Journal of Contemporary Health Law & Policy (1985-2015)

Volume 22 | Issue 1 Article 6

2005

Restaurants, Bars and Workplaces, Lend Me Your Air: Smokefree Laws as Private Property Exactions–The Undiscovered Country for Nollan and Dolan?

Robert P. Hagan

RESTAURANTS, BARS AND WORKPLACES, LEND ME YOUR AIR: SMOKEFREE LAWS AS PRIVATE PROPERTY EXACTIONS—THE UNDISCOVERED COUNTRY FOR *NOLLAN* AND *DOLAN*?

Robert P. Hagan[*]

A disturbing trend has developed in the United States that threatens private property rights protected under the Fifth[1] and Fourteenth[2] Amendments to the U.S. Constitution. Through the efforts of a powerful anti-smoking movement[3] responding to voluminous evidence linking exposure to secondhand environmental tobacco smoke[4] with a number of

---

[*] J.D. candidate, 2006, The Catholic University of America, Columbus School of Law. There are many people without whom this article would not have been possible. First, many thanks and regards to Nancie G. Marzulla, Esq., President of Defenders of Property Rights, for serving as my expert reader and bringing her knowlege of Takings jurisprudence to bear throughout the drafting process. Second, I thank Christopher G. Byrnes, Esq. for encouraging me to explore this topic and its many possible angles, and for his helpful comments along the way. To the editors and staff to Volume XXII, thank-you all for your assistance and dedication in bringing this piece to fruition and making the editorial process enjoyable. And finally, to my wonderful fiancée Erika Kosciecha, whose patience, understanding, and grace guided me to the finish line.

1. The Fifth Amendment states in relevant part: ". . .nor shall private property be taken for public use, without just compensation." U.S. CONST. amend V.

2. The Fifth Amendment is made applicable to the States by "incorporation" into the Due Process Clause of the Fourteenth Amendment. *See* Haw. Housing Auth. v. Midkiff, 467 U.S. 229, 244 (1984); *see also* Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 827 (1987).

3. For a brief history and tactical strategy of the movement, *see* AMERICANS FOR NONSMOKERS' RIGHTS, RECIPE FOR A SMOKEFREE SOCIETY (May 1, 2003), http://www.no-smoke.org/pdf/recipe.pdf.

4. Secondhand smoke, also called "environmental tobacco smoke," or ETS, is a mixture of "sidestream smoke" emitted from a burning tobacco product and "mainstream smoke" exhaled by a smoker. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING 7 (1986) [hereinafter 1986 SURGEON GENERAL REPORT]. There are roughly 250 toxic or carcinogenic chemicals in ETS. Andrew Hyland et al., 7 City Air Monitoring Study (7CAM) 3, March-April 2004 (May 2004), http://www.tobaccofreekids.org/pressoffice/7camreport.pdf.

health risks,[5] several states and municipalities[6] have passed one-hundred percent smokefree laws or ordinances applicable to restaurants, bars and workplaces.[7]

---

5. The health effects of secondhand smoke are well-documented. *See, e.g.*, 1986 SURGEON GENERAL REPORT, *supra* note 4; OFFICE OF HEALTH AND ENVIRONMENTAL ASSESSMENT, U.S. EPA, THE RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING: LUNG CANCER AND OTHER DISORDERS (1992). The EPA declared secondhand smoke a Group A carcinogen, a designation reserved for those pollutants that have been shown to cause cancer in humans. *See* U.S. EPA, FACT SHEET: RESPIRATORY HEALTH EFFECTS OF PASSIVE SMOKING (1993), http://www.epa.gov/smokefree/pubs/etsfs.html. Studies have also linked secondhand smoke to increased risk of coronary heart disease, stroke, respiratory ailments and other cancers. *See* Action on Smoking and Health, Passive Smoking: A Summary of the Evidence (May 2004), http://www.ash.org.uk/html/passive/html/passive.html [hereinafter ASH Summary]; Smoke-Free Environments Law Project, The Health Effects of Environmental Tobacco Smoke, http://www.tcsg.org/sfelp/health.htm (last visited Feb. 14, 2005) (linking to Peter H. Whinicup et. al., *Passive Smoking and Risk of Coronary Heart Disease and Stroke: Prospective Study With Cotinine Measurement*, BRITISH MED. J., June 30, 2004, http://bmj.bmjjournals.com/cgi/reprint/bmj.38146.427188.55v1). Some studies have concluded that surprisingly low levels of exposure (as little as one-half hour) to secondhand smoke can be potentially disastrous to one's cardiovascular system, *see* ASH Summary, *supra*. The effects on children are also alarming: secondhand smoke has been linked to increased risk of pneumonia, bronchitis, asthma, middle ear infection, SIDS, stunted development of lung functions and spinal disorders later in life. *See* 1986 SURGEON GENERAL REPORT, *supra* note 4, at x-xi; ASH Summary, *supra*; AMERICANS FOR NONSMOKERS' RIGHTS, SECONDHAND SMOKE: THE SCIENCE (Oct. 2004), http://www.no-smoke.org/pdf/SHS.pdf. Exposure to secondhand smoke has been linked to decreased cognitive abilities with respect to math, reading and logical reasoning. *See* Press Release, Cincinnati Children's Hospital Medical Center, Environmental Tobacco Smoke Linked to Reading, Math, Logic and Reasoning Declines in Children (Jan. 4, 2005), http://www.eurekalert.org/pub_releases/2005-01/cchm-ets122804.php. Exposure to secondhand smoke has also been linked to miscarriage, exacerbation of cystic fibrosis and meningitis. *See* ASH Summary, *supra*. Secondhand smoke exposure ranks third in causes of preventable mortality in the United States annually. *See* AMERICANS FOR NONSMOKERS' RIGHTS, SECONDHAND SMOKE: THE SCIENCE, *supra*. In 1998, tobacco manufacturers filed suit against the EPA seeking to invalidate portions of its 1993 study due to faulty research methodologies. Today, even some tobacco companies have acknowledged the dangers of secondhand smoke exposure. *See, e.g.*, Philip Morris USA, Health Issues, Secondhand Smoke, http://www.pmusa.com/health_issues/secondhand_smoke.asp (last visited Feb. 14, 2005). Others dispute the evidence. *See, e.g.*, R.J. Reynolds Tobacco Company, Tobacco Issues, Secondhand Smoke, http://www.rjrt.com/TI/Tisecondhand_smoke.asp (last visited Feb. 14, 2005).

6. Smokefree laws are generally more successful at the local level because they provide the best protection for nonsmokers. State statutes often aren't well enforced and are misunderstood by the general populace. Local laws are also more effective because

As of September 2005, 397 municipalities[8] and fourteen states[9] have adopted one-hundred percent smokefree coverage in at least one of these three establishments.[10] Absent any exemption in the statutory or regulatory scheme, smoking is completely prohibited in the category of establishment targeted. Bars and restaurants[11] are particularly targeted for regulation due to

---

the governing bodies of local municipalities are less likely to be influenced by tobacco lobbyists and more attuned to their constituents than are state legislators. At the local level, the laws are better enforced and better understood by the local population. *See* AMERICANS FOR NONSMOKERS' RIGHTS, RIGHTS OF NONSMOKERS (Jan. 2003), http://www.no-smoke.org/pdf/rights.pdf.

7. AMERICAN NONSMOKERS' RIGHTS FOUNDATION, OVERVIEW LIST—HOW MANY SMOKEFREE LAWS? (Jan. 4, 2005), http://www.nosmoke.org/pdf/mediaordlist.pdf.

8. This figure includes only those municipalities with 100% smokefree ordinances in effect at the local level. The actual number of municipalities affected by 100% smokefree bans in one of the three main categories is much higher, because any municipality in a state that has enacted a 100% smokefree law is affected regardless of whether a local ordinance has been passed. For a list of municipalities with local ordinances, *see* AMERICAN NONSMOKERS' RIGHTS FOUNDATION, MUNICIPALITIES WITH LOCAL, 100% SMOKEFREE LAWS (Jul. 7, 2005), http://www.no-smoke.org/pdf/100ordlisttabs.pdf.

9. AMERICAN NONSMOKERS' RIGHTS FOUNDATION, OVERVIEW LIST—HOW MANY SMOKEFREE LAWS?, *supra* note 7. The fourteen states are: California (all three), CAL. LAB. CODE § 6404.5 (West 2004); Connecticut (restaurants and bars), CONN. GEN. STAT. § 19a-342(b)(1) (2004); Delaware (all three), DEL. CODE ANN. tit. 16, §§ 2902-04 (2004); Florida (workplaces and restaurants), FLA. STAT. ANN. § 386.204 (West 2004); Idaho (restaurants), *see* IDAHO CODE ANN. §§ 39-5502-5503 (2004); Maine (restaurants and bars), ME. REV. STAT. ANN. tit. 22, §§ 1541-42 (2004); Massachusetts (all three), MASS. GEN. LAWS ANN. ch. 270, § 22 (West 2004); Montana (workplaces and restaurants, bars in 2009), MONT. CODE. ANN. §§ 50-40-103, -04 (2005); New York (all three), N.Y. PUB. HEALTH LAW § 1399-O (McKinney 2004); North Dakota (workplaces), N.D. CENT. CODE § 23-12-10 (2005); Rhode Island (all three), R.I. GEN. LAWS §§ 23-20.10-3, -4 (2004); South Dakota (workplaces), S.D. CODIFIED LAWS § 22-36-2(2004); Utah (restaurants), UTAH CODE ANN. § 26-38-2, -3 (2004); Vermont (restaurants and bars), 2005 Vt. Acts & Resolves 34 (repealing VT. STAT. ANN. tit 18, § 1744 (2005)). One-hundred ten municipalities have 100% smokefree coverage in all three major categories. AMERICAN NONSMOKERS' RIGHTS FOUNDATION, OVERVIEW LIST—HOW MANY SMOKEFREE LAWS?, *supra* note 7.

10. The numbers are growing each year at the local level. *See* AMERICAN NONSMOKERS' RIGHTS FOUNDATION, MUNICIPALITIES WITH LOCAL 100% SMOKEFREE LAWS—CUMULATIVE NUMBER EFFECTIVE BY YEAR 1990-2005 (Jul. 7, 2005), http://www.no-smoke.org/pdf/100ordgraph.pdf.

