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Can the Government Do That?! Teaching Takings and Eminent Domain to Skeptical Students

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CAN THE GOVERNMENT DO THAT?! TEACHING TAKINGS AND EMINENT DOMAIN TO SKEPTICAL STUDENTS

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I. INTRODUCTION

There are some things first-year law students understand about their doctrinal classes before they set foot in the school itself. The sources of this understanding are part logic, part common knowledge and part multiple *Law & Order* marathons on A & E.

Most potential law students know that if there is a contract between two parties and one breaches, the other can sue. Next, if the breacher is in the state, they can be served and the legal mechanics can be set in motion. When the breacher punches the process server, he will be criminally punished and will probably have to pay tort damages to the process server.[1] With the money he gets from the jury or in the settlement, the process server can buy a mansion next to Nelly[2] in Lake St. Louis[3] and that property is his to use however he sees fit. Or is it? Possibly the single most difficult concept to grasp as a first-year law student is that the government can take your land at any time. Because this is in such stark contrast to the "absolute ownership of property" we thought existed before law school, it begs the question of what is the best way for a professor to get students to accept the reality of takings law?

I have been fortunate (or unfortunate, depending on your feelings of the topic) to encounter takings and eminent domain in four classes taught by two

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1. This is especially true if the breacher is affiliated with a large corporation. In our country, most kindergartners can tell you that being hurt by a big corporation equals a big settlement.

2. Although Cornell Haynes, Jr., known to fans as "Nelly" is a member of the rap group the "St. Lunatics," he hit solo success when his album *Country Grammar* sold over nine million copies. What he refers to as "rappin' the blues" or "a jazz form of hip-hop" has become the standard of what is known as the "St. Louis Sound."

3. A lakeside community located approximately thirty-five miles west of St. Louis, Missouri.

terrific professors. Their distinct styles and the order in which they presented the same cases could lead students to vastly divergent views of the government's ability to "take" property.

It appears to me that there are two main, very different theories on the best way to teach takings and eminent domain law. The first will be referred to as the "all with exceptions" method. In this teaching style, the professor starts from a proposition that governments (federal, state and local) have expansive takings powers, then use cases to point out exceptions. The second method can be called the "nothing with exceptions" method. Professors who employ this style begin with cases that limit the governments' abilities to take land, and then use cases to demonstrate pockets where takings are allowed.

II. ALL WITH EXCEPTIONS

A. Property Law

My first exposure to takings law was in first year Property with Professor Peter W. Salsich, Jr.[4] While some have called into question the applicability of the knowledge gained in this class to the rest of a student's law school career,[5] the importance of the issues dealt with in this class, particularly takings,[6] cannot be diminished.

Professor Salsich began the discussion of takings, as all professors should, by examining the Fifth Amendment.[7] It does not say that government cannot *take* property, just that the government cannot take property *without due process and just compensation.* He also made certain we understood that there

4. McDonnell Professor of Justice in American Society, Saint Louis University School of Law. I apologize in advance for any inaccurate statements of the law in this Essay. They are a reflection of my ability to recall what I learned and not of Professor Salsich's ability to teach the material.

5. Jay Zych, *Theory and Praxis: Advice to Those Learning Property and a Request to Those Who Teach It*, 46 ST. LOUIS U. L.J. 807 (2002).

6. For more on the Supreme Court's most recent takings case, I would recommend the following two articles also appearing in this issue: William M. Hof, *Trying to Halt the Procedural Merry-Go-Round: The Ripeness of Regulatory Takings Claims After* Palazzolo v. Rhode Island, 46 ST. LOUIS U. L.J. 833 (2002); and Daniel J. Hulsebosch, *The Tools of Law and the Rule of Law: Teaching Regulatory Takings after* Palazzolo, 46 ST. LOUIS U. L.J. 713 (2002).

7. U.S. CONST. amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

are two distinct clauses that lead to two distinct lines of cases. While the distinction between the lines of cases is important to note, they are considered together in this Essay because my classmates and I did not fully understand the difference between them until it was time to cram for the final exam.

