unless the court begins granting damages for the entire time the lot was subject to the ordinance before the granting of the variance, the "temporary takings" damages are clearly a penalty for the foot-dragging of the zoning authority, not compensation for the actual loss of use.⁵³

A similar issue arises where a moratorium is enacted that prohibits some sorts of development on property for a specified amount of time.⁵⁴ Since most of these moratoria are upheld, any compensation for an excess period of time such a moratorium lasts is again a penalty for the excess time, not compensation for loss of use.

Emergency Takings

Emergency takings occur where property is substantially destroyed, but in an emergency. The oldest of these cases are those in

53. See, e.g., *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. Ct. App. 1992), *petition for reversal denied* (Minn. Jan 15, 1993), *cert. denied*, 508 U.S. 960 (1993) (The court stated that "First English does not create a new liability standard to determine when a "temporary" taking occurs, but clarifies the appropriate remedy after a taking is recognized."). It is uncertain whether the term "temporary taking" as employed by *First English* was even intended to apply to planning moratoriums. The opinion seems to presuppose that "temporary regulatory takings" means "regulatory takings which are ultimately invalidated by the courts." *Id.* at 262.

54. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). In *Tahoe-Sierra*, the Tahoe Regional Planning Agency (TRPA), concerned about the water quality and unique characteristics of the nearby lake, imposed a moratorium on construction on land surrounding the lake until the TRPA had time to determine what amount of development could be done without jeopardizing the quality of the lake. *Id.* at 310. This moratorium was enacted for eight months. *Id.* at 310-11. Due to complications in planning work and public controversy, the moratorium was extended, lasting a full 32 months. *Id.* at 312. The Supreme Court upheld the validity of the moratorium and found it was not a compensable taking. *Id.* at 342-43. See *First English Evangelical Lutheran Church v. County of L.A.*, 482 U.S. 304 (1987). In *First English*, a religious organization operated a camp for handicapped youth, which was flooded. *Id.* at 307. In response to the flooding, the city adopted an interim ordinance preventing construction on the flood plain where the camp was located. *Id.* The result was that the organization was prevented from rebuilding its camp as long as the ordinance was in effect. *Id.*

which buildings have been set on fire to prevent a larger fire from spreading or due to the exigencies of war.⁵⁵

Other more recent examples have arisen from California earthquakes, where buildings have been too dangerous to enter and both the buildings and the valuable personal property in them have been destroyed in the interest of public safety.⁵⁶

Such cases uniformly result in no award of compensation to the land or property owner, regardless of the percentage of destruction because of the state's need to respond to an act of nature. The public, of course, does not use the destroyed property in any sense. Moreover, the potential harm to the public if the structure is not demolished is very great. Thus, part of the calculus seems to be the degree of necessity on the part of the state to take the action that destroys the property.

An examination of these six kinds of "regulatory takings" cases reveals that none are clear-cut cases of "regulatory takings" requiring compensation. Two types of cases are real takings (or total takings that are treated as real takings) where the state, on behalf of the public, actually takes something from the landowner and pays for it. Two others are cases where the state is acting, through the imposition of the regulation, in an inappropriate way (temporary takings and invalid regulations). In such cases the state is prohibited from imposing the regulation on the landowner, and the suit results in the landowner not being subject to the challenged regulation at all. The last two are cases where the state is allowed to impose some harm on the landowner (emergency destruction, and valid regulatory takings that do not go too far) where the harm does not impose an undue burden on the landowner, at least in relation to the harm that is being prevented.⁵⁷

55. See, e.g., *United States v. Cent. Eureka Mining Co.*, 357 U.S. 155 (1958) (denying compensation for the government's forced closing of plaintiff's gold mine to facilitate wartime production during World War II); *United States v. Caltrex, Inc.*, 344 U.S. 149 (1952) (denying compensation where plaintiff's property was destroyed by retreating American troops in the Philippines during the Japanese invasion of those islands during World War II).