11. Under many statutory schemes, bars attached to restaurants are treated as part of the restaurant. If a state or municipality outlaws smoking in restaurants but not bars, smoking in bars attached to restaurants will be prohibited. Smoking in freestanding, non-attached bars will be permitted. Idaho is illustrative. Under Idaho law, smoking is

the prevalence of secondhand smoke in such establishments. Secondhand smoke levels in bars are 240-1850% higher than those in workplace smoking environments, and restaurant smoke levels are 160-200% higher.[12]

Smokefree laws represent a major victory for anti-smoking activists, who desire freedom to breathe clean air and avoid a health risk regardless of where they work and where they socialize.[13] However, the implications are grim for private property ownership. Restaurant and bar owners have complained that the laws injure business by repelling smoking customers;[14] to them, the laws are an unwarranted governmental intrusion adversely affecting their profits.[15] Private property rights are at the forefront of the

---

prohibited generally in "public places" subject to exceptions. IDAHO CODE ANN. § 39-5503(1) (2004). "Public place" is defined to include, *inter alia*, restaurants. *Id.* at § 39-5502(6)(c). Smoking is not prohibited, however, in bars. *Id.* at § 39-5503(1)(a). A "bar" is defined as

> any indoor area open to the public operated primarily for the sale and service of alcoholic beverages for on-premises consumption and where: (a) the service of food is incidental to the consumption of such beverages, or (b) no person under the age of twenty-one (21) years is permitted except as provided in section 23-943, Idaho Code, as it pertains to employees, musicians and singers, and all public entrances are clearly posted with signs warning patrons that it is a smoking facility and that persons under twenty-one (21) years of age are not permitted. "Bar" does not include any area within a restaurant.

Id. at § 39-5502(2).

12. AMERICANS FOR NONSMOKERS' RIGHTS, SECONDHAND SMOKE: WORKER HEALTH (2004), http://www.no-smoke.org/pdf/shsworkerhealth.pdf.

13. Russell Sciandra, *Law Protects Nonsmokers' Rights*, BUFFALO NEWS, Oct. 5, 2003, at H5.

14. *Id.* For an example of the opinions of what might be called a "typical" American smoker, *see* Matt McCoy, *Letter to the Editor*, THE DALLAS MORNING NEWS, Sept. 19, 2004, at 2Q. With the diminishing rights of smokers to be able to choose their vice, the huddled masses outside offices and parking garages continue to grow. Like lepers banished to a dismal corner to seek shelter from the rain, smokers find any safe haven in order to be in a 'Designated Smoking Area.' One state, Delaware, has acknowledged the rights of smokers and has attempted to strike a balance with its smokefree law. DEL. CODE ANN. tit. 16, § 2901(2004) (trying to "minimize unwarranted governmental intrusion into and regulation of private sphere of conduct and choices").

15. *See, e.g.*, Tim Rowden, *Restaurant Owners Praise Accord on Smoking*, ST. LOUIS POST-DISPATCH, JEFFERSON COUNTY POST, Sept. 20, 2004, at 01; Michelle Jacklin, Editorial, *Casinos Cloud State's Smoking Ban*, THE HARTFORD COURANT, Aug. 11, 2004, at A15 ("As proof of the alleged economic devastation wrought by the no smoking law, [attorney Jan] Trendowski said one of the plaintiffs, Diane Batte-Holmgren, owner of Nowhere Café in New London, saw a decline in the number of cases of Budweiser sold each week from 50 to 20."); Charles Yoo, *2-Stage Smoke Ban Urged*, THE ATLANTA JOURNAL-CONSTITUTION, METRO NEWS, September 17, 2004, at 1D.

assault, thus non-smokers too have entered the fray and criticized the smokefree movement.[16]

Governments have enacted smoking bans by using their police powers to protect the health and safety of their citizens.[17] States and local governments maintain that their police power authorizes the enactment of smokefree laws in an effort to prevent the onset of various debilitating and potentially fatal diseases purportedly[18] aggravated by environmental tobacco smoke.[19] However, whether the police power validates such legislation is far from a settled question. It is axiomatic that any legislative enactment must pass federal constitutional muster,[20] but the constitutionality of smokefree laws has not been resolved, regardless of their prevalence and popularity.[21]

Legal challenges to smokefree laws abound, premised on numerous theories of constitutional infirmity.[22] Four restaurant owners in Connecticut

---

16. *See, e.g.*, JIM WATERS, BLUEGRASS INSTITUTE FOR PUBLIC POLICY SOLUTIONS, ZEALOTS BLOW SMOKE ON PROPERTY RIGHTS (2004), *available at* http://www.bipps.org/pubs/Zealots.pdf; Tony Messenger, *Price of Freedom Lost in Hazy Cloud of Secondhand Smoke*, COLUMBIA DAILY TRIBUNE, Dec. 1, 2004, *available at* http://www.columbiatribune.com/2004/Dec/20041201Feat001.asp. On the takings issue, the writer, a non-smoker, states:

> Unless government commits to the same process that occurs when it takes a person's land so it can build a new highway - reasonable compensation determined by the market - this movement to ban smoking in private businesses that make their living on folks who want to come in and have a beer and a cigarette is an unconstitutional taking.

Id.

17. *See, e.g.*, Dean Milk Co. v. Madison, 340 U.S. 349, 353 (1951); H.P. Hood & Sons v. DuMond, 336 U.S. 525, 531-32 (1949).

18. The science is still open to dispute. *See, e.g.*, Flue-Cured Tobacco Coop. Stabilization Corp. v. United States EPA, 4 F. Supp. 2d 435 (M.D.N.C. 1998), *vacated,* 313 F.3d 852 (4th Cir. 2002); James E. Enstrom & Geoffrey C. Kabat, *Environmental Tobacco Smoke and Tobacco Related Mortality in a Prospective Study of Californians, 1960-98*, BRITISH MED. J. (May 17, 2003), http://bmj.bmjjournals.com/cgi/content/full/326/7398/1057; R.J. Reynolds Tobacco Company, Tobacco Issues, Secondhand Smoke, http://www.rjrt.com/TI/Tisecondhand_smoke.asp (last visited February 14, 2005).

19. *See, e.g.*, IDAHO CODE ANN. § 39-5501 (2004) and DEL. CODE ANN. tit. 16, § 2901 (2005).

20. *See, e.g.*, Calder v. Bull, 3 U.S. 386, 399 (1798) (Iredell, J. dissenting).

21. *See* AMERICANS FOR NONSMOKERS' RIGHTS, PATRON SURVEYS AND CONSUMER BEHAVIOR (May 2005), http://www.nosmoke.org/pdf/patronsurveys.pdf.

22. Where a ban is in place, the interests of nonsmokers are served fully and challenges arise from business owners and smokers. Where there are no laws in effect, *nonsmokers* have brought legal challenges of their own premised on different theories. Some have argued that injury from second-hand smoke is a basis for workers compensation. *See, e.g.*, Johannesen v. New York City Dept. of Hous. Pres. & Dev., 638

recently filed suit in state court alleging violation of the equal protection clause of the Fourteenth Amendment because Connecticut's ban does not apply to Indian casinos or private clubs.[23] In another case, the Fraternal Order of Eagles sued the city of Marlboro, the Board of Health and its members, alleging interference with private property rights and violations of the First Amendment guarantee of free exercise of religion and right to assemble.[24] The Empire State Restaurant and Tavern Association challenged New York's smoking ban as unconstitutionally vague and preempted by federal law, arguments which were rejected by a U.S. district court judge.[25]

One emerging[26] constitutional avenue for restaurant and bar owners is a federal law challenge predicated on the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment.[27] In relevant part, the Fifth Amendment guarantees "nor shall private property be taken for public use, without just compensation."[28] A long line of Supreme Court case law has extended the applicability of the Takings Clause beyond the exercise of eminent domain[29] to certain statutes and

---

N.E.2d 981 (N.Y. 1994); negligence claims, *see, e.g.*, McCarthy v. Dept. of Soc. & Health Serv., 759 P.2d 351 (Wash. 1988); disability benefits, *see, e.g.*, Parodi v. Merit Sys. Prot. Bd., 702 F.2d 743 (9th Cir. 1982); and emotional distress claims, *see, e.g.*, Carroll v. Tenn. Valley Auth., 697 F. Supp. 508(D. D.C. 1998) among other claims. Other plaintiffs have alleged that sensitivity to second-hand smoke can be a basis for a claim under the Americans with Disabilities Act, *see, e.g.*, Bell v. Elmhurst Chicago Stone Co., 919 F. Supp. 308 (N.D. Ill. 1996) and Bond v. Sheahan, 152 F. Supp. 2d 1055 (N.D. Ill. 2001). *See* AMERICANS FOR NONSMOKERS' RIGHTS, RIGHTS OF NONSMOKERS, *supra* note 6.

23. Jacklin, *supra* note 15, at A15. The suit was dismissed at the trial level. *See* Christopher Keating, *Judge Upholds Ban on Smoking*, THE HARTFORD COURANT, Nov. 9, 2004, at B1.

24. Scott J. Croteau, *Eagles Sue Over Ban on Smoking*, WORCESTER TELEGRAM & GAZETTE, ROUTE 9 E. EDITION, Jul. 8, 2004, at B1.

25. John Caher, *New York State's Smoking Ban Wins Round in Federal Challenge*, 230 N.Y.L.J. No. 80, 1 (2003).

26. Takings challenges to smokefree laws are in their infancy. No court has yet struck down a smokefree law as an impermissible taking. *See* AMERICANS FOR NONSMOKERS' RIGHTS, LEGAL CHALLENGES TO SMOKEFREE INDOOR AIR ORDINANCES (Aug. 2004), http://www.no-smoke.org/pdf/LegalChallenges.pdf; *see, e.g.*, City of Tucson v. Grezaffi, 23 P.3d 675 (Ariz. Ct. App. 2001); D.A.B.E., Inc. v. City of Toledo, 393 F.3d 692 (6th Cir. 2005); Helena Partnership, LLP v. City of Helena, No. BVD-2002-420, 2003 Mont. Dist. LEXIS 1844 (Dist. Ct. Mont., Jan. 7, 2003).

27. *See* Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 827 (1987).

28. U.S. Const. amend V.

29. Eminent domain is "the inherent power of a governmental entity to take privately owned property, especially land, and convert it to public use, subject to reasonable compensation for the taking." BLACK'S LAW DICTIONARY 562 (8th ed. 2004).

regulations that "work" the effect of a taking even in the absence of any physical occupation or appropriation of the property by the governmental authority.[30]

In 1987, the Supreme Court further extended the Takings Clause to cover situations in which the government demands an exaction (also known as a "dedication") of a portion of property for a public use as a condition for the owner to obtain a permit for a desired private use.[31] Though the Takings Clause now sweeps broadly, standards of judicial review differ remarkably depending on the taking's nature.