Beginning with the Fifth Amendment is fairly typical of both schools of takings teaching—it is the next step that places the professors into either the "all with exceptions" or the "nothing with exceptions" category. Since we were taught *Hawaii Housing Authority v. Midkiff*[8] immediately after the Fifth Amendment, I will place Professor Salsich in the "all with exceptions" category. Starting with *Midkiff*[9] was a bold move considering the drastic nature of the eminent domain action in the case, and many of us were skeptical. Having no knowledge of constitutional law outside of that which we heard Alan Dershowitz spew forth on one of his numerous appearances as a talking head on CNN, MSNBC or another news network, we were surprised with the ease with which the Court turned "public use" into "public purpose."[10] Our professor assured us that they could do this, but we were not so certain it was something that they *should* do. It was more shocking that a public purpose that would take almost half the island's land and redistribute it did not even have to be a good purpose, only a "conceivable" one.[11] Of course it is *conceivable*, because they *conceived* it! This did not seem like much protection for landowners against a government that might want to take land for a purpose that most disagree with but that the legislature is certain is a good public purpose. Also, while it seemed unjust that only seventy-two landowners owned forty-seven percent of the land,[12] it seemed equally unjust that the government, which owned forty-nine percent of the land, did not have to give one inch.[13]

This difficult issue was still rattling around in our heads when we moved onto regulatory takings. The introductory case to this section, *Pennsylvania Coal v. Mahon*,[14] appeared innocent—it seemed to be a cut and dried case of a regulation reaching too far and being found an unconstitutional taking. If only the law were that simple! There happens to be a very eloquent dissent[15] to throw a wrench in our plans to accept the majority opinion as Bible truth and move on. To the "all with exceptions" professors, this dissent, combined with some weak points in Justice Holmes' argument for the majority, opens the door to a much broader discussion of the theory of property regulation. The dissent

8. 467 U.S. 229 (1984).
9. *Id*.
10. *Midkiff*, 467 U.S. at 241.
11. *Id*. at 241.
12. *Id*. at 232.
13. *Id*.
14. 260 U.S. 393 (1922).
15. *Id*. at 416 (Brandeis, J., dissenting).

is used to prove that government can pass a regulation and take away some of the owner's right to use the land, but it must develop an argument as to why its action will fulfill an important goal such as protecting health and safety. For the "all with exceptions" teachers, this leads perfectly into a discussion of zoning. Of course we discussed this topic in Property, but a more expansive treatment was given in another class taught by Professor Salsich, Land Use Control.

B. Land Use Control

Since we have all grown up in a system of zoning, the concept was not too radical for my classmates and I to understand. Government can tell people that they can only do certain things in certain areas. It was a simple fact of life, until we were forced to ask the question "why?" In this situation, a concept that had been crystal clear was now quite uncertain. We never had to think very hard about it, so our two paradigms of "you can do whatever you want with your property" and "government can tell people where they can do certain things" had never come to their obvious clash.

Village of Euclid v. Ambler Realty Co.[16] is the "cosmic case"[17] in zoning law, and any discussion of the topic clearly begins here. The difference between the two styles of teaching is in the discussion of the standard of review. Just as it was difficult to comprehend *Midkiff*'s "conceivable" standard,[18] accepting *Euclid*'s "fairly debatable" standard[19] was a tough pill to swallow. If it was discussed at all, any zoning decision by a legislature could be deemed "fairly debatable" and thus perfectly constitutional. It is hard to see how this does not constitute a blank check to the legislative body. Professor Salsich set our minds at ease by explaining that determination of public policy has always been a legislative power (a statement with which even the staunchest property-rights advocate would agree), thus the courts should not interfere with that important power. He also made sure we understood that "fairly debatable" only applied to facial challenges, so plaintiffs have a better chance in "as applied" challenges. This distinction seemed to provide the element of fairness that skeptical law students like myself sensed was lacking.