56. See DIS, *Your Partner in Earthquake Protection*, <http://www.dis-inc.com/northrid.htm> (last visited May 10, 2006); DIANA TODD ET AL., NAT'L INST. OF STANDARDS & TECH., SPECIAL PUBL'N NO. 862, 1994 NORTH RIDGE EARTHQUAKE: PERFORMANCE OF STRUCTURES, LIFELINES, AND FIRE PROTECTION SYSTEMS 54-55 (1994), <http://fire.nist.gov/bfrlpubs/build94/PDF/b94060.pdf> (discussing the Barrington Bldg).

57. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) ("Government 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.").

Valid Non-Total Regulatory Takings That Go “Too Far”

That brings us to the crucial issue this article aims to address: regulations that are valid (i.e., that do not run afoul of the due process clause) but nonetheless impose too great an obligation on a landowner.

These cases fit all the criteria of the Supreme Court’s “takings template.” First, the regulations are valid; that is, they do not violate the landowners’ rights under the Due Process Clause. They are rational, not arbitrary; clear enough to follow; and further some power that the state has. Nor do they result in a total diminution of value—there are some valuable uses that landowners can engage in that do not violate the regulation. However, the claims on the part of the landowners are that the degree of diminution of value is so great that the regulations fit Justice Holmes’ measure: they go “too far.”

To evaluate such claims, the lower court must weigh a number of factors under the Supreme Court’s *Penn Central* analysis and come to a conclusion about the regulation’s effect on the interests of the landowner.⁵⁸ If the court concludes that the regulation does not go “too far,” then the regulation is upheld and the landowner loses the case. In those situations, the court finds nothing wrong with the regulation and nothing wrong with applying the regulation to a particular parcel in question. Even though the regulation may well diminish the value of the parcel to which it applies, if the court concludes, after applying the *Penn Central* test, that the diminution of value is not excessive, then the conclusion that the regulation does not go “too far” follows.

58. As Justice O’Connor explained again in *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 632-34 (2005) (O’Connor, J., concurring):

[R]egulatory takings challenges are governed by the standards set forth in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The Court in *Penn Central* acknowledged that it had hitherto been “unable to develop any ‘set formula’” for evaluating regulatory takings claims, but identified “several factors that have particular significance.” *Id.* at 124. Primary among those factors are “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.” *Ibid.* In addition, the “character of the governmental action”—for instance whether it amounts to a physical invasion or instead merely affects property interests through “some public program adjusting the benefits and burdens of economic life to promote the common good”—may be relevant in discerning whether a taking has occurred. *Ibid.* The *Penn Central* factors—though each has given rise to vexing subsidiary questions—have served as the principal guidelines for resolving regulatory takings claims that do not fall within the physical takings or *Lucas* rules. See, e.g., *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001).

If, on the other hand, the court concludes that the regulation does go "too far," then what should happen? The court should not invalidate the regulation, nor should it refuse to allow the regulation to be applied to the land, since the regulation has been found to be valid on its face and as applied. Nor should the court dismiss the suit since the regulation goes "too far." If we are reading Holmes' phrase literally, we should conclude that the application of the regulation violates the takings clause.

The takings clause states that, when courts conclude that "private property has been taken for public use" (where the state has "taken" the private property), the courts should award compensation. But they do not.

Illustrative Hypothetical

Hypothetically, let's assume the case of an owner of a dilapidated old house of historical interest.⁵⁹ If the house is located in a city-designated historical preservation district, extensive rules surround any proposed changes to the structure.⁶⁰ For instance, the owner may not be allowed to change the facade, the interior layout, or even the mechanicals without permission from a historical preservation board.⁶¹

59. This example is based upon the *Penn Central* case. That case centered on the designation of Grand Central Terminal in midtown Manhattan as a historic site. *Penn Central*, 438 U.S. at 115. Grand Central opened in 1913 and is noted as "providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of French beaux-arts style." *Id.* The terminal is an eight-story building, predominately used as a railway station, with some leased commercial space. *Id.* A 20-story office tower was originally planned as part of Grand Central Terminal but was never constructed. *Id.* This structure was owned by Penn Central Transportation Company and on August 2, 1967, the Commission designated the terminal a landmark; Penn Central Transportation Company opposed the designation but did not seek judicial review of the decision. *Id.* at 115-16.