While business owners who challenge smoking bans are not suffering physical occupations of their property, they may still argue that smokefree laws constitute impermissible regulatory takings. The government may properly interfere with property rights so as to effect a taking, but the Fifth Amendment guarantees that such a taking requires the government to compensate the property owner.[32] Smokefree laws work impermissible takings of property precisely because they fail to provide just compensation.[33] The argument is not merely academic curiosity or reserved for daring litigators - at least one state legislature has attempted to give such an argument vitality within a statutory scheme protecting private property from regulatory takings.[34]

This comment suggests that an as-applied challenge to a smokefree law based on a theory of an impermissible regulatory taking is a viable option for affected business owners. While a challenge under the deferential standard announced in *Penn Central Transportation Co. v. New York City*[35] is unlikely to succeed, a suit could be successful if framed as an exaction case meriting the heightened judicial scrutiny applied in the *Nollan v. California*

---

30. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 122-28 (1978) (emphasis added). *See also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014 (1992) ("'while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.'") (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

31. *Nollan*, 483 U.S. 825.

32. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987).

33. The goal of just compensation is to return the injured party to the status quo. "The Supreme Court defines just compensation as 'the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.'" Bryan C. Goldstein, Case Comment, *Phillips v. Washington Legal Foundation: The Future of IOLTA*, 79 B.U. L. Rev. 1277, 1291 (1999) (quoting United States v. Reynolds, 397 U.S. 14, 16 (1970)).

34. *See* H.B. 2833, 79th Leg. (Tex. 2005) (last action May 22, 2005).

35. *Penn Cent.*, 438 U.S. at 127 (suggesting that a land use regulation need only be "reasonably necessary to the effectuation of a substantial public purpose").

Coastal Commission[36] and *Dolan v. City of Tigard*[37] decisions. A takings challenge sends a clear message: if government wants to burden owners economically by interfering with the operations of a privately-owned establishment, it must pay to do so. Furthermore, there are alternative constitutional means with which states may achieve the ends of smokefree legislation apart from mandatory smoking bans.

This comment is organized in three sections. Part I will discuss the various frameworks for takings analyses informing Supreme Court takings jurisprudence. Part II will analyze smokefree laws as applied to restaurants and bars under the various frameworks identified in takings case law and argue that as-applied to certain restaurant and bar owners, they amount to uncompensated and therefore unconstitutional takings. Part III will provide alternative proposals for initiatives that stop short of affirmative bans but achieve the same goals of protecting nonsmokers' rights while withstanding constitutional scrutiny.

I. AN OVERVIEW OF PROPERTY AND TAKINGS JURISPRUDENCE

The Just Compensation Clause of the Fifth Amendment requires the government to provide the private[38] property owner with just compensation if it takes his property for public use.[39] While the text of the Constitution implicates the government's exercise of eminent domain or physical appropriation of private property, the Supreme Court has extended its reach to regulatory takings,[40] wherein a statute or regulation operates so as to effect a taking of property. An exaction is a special form of regulatory taking in which a desired use of property is conditioned on a dedication of some interest in the property for a public use.[41]

---

36. *Nollan*, 483 U.S. at 837 (explaining the "essential nexus" test).

37. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (explaining the "rough proportionality" test).

38. Sheldon Richman takes issues with labeling restaurants, for example, as "public" places. They are public accommodations, or open to the public, but they are not true public places in the sense of being owned by the state and funded by the taxpayers. His preferred term is "commercial property," connoting private property open to the public. *See* Cato Policy Report, Do Smokers Have Rights? The Science and Politics of Tobacco, http://www.cato.org/pubs/policy_report/smoke-pr.html (last visited Feb. 14, 2005). Perhaps the status of the restaurants and bars as public accommodations has muted the reality that such establishments are actually private property whose owners grant the public the privilege of entering at certain times for a certain purpose. If so, this may contribute to the dearth of takings challenges in this area.

39. U.S. Const. amend V.

40. *See, e.g.*, Pa. Coal v. Mahon, 260 U.S. 393, 415 (1922).

41. *See, e.g., Dolan*, 512 U.S. at 386.

"The straightforward purpose of the Takings Clause," writes leading constitutional law scholar and commentator Professor Douglas Kmiec, "is to avoid the disproportionate placement of public burdens upon a single property owner."[42] Inherent in the clause is an implicit struggle between state police power to protect the health, safety and welfare of the citizenry and private property interests.[43]

"Property" itself is a concept admitting no simple definition. It contains both positive and natural law components and predates government, meaning the term is not solely derived from legislative exercise of power.[44] At the time of the nation's founding, the Framers relied on Sir William Blackstone's conception of property as a claim over an external thing to the exclusion of all others in the universe.[45] This right to exclude is one of the "bundle of rights"[46] held in a private property interest and is arguably the most essential right.[47] Originally, the concept of common law private property flowed from nuisance law: one could use his property in any way he desired, so long as he did not injure others.[48] The connection between private property and nuisance law constructs property as a balance between competing public and private rights.[49] There is no federalized or constitutionalized conception of property. The Supreme Court instead has adopted a concept that defines property and police power "reciprocally in relation to a state's background principles of property law, especially the common law of nuisance."[50] Given the obtuse and amorphous nature of

---

42. Douglas W. Kmiec, Defining Takings: Private Property and the Future of Government Regulation: Inserting the Last Remaining Pieces Into the Takings Puzzle, 38 WM. AND MARY L. REV. 995, 997 (1997).

43. *Id.*

44. *Id.* at 999-1000.

45. Douglas W. Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak Nor Obtuse*, 88 COLUM. L. REV. 1630, 1635 (1988).

46. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 142-43 (1978) (Rehnquist, J., dissenting) ("'Property'... 'denote[s] the *group of rights* inhering in the citizen's relation to the physical thing, *as the right to possess, use and dispose of it*...The constitutional provision is addressed to *every sort of interest* the citizen may possess.'") (internal citations omitted).

47. *See* Nollan v. Cal. Coastal Comm., 483 U.S. 825, 831 (1987).

48. Kmiec, *The Original Understanding*, *supra* note 45, at 1635, 1639.

49. Carol M. Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 WASH. & LEE L. REV. 265, 275 (1996). The rights of neighboring property owners were traditionally vindicated through nuisance or trespass actions while the rights of the public writ large were handled through the State's exercise of its police power.

50. Kmiec, *Defining Takings*, *supra* note 42, at 1002. Professor Kmiec suggests that courts should not attempt to define these background principles. The states are bound by

property, the chosen regime is not inevitable. However, it is the framework on which takings analysis is based.[51]

The Fifth Amendment prevents the possibility that property may be taken for a purely private use,[52] "without a justifying public purpose, even though compensation is paid."[53] Public use does not require that the property actually be used by or enjoyed by the general public.[54] Such use has been interpreted broadly to be "coterminous with the scope of a sovereign's police powers."[55] Whatever the sovereign deems as public use is legitimate. Under

---

the notion of *sic utere* enshrined in common-law nuisance, subject to legislative nuances. "Within the borders set by the common law of nuisance, and reasonable statutory extensions thereof, common law ownership includes rights of possession, exclusion, use, profit, and disposition or transfer." *Id.* at 1002 n.33.

51. Professor Kmiec notes that there are competing definitions of private property to that employed by the Court. Private property could be conceived as deriving entirely from legislative enactments, sacrificing the individual to majoritarian rule and obliterating any distinction between harms and benefits (a dichotomy for nuisance law). Alternatively, property could be conceived of as sacrosanct and absolute, admitting of no authority by the state to prevent any use whatsoever. For Kmiec, "fixing upon a conception of property that gets the distinction between harm and benefit off the ground in a manner consistent with the constitutional aim of insulating individual citizens from arbitrary or disproportionately burdensome exercises of governmental power, but which does not deny the existence of that power..." is key. Kmiec, *The Original Understanding*, *supra* note 45, at 1640.

52. The distinction between public and private use has been eviscerated by the Supreme Court's recent decision in *Kelo v. City of New London*. 545 U.S. __, 125 S. Ct. 2655 (2005). In *Kelo*, the Court held that condemnation and transfer of private land to another private party satisfied the public use requirement because the land was to be developed for the benefit of the area in the form of new jobs and increased tax revenue. The Court deferred to the city's determination that its economic development plan served a public purpose and refused to hold, as petitioners urged, that economic development does not qualify as public use. *Id.* at 2665-66. Dissenting, Justice O'Connor chastised the Court for expanding the meaning of public use to essentially sanction private takings: "[The Court] holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary private use, so long as the new use is predicted to generate some secondary benefit for the public...." *Id.* at 2675 (O'Connor, J., dissenting). Justice O'Connor went on to say that since a standard of predicted beneficial side-effects is required rather than proof of direct public use or benefit was applied, "for public use" is rendered superfluous.

53. Haw. Housing Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (citing Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937)).

54. *Id.* at 244.

55. *Id.* at 240.

separation of powers principles, courts must defer to the legislature's determination unless it lacks a reasonable foundation.[56]

Regulatory takings law is confusing and inconsistent,[57] but the weight of the case law yields a few key principles for different factual settings.[58] Regulatory takings jurisprudence was born in *Pennsylvania Coal v. Mahon*, where Justice Holmes remarked that "the general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[59] Holmes did not elaborate on this proposition, but left it to future courts to determine when the line is crossed from mere regulation to compensable taking. In grappling with this question, the Court has employed "[essentially] ad hoc, factual inquiries."[60]

Regulatory takings cases can be grouped into four categories. The first three involve the application of a regulation. A regulation can result in a physical occupation, a partial non-physical taking, or a total non-physical taking. The last category is exactions, the imposition of a condition on a desired use of property.

A. Regulation resulting in physical occupation

In *Loretto v. Teleprompter Manhattan CATV Corp.*, the Supreme Court held that the government must compensate the property owner for a physical occupation of a recognized property interest, no matter how minor the intrusion.[61] If the occupation is physical, there is no inquiry into the public interest served.[62] This result is grounded in the Blackstonian concept of property as an absolute right to exclude others and it "reminded the Court that no matter how high-minded the justifications for a public regulatory scheme might be, in a democratic republic with a natural law foundation, the

---

56. *Id.* at 241.

57. Kmiec, *Defining Takings*, *supra* note 42, at 995-96. Professor Kmiec refers to takings jurisprudence as a puzzle. *Id.*

58. The present discussion will not include an analysis of eminent domain but will rather be confined to regulatory takings, since smoking bans do not involve the exercise of eminent domain powers.

59. Pa. Coal v. Mahon, 260 U.S. 393, 415 (1922). Without defining it, Holmes was drawing a line between legitimate exercise of police power and a taking for which just compensation is due. *See* Smith v. Town of Mendon, 822 N.E.2d 1214, 1226 (N.Y. 2004) (Read, J., dissenting).

60. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

61. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (requiring compensation to property owners who were forced to allow New York cable company to insert cable apparatus in building).

62. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992). *See also* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l. Planning Agency, 535 U.S. 302, 322 (2002).

objective reality of privately-held property resources limits those schemes."[63] As long as a regulation produces a physical occupation, private property interests trump governmental justifications.

