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New Property Rights Under the Takings Clause (Speech)

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NEW PROPERTY RIGHTS UNDER THE TAKING CLAUSE*

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On December 11, 1922, two years after my father graduated from this law school, Supreme Court Justice Oliver Wendell Holmes walked to the lectern where he dictated decisions to his clerks. Looking up from his notes, he began reading his opinion in *Pennsylvania Coal Co. v. Mahon*,[1] which established the basis for takings law when government regulates the use of land.[2]

Takings law applies the Fifth Amendment to the federal constitution, as applied to the states. It states: "[N]or shall private property be taken for public use, without just compensation."[3] Prior law in the Court held the mere regulation of land was not a taking of property, although regulation had to be reasonable.[4] *Pennsylvania Coal* changed all this.

Holmes said *Pennsylvania Coal* was a case of a "single private house." The coal company had deeded the land on which the house stood to the plaintiff, but reserved the right to mine coal in its conveyance. A Pennsylvania statute prohibited coal mining under the surface that would cause subsidence. The statute curtailed the company's right to mine coal because it had to leave coal in the ground to prevent subsidence. Although the company could mine the rest of the coal, it was not clear how much coal had to be left in place. The owner of the house sued to prohibit the company violating the statute by mining coal, but Holmes held the statute unconstitutional as a taking of property. In words that were to become famous, he wrote that a taking occurs when a regulation goes "too far."

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1. 260 U.S. 393 (1922).

2. *But cf.* Robert Brauneis, *The Foundation of Our 'Regulatory Takings' Jurisprudence: The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 YALE L.J. 613 (1997), who argues *Pennsylvania Coal* was a substantive due process decision based on Holmes' conception of property rights.

3. U.S. CONST. amend. V.

4. *See, e.g.*, Lawton v. Steele, 152 U.S. 133 (1894).

A decision on the "property" taken by the statute was an important issue in the case. Courts and commentators refer to this issue as the "denominator" problem.[5] A court must determine the property interest "denominator" so it can apply the regulatory "numerator" to decide whether the economic impact of the regulation is so great that a taking has occurred. To resolve the denominator problem, a court must decide whether to consider all of the property held by a landowner or only the property affected by the regulation. The denominator problem did not trouble Holmes. He found the statute made it "commercially impracticable to mine certain coal," and that this prohibition on mining was regulation gone "too far." This holding segmented the company's interest in the coal because Holmes held the statute extinguished the company's right to mine coal as reserved in its deed.

Justice Brandeis dissented and disagreed with Holmes on this point. He stated:

> But values are relative. If we are to consider the value of the coal kept in place by the restriction, we should compare it with the value of all other parts of the land. That is, with the value not of the coal alone, but with the value of the whole property.[6]

The Brandeis dissent is the basis for the "whole parcel" rule.

I want to examine the segmentation problem in takings law, and how the Supreme Court has treated the different views on this problem in *Pennsylvania Coal.* As we shall see, the Court continues to use the segmentation principle to determine the property rights protected from regulation under the taking clause. We shall also see that the Court's use of the segmentation principle is a conceptual muddle that has led to conflicting results. We shall then ask whether a property rights approach to defining the breadth of the taking clause is either useful or wise.

A. THE SEGMENTATION PROBLEM

Property, as the scholars say, is a bundle of rights. These rights include the right to possess, use and dispose of property. The problem to consider is how courts should define the bundle of property rights that deserve protection under the takings clause.

The term "segmentation" describes this problem.[7] Segmentation

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5. *See* Florida Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994).

6. *Id.* at 419.

7. Professor Radin captures the same idea in her notion of "conceptual severance" as a way of explaining takings decisions:

occurs when courts must define the landowner's property interest to decide whether a taking has occurred. Should courts look at the whole bundle as Brandeis did? Or should they look only at one "strand" in the bundle, as Holmes did? Most important, did Holmes create "new" property rights under the takings clause by holding a taking occurs when a land use regulation affects only one right in the bundle? If, as in *Pennsylvania Coal,* the property interest segmented is the property interest affected by the regulation, a taking occurs if the regulation destroys that interest.

The segmentation problem is even more important since the Supreme Court created a *per se* takings category in *Lucas v. South Carolina Coastal Council.*[8] Lucas owned two lots adjacent to the coast in an area where a setback law prohibited any development. The Court found a taking *per se* because Lucas suffered a total deprivation of all use of his land. A court must determine the property interest a land use regulation affects to decide whether a per se taking has occurred. The Court has admitted that this determination is difficult.[9] If a taking *per se* has not occurred, courts are to apply a balancing test in which the economic impact of a regulation is one factor to consider.[10] Segmentation is relevant here as well. A court must again determine the property interest it will select to measure the economic impact of a land use regulation, although economic impact is not decisive.