60. The enactment of historical preservation districts by states and municipalities is quite common. *Id.* at 107. The reasons for such enactments are primarily to protect historic structures and landmarks that have deteriorated without public attention to their historic value. *Id.* The laws were also enacted due to a public outcry that these historic structures should be saved as an educational part of the United States' heritage. *Id.* Pursuant to New York City's Landmark Preservation Law, the owner of a landmark building was required to keep the exterior features "in good repair." *Id.* at 112.

61. *Id.* According to *Penn Central*, an owner wishing to make alterations to a building designated as "historic" must first apply for and obtain a "certificate of no effect on protected architectural features," which affirms that the owner's changes will not impact any architectural feature of the building. *Id.* The owner must then obtain a certificate of "appropriateness" from the Commission. *Id.* In its approval process of this appropriateness permit, the Commission evaluates the "aesthetic, historical, and architectural values—that the proposed construction on the landmark site would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark." *Id.* There are also procedures

For some landowners, the designation may in fact increase the value of the house. For others, though, the costs and requirements of maintaining the historically significant aspects of their house may be unduly burdensome.

If the cost of necessary renovations, carried out as the historical preservation board requires, exceeds the present value of the property, and would be even more than the house would be worth after those expensive renovations, it could be argued that the homeowner ought to be free of some or all of the historical preservation board's requirements.⁶² This remedy, as a solution to the problem the homeowner faces, would make a good deal of sense but would not be the sort of "just compensation," or monetary payment, the takings clause seems to require.

Do the regulations require renovations or upkeep that would cost more than the building is worth, while at the same time prohibiting the building from being torn down? Typically, if there is no way to keep the historically important building safe and usable without spending more than it is worth (and more than the owner is willing to spend) and there is no public entity willing to take it over, the building will be torn down.⁶³ This usually happens when the historical preservation board has run out of options and allows the destruction. Occasionally, a court must step in and order the board to cease enforcement of the historical preservation regulations as applied to a particular building.

I have used a hypothetical case here because there simply are no actual cases. There is no coherent way to articulate what the appropriate measure of damages should be in this situation, any more than there is a coherent theory of "regulatory takings." Once again the remedy, when

available to the landowner if the designation of his building as a historic building causes him an economic hardship. *Id.*

62. The New York historical designation municipal ordinance at issue in *Penn Central* did address some of these concerns. *Id.* If the landowner can show that he is not earning a reasonable return on his property due to the designation, the Commission and city agencies have the obligation of aiding the owner in developing a plan to earn a reasonable income. *Id.* The plan can include "partial or complete tax exemption, remission of taxes, and authorizations for alteration, construction, or reconstruction appropriate for and not inconsistent with the purposes of law." *Id.* The owner then is given the opportunity to accept or reject the plan. *Id.* If the plan is rejected, the Commission may then recommend that the city purchase the property through eminent domain; however, if the city does not act within a specified time frame, the Commission must allow for the property owner to proceed on the alteration he requested in his certificate of appropriateness, but was denied by the Commission. *Id.*

63. See Michael Fielding, *Fate Decided for Historic Homes*, RED WING REPUBLICAN EAGLE, Oct. 15, 2002 (the story of a historic house that the Red Wing, Minnesota city council allowed to be torn down in part because of the cost of renovations).

the regulation goes “too far,” is to free the land from the regulatory burden—to invoke the due process clause, but to refer to this unfair burden as a “taking,” as the following cases do, to the confusion of all.