A physical occupation need not be static and attached to the property for the categorical rule of just compensation to apply. In *Nollan v. California Coastal Commission*, the Court held that a building permit conditioned on the grant of an easement to the public to cross their beachfront property constituted a taking requiring just compensation.[64] Because the conveyance of the easement was an exaction in exchange for a land-use permit rather than a mandatory conveyance, the Court engaged an additional inquiry in reaching its conclusion, but noted that had the Commission required the easement outright, a taking would have occurred.[65] Though ultimately decided on exaction grounds, the Court considered the permanent and continuous right of any individual to pass over the property at any time to amount to a physical occupation.[66]

B. Regulation resulting in a partial non-physical taking

The leading case involving partial regulatory takings is *Penn Central Transportation Co. v. New York City*, decided in 1978.[67] The dispute in *Penn Central* involved the application of New York City's Landmarks Preservation Law to Grand Central Terminal. Grand Central had been designated a historic landmark under the statute, resulting in restrictions placed on Penn Central's use of the terminal.[68] The company applied to the Landmarks Preservation Committee for permission to construct an office tower on top of the terminal and was denied.[69] Penn Central brought suit in state court alleging that the Landmarks Preservation Law as applied to Grand Central took its property without just compensation in violation of the Fifth and Fourteenth Amendments.[70] The company argued that even though the terminal, without the office tower, was generating a reasonable investment return, the city took its property interest in the valuable airspace

63. Kmiec, *Defining Takings*, *supra* note 42, at 1002.

64. 483 U.S. 825 (1987).

65. *Id.* at 834.

66. *Id.* at 832. *See also* United States v. Causby, 328 U.S. 256, 265 (1946) (holding that easement for flight of government planes is an appropriation of the use of land "so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it").

67. 438 U.S. 104 (1978).

68. *Id.* at 115.

69. *Id.* at 116-17.

70. *Id.* at 119.

above the terminal without just compensation for the fair market value of those air rights by rejecting its application to build the tower.[71]

The Court rejected Penn Central's claim that just compensation was owed merely because the company was unable to exploit a valuable property interest previously thought available for development.[72] Penn Central argued that its use and exploitation of air rights was inexorably tied to its reasonable investment-backed expectations in the terminal, and the statute interfered with these expectations.[73] The Court rejected this contention, looking instead to both the character of the governmental action as related to the promotion of the general welfare and the "nature and extent of the interference with rights in the parcel as a whole."[74] The Court dismissed diminution in value of a parcel as an allowable justification to find a compensable taking and focused instead on Grand Central's remaining available uses.[75] The Court

---

71. *Id.* at 130.

72. *Id.* ("'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated").

73. *Id.* The Court noted that the landmark designation did not prevent Penn Central from using Grand Central in the way it had been used since its inception, as a train terminal with office space and concessions. This, said the Court, was the main investment-backed expectation of the parcel, from which Penn Central continually derived profits. *Id.* at 136.

74. *Id.* at 130-31 (defining the relevant parcel for purposes of takings analysis has proven a controversial and vexing issue). Professor Margaret Radin coined the term "conceptual severance" and the strategy therein—"delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken." Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988). While at odds with the majority's instruction in *Penn Central*, it does seem that conceptual severance has gained somewhat of a foothold in certain situations. Justice Rehnquist relied on it in his *Penn Central* dissent, and while not explicit in the opinions, *Nollan* and *Loretto* are technically examples of conceptual severance. *Id.* at 1676-77. There is a limitation here, however, as judicial acceptance of conceptual severance seems forthcoming only where *affirmative* easements or servitudes are concerned. (The servitude in *Penn Central* was negative). *Id.* at 1678-79. This goes back to the Blackstonian conception of "right to exclude." In one other example of conceptual severance, the Court held that a regulation extinguishing the right of Indian tribal members to devise property to their heirs amounted to a compensable taking. Hodel v. Irving, 481 U.S. 704 (1987). The Court found the character of the regulation "extraordinary" and noted that it abrogated a right attaching to property enjoyed since feudal times. While States can modify descent and devise rules for classes of property, complete abrogation of those rights amounts to a taking. *Id.* at 717-18.

75. *Penn Cent.*, 438 U.S. at 131. The Court also noted that Penn Central did not petition the Landmarks Preservation Commission for permission to build a smaller

also noted that the statute allowed for airspace rights to be transferred to other parcels owned by the company in other areas of the city, seriously undercutting Penn Central's assertion that the regulation frustrated its reasonable investment-backed expectations.[76]

Penn Central thus devised a three-pronged balancing test to determine whether a regulation operates as a compensable taking. The first prong assesses the economic impact of the regulation on the landowner. The second prong addresses its interference with distinct and reasonable investment-backed expectations. The final prong looks to the character of the governmental action.[77] Deference and presumptive validity are the hallmarks of the *Penn Central* framework.

C. Regulation resulting in a total non-physical taking

In 1992, the Court adopted another categorical rule relating to regulations that deprive the owner of all economically viable use of his property—an admittedly "extraordinary circumstance"[78] called a "total" regulatory taking.

In *Lucas v. South Carolina Coastal Council*,[79] plaintiff Lucas owned two parcels of beachfront property that required no permit in advance of development activity at the time of purchase. Two years after purchasing the lots for nearly one-million dollars, Lucas began developing single family homes on the parcels.[80] Soon thereafter, South Carolina passed the Beachfront Management Act, provisions of which directly affected Lucas by flatly prohibiting his development of the parcels by requiring them to remain largely in their natural state.[81] Lucas sued the Coastal Council, contending that the Act operated as an uncompensated taking and that any inquiry into the legitimacy of police power objectives to promote the public welfare was irrelevant since the regulation stripped the property of *all* economic viability and value.[82]

The Court seemingly equated this total deprivation of beneficial economic use to a physical appropriation and noted that situations such as this "carry

---

structure atop the terminal, so in theory, the air rights above the structure were still open to exploitation given an appropriate plan. *Id.* at 137.

76. *Id.* at 137.

77. *Leading Cases*, 116 HARV. L. REV. 321, 327 (2002) (discussing preservation of *Penn Central*).

78. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l. Planning Agency, 535 U.S. 302, 325 (2002).

79. 505 U.S. 1003 (1992).

80. *Id.* at 1006, 1008.

81. *Id.* at 1007.

82. *Id.* at 1009.

with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm."[83] The Court, speaking through Justice Scalia, held that when the owner "has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[84] However, the Court did carve out one exception—there is no compensable taking in cases where the owner has been deprived of all economically beneficial use of the property if the use proscribed by the regulation is not part of, or reasonably expected to be part of, the title to the property to begin with.[85] Whether a particular use inheres in the title is determined by "examining the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[86]

Post-*Lucas*, one unresolved issue was whether a regulation depriving a property owner of all economically beneficial use of land for only a *temporary* period of time must be analyzed under *Penn Central* or *Lucas*. The Court recently held that the former controls.[87] *Lucas* is limited to those situations where the deprivation of all economic use of the property is permanent. A regulation that has only temporary effect cannot be considered to deny *all* economically beneficial uses of property for all time and therefore cannot properly be called total, when the property is considered as a whole rather than in impermissible temporal segments.[88]

---

83. *Id.* at 1018.

84. *Id.* at 1019 (emphasis in original).

85. *Id.* at 1027. The Court rejected South Carolina's contention that title is held subject to the implied right of the State to eliminate all economically valuable use of land pursuant to land-use measures. The total takings inquiry considers the degree of harm to public lands and adjacent private property posed by the proposed proscribed activity, the social value and suitability of the activity to the locale, and ease with which the harm can be abated by the property owner or third parties. *Id.* at 1030-31.

86. *Id.* at 1029.

87. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l. Planning Agency, 535 U.S. 302 (2002). In *Tahoe-Sierra*, a thirty-two month moratorium on development of land was imposed by the Agency pending a study of the impact of a certain development near Lake Tahoe. Landowners brought suit alleging violations of the Fifth and Fourteenth Amendment right to just compensation for depriving them of all economically viable use of their land for the period of the moratorium. The Court held that the landowners could not bring the case under the *Lucas* rubric by segregating the thirty-two month period and instead ruled *Penn Central* to be controlling as this was at most a partial taking.

88. *Id.* at 331. An argument based on conceptual severance of the property or temporal segments must fail because it ignores *Penn Central's* thesis that the parcel must be considered as a whole.

D. Exactions

The Takings Clause has also been applied in cases where the government has conditioned a desired property usage on a dedication of a portion of the property to some public use. In *Nollan v. California Coastal Commission*,[89] the Court held that a permit to build a house on beachfront land conditioned on the owners' grant of an easement across their property to the public for beach access constituted a compensable taking.[90] The Court reiterated its rule that land use regulations are not takings so long as they substantially advance legitimate state interests and do not deprive the landowner of all economically beneficial use of the property.[91] Under this standard, the Commission could have denied the permit outright since it had advanced a legitimate state interest and the Nollan's property retained substantial economic value.[92] The issue then was whether a regulation in the form of a permit condition (rather than the permit denial) commanded the same result.[93] The Court concluded that it did not. The Commission had identified ends that would have been served by denial of the permit itself but its course of action—electing to impose conditions on the permit rather than deny it—failed to achieve the very ends it identified.[94] When a regulation takes the form of an exaction, there must be an "essential nexus"[95] between the legitimate state interest advanced and the means chosen to meet that end. A requirement of an access easement to and from the beach across the Nollan's property lacked any nexus with the goals set forth by the Commission that would have supported the denial of a permit, namely, the prevention of overcrowding, protection against the psychological barrier to use of the beach a dwelling might create and the preservation of a sightline to the ocean.[96] Absent an essential nexus, there was no valid use of the police power and a compensable taking had occurred.

Because the lack of a nexus was so obvious in *Nollan*, the Court did not address how close the means-end fit between the exaction and legitimate state interest must be.[97] In 1994, the Supreme Court reached this question in

---

89. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

90. *Id.* at 842.

91. *Id.* at 834.

92. *Id.* at 835.

93. *Id.* at 837.

94. *Id.* at 838-39.

95. *Id.* at 837.

96. *Id.* at 835, 838-39.

97. *Id.* at 834. The *Nollan* essential nexus requirement and the *Dolan* rough proportionality standard gave some bite to the formulation of "'substantially advancing a legitimate governmental interest,' which had become indistinct from the reasonableness

Dolan v. City of Tigard.[98] In *Dolan*, the plaintiff sought to redevelop her parcel to expand the square footage of her electrical appliance store and pave a parking lot.[99] The city conditioned her permit on her dedicating a portion of her property to the city for improvement of a storm drainage system and a pedestrian and bicycle path.[100] The Court found that the city's proffered reasons for the dedication met the essential nexus test.[101] Also, the Court announced a new standard for the question left open in *Nollan*: there must be a "rough proportionality" between the exaction required and the impact of the proposed property use in question.[102] The governmental authority must "make some sort of individualized determination that the required dedication is related both in nature and extent to the impact" of the use.[103]

The theoretical frameworks for takings analysis are diverse. Which construct to employ in analyzing smokefree laws will depend on the character and nature of the statute or regulation and its effect on the property owner.

