TAKINGS ANALYSIS OF REGULATIONS

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Because the panel already has discussed why property is both an enemy and an ally of regulation, I will move immediately to a discussion of how to protect property from excessive regulation. How do we restore a regime of property rights? I would like to discuss a few things happening on that front.

This Symposium occurs at an appropriate time: March 15, 1989, is the first anniversary of the issuance of President Reagan's Executive Order 12,630 dealing with takings.[1] It is surprising that the Executive Order has received so little publicity because it is a unique approach to the issue. It asks the federal agencies to move beyond their environmental and regulatory impact analyses, and to perform a takings impact analysis.[2] The agencies are asked to examine their regulations and determine whether the regulations are likely to cause takings of property and, if so, to estimate what effect the regulations will have on the federal budget.[3] As might be expected, the agencies are not wildly enthusiastic about performing takings impact analyses. The agencies tend to believe that they are not taking anything and that they should never have to pay compensation. Nevertheless, it appears that the agencies are beginning to develop plans for performing analyses in accordance with the Order.

Compensation is the key issue in any analysis under the Takings Clause.[4] First, of course, compensation provides fairness to the person who is harmed by the regulation or other government action. The classic rationale for compensation is that, in fairness and justice, one individual should not be forced to bear the burden that ought properly to be borne by society as a whole.[5] Second, compensation tends to limit government ac-

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1. Exec. Order No. 12,630, 3 C.F.R. § 554 (1988), *reprinted in* 5 U.S.C. § 601 app. at 319-21 (1989) (requiring government decisionmakers to evaluate agency action that threatens to effect an unconstitutional taking of property so that it accords with guidelines issued by the Attorney General).

2. *See id.* at § 4(d).

3. *See id.* at § 4(d)(4).

4. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

5. *See* Armstrong v. U.S., 364 U.S. 40, 49 (1960). As Justice Holmes wrote, "the question at bottom is upon whom the loss of the changes desired should fall." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

tion. Even though bureaucrats enjoy the benefit of spending other people's money, their actions are constrained by their agency's budget. If the government must pay compensation when its actions interfere with private property rights, then its regulatory actions must be limited. This constraint also results in a limitation on transfer activity. If compensation is paid, the political system must take into account some financial costs. Therefore, some brakes are applied on political redistribution as compared with a system that puts everyone's property rights up for grabs.

Finally, the payment of compensation helps encourage the resolution of social problems by private, voluntary contractual arrangements rather than by regulation. It may appear cost-free to work out conflicts by regulation because the costs are off-budget.[6] But when regulations impose burdens on private individuals, the costs are borne by the private sector and are not considered in the democratic decisionmaking process. As those costs are returned to the budget by payment of compensation, we will start looking at alternatives to regulation that may in the long run be more beneficial.

President Reagan's Executive Order on takings has generated significant disapproval from the environmental community, including criticism from Jerry Jackson, a former attorney for the National Wildlife Federation.[7] He said the Executive Order mandates an impossibility because it requires the agencies to determine under the current takings law what actions might be unconstitutional takings.[8] I agree with him on this point. The takings case law is currently such a mess that it is difficult to ascertain what is and is not a taking. The Supreme Court has not provided clear guidance in this area.[9]

6. *See* Pennell v. San Jose, 485 U.S. 1, 15 (1988) (Scalia, J., concurring in part and dissenting in part) (rent control ordinance imposes costs of welfare program on landlords who happen to have impoverished tenants; cost of program is not considered in city budget).

7. *See* Jackson & Albaugh, *A Critique of the Takings Executive Order in the Context of Environmental Regulation*, 18 ENVTL. L. REP. 10,463 (1988).

8. *See id.* at 10,471.

9. *See* Pennsylvania Central Transp. Co. v. New York City, 438 U.S. 104 (1978) ("this Court, quite simply, has been unable to develop any 'set formula' " for determining when compensation is necessary; relying on ad-hoc factual inquiries (citation omitted)). *Compare* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (holding that the means by which the state advances its interests in takings cases must be a "tight fit" with the ends the state hopes to attain) *with* Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470 (1987) (distinguishing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), on the basis of trivial differences; holding that compensation was

I, however, disagree strongly with Mr. Jackson about the role of the Constitution in executive agency decisionmaking. He seems to believe that the only way the Constitution figures into an executive agency's decision is that, long after the fact, a court finally addresses the issue and decides that there was indeed a taking. Before a court's decision, the agency should be oblivious to the takings implications. Mr. Jackson says, "Whether a permit denial might be construed by a court to effect a taking is not a relevant factor in an agency's decision to grant or deny the permit absent express legislative authority making it a factor."[10] I would be very interested to see that legislative authority. It would have to say something like, "In this case, the Constitution applies." Mr. Jackson also notes that the Executive Order on takings may have a chilling effect on regulation.[11] I view that as something positive.