The idea that plaintiffs had a chance to win was short-lived, however, as we next dealt with *Penn Central Transportation Co. v. City of New York*.[20] Here, the Court denied an as applied challenge, arguably giving the public a

16. 272 U.S. 365 (1926).

17. This useful phrase must be attributed to Professor Kathleen A. Kelley, Director of Legal Research and Writing, Saint Louis University School of Law. It was described to us as "the case from which all other cases in the area of law stem."

18. *See* text accompanying note 9.

19. *Euclid*, 272 U.S. at 388.

20. 438 U.S. 104 (1978).

benefit it did not pay for. The first two zoning cases studied are resounding victories for the government. With this "government will usually win" pattern in our heads, the rest of the class, which dealt with the exceptions, appeared to represent small dots of "government cannot do this" inside an all encompassing circle of "government can do whatever it believes is in the public interest."

III. NOTHING WITH EXCEPTIONS

A. Constitutional Law

In contrast to the "all with exceptions" approach of Professor Salsich was Professor Alan Howard's[21] "nothing with exceptions" approach in Constitutional Law II. I was taking this class at the same time as Land Use Control, and both classes discussed takings at the same time, making a comparison of styles very easy. Both professors began with a discussion of the Fifth Amendment and the two restrictions that have led to litigation. The difference between the methods became clear in the first case each professor taught after the Fifth Amendment, however. Professor Howard falls into the "nothing with exceptions" camp because of his choice to begin with *Pennsylvania Coal*.[22] By beginning with a case in which the government regulation was deemed to go too far, Professor Howard emphasized that government can lose these cases and often does. Under this approach, a discussion of Justice Brandeis's dissent is necessary, but it is just that, a dissent that no other justice joined.[23]

After making the opening impression that government does not have unfettered power in the area of land regulation, we set out to find pockets in which they could regulate. Forcing private parties to pay for harm they caused was allowed,[24] as was regulating for historic preservation,[25] however, a permanent physical occupation was seen as always resulting in a taking.[26]

But to "nothing with exceptions" theorists, *Nollan*,[27] *Dolan*[28] and *Lucas*[29] are the holy triumvirate of cases that must be seen as severely tying governments' hands in potential regulatory takings cases. Their combined

21. Professor of Law, Saint Louis University School of Law.

22. *See generally* text accompanying notes 12 and 13.

23. Of course this is trivializing the amount of time spent on the dissent, but Professor Howard's straightforward style does not allow for expansive theoretical discussions such as those in first year Property.

24. Miller v. Schoene, 276 U.S. 272 (1928).

25. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

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

27. Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

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

29. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

requirements of an essential nexus, rough proportionality and an individualized determination of harm could be used to render many changes in the law or proposed regulations unconstitutional.

Only after studying many cases that limit governments' authority to regulate land did we get to *Midkiff*.[30] This case was dealt with last and treated almost as an outlier: one that does not really fit into the fabric of Constitutional jurisprudence. While it was certainly treated as good law, the class got the distinct impression that this is further than the Court has ever gone before and that it will probably never go this far again.

B. First Amendment

The final class in which the topic of takings was discussed was First Amendment, again with Professor Howard. *City of Renton v. Playtime Theatres, Inc.*[31] was the "cosmic case" we discussed on the issue of "erogenous zoning." This case had been discussed in Land Use Control, focusing on the "substantial government interest"[32] and listing potential interests such as property values, family values and public morality among others. The First Amendment approach was much more skeptical of the Court's "content neutral" label and thus the city's ability to regulate in the manner it did. Professor Howard best phrased the problem with the content neutral designation in class as:

> Would the Court allow the city to limit the location of theatres that showed *Bambi* and other children's fare? If not, are they not just allowing the city to regulate a certain type of theatre that shows a certain type of film and thus expresses a certain type of speech? So isn't this regulation based on the content of the speech?[33]

When presented this way, it is easy for a student to understand problems with the theory of zoning and see how simple regulations of adult entertainment can be takings. Also, First Amendment scholarship is by obvious design suspicious of any regulations of speech, and thus zoning is generally treated as a bad thing by First Amendment professors. Therefore, treatment of takings and eminent domain in First Amendment classes falls into the "nothing with exceptions" category.