II. AN AS-APPLIED TAKINGS CHALLENGE TO SMOKEFREE LAWS

It is important to categorize smokefree laws[104] properly because the theoretical framework employed to analyze the takings question depends on what the bans actually do. Physical occupation of or complete economic viability deprivation of the property would be most advantageous for restaurant and bar owners because they invoke categorical rules requiring just compensation. However, smokefree laws do not fit fairly into either of these categories. There is no physical occupation of a restaurant or bar with an affirmative easement or servitude. Likewise, smoking bans do not deprive restaurant and bar owners of all economically viable use of their establishments.

---

or mere rational basis standards applied in other economic contexts." Kmiec, *Defining Takings*, *supra* note 42, at 1003.

98. 512 U.S. 374 (1994).

99. *Id.* at 379.

100. *Id.* at 379-80.

101. The City was interested in reducing traffic congestion and preventing flooding along Fanno Creek, and Dolan's property sat within the 100-year floodplain. *Id.* at 387.

102. *Id.* at 391. The Court has subsequently stated that the "rough proportionality" test is unique to exaction analysis and does not extend to standard regulatory takings analysis. Monterey v. Del Monte Dunes At Monterey, Ltd., 526 U.S. 687, 703 (1999).

103. *Dolan*, 512 U.S. at 391. The Court concluded that the city failed to carry its burden in showing that a pubic greenway, as opposed to a private one, was needed. *Id.* at 393. It also failed to show that the increase in traffic generated by Dolan's development was reasonably related to the exaction of a bike path and pedestrian easement. *Id.* at 395.

104. *See supra* note 9.

This leaves the broad category of partial non-physical regulatory takings, governed by *Penn Central*.[105] This rubric represents much of the area under the takings curve, applicable in situations where *Lucas*[106] (total regulatory) and *Loretto*[107] (physical occupation) are not implicated. Smoking bans neither deprive property owners of all beneficial economic use of their establishments nor do they constitute physical occupations of private property interests. Rather, the claim is that they cause a diminution in value to property and interfere with the distinct and reasonable investment-backed expectations of property owners,[108] notwithstanding the public health, safety and welfare justifications put forth by the government—classic partial takings claims under *Penn Central*. The property interest invaded is the right of the owner to prevent total abdication of the air of the establishment to the government.

Penn Central, however, is no friend of property owners due to the low-level scrutiny and elusiveness of actual content embodied in the test.[109] Property owners need a far better hook.

At first blush, smoking bans do not appear to be exactions, at least not like the ones at issue in *Nollan* and *Dolan*. In those cases, permits to develop were conditioned on a dedication of a portion of the parcel for public purpose and a grant of a real property interest to the locality. In the context of smokefree laws, there is no dedication as a condition on a permit in the literal sense. However, if one considers a ban on smoking to be a condition on continuing the desired use of the property as a restaurant or a bar, then such ban may properly be characterized as an exaction.[110] From the moment the regulation becomes effective, permission to be a bar or a restaurant is essentially conditioned on the exaction of the air of the premises for a public

---

105. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978).

106. 505 U.S. 1003 (1992).

107. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

108. *See infra* note 144.

109. *See* John D. Echeverria *Is the* Penn Central *Three-Factor Test Ready for History's Dustbin?*, 52 LAND USE & ZONING DIG. 3, (2000), http://www.law.georgetown.edu/gelpi/papers/dustbin.htm. *See also* Timothy Sandefur, *The Obstacle Course of the Takings Clause*, 52 THE FREEMAN: IDEAS ON LIBERTY (Jan. 2002), http://www.fee.org/publications/the-freeman/article.asp?aid=3929.

110. Some courts have held that exactions need not be dedicatory—that is, involve a transfer or appropriation of real property to the government-in nature in order to trigger a *Nollan/Dolan* analysis. *See, e.g.*, Town of Flower Mound v. Stafford Estates Ltd. Partnership, 135 S.W.3d 620, 639-40 (Tex. 2004). Further bolstering the view that actual land appropriation is not required, some courts apply *Nollan/Dolan* scrutiny to the imposition of impact fees as a condition on a desired use and in at least one case such an analysis was directed by the Supreme Court itself. *See* Ehrlich v. City of Culver City, 911 P.2d 429, 433 (Cal. 1996).

purpose. This theory is not unsupported. In *United States v. Causby*,[111] the Supreme Court addressed air rights above a parcel of land and held that a landowner owns "as much of the space above the ground as he can occupy or use in connection with the land."[112] It is not implausible to maintain that the property owner "owns" the air in his establishment, and the "economic vitality"[113] of that air can be impaired. Smokefree laws do not permit him to allow his patrons to "use" his air as a depository for secondhand smoke and use is "'an essential attribute of ownership'".[114] As such, restaurant and bar smoking bans should be susceptible to the heightened scrutiny of a *Nollan/Dolan* analysis.[115]

A threshold matter is whether the nature of restaurants[116] and bars[117] as public accommodations alters the core takings analysis. No takings case is directly on point with this issue.[118] However, some rights generally attached to the concept of property have been undercut with respect to owners of

---

111. 328 U.S. 256 (1946).

112. *Id.* at 264.

113. See WATERS, *supra* note 16.

114. *Id.* (quoting Lexington Fayette County Food and Beverage Ass'n v. Lexington-Fayette Urban County Gov't, 131 S.W.3d 745, 757 (Ky. 2004) (Graves, J., dissenting)).

115. While *Nollan/Dolan* clearly applies to permit conditions imposed on an individualized basis in adjudicatory proceedings, it is less clear that heightened scrutiny applies to conditions imposed legislatively and which apply to a broad class of property owners. Smokefree laws fit into this latter category. There is a split of authority on this issue and the Supreme Court has never *held* that *Nollan/Dolan* does not apply to legislatively-imposed exactions. *See* Andrew W. Schwartz, The Application of Nollan/Dolan Heightened Scrutiny to Legislative Regulations and "Unsuccessful Exactions" (Oct. 1999), http://www.law.georgetown.edu/gelpi/conference/schwartz.htm. *See also* Parking Ass'n. of Ga. Inc. v. City of Atlanta, 512 U.S. 1116 (1995)("[T]he general applicability of the ordinance should not be relevant in a takings analysis.")(Thomas, J. dissenting from denial of certiorari); John P. Seibels, Jr., Nollan & Dolan*:* *Exaction Packed Adventures and Takings Jurisprudence*, 4 S.C. ENVTL. L.J. 1, 22-23 (1995) (discussing the applicability of *Nollan* and *Dolan* to legislative determinations).

116. *See* 42 U.S.C.S. § 2000ab-2 (2000).

117. *See* 42 U.S.C.S. § 2000ab-3 (2000). Bars have been held to be "places of entertainment" and thus public accommodations. *See, e.g.*, United States v. De Rosier, 473 F.2d 749, 751 (5th Cir. 1973).

118. In *Heart of Atlanta Motel, Inc. v. United States*, the Court held that the Civil Rights Act did not effect a taking of the Motel's property without just compensation. 379 U.S. 241, 261 (1964). However, the Court merely cited to prior case law and did not discuss whether or not the takings analysis was any different in the public accommodation context. *Id.*

public accommodations, such as the absolute right to exclude.[119] Under the Americans with Disabilities Act (ADA), owners of public accommodations must make their establishments accessible to patrons with disabilities.[120] Public accommodation laws are, in essence, a customer bill of rights.[121] Admittedly, Title III of the ADA has been employed to protect nonsmokers with documented sensitivity to tobacco smoke from exposure to secondhand smoke.[122] Still, the courts have not addressed squarely the public accommodation issue in the context of Fifth Amendment takings. While certain *de minimis* requirements must be met by public accommodation owners, others reaching beyond that threshold may go too far as to amount to compensable takings.

A. Challenging Smokefree Laws Under Penn Central

Under the tripartite *Penn Central* test, the focus of the inquiry is on the character and nature of the governmental action; the economic impact of the regulation on the landowner; and its interference with reasonable investment-backed expectations.[123] There are essentially two ways to argue the case. First, one can attack the existence of a public use or purpose, thus making any taking, even a compensable one, unconstitutional. Secondly, one could argue the existence of the *Penn Central* elements and then claim a right to just compensation. In this context, the latter is the better track: it is beyond dispute that the proffered purpose of smokefree laws is to promote the public health, safety and welfare of the citizens by protecting nonsmokers from the harmful health consequences of secondhand smoke exposure.[124] Taking heed of the Court's admonition that a justifying public

---

119. *See, e.g., id.*, at 258 (holding that owner of motel serving interstate travelers cannot exclude patrons on the basis of race).

120. 42 U.S.C. § 12182(b)(2)(A) (2000).

121. *See* PGA TOUR, Inc. v. Martin, 532 U.S. 661, 692 (2001) (Scalia, J., dissenting).

122. AMERICANS FOR NONSMOKERS' RIGHTS, RIGHTS OF NONSMOKERS, *supra* note 6. To prevail on an ADA claim, the plaintiff must demonstrate a documented sensitivity to tobacco smoke (i.e., the disability) that "substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102 (2)(A) (2000). The ADA entitles all individuals to the full and equal enjoyment of all public accommodations, 42 U.S.C.S. § 12182(a) (2000), and courts have held that bans on smoking might in the appropriate circumstance be a reasonable modification to the premises in order to satisfy the mandate of the ADA. *See* SMOKE-FREE ENVIRONMENTS LAW PROJECT, THE AMERICANS WITH DISABILITIES ACT AND SMOKING IN THE WORKPLACE (July 11, 2001), http://www.tcsg.org/sfelp/adafact1_01.pdf.

123. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

124. *See, e.g.*, IDAHO CODE ANN. § 39-5501 (2004); DEL. CODE ANN. 16, § 2901 (2004); FLA. STAT. § 386.202 (West 2004).

use is whatever the government determines pursuant to the exercise of its legitimate police power,[125] there is little benefit in attacking the public use and purpose identified by the legislatures. The real question is whether this action comes with a price tag.

