

MODULE 2A

The Takings Clause

Text · Property · Possessory takings · Regulatory takings · Exactions · Public use · Just compensation

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The question Alger left open

If “you never held that stick” is always available, what is the Takings Clause for?

“...nor shall private property be taken for public use, without just compensation.”

It does not say the government may not take property. It says it may — for public use, if it pays. A permission with a price, not a prohibition.

1

Is it PROPERTY?

2

Was it TAKEN?

3

Is the use PUBLIC?

4

**What is JUST
COMPENSATION?**

Every case today answers one of these four. Know which one before you start writing.

Three routes to a taking

Which box a programme falls into does almost all the work.

ROUTE 1

APPROPRIATION

The government takes the thing, or the right to exclude.

PER SE. No balancing, no factors, no inquiry into the public interest.

Loretto • Cedar Point • Horne

ROUTE 2

REGULATION

The government restricts use.

Presumptively NOT a taking. The owner must show it went “too far.”

*Mahon • Penn Central • Lucas • Palazzolo
• Tahoe*

ROUTE 3

EXACTIONS

The government conditions a permit on giving something up.

A special regime: the government is bargaining rather than commanding.

Nollan • Dolan • Sheetz

Ask yourself all afternoon whether that distinction tracks anything about how much the owner actually loses.

Regulatory takings begin in a deed

And in a sentence Holmes knew had no content.

260 U.S. AT 415

“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.”

THE FACTS ARE A CONTRACT PROBLEM

The 1878 deed sold the surface and expressly reserved the coal; the grantee took the risk and waived damage claims. The Kohler Act, forty-three years later, gave him back what he had not bought.

HOLMES KNEW IT HAD NO CONTENT

Same page: once absolute protection is qualified by the police power, “the natural tendency of human nature is to extend the qualification more and more until at last private property disappears.” Not a test — an anxiety.

This is the answer to Alger — and every regulatory takings case for a century is an attempt to give content to two words.

The denominator problem

Holmes and Brandeis measure the same loss against different parcels. Neither defends the choice.

HOLMES — AT 414

“For practical purposes, the right to coal consists in the right to mine it.”

Denominator: the support estate. Against that, the loss is 100%.

A TAKING

BRANDEIS — AT 416

“Coal in place is land; and the right of the owner to use his land is not absolute.”

Denominator: the whole parcel. Against that, the loss is a fraction.

NOT A TAKING

Same statute. Same coal. Same loss. The only thing that changed is what you decided the property was.

Neither Justice defends his choice, and no case since has supplied a rule for choosing.

Miller v. Schoene — the forced choice

Stone reframes the question, and the reframing decides it.

MAHON — HOLMES

The State intruding on a settled entitlement.

Someone held the right; the statute took it. The question is how much.

MILLER — STONE

The State allocating between two claimants.

Neither had a pre-political right to win. The question is who should bear the loss.

276 U.S. AT 279

“...the state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity.”

There was no option in which the State left everyone alone. Inaction has the same distributive consequences as action.

A permanent occupation is a taking, full stop

No balancing. No factors. No inquiry into the public interest it serves.

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

THE OBJECT

A directional tap, two boxes and cable runs. About one and a half cubic feet of a Manhattan roof. One dollar in statutory compensation.

THE REASON

Not the SIZE of the loss but the STRUCTURE of the right. A permanent occupation destroys the whole bundle as to the occupied space — possess, use, exclude, dispose.

THE INVERSION

One and a half cubic feet wins categorically. A ninety-five per cent loss of value under Penn Central may lose. Be uncomfortable — that discomfort drives everything after Lucas.

Cedar Point, against Loretto's footnote 12

The line Loretto drew was permanence. Cedar Point holds a temporary access right a per se taking anyway.

LORETTO, FOOTNOTE 12

Permanence and absolute exclusivity distinguish an occupation from “temporary limitations on the right to exclude” — and temporary limitations stay inside the balancing test.

1982

THE CALIFORNIA RULE

Three hours a day. Up to four thirty-day periods a year. One hundred and twenty days. Nobody lives on the roof. A temporary limitation by any ordinary use of the words.

2021

CEDAR POINT'S ANSWER

Duration, like size, “bears only on the amount of compensation.” Which is Loretto's move about size, extended to time — the very thing footnote 12 said was not happening.

PER SE

Would the Loretto Court have recognised this rule?

Read the holding alone and you see settled law applied. Read the footnote too and you see an extension performed and denied in the same paragraph.

Three things still outside the per se rule

Ask which of them would have saved the California regulation, if the Court had wanted to save it.