I consider next the formulations that might be used in deciding when an environmental regulation is a taking and ought to result in compensation. An exception to the compensation requirement has been recognized when the government acts pursuant to the police power or restrains public nuisances.[12] The exact scope of this exception is not clear. Because we are looking at alternatives, I will act like a good bureaucrat and look at the extreme alternatives.

Let us first assume that there is absolutely no police power or nuisance exception to the takings rule. The government pays whenever it regulates in a way that interferes with private property rights. In a way, this regime would be easy to administer. One would simply look at the property values before and after the regulation is imposed to determine the amount of compensation. But under this regime, the government would have to pay for all types or regulations—even those that halt the worst criminal offenses. (One wonders what the compensation to criminals would be for closing down a crack house—probably mind-boggling.) In such a case, we have little justification for taking money from the taxpayers to pay someone not to engage

unnecessary for a police power regulation) *and* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (holding that the judicial inquiry into whether property was taken for a public use is very narrow).

10. Jackson & Albaugh, *supra* note 7, at 10464.

11. *See id.*

12. *See* Keystone Bituminous Coal Ass'n v. DeBenedicitis, 480 U.S. 470 (1987); Mugler v. Kansas, 123 U.S. 623 (1887).

in socially inappropriate or criminal behavior. Such cases also pose the danger of someone coming back time and time again with, "Well, last time you paid me to close down a crack house. Now it's time to pay me to close down the bordello, and next week you can pay me to close down whatever I dream up next time." The model is open to exploitation by repeat offenders.

At the other extreme, let us assume that the government does not have to pay at all unless it chooses to label its action condemnation. Again, such a regime would be easy to administer. In fact, it would be facile. The government never would have to worry about what it takes, but individual rights clearly would not be protected.

One formulation that actually has been adopted by the courts is a nuisance exception[13]: No compensation is due if a taking is performed pursuant to the police power in regulating a nuisance. Unfortunately, this is often expressed as a broad police power exception: Compensation need not be paid for government actions undertaken pursuant to the police power. The problem with this approach is defining the police power. The police power may be interpreted very broadly, as it was, for example, in the License Cases of 1847[14]: "nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."[15] This definition covers far too much. No regulatory taking would ever be compensated. Furthermore, there is no textual support in the Constitution for an exception to the takings rule for police powers. A further problem with a broad police-power exception to the compensation requirement is that the public-use requirement in the Takings Clause has been interpreted as being "coterminous" with the police power.[16] Combining a police-power exception to the compensation requirement with a police-power definition of what is a public use leaves an empty box as to when compensation would be awarded. A taking would be appropriate if performed pursuant to the police power and pursuant to public use, but no compensation would be necessary because it falls

13. *See, e.g.*, Goldblatt v. Hempstead, 369 U.S. 590 (1962); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

14. Fletcher v. Rhode Island, 46 U.S. 540 (1847); Pierce v. New Hampshire, 46 U.S. 554 (1847); Thurlow v. Massachusetts, 46 U.S. 504 (1847).

15. *Thurlow*, 46 U.S. at 582.

16. *See* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); Sax, *Takings and Police Power*, 74 YALE L.J. 36 (1964).

within the police-power exception.[17]

A much better formulation focuses on the extent of the property rights involved. Presumably, there is no actual property right in maintaining a nuisance. Thus, government is not involved in a taking when it halts a nuisance because there is no property right to take. The *Keystone* decision states this rule,[18] but the analysis in the opinion proceeds to ignore it.[19] There was clearly a property right under state law in that case,[20] but the Supreme Court proceeded as if there were no such right.[21]

Another crucial step in the analysis is defining a nuisance, including determining whether a nuisance is to be interpreted by the common law, and deciding whether nuisance is synonymous with a negative externality. If they are synonymous, then aesthetic harms are problematic. Let me give you an example. I am from Denver. I am a Broncos fan—at least I watch about half of every Super Bowl game in which they are involved. A few years ago, when we were in our first Super Bowl, there was a craze to paint one's house Bronco orange. If I lived across the street from one of those houses, I would view the aesthetic harm to myself as an interference with my right to use my property, but I doubt that we want to regulate such aesthetic harm.

A different way of identifying a nuisance is to require a physical invasion of neighboring property. A physical invasion test eliminates the problem of aesthetic harm. But physical invasion standing alone is not necessarily a nuisance. There must be some additional element of harmfulness, undesirability, or inappropriateness.

Another alternative is to consider some kind of reasonable right to use our property. In the *Nollan* case, Justice Scalia, writing for the Court, noted that the right to build on one's property was an actual right and not a government-granted privilege[22]. Regulation of this right may have very significant repercussions in future land-use litigation. Interestingly, we might even go so far as to recognize a homesteading right to

17. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 n.20 (1987).