Defining the character and nature of smokefree laws[126] is political exercise. For antismoking advocates, such laws are laudable achievements serving society at large, classic exercises of police power that push all the right constitutional buttons. First, they impose an affirmative duty on all owners of affected establishments to prevent smoking on their premises, but this duty is shared across the board by all affected establishments so the burden of compliance is not on a single property owner. Secondly, while they apply only to selected establishments, the laws are part of a comprehensive effort[127] to protect non-smokers from the damaging effects of secondhand smoke exposure, amply documented by scientific evidence.[128] They are not discriminatory[129]—all owners of like establishments are affected by the laws–nor are they applied to only selected establishments within a class. In essence, even though restaurants and bars might be spread throughout a city rather than discrete parts of physical communities, they are in effect a constructive community.[130] The laws seek to eliminate a harm and provide a substantial benefit to the public at large by protecting the health of the community.[131] Furthermore, the regulations can benefit the owner of the

---

125. Haw. Housing Auth. v. Midkiff, 467 U.S. 229, 240 (1984).

126. For the purposes of discussion, it is assumed that the smokefree laws in issue apply to restaurants and bars. The analysis might be different if a specific ban applied only to restaurant establishments and not bars. For example, application of a restaurant-only smokefree ordinance defining attached bars to be part of the restaurant to a restaurant that is primarily operating as a bar after a certain hour of the evening may well be discriminatory if surrounding establishments are all bona fide bars not captured by the ordinance. *See* Yoo, *supra* note 15, at 1D ("If the city adopts the ban, however, he [Warren Bruno, restaurant owner] said he'll lose customers to competing bars. 'Late night, we're a bar,' Bruno said. 'After 11 p.m. they want to smoke.'").

127. *See Penn Cent.*, 438 U.S. at 132.

128. See *supra* note 9.

129. *See Penn Cent.*, 438 U.S. at 132.

130. Such a scheme is in contrast to discriminatory spot zoning, wherein a parcel is arbitrarily singled out for less favorable treatment than neighboring ones. *See Id.* Smokefree laws contemplate a "comprehensive plan" for a particular class of establishments "wherever they might be found." *Id.*

131. An additional, non-obvious benefit is found in reduced costs to taxpayers bearing the medical burden of secondhand smoke-related deaths: "We all pay for these conditions through higher insurance premiums and increased costs for public insurance programs like Medicaid. To the extent the [New York] law reduces secondhand smoke exposure, those needless costs will go down." Russell Sciandra, *Law Protects Nonsmokers' Rights*, BUFFALO NEWS, Oct. 5, 2003, at H5.

establishment in a few ways. First, those who would not normally frequent a smoke-filled environment may now patronize the establishment. Second, the threat of potential lawsuits against restaurant and bar owners predicated on employment discrimination, the ADA, negligence in failing to provide a safe workplace, assault and battery, emotional distress and nuisance, among others, would be reduced.[132] In short, smokefree laws substantially advance legitimate state interests.[133]

From the perspective of the owners, there are interests just as compelling. First, and most basic, owners want as little governmental intrusion as possible into their use and enjoyment of their property. Second, owners have an interest in making a profit and earning a living through the operation of the establishment, a livelihood compromised by a law which places government interests first and robs the property owner of the fundamental choice to permit or prohibit smoking in furtherance of "the most efficient use of the investment of his capital and labor."[134] Though smokefree laws essentially "impair[] economic efficiency"[135] and render the owner's knowledge of the needs and wants of his clientele immaterial—reposing such an assessment with the government sight unseen[136]—*Penn Central* places the government in a very strong position if its actions achieve legitimate state interests, to the point that the interests of affected landowners are presumptively subordinated unless all economically viable use of the property is obliterated.[137] The character and nature of the laws thus weigh heavily against property owners.

---

132. *See* AMERICANS FOR NONSMOKERS' RIGHTS, RIGHTS OF NONSMOKERS, *supra* note 6.

133. *See* Agins v. Tiburon, 447 U.S. 255, 260 (1980).

134. *See* Lexington Fayette County Food and Beverage Ass'n v. Lexington-Fayette Urban County Gov't, 131 S.W.3d 745 (Ky. 2004) (Graves, J. dissenting).

135. *Id.* at 757.

136. *Id.* In his dissent, Justice Graves went on to state:

> Since the owner is free to start a new business or close an existing business, he should be able to determine - for good reasons, bad reasons, or no reason at all - whether to admit smokers, nonsmokers, or both. Customers or employees who object may go elsewhere. They would not be relinquishing any right that they ever possessed. By contrast, when a businessman is forced to effect an unwanted smoking policy on his own property, the government is taking part of his property by regulation.

Id. at 758. Justice Graves did not cite *Penn Central* or its progeny. The argument, however, fits nicely into a *Dolan/Nollan* exaction analysis, but those cases were likewise not cited.

137. *See* Agins, 447 U.S. at 260 (citing Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1978)).

Focusing on the economic impact of smokefree laws and their interference with distinct and reasonable investment-backed expectations are the only plausible hopes for success under *Penn Central*. Almost all commentaries on smokefree laws include some iteration of the chief complaint: smokefree laws hurt business in a very real economic sense. In some cases, restaurant and bar owners can provide hard proof that the laws are decimating business[138] and in other cases, the complaints offer dire predictions of the impact of the laws.[139]

Business owners argue that smokefree laws impact their profits and in some cases might force them out of business altogether.[140] *Penn Central*, however, makes it clear that diminution in the value of the property alone is not sufficient to establish a taking.[141] If the business remains afloat, it is a stretch for the owner to claim that the law "has an unduly harsh impact,"[142] on his use of the property or causes it to lose economic viability. Even if the

---

138. *See, e.g.*, Jacklin, *supra* note 15, at A15.

139. *See, e.g.*, Associated Press, *Laramie Approves Smoking Ban*, BILLINGS GAZETTE, Sept. 8, 2004, http://www.billingsgazette.com/index.php?tl=1&display=rednews/2004/09/08/build/wyoming/34-laramie-smokingban.inc ("Opponents believe the ban infringes on business owners' rights and could cost the city tax money because customers will more likely stay at home or travel outside the city to establishments where smoking is allowed."); Anthony Cronin, *Smoking Ban Suit to be Heard This Fall in Hartford, Conn.*, THE DAY, Jul. 27, 2004 ("[Attorney Jan] Trendowski said the exclusions for the various private clubs and casinos is causing undue financial hardship for many bars, taverns and restaurants statewide. 'A lot of places may go belly up', he said."); Tim Rowden, *Restaurant Owners Praise Accord on Smoking*, ST. LOUIS POST-DISPATCH, Sept. 20, 2004, at 01 ("[Restaurant owner Chris] Olsen... says smoking is part of the business. He says smokers and their nonsmoking companions would leave even their favorite restaurant if it banned smoking. 'If that wasn't the case, then nonsmoking restaurants would outnumber smoking restaurants... [T]hey don't. They don't even come close.'"); *Jobs Will Go Up in Smoke With Statewide Smoking Ban*, THE COLUMBIAN BASIN HERALD, May 6, 2004, http://www.secondhandsmokesyou.com/news/news_050604_columbian-basin-herald.php. Discussing adverse economic impact of Pierce County, Washington smokefree law:

> Taverns and restaurants in Pierce County are hemorrhaging jobs. . . [h]ealth department officials say employers just need to hang on for a year or so until non-smokers make up for lost business. A year? That's like telling a drowning man, 'hey, I'll be back tomorrow to give you a hand'. . . [a]s one beleaguered casino employee asked the health department officials, 'how many people have to lose their cars and their jobs and their homes before you see that trying to protect my health is endangering my livelihood?'

Id. But see infra note 150.

140. *See* Rowden, *supra* note 139.

141. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 131 (1978).

142. *Id.* at 127.

business fails due to the impact of the law, the parcel or the establishment itself can presumably be used for other purposes that would be economically viable.

There is a potential for smokefree laws to have an effect on the owner's reasonable investment-backed expectations. Restaurant and bar owners enter the hospitality business to make a living. They expect to purchase the premises and not only recoup what they paid, but generate a return through the operation of a successful venture. Ultimately the success of the venture depends on what the owners put into the enterprise, the locale and community conditions. Yet so long as the product appeals to a clientele and the owner complies with those inevitable and accepted governmental intrusions such as public accommodation laws,[143] liquor laws and building codes, the owner expects to generate a reasonable return on his investment. When the government intrudes beyond any property law conditions in place at the start of the venture—intrusions not factored into the initial decision to open the business and which may adversely affect economic realization—there is no question that the government has interfered with distinct investment-backed expectations.[144] This is the situation in which many bar and restaurant owners are finding themselves. Opening their establishments with smoking permitted, they have now seen their smoking patrons disappear and with them, a portion of their profits.[145] It would seem that full

---

143. *See generally* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (199); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

144. Kmiec, *Defining Takings*, supra note 42, at 1044-45.

145. The experiences of *individual* owners is of paramount importance for the claim that smokefree laws work impermissible takings. Such evidence helps build a case in an as-applied setting, which is really the only plausible way in which to attack smokefree laws. A facial challenge would be much harder to make because it would have to be shown that the law in question had an adverse economic impact across the board. Economic impact studies going to this very question are legion, some of which have tended to demonstrate no adverse economic impact on the owners of affected establishments and some of which have. *See, e.g.*, Benjamin C. Alamar & Stanton A. Glantz, *Smoke-Free Ordinances Increase Restaurant Profit and Value*, 22 CONTEMP. ECON. POL'Y 520 (2004), *available at* http://www.tobaccoscam.ucsf.edu/pdf/SmokefreePremiumFinal.pdf (finding no adverse effect); Fabrizio McLaughlin & Associates Inc., Impact of Smoking Bans on Smokers Dining Out Patterns Derived from National Survey of Adult Smokers (Oct. 3, 1995), http://www.forces.org/evidence/evid.htm (finding adverse effect); M. Scollo, et al., *Review of the Quality of Studies on the Economic Effects of Smoke-Free Policies on the Hospitality Industry*, 12 TOBACCO CONTROL 13 (Mar. 2003), *available at* http://tc.bmjjournals.com/cgi/reprint/12/1/13 (comparing different studies showing both adverse and non-adverse effects and concluding those showing non-adverse effects were of higher quality); AMERICANS FOR NONSMOKERS' RIGHTS, ECONOMIC IMPACT OF SMOKEFREE LAWS: CASE STUDIES (Dec. 2004), http://www.no-smoke.org/pdf/econcia.pdf; AMERICANS FOR NONSMOKERS'

exploitation of the indoor air is thus tightly wound up with the owner's investment-backed expectations.[146] But is the connection so intimate that its removal destroys the investment-backed expectation completely?

That final consideration is what disqualifies *Penn Central* as a useful tool for owners challenging smokefree laws. While analysis of the economic impact and investment-backed expectation prongs may mitigate in favor of restaurant and bar owners, they fail to tip the balance in their favor because total diminution of value is not present. The few constitutional cases predicated on the Takings Clause have been facial challenges failing on the diminution issue.