CASES FINDING “UNCONSTITUTIONAL TAKINGS” WITHOUT GRANTING “JUST COMPENSATION”

Many recent cases, inspired by the Supreme Court’s takings template, have found on behalf of landowners that land use regulations result in “regulatory takings.” Yet none of these courts have granted compensation, as the Supreme Court’s decisions would seem to mandate. *Stupak-Thrall v. Glickman*⁶⁴ is a classic example of such a case.

The Court in *Stupak-Thrall* found that a rule limiting the plaintiff’s use of motorized boats on a wilderness lake on which they owned riparian land was an “unconstitutional taking.” The riparian landowners, faced with the horrific prospect of having to sail or row (or even worse—telling paying guests that they would have to sail or row), sued. The court granted the riparian landowners an injunction, forbidding the Forest Service from enforcing the rule against the plaintiffs rather than granting them any compensation.⁶⁵

This is the sort of absurd example of the use of takings terminology to fix an unreasonable regulation: under the regulation at issue in *Stupak-Thrall*, what private property is the public now using? The noise the guests used to be able to make? The perspiration the owners and their guests now would have to expend? The owner’s business is harmed—and, according to the court, harmed too much. “It is unfair,” the court should say, and then enjoin the application of the regulation.⁶⁶

64. 988 F. Supp. 1055 (1997).

65. *Id.* at 1061.

66. There are many other cases that show how lower courts actually deal with “unconstitutional takings.” See, e.g., *Chevron U.S.A., Inc. v. Cayetano*, 198 F. Supp. 2d 1182 (2002) (holding that a rent control ordinance was an “unconstitutional taking”). There the court found that there was no “public purpose” for the regulation (a classic violation of the Due Process Clause). *Id.* Rather than straightforwardly finding such a due process violation, the court seemed to invoke the takings clause. *Id.* However, the remedy the court granted was to declare the ordinance unconstitutional, without ordering any compensation. *Id.* In *Scott v. Metropolitan Development Commission of Marion County*, 2002 WL 31921295 (S.D. Ind.) (2002), the court agreed with the plaintiff that the defendant county’s unilateral vacation of a covenant that applied to three lots in a subdivision (to allow the county to build a parking lot) was an “unconstitutional taking of private property for a private use contrary to the Fifth Amendment to the U.S. Constitution.” What is the remedy? – an injunction and a reinstatement of the covenant. These cases are a very small sample of the many that can be found every year—cases where lower courts seem compelled to discuss “unconstitutional takings” yet fail to apply the takings clause.

SOME HYPOTHETICAL REMEDIES – AND WHY THE COURTS HAVE NOT USED THEM

The problem is that we would be asking the court to employ what is historically and logically a condemnation remedy—awarding cash equal to what the state has taken from the private landowner and transferred to public use—in a situation where nothing tangible has been taken from the landowner. In a real takings case, the government is buying the title from the landowner. In a regulation case, however, a limit is being set on what the landowner can do on the land. The owner still possesses the entire title to the land and can still prohibit the public from using the land, while the government has received nothing from the landowner.

As an experiment, suppose we take the court at its word and accept the conclusion that these situations are “takings.” What possible measures of “just compensation” can we think of? What problems would those measures create?

Pay the Entire Amount of the Diminution

This measure would compensate the landowner the entire diminution of value the regulation imposed. But, this dog won't hunt. One major problem with this approach is the vast difference between the large amount the aggrieved landowner would receive and the lack of any compensation paid to neighboring landowners. While most landowners' land will increase in value due to the regulation—after all, a valid regulation presumably fulfills some public good and so provides an overall benefit to society—many landowners subject to the valid regulation have land whose value is diminished by the regulation to some degree.⁶⁷ Thus, only those whose land value is excessively decreased will get this remedy—the whole value of the land. Those whose land value is diminished a smaller amount—but not enough to rise to the “too far” level—will receive nothing at all. And the rest of those subject to the regulation will see an increase in value.