1

AN ISOLATED INVASION

A tort, not a taking. A trespass by a government employee is a trespass.

2

A BACKGROUND RESTRICTION ON TITLE

Including traditional common-law privileges. Lucas's background principles, arriving in the physical cases.

3

ACCESS AS A CONDITION OF A BENEFIT

Ordinary health and safety inspection regimes. And the bridge to the exactions cases after the break.

AND HORNE EXTENDS IT SIDEWAYS — 576 U.S. AT 358, 365

“The Government has a categorical duty to pay just compensation when it takes your car, just as when it takes your home.” On voluntariness: “‘Let them sell wine’ is probably not much more comforting to the raisin growers than similar retorts have been to others throughout history.”

How much of takings law is carried by the categories, and how much by the exceptions to them?

No set formula, then three factors

Brennan concedes the Court cannot state a rule, and in the next sentence supplies the one everybody uses.

The Court “has been unable to develop any ‘set formula’” ... and the inquiry is “essentially ad hoc, factual.” And then, in the next sentence, the three factors that have governed the field ever since.

1 ECONOMIC IMPACT

“The economic impact of the regulation on the claimant.”

Of what, measured against what denominator? Slide 5 is not behind you.

2 INVESTMENT-BACKED EXPECTATIONS

“...the extent to which the regulation has interfered with distinct investment-backed expectations.”

Whose expectations, formed when — and does “distinct” mean reasonable, or documented?

3 CHARACTER OF THE ACTION

“So, too, is the character of the governmental action.”

In practice: invasion or use restriction? A routing instruction, not a factor.

It organised the field for fifty years precisely because it decides nothing in advance.

“The parcel as a whole”

Which is Brandeis’s denominator, adopted without argument fifty-six years later.

The Court focuses “both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole” — and not on whether a discrete segment has been abrogated, “irrespective of the impact of the restriction on the value of the parcel as a whole.”

WHAT IT DECIDES

Air rights are a segment; the terminal is the parcel. Penn Central lost the whole of the first and a fraction of the second — and the Court measures the fraction.

WHAT IT DOES NOT SAY

Why the parcel is the parcel. Not the air rights, not the city block, not the company’s portfolio. It asserts the denominator and moves on — as Holmes and Brandeis each did, in opposite directions.

WHAT IT MEANS IN PRACTICE

Whoever controls the denominator wins. The owner argues the narrowest defensible unit, the government the broadest — and neither has a rule to cite.

Penn Central does not solve the denominator problem. It picks a side and does not say why.

Lucas — the second categorical rule

All economically beneficial use gone, and no inquiry into the public interest. Unless.

THE RULE

“...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.”

No inquiry into the public interest. Categorical.

THE EXCEPTION

Unless the restriction inheres in “background principles of the State’s law of property and nuisance.”

If a common-law nuisance court would have enjoined it anyway, nothing was taken.

AND SCALIA’S OWN FOOTNOTE CONCEDES THE DENOMINATOR PROBLEM

Where a regulation makes a developer leave 90% of a tract in its natural state, “it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion... or... a mere diminution in value of the tract as a whole.”

The author of a rule keyed to “all” says, in the opinion announcing it, that he does not know what “all” is measured against.

Two cases that police the edge of Lucas

One says a statute does not become part of the title by outliving an owner. The other extends the parcel into time.

PALAZZOLO — 2001

A statute does not become title by outliving an owner

“Were we to accept the State’s rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable.”

But he lost his Lucas theory anyway: ~\$200,000 of upland value remained. Back to Penn Central.

TAHOE-SIERRA — 2002

The parcel is whole in time as well as space

“An interest in real property is defined by the metes and bounds... and the term of years that describes the temporal aspect of the owner’s interest... Both dimensions must be considered.”

So Lucas now needs PERMANENT obliteration — and almost no regulation is permanent.

If thirty-two months is not a taking, what is? And if the answer is “it depends,” name the circumstance you would measure.

Nollan — direction

Not a rule about how much the owner loses. A rule about the government's reasons.

483 U.S. AT 837

“When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury... the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’”

THE MISMATCH

The Commission's justification was the VIEW of the ocean from the road. The condition was an easement to walk ALONG the beach. One does nothing for the other.

WHAT KIND OF RULE

Not about how much the owner loses — about the government's REASONS. It had the power to say no. What it could not do was sell the yes.

WHAT IT LEAVES UNDONE

Nexus tests DIRECTION, not amount. A city could demand a hundred acres to offset a problem worth one, and the nexus would be perfect.