In *D.A.B.E., Inc. v. City of Toledo*, the United States Court of Appeals for the Sixth Circuit rejected the claim of a consortium of restaurant, bar and bowling alley owners alleging that the city's Clean Indoor Air Ordinance effected a regulatory taking.[147] The consortium failed to prove that the ordinance denied its members all economically beneficial use of their properties, holding that the plaintiff's submission of affidavits testifying to lost profits or fear of lost profits due to the regulation was insufficient to sustain the claim.[148]

Similarly, in *City of Tucson v. Grezaffi*,[149] the Court of Appeals of Arizona rejected a takings challenge to Tucson's smokefree ordinance, noting that depriving the owner of the most economically beneficial use of the property and diminishing its value do not suffice to find a taking and

---

RIGHTS, ECONOMIC IMPACT STUDIES CIRCULATED BY THE TOBACCO INDUSTRY (Feb. 2004), http://www.no-smoke.org/pdf/TI_econ.pdf; Eli Sanders, Last Gasp (Jul. 14, 2004), http://www.thestranger.com/2004-07-08/feature.html (quoting University of California at San Francisco professor of medicine Stanton A. Glantz: "How many times do we have to prove that the world is not flat before people stop saying, 'Well, the world wasn't flat in California but maybe it will be flat in Seattle.'"). Smokefree advocates point out that every study that shows a negative impact has been funded either by the tobacco industry, persons or organizations linked to it or have secured funding of unknown origin. They also accuse the adverse impact studies of relying on subjective measures such as predictions, perceptions, estimates or surveys rather than objective measures such as sales data and taxable receipts. Those studies that show adverse impacts serve an important role: they show the importance of the individual apart from objective criteria and the population as a whole, which is the key to an as-applied challenge. As applied, takings cases are highly fact-sensitive and general impact studies would be subordinate to an individualized determination of the merits of the economic plight of the particular plaintiff before the court.

146. *See Penn Cent.*, 438 U.S. at 131.

147. 393 F.3d 692 (6th Cir. 2005).

148. *Id.* at 695.

149. 23 P.3d 675 (Ariz. Ct. App. 2001).

emphasized that even a showing of some negative economic impact on the owner's business would be insufficient.[150]

Penn Central is often criticized as establishing a meaningless test with a presumption of regulatory validity inconsistent with freedom of ownership, and is now "outdated."[151] Yet, rational basis scrutiny remains the standard for partial non-physical takings challenges despite the criticism.[152] Professor Kmiec has argued that *Penn Central* should be abrogated in favor of applying the heightened scrutiny of *Nollan/Dolan* to *all* takings analyses,[153] but that has not occurred despite predictions to the contrary.[154] Instead, the Court has actually reaffirmed *Penn Central*'s continuing vitality[155] while denying the applicability of the *Nollan/Dolan* level of scrutiny outside of the exaction setting.[156]

However, if smokefree laws are characterized as exactions, however, heightened scrutiny would apply and the burden shifts to the government to demonstrate essential nexus and rough proportionality. Therein lies the best hope to challenge the constitutionality of smoking bans as uncompensated takings in violation of the Fifth Amendment.

B. Challenging Smokefree Laws Under Nollan/Dolan

The heightened judicial scrutiny employed in exaction cases is a potent weapon for those challenging smokefree laws. This sword has remained sheathed but it should be no longer.[157]

---

150. *Id.* at 684.

151. Kmiec, *Defining Takings, supra* note 42, at 995-96. Professor Kmiec views *Penn Central* as an "ill-fitting" piece of the takings puzzle "perpetuat[ing] an overly deferential standard of review" and "[m]asking a virtually insurmountable presumption of constitutionality." *Id.* at 995. *See generally* Echeverria, *supra* note 109.

152. Richard A. Epstein, *The Harms and Benefits of* Nollan *and* Dolan, 15 N. Ill. U. L. Rev. 479, 491 (1995) (commenting on the rational basis test: "if the lawyer for the state can offer a bad reason with a straight face, then he or she wins. But if you smirk before you finish, then you lose. Now I do not think that the facial muscles should be used to set constitutional norms.").

153. Kmiec, *Defining Takings, supra* note 42, at 1044.

154. *See* Epstein, *supra* note 152, at 491.

155. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l. Planning Agency, 535 U.S. 302 (2002).

156. City of Monterey v. Del Monte Dunes At Monterey, Ltd., 526 U.S. 687, 702-03 (1999).

157. The author's research has failed to identify any smokefree law challenges predicated on a *Nollan/Dolan* theory. While the plaintiff in *City of Tucson v. Grezaffi*, 23 P.3d 675 (Ariz. Ct. App. 2001), invoked *Dolan*, the claim was not based on *Nollan/Dolan*

Smokefree laws do not operate as dedications in a literal sense, but they take on the character of exactions because they operate by conditioning permission to operate a bar or restaurant on the exaction of the air of the property for a distinct public use and purpose. If restaurant or bar owners wish to continue in their desired use of the establishments, they must accept this condition or risk breaking the law.[158]

Under *Nollan*, there must be an essential nexus between the stated legitimate public purpose for the exaction and the exaction itself—there must be at least some semblance of a means-end fit.[159] Under *Dolan*, if the nexus exists, there must be a rough proportionality between the exaction and the impact and burden created by the desired property use.[160] As professor Kmiec notes, *Dolan* supplies a causation requirement to the takings analysis—the government has the burden of justifying its regulation and showing "the need for this particular regulatory imposition on this particular landowner."[161]

The essential nexus between regulatory means and ends is not well-disputed in this situation. In exercising their police power, state and local governments have determined that the scientific evidence documenting the health effects of secondhand smoke exposure is a call to action to protect the health, safety and welfare of its citizens by shielding them from harmful environmental tobacco smoke.[162] To implement this goal, governments have chosen to adopt smokefree laws that prohibit smoking in restaurants, bars and workplaces—going to the root of the problem. There is a nexus between the means and the ends.

The thrust of an attack on smokefree laws comes in *Nollan*'s rough proportionality test. Here, there is no presumptive validity of the regulation as in *Penn Central*; the burden shifts to the government to show that the exaction for clean indoor air "is related both in nature and extent"[163] to the burden created by the proposed use of the establishment as a restaurant or a bar. The owner of the establishment would of course need to demonstrate the existence of a reasonable investment-backed expectation at the time of the

---

heightened scrutiny and the quote was to a general principle of takings law reiterated in *Dolan*.

158. *See, e.g.*, Kenneth P. Vogel, *Business Owners Declare War on Smoking Ban*, NEWS TRIB., Dec. 27, 2003, http://www.citizenreviewonline.org/dec_2003/business.htm ("many [owners] plan to let their customers keep right on puffing. . . even though that could bring fines on smokers and businesses. Violators also could lose various licenses needed to stay open for business.").

159. Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 837 (1987).

160. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

161. Kmiec, *Defining Takings*, *supra* note 42, at 1008.

162. *See supra* note 124 and accompanying text.

163. *Dolan*, 512 U.S. at 391.

investment and an interference with the same based on the subsequent dedication of clean air.[164] Once that showing is made, the government would then need to demonstrate that

> (1) the regulatory prohibition was not categorically off-limits to the state. . .and (2). . . that the prohibition of the intended use was *necessary* to avoid substantial harm to the public or private lands and resources, which harm outweighs the social value of the intended use and *cannot be avoided reasonably by other means.*[165]

The existence of alternative means to achieve the ends identified for enactment of smoking bans is the gravamen of a business owner's case. The government must identify the impact of the use of the establishment as a bar or restaurant (presumably the creation and continuing existence of a secondhand smoke environment being the main factor) and show why a one-hundred percent smokefree dedication is *necessary* in the interest of shielding the public from secondhand smoke. The prohibition on smoking does eliminate a substantial public harm that arguably outweighs the social value of "unfettered" restaurants and bars, but the public harm can be addressed adequately and reasonably by alternative means. If the government is to succeed on this point, it needs to demonstrate clearly why alternative and less burdensome means fail to carry the day. In the same way that the City of Tigard failed to demonstrate why a public rather than a private easement was necessary in the interest of flood control[166] and why a bike path was necessary in the interests of offsetting additional traffic,[167] other governments may find it difficult to show why smokefree dedications are the only reasonable means of avoiding the harm to the public from secondhand smoke.

No cases to date have been litigated on this theory, but such a potent weapon should not remain holstered. *Nollan/Dolan* analysis is the welcome talisman for restaurant and bar owners. Rough proportionality could prove difficult for the government to demonstrate. If it fails to make an adequate showing, a taking will be found for which just compensation is due. This is the price governments must pay to mandate complete smokefree environments in restaurants and bars.[168] Legitimate state interests notwithstanding, smokefree dedications are hardly the sole means of shielding the public from the health consequences of secondhand smoke.

---

164. Kmiec, *Defining Takings*, *supra* note 42, at 1044.

165. *Id.* at 1045 (emphasis supplied).

166. *Dolan*, 512 U.S. at 393.

167. *Id.* at 395.

168. *Id.* at 396 ("'A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change'") (quoting Pa. Coal v. Mahon, 260 U.S. 393, 416 (1922)).

There are less intrusive means of protecting the public and achieving smokefree air.

III. ALTERNATIVE INITIATIVES TO PROTECT THE PUBLIC FROM SECONDHAND SMOKE

A. Separate smoking area with separate ventilation

Restaurants and bars could permit smoking, provided smoking is confined to its own enclosed room with a separate ventilation system so that the air of the smoking section would not mix with the air in the non-smoking section.[169] Under this dual system, smoking patrons would be afforded the opportunity to enjoy their vice without encroaching on the interests of nonsmokers. The dual system is the best of both worlds because it allows a smoking clientele and has potential to attract nonsmokers who would not otherwise frequent the establishment. The economic burden on the business owner would be limited to a one-time outlay to cover the cost of creating the dual system and any incidental maintenance costs. In the long run, it would enhance the quality and value of the business by allowing a diverse client base to coexist without a clash of competing interests. Further, governments could require that bar and restaurant owners assign only smoking employees to smoking sections, or obtain consent from nonsmoking employees before assigning them to work in smoking sections, subject to monetary penalties for noncompliance.

Smokefree advocates have rejected the separate ventilation system solution as inadequate to address the dangers of secondhand smoke exposure.[170] While separate ventilation may not completely eradicate the risk to nonsmokers,[171] it is certainly an improvement over no action at all and strikes an appropriate balance between the state's legitimate interest in protecting nonsmokers from secondhand smoke exposure and the rights of

---

169. Several states have taken the physical barrier/separate ventilation approach with regard to smoking in public accommodations, whether restaurants and bars are included or not. *See, e.g.*, ALA. CODE § 22-15A-6(b) (2004); IOWA CODE §142B.2(3) (2003); KAN. STAT. ANN. § 21-4010(c) (2003); MICH. COMP. LAWS § 333.12605(1) (2004); S.C. CODE ANN. § 44-95-40 (2003); VA. CODE ANN. § 15.2-2802(3) (2004).