Most people would also be troubled by the government paying so much without getting anything in return. At least in *Lucas* the state got the title to the land after paying its value to the landowner.

Moreover, this remedy cannot accommodate future changes. If the regulation is ever repealed, the landowner will have land worth “full

67. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (“Government 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.”).

value" as well as a pot of money from the government that supposedly represents the diminution value caused by the now non-existent regulation. The same problem also arises if the regulation later results in an increase in value.⁶⁸

Limit the Percentage by Paying the Amount Diminished by the Regulation

Under the cases applying the *Penn Central* analysis, the percentage diminutions that have not resulted in any remedy for the landowners have ranged from quite small to more than 90 percent.⁶⁹ If there were a recognized or mandated percentage below which it is determined that the *Penn Central* factors do not support a taking and above which a taking has occurred, then one possible remedy would be to grant the landowner the difference. Thus, if the regulation diminished the value of the owner's property five percent more than the limit, the damages would be five percent of the value of the land.

This remedy would compensate the landowner only to the extent that the diminishment went above the amount of diminution of value that would not be "too far." Here, at least, we do not see a windfall—the compensated landowner and the landowner who receives nothing remain in nearly the same financial position, and both are still subject to the regulation.

The first problem with this seemingly straightforward remedy is that the courts would have to establish the allowable percentage of diminution. Thus far, no court has been willing to suggest that a particular fixed percentage is the limit. Paying the landowner the amount necessary to bring the harm to the acceptable limit recognized in one case may be more than is required in another, and not enough in yet another.

68. A similar type of remedy was enacted by ballot initiative in Oregon in 2004. See Pre-Election Review of Proposed Initiative from Office of Secretary of State Bill Bradbury (Mar. 17, 2003), available at <http://www.friends.org/issues/documents/M37/M37text.pdf>. Although somewhat different in approach, and not required by the constitution, many of the problems with the remedy were suggested in the arguments against the initiative. See, e.g., Take a Closer Look, Committee, No on 37, at <http://www.takeacloserlookoregon.com/> (last visited May 4, 2006); Measure 37: An Endless Tide of Lawsuits (Oct. 23, 2004), at http://www.blueoregon.com/2004/10/measure_37_an_e.html.

69. In *Bernardsville Quarry, Inc. v. Borough of Bernardsville*, 608 A.2d 1377 (1992), the New Jersey Supreme Court rejected a takings challenge to a local ordinance limiting the permissible depth of a quarry that reduced the value of the plaintiff's land by over 90 percent, and in *Gove v. Zoning Board of Appeals of Chatham*, 831 N.E.2d 864 (Mass. 2005), the court upheld a regulation that prohibited building on a lot, reducing its value from \$346,000 to \$23,000.

This remedy creates the same randomness we see in the present decision making by making nearly impossible any predictions of when a regulation results in an “unconstitutional taking” and when it instead results only in a diminishment in value that, according to Holmes, we simply have to accept.⁷⁰

Other problems parallel those discussed above: If a landowner is paid the percentage difference, she still owns the title to all her land, while the government has received nothing for its payment. If changes are made later – if the regulation is amended to be more permissive, or if the regulation’s effect on the value of the land becomes more positive – should the court require a refund of the landowner’s windfall? If the riparian owners in *Stupak-Thrall* had been awarded some percentage of the amount their business would have been diminished by the regulation, what would the state’s remedy be if it turned-out that the business actually improved because of the increased peace and quiet? Would the landowner be required to keep the funds in a separate account in the event the loss was reversed?

This remedy would also produce a great deal of resentment among landowners: Since the regulation is valid, most landowners would have to bear the burden on their land. Paying a few affected landowners some amount while giving nothing to the rest would seem quite unjust to those not paid.⁷¹

Both this remedy and the “entire pay” remedy are also highly speculative, particularly when the court is contemplating unimproved ground with no present uses and no structures and is forced to decide how much that land is worth and how much it will be worth after a regulation has been imposed.