IV. COMPARISON OF THE METHODS

Both of the methods discussed in this Essay have advantages over the other, and both are effective ways to teach this area of law. I prefer the "nothing with exceptions" approach because it falls closer to my view of

30. 467 U.S. 229 (1984).

31. 475 U.S. 41 (1986).

32. *Id.* at 47.

33. Alan J. Howard, First Amendment Lecture (Oct. 19, 2001) (on file with author).

governmental power in this area, but I am not certain it is the best way for a student to learn the material.

"All with exceptions" is a more effective method of teaching for three reasons. First, it is a shock to most law students' sense of order and better challenges the beliefs they held before they entered law school. By forcing students to realize that the law is not as cut and dried as they believed, it will probably drive them to study harder and go the extra step to make sure they understand concepts that, pre-law school, would have been laughed off as impossible.

Second, if the concepts are in opposition to what the student thought before law school, it is more likely that they are also in opposition to what the student believes is right. This will motivate students to study and show why their position is correct. Nothing motivates people like a good challenge, and law students are already generally highly motivated people with strong opinions. I challenge anyone to find a future lawyer who will readily give up in an argument on a deeply held belief and change his or her mind without serious contemplation of the topic. It is almost certain that a student in disagreement with the law will look for every weakness in cases such as *Midkiff* and *Penn Central* and will study *Nollan, Dollan* and *Lucas* harder if they must do so to validate a previously held position.

Finally, "all with exceptions" makes learning easier by delivering the blow earlier. Once a student gets over the initial shock of *Midkiff*, he or she can settle down and realize that the law is different than how they perceived it before law school. After reading that the government can take forty-seven percent of the land based on "conceivable public purpose," suddenly not being able to use your land to its maximum economic output does not seem that bad.

"Nothing with exceptions" also has advantages. First, it does not force students to accept foreign concepts at the beginning. Instead, it allows students to ease into the difficult concepts and thus makes it more likely they will be accepted. By starting with cases that reaffirm the students' pre-law school beliefs, "nothing with exceptions" is basically telling students that takings and eminent domain law is not a radical theory and, therefore, they can accept what courts do in this area.

Next, if it treats cases such as *Penn Central* and *Midkiff* fairly and accurately, I believe it is a more accurate view of the law. Scholars with much more experience studying the topic may certainly disagree, but I believe the triumvirate of *Nollan, Dolan* and *Lucas* seriously curtailed government's power in this area.[34] Therefore, an approach that teaches that the government does not have unfettered control over land seems more useful for students as they embark on their legal careers.

34. This is a bold statement worthy of many law review articles, but I think those who disagree will at least agree that it is "fairly debatable."

V. CONCLUSION

Law school can be a frightening place in the beginning, but students are often reassured when they learn that the law matches nicely to what they believed before school. One area that does not match is takings and eminent domain law. Because it does not fit, professors have the challenge of helping students understand why the law is the way it is. Generally, two methods are employed to accomplish this. The first, "all with exceptions," starts with a controversial case such as *Midkiff* and a proposition that the government's power in this area is broad. The second, "nothing with exceptions," begins with a case in which the government loses and the idea that the government's power in this area is limited.

I have been fortunate to have four classes taught by two great professors who used the competing theories. Since both Professor Salsich and Professor Howard are so effective in conveying knowledge to their students, it is almost impossible to decide from whom I learned more. My personal beliefs fall closer to "nothing with exceptions;" but I think that is why "all with exceptions" is the better method for me. I did not agree with the original cases, so I was forced to work extra hard to effectively defend my beliefs. Of course, for a student whose original beliefs are closer to "all with exceptions," the other method may be more valuable for the same reason. One thing is certain—good professors will be able to teach students the intricacies of this area of law, and we will have more than enough knowledge to counsel our poor process server regarding what he can do with his land.