170. *See* AMERICANS FOR NONSMOKERS' RIGHTS, VENTILATION AND AIR FILTRATION: THE SCIENCE (July 2005), http://www.no-smoke.org/pdf/ventilationfactsheet.pdf; AMERICANS FOR NONSMOKERS' RIGHTS, DON'T BUY THE VENTILATION LIE (Nov. 2004), http://www.no-smoke.org/pdf/ventilationlie.pdf; JAMES REPACE, CAN VENTILATION CONTROL SECONDHAND SMOKE IN THE HOSPITALITY INDUSTRY (Jun. 2000), http://www.dhs.ca.gov/tobacco/documents/FedOHSHAets.pdf.

171. REPACE, *supra* note 170.

private property owners, a balance absent in a smokefree regime. One-hundred percent smokefree laws represent an uncompromising and burdensome extreme, while a separate ventilation regime represents compromise serving competing interests.

There is an inevitable counterargument to this solution. Separate ventilation laws would be just as mandatory as smokefree laws and would come with a cost to owners, thus making them susceptible to a *Nollan/Dolan* challenge as well. Why is this approach any better? This criticism ignores one crucial difference: except for the smallest of businesses in terms of both physical space and capital, the strength of the plaintiff owner's case would be much weaker in this scenario than it would be under a complete smokefree regime. This is the case simply because it would be harder to demonstrate interference with reasonable investment-backed expectations and overall adverse economic impact.[172] A ventilation regime would require a cash outlay to ensure the premises complies with the statute or regulation, and costs associated with upkeep, but the overall effect of compliance would be to enhance the value of the establishment by catering to diverse clientele. Owners would suffer an affirmative cost in complying, but the benefits of that cost would more clearly flow to them, whereas the benefits of compliance with smokefree laws are less certain.

In the case of small businesses where either (1) the establishment is too small in terms of space to make a separate ventilated area feasible or (2) the owner simply does not have the required capital to build a separate area and install ventilation, a *Nollan/Dolan* case remains viable for the owner and a risk to the government. Because of this, a ventilation regime could provide an exemption for any establishment the square footage of which is less than a certain amount or upon proof by the owner of an economic hardship that prevents it from installing separate ventilation.

In the former case, the exemption reflects that as a matter of policy, it is more important to protect the public health, safety and welfare by focusing on the bigger establishments that are frequented by a larger portion of the population rather than the smaller ones frequented by fewer numbers. This is a trade-off likely to be detested by antismoking advocates but again, they must be willing to come to the table and compromise—so far they have not.

In order to assist capital-strapped owners who seek to comply with the dual ventilation regime, the government could build a subsidy into the statute. If such owners could demonstrate a hardship in accordance with certain criteria, they would qualify for a subsidy, which would be applied towards bringing the establishment into compliance with the regime.

---

172. *See* Kmiec, *Defining Takings*, *supra* note 42, at 1044-45; Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

B. Incentive Schemes

In *South Dakota v. Dole*, the Supreme Court held that Congress was not precluded from achieving indirectly though the spending power what it could not constitutionally achieve through direct legislation.[173] While the power at issue in the smokefree law context belongs to the state and its municipalities, the *Dole* principle applies. Assuming a court held a smokefree law to be unconstitutional as an impermissible taking, thus precluding direct regulation absent the payment of just compensation (and assuming the state elected to abandon legislation entirely rather than face the potential of paying compensation to successful litigants), the state could still achieve its goal indirectly through a system of incentives conferring special benefits on those bar or restaurant owners who agree to go smokefree of their own volition.

For example, favorable tax treatment could be afforded to those businesses that go entirely smokefree or which provide separate enclosed smoking areas with separate ventilation. Such an incentive allows the business owner to continue to meet both investment-backed expectations and the standard the government encourages. In contrast to a "positive" incentive like a tax break, the government could provide "negative" incentives such as increased tax burdens and stricter regulations with respect to alcohol permits and consumption for establishments that permit smoking. The government could also enact laws providing for enhanced damages in cases sounding in tort imposing liability on owners of bars and restaurants for injuries arising from secondhand smoke exposure.[174] Incentive schemes, whether positive or negative, would be tailored to weigh heavily in favor of bar and restaurant owners adopting voluntary smokefree policies.[175]

A counterargument to this approach is that while the decision to go completely smokefree is in theory voluntary, the incentive system may be structured in such a way as to be effectively coercive. This interpretation is

---

173. South Dakota v. Dole, 483 U.S. 203, 212 (1987). *Dole* involved an attempt by Congress to encourage the states to adopt a minimum drinking age of 21 (an age it could not itself set under the Twenty First Amendment) by permitting the Secretary of Transportation to reduce otherwise allocable federal highway funds to states that permit persons under 21 to consume alcoholic beverages. The Supreme Court held this scheme to be a valid use of the constitutional Spending Power.

174. Such tort cases would involve claims by restaurant and bar employees against their employers. Tort theories advanced in this arena include: negligence for failure to provide a safe workplace; assault and battery; emotional distress; and nuisance. *See* AMERICANS FOR NONSMOKERS' RIGHTS, RIGHTS OF NONSMOKERS, *supra* note 6.

175. The statutory provision at issue in *Dole* was obviously meant to weigh heavily in favor of the states adopting 21 as the minimum drinking age, but the Court characterized it as merely a "relatively mild encouragement." *Dole*, 483 U.S. at 211.

open to dispute.[176] The economic burden on business owners under an incentive regime differs from those in a complete smokefree regime because the government is not affirmatively interfering with private property rights by mandating compliance.[177] Rather, the government is leaving the owner with a choice.[178] Whether the owner decides to reap a financial benefit by going smokefree or risk a financial loss if he does not, he chooses his own destiny.[179] That freedom of choice brings the incentive scheme into a broader grant of state power to encourage particular action and lifts any cloud of constitutional repugnancy.[180]

The incentive is also preferable because it takes individual circumstances into account whereas a smokefree law applicable to all does not. An owner might well decide that on balance, the monetary benefit of a tax break would be outweighed by the income generated by his smoking establishment plus the less favorable tax treatment he would face, and thus choose against going smokefree. Likewise, a struggling business owner who would not otherwise go smokefree might do so in order to reap the benefits of more favorable tax treatment.

There is one situation, however, that merits a carved-out exception. It is not hard to imagine a small business owner with an almost exclusively smoking clientele who cannot afford less favorable tax treatment, yet at the same time does not want to turn away his chief client base. The plight of such an owner deserves sympathy and the incentive scheme should contain an exception to allow him to continue operating a smoking bar without facing the tax penalty. The government must be careful not to allow this

---

176. *Id.* at 211-12 ("But the enactment of such laws remains the prerogative of the States not merely in theory but in fact.") (holding that conditioning grant of full federal highway funds on adoption of minimum drinking age was not coercive against the States). *See also* Steward Machine Co. v. Davis, 301 U.S. 548, 589-90 (1937) ("But to hold that motive or temptation is equivalent to coercion is to plunge the law in endless difficulties") (holding that Social Security Act was not a weapon of coercion against the States).

177. *See* Maher v. Roe, 432 U.S. 464, 475-76 (1977):

> There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy. Constitutional concerns are greatest when the State attempts to impose its will by force of law; the State's power to encourage actions deemed to be in the public interest is necessarily far broader.

Id.

178. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 552 (2001) (Scalia, J., dissenting) (noting difference between the direct effects of regulatory power compared to the indirect effects of government subsidies).

179. Lexington Fayette County Food and Beverage Ass'n v. Lexington-Fayette Urban County Gov't, 131 S.W.3d 745, 757 (Ky. 2004) (Graves, J., dissenting).

180. *Maher*, 432 U.S. at 476-77.

carve-out to swallow the scheme, so it should be carefully drawn to extend only to its intended beneficiaries. To claim the exemption, the owner would need to have operated the establishment for a minimum number of years and realized no more than a maximum yearly revenue as fixed by the statute. In addition to meeting these requirements, the tax otherwise assessable on the owner must exceed a certain percentage of revenue in order to claim the exemption. Because the requirements are stringent, it is likely the exemption would not be abused. Furthermore, such an exemption makes sense from a policy perspective because the harm to the non-smoking public from the business would be minimal—the owner's clientele are predominantly smokers—and the lower revenue implies fewer patrons to protect, when legislative energies are better focused elsewhere.

C. Smoking Licenses

A new trend in the movement against smokefree laws is the fight for "smoking licenses", which provide an option those "willing to pay for the privilege a way to get out from under a[n]. . .anti-smoking blanket."[181] Along the same line as incentive schemes, smoking licenses would place the decision of whether or not to go smoke-free squarely in the hands of bar and restaurant owners. Under such a system, owners would again make decisions based on their individual circumstances after weighing the costs and benefits of paying for the privilege of allowing smoking. The pricing of a license could be based on an economic model, taking into account such factors as square footage of the establishment, hours of operation, type of establishment, average daily sales of liquor compared with other items, local geographic market, air quality scores[182] and similar measures. The governmental goal behind licensing smoking in venues targeted by smokefree laws could undoubtedly be to kill it altogether, but that decision ultimately rests with business owners.

---

181. Fran Spielman, *Restaurant Group to Fight City Smoking Ban*, THE CHICAGO SUN TIMES, Oct. 1, 2005, http://suntimes.com/output/news/cst-nws-smoke01.html; *see also* Michelle Ku, *Lexington's Smoking Ban to Stand For Now*, LEXINGTON HERALD LEADER, Sept. 21, 2005, http://www.kentucky.com/mld/kentucky/2005/09/21/news/local/12699937.htm.

182. *See* Chad Lawhorn, *Smoking Ban Foes Appeal to City*, LAWRENCE JOURNAL-WORLD, Nov. 17, 2004, http://www2.ljworld.com/news/2004/nov/17/smoking_ban_foes/.

CONCLUSION

Government undoubtedly has the right, through the exercise of the police power, to protect the health, safety and welfare of the public from the ill effects of exposure to secondhand smoke by promoting clean indoor air. Some states and municipalities have chosen to advance this legitimate state interest by enacting one-hundred percent smokefree laws applicable to hospitality establishments. Thanks to the heightened judicial scrutiny supplied by the Supreme Court's *Nollan* and *Dolan* holdings, owners of bars and restaurants affected by the laws should be able to bring viable claims that these laws as applied to their establishments take their property without just compensation in violation of the Fifth and Fourteenth Amendments.

Smokefree laws are means not justified by the regulatory ends. In an industry already regulated by food and beverage control laws and health and occupancy codes, smokefree laws go far beyond regulation incident to public accommodation ownership, which goes with the territory, to unnecessary and questionable governmental intrusion. Justice Holmes recognized that governmental regulation could cross the line from a legitimate exercise of the police power to a taking.[183] Here the line has been crossed. The same police power ends can be achieved by alternative means, such as separate ventilation regimes that lend proper balance to competing interests, enhance property values and promote economic vibrancy, or incentive schemes that leave the restaurant or bar owner a choice while encouraging the creation of a smokefree environment.

183. *See* Pa. Coal v. Mahon, 260 U.S. 393, 415 (1922).