Resolving these sorts of problems would require a vast expenditure of resources. The landowner would have to pay valuation experts, as would the state, and the court process would be time consuming and costly. Only those landowners with deep pockets could avail themselves of this remedy; to everyone else affected, it would appear arbitrary and capricious.

Temporary Taking Compensation

Here the court would allow monthly compensation for the value lost by the imposition of a regulation that goes “too far.” This remedy would avoid the problems of changing conditions such as an actual increase in the value of the property. However, this remedy would

70. *Pa. Coal Co.*, 260 U.S. at 413

71. See web sites cited *supra* note 68.

generate yet more costs, particularly on the part of the government. Further, given the speculative nature of all the necessary calculations, it would no doubt give rise to a significant amount of litigation, as landowners sought to increase the monthly stipend paid and governments sought to lower it.

The administrative costs of this and the other hypothetical remedies would in themselves likely be prohibitive. And whose experts would make the necessary evaluations?⁷²

Allow Some of the Prohibited Use

Here the court would allow some of the uses the regulation prohibits to make up for the regulation's going "too far." For example, in our historical preservation hypothetical, the court could allow the landowner to undertake some degree of historically inaccurate, yet cheaper, renovation.

This remedy is in the nature of a variance, which is, of course, a fine remedy, but it is a traditional due process remedy, not compensation.

CONCLUSION: REGULATORY "TAKINGS" OR RHETORIC?

The Supreme Court continues to contend that lower courts should treat regulations that go "too far" as takings, while the lower courts, sensing the irrationality of this approach, continue to grant injunctions for invalid regulations and compensation for real takings. The reason for the lack of "valid regulatory takings" cases is that the courts implicitly recognize that there is no such thing as a valid regulatory taking deserving of "just compensation." The lack of appropriate cases perhaps says more about the issue than a critique of a series of wrong-headed decisions. There is unlikely to be a rational and fair measure of damages for a valid regulatory "taking," assuming that there is such a thing as a valid regulatory "taking" at all.

To conclude with our canine theme, using the takings template to fight land use regulation by setting a workable damage remedy has been met with a resounding silence of judicial opinion. Not only does this dog not bark, this dog will not hunt. If the U.S. Supreme Court cannot figure out what is, and what is not, a regulatory "taking" from

72. As Laura S. Underkuffler writes in *THE IDEA OF PROPERTY: ITS MEANING AND POWER* 44 (2003), "The idea that compensation must be paid whenever the individual's pre-existing property rights are changed by government is one at which 'common sense revolts.'" (quoting *United States v. Causby*, 328 U.S. 256, 260-61 (1946)).

case to case, perhaps the lower courts should be forgiven their failure to determine a rational, applicable damage remedy for such cases.

The takings clause works well in those cases that it was designed to address, and the courts have very little trouble in those cases applying a takings remedy. When the government takes land for a road or for a post office, the previous owner of the land gets paid for the land. While there are arguments about how to value the land,⁷³ that is fundamentally a technical valuation question, not a constitutional one. The controversy over the phrase “for public use” that spawned the recent *Kelo*⁷⁴ case is troublesome, but even in that situation, the remedy issue is clear: if the government can and does take your land for the contested purpose, it must pay you for it.

In marked contrast to its application to “real takings” cases, the takings clause has proven to be an inadequate and confusing vehicle for questions relating to the justification for and validity of regulations that affect how landowners use their land. Whereas an analysis under the Due Process Clause not only makes more logical sense, but would result in clear decisions and remedies, we instead have the present morass under the takings clause—with the takings clause remedy (compensation) granted in some cases and a due process remedy (injunctions) in others. Tellingly, the remedies the courts actually grant in regulatory “takings” cases are an implicit recognition that those cases are not about the government taking property, but about the landowner’s due process rights.

73. See Salzberg, *supra* note 2, at 435.

74. *Kelo v. City of New London, Conn.*, 545 U.S. ___, 125 S. Ct. 2655 (2005).