18. *See id.*

19. *See id.* at 481-506.

20. Pennsylvania law recognized a "support estate," separate from the mineral and surface estates, which gave a miner the right to cause surface subsidence. *See id.* at 478.

21. *See id.* at 493.

22. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987).

pollute or to make noise in an area. This approach would eliminate some of the theoretical problems with defining a nuisance.

Moving beyond the question of defining the nuisance exception to the just compensation requirement, I would like to summarize a few other key components of current takings analysis. In evaluating regulatory takings, particularly in the land-use context, the Court often employs a diminution in value test.[23] Under this test, if a regulation goes too far, it is a taking. The question, as phrased by the courts, is whether the regulation denies the owner all economically viable use of the property.[24] Under this test, the courts have found that diminutions in value of seventy-five percent to almost ninety percent are not sufficiently severe to constitute takings.[25]

Another question is whether a regulation substantially advances a legitimate state interest.[26] This is similar to the requirement of having a public use for the taking under the Fifth Amendment, and therefore it does not provide us with a satisfactory test of what should and should not be compensated. It focuses on what the government is properly empowered to do, not at what it can do on the condition that it pay compensation. Although this test has been frequently reiterated by the Court, it has seldom been used to strike down an uncompensated taking.[27]

One other approach is the bundle of rights test.[28] An interference with a particularly important strand in the bundle of rights may constitute a taking. This test has not yielded particularly enlightening results. A right to exclude others[29] and a

23. *See e.g.*, Pennsylvania Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (making ad-hoc inquiry into the economic impact on the claimant and the extent to which the regulation interfered with the claimant's investment-backed expectations).

24. *See id*; *see also* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) (citing Agins v. Tiburon, 447 U.S. 255 (1980)).

25. *See, e.g.*, Euclid v. Amber Realty Co., 272 U.S. 365 (1926) (seventy-five percent diminution in value when property held as investment for sale to industrial interests was limited by zoning ordinance to residential uses); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (eighty-seven percent diminution in value when ordinance was passed forbidding manufacture of bricks within city limits).

26. *See* Agins v. Tiburon, 447 U.S. 255, 260-61 (1980) (zoning restriction limiting landowners to building one-family dwellings, accessory buildings, and open space uses did not deny the property owners all economically viable use of their land).

27. The most active use of the "substantial advancement" standard was in *Nollan*, where it formed the basis of a nexus requirement. See *Nollan*, 483 U.S. at 837, and discussion *infra*.

28. *See* Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 517 (1987) (Rehnquist, C.J., dissenting).

29. *See* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

right to pass to one's heirs[30] are significant and denial of these rights will be deemed a taking. On the other hand, ownership of a support estate as part of a mineral interest[31] or the right to sell property,[32] are not considered significant and compensable.

An emerging way of looking at the question is the nexus requirement that is set forth in the *Nollan* decision[33] and that is discussed extensively in Executive Order 12,630.[34] This analysis requires that conditions put on permits have the same health and safety objectives, and substantially advance the same objectives, as the denial of a permit would serve.[35] A good example of such an approach is the case of wetlands dredge and fill permits.[36] The purpose of the wetlands regulatory program is to protect water quality.[37] Its application has been judicially and administratively expanded to protect wetlands values.[38] Frequently, conditions are placed on dredge and fill permits that have no relationship to the overall purpose of the regulatory program, such as providing recreational boat ramps and docks. It will be interesting to watch how these issues are treated as the Executive Order analysis develops.

In this discussion, I have not examined a number of other formulations in the takings context—compensating benefits and so forth—that further complicate the whole analysis. As the preceding discussion indicates, the analysis at this point is very confused and inconsistent. This confusion, however, creates an opportunity for a major shift in takings jurisprudence, toward a greater protection of property rights.[39]

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30. *See* Hodel v. Irving, 481 U.S. 704 (1987).

31. *See Keystone,* 480 U.S. 470.

32. *See* Andrus v. Allard, 444 U.S. 51 (1979) (the simple prohibition of the sale of lawfully-acquired property does not effect a taking in violation of the Fifth Amendment).

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

34. *See* Exec. Order No. 12,630, *supra* note 1, §§ 3-4.

35. *See e.g., Nollan,* 483 U.S. 825.

36. *See* Clean Water Act of 1977, 33 U.S.C. § 1251 *et seq.*

37. *See id.*

38. *See, e.g.,* United States v. Boyd, 609 F.2d 1204 (7th Cir. 1979); Caplin, *Is Congress Protecting Our Water?: The Controversy on Section 404 of the Federal Water Pollution Control Act of 1972,* 31 U. MIAMI L. REV. 445 (1977).

39. The analysis presented herein reflects work in progress for the Pacific Research Institute Property Rights Task Force. The Task Force's goal is to chart a long-term litigation strategy for enhancing property rights safeguards.