Dolan — amount, and the burden flips

Nollan is direction. Dolan is amount. Learn the pair that way and you will not confuse them.

ROUGH PROPORTIONALITY

“No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”

AND THE BURDEN FLIPS — n.8

“The city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.” And the city lost on it.

Nollan is direction. Dolan is amount.

And notice how much work “adjudicative” does in footnote 8. For thirty years lower courts read it as excluding legislative conditions altogether.

Sheetz — the smallest possible question

A unanimous Court resolves a thirty-year split by deciding almost nothing.

“The Takings Clause does not distinguish between legislative and administrative permit conditions.”

WHAT IT DECIDES

Legislative conditions are not categorically exempt. The reading many courts drew from Dolan’s footnote 8 is wrong.

IF PARCEL-BY-PARCEL

Impact fees exist precisely to avoid case-by-case haggling, and they fund a great deal of ordinary infrastructure. They become expensive and possibly unadministrable.

WHAT IT LEAVES OPEN

“[W]hether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development.”

IF CLASS-WIDE SUFFICES

A county achieves by ordinance exactly what Nollan forbids across a counter. The extortion concern is answered with a drafting instruction.

Ask what a minimal holding buys — and what it costs the lower courts that now have to answer the question it declined.

Kelo — public use means public purpose

And the two polar propositions the Court brackets before it starts.

POLE ONE — FAILS

A taking for the sole purpose of conferring a private benefit.

Nobody disputes this. The question is whether anything is left in the category.

POLE TWO — SUCCEEDS

A transfer between private parties where future “use by the public” is the purpose — “the condemnation of land for a railroad... is a familiar example.”

Also undisputed. The case is about where between the poles economic development sits.

AND THE AGGREGATION MOVE — MARK IT, IT IS THE FOURTH TODAY

The Court judges the PLAN AS A WHOLE, not parcel by parcel. Whether Susette Kelo’s particular house was needed is not the question. Penn Central aggregated space; Tahoe aggregated time; Kelo aggregates the plan.

O'Connor's objection

The first pole has just been made unenforceable.

The limit survives in name and nothing can be shown to fall inside it: nothing now prevents the State from replacing any Motel 6 with a Ritz-Carlton.

THE SHAPE OF THE COMPLAINT

Not that the majority abolished the limit — that it made it unfalsifiable. The category exists and nothing can be proved to fall in it.

YOU HAVE MET IT BEFORE

Module 2: Williamson's rational basis. And you will meet it again: "important governmental interest," Module 11A.

THE MAJORITY'S FAIR ANSWER

A court asking whether a plan is really a pretext is substituting judicial for legislative judgment about economic policy. Which is what *Lochner* did.

*The aftermath belongs to politics, not doctrine: more than forty states restricted economic-development takings after *Kelo*.*

The majority did not disagree that the first pole exists. It disagreed about who decides whether a case is in it.

A taking and a right to compensation differ

The State takes it, admits it, uses it — and owes nothing. The clause is satisfied by arithmetic.

538 U.S. AT 235–236, 240

“...the ‘just compensation’ required by the Fifth Amendment is measured by the property owner’s loss rather than the government’s gain.” And so: “Because that compensation is measured by the owner’s pecuniary loss—which is zero whenever the Washington law is obeyed—there has been no violation of the Just Compensation Clause.”

1 Is the loss really zero?

The client could not earn it alone. The pooled fund earned it precisely BECAUSE it was pooled. If the value exists only in aggregate, whose is it?

2 What stops the design?

If compensation tracks the owner’s loss and not the government’s gain, what stops a design in which each individual loss rounds to nothing?

3 And notice the direction

Here the LOSS is disaggregated while the GAIN stays pooled. In Kelo and Tahoe it ran the other way — and both favoured the government.

Aggregation is doing the work

Four cases, four aggregation choices, and every one of them favours the government.

PENN CENTRAL

SPACE

Air rights are a segment.
Measure against the
terminal.

ENLARGED

TAHOE-SIERRA

TIME

Thirty-two months is a
segment. Measure against
the fee.

ENLARGED

KELO

THE PLAN

One house is a parcel.
Measure against the
scheme.

ENLARGED

BROWN

THE LOSS

The gain stays pooled; the
loss is disaggregated to you.

SHRUNK

Three times the unit is enlarged and the government wins. Once it is shrunk, and the government wins. Aggregation is doing enormous work — in whichever direction the government needs.

A coherent method, or a pattern of convenience? Take both sides seriously before you answer.