Pennsylvania Coal was a case of vertical segmentation. Justice Holmes vertically segmented the right to mine "certain coal" from the rest of the property rights bundle and held a taking occurred because

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> "[C]onceptual severance"... consists of 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. Thus, this strategy hypothetically or conceptually "severs" from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.

Margaret Jane Radin, *The Liberal Conception of Property: Cross Current in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988). *See also* D. Benjamin Barros, *Defining "Property" in the Just Compensation Clause*, 63 FORDHAM L. REV. 1853 (1995).

8. 505 U.S. 1003 (1992).

9. The Court explained:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured.... Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.

Id. at 1016-17 n.7.

10. The Court adopted the balancing test in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

the statute totally restricted this right. The Court returned to the vertical segmentation issue in a case decided more than 50 years after *Pennsylvania Coal,* but reversed itself and adopted the Brandeis view, rather than the Holmes view, on this question. We will consider this reversal of opinion later, but a detour is first necessary to see how the Court has handled the segmentation problem when it arose in a different form.

B. FUNCTIONAL SEGMENTATION

In *Kaiser Aetna v. United States*,[11] the Supreme Court considered functional, rather than vertical, segmentation. Functional segmentation occurs when government intervention or regulation segments intangible, nonpossessory property rights.[12] Functional segmentation can be permanent or temporary, but usually requires government action that transfers a nonpossessory property right to others, such as the right of access.

In *Kaiser Aetna* a corporate developer on the island of Oahu in Hawaii created a private marina when it dredged a pond and removed a barrier beach separating the pond from the ocean. The United States claimed the developer could not exclude members of the public from the marina because "[the] public enjoys a federally protected right of navigation over the navigable waters of the United States."[13]

Then-Justice Rehnquist, writing for the majority, disagreed and held the public access claim was a taking of property. He defined the property rights issue by holding that certain "expectancies" are "embodied in the concept of 'property'" which, "if sufficiently important," require condemnation and compensation if government curtails these expectancies.[14] He then held the right to exclude others is a fundamental property right under this test, and that government must pay compensation if it takes this right.

Notice how Justice Rehnquist segmented the plaintiff's property rights by identifying the "right to exclude" as a property interest pro-

11. 444 U.S. 164 (1979).

12. Distinguishing different types of segmentation may be misleading, because all property interests are intangible and segmentation merely selects different types of intangible interests for consideration. However, the distinctions are useful because they have descriptive value. For a case considering the horizontal segmentation of geographically related property, see Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996) (rejecting horizontal segmentation). For discussion of the various types of segmentation see Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L. J. 663 (1996).

13. *Kaiser Aetna*, 444 U.S. at 169.

14. *Id.* at 179.

tected by the taking clause. Segmentation decided the case, because Justice Rehnquist held the destruction of this right was a taking without considering the economic impact of its loss.

Justice Brandeis' view of segmentation might have led to a different result in *Kaiser Aetna.* The marina was part of a major residential development in Honolulu, and Brandeis could have held that this development was the "whole parcel." Presumably, he would not have segmented the right to exclude as a separate property interest entitled to protection under the taking clause.[15] He could then have found enough value left in the "whole parcel" to overcome a claim that the government had taken the right to exclude. This view of the case shows how a court's decision on segmentation can determine the outcome of a taking claim.

The Supreme Court applied functional segmentation in later land use cases to find a taking when government conditioned a permit with a demand for public access. In *Nollan v. California Coastal Commission,*[16] for example, the Commission conditioned a permit for a new house with a requirement that plaintiffs convey a right of public access across their beach. The Commission required the condition to provide public views of the beach to offset the view obstruction created by the house. However, the Court found a taking because it could find no relationship between the access condition and this regulatory purpose.

The Court compared the compulsory access demand to the demand for access in *Kaiser Aetna* and quoted from that case:

> We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'"[17]

These access cases may be extreme. In *Nollan,* for example, the Court held the access demand amounted to a physical taking because it characterized the right of access as a permanent physical occupation. The Court then noted there was no question that physical occupation is

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15. Note how the Court's decision in *Kaiser Aetna* ignores the economic impact problem. By segmenting the right to exclude as the property right affected by the access claim, the Court was able to find a taking had occurred because the access claim extinguished this right.

16. 483 U.S. 825 (1987). *See also* Dolan v. City of Tigard, 512 U.S. 374 (1994) (invalidating condition on permit for store that required dedication of floodway and bikeway easements).

17. *Nollan,* 483 U.S. at 831, (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982), quoting in turn from Kaiser Aetna, 444 U.S. at 176).

compensable. Yet the *Nollan* decision also suggested that government can condition a development permit with a demand for public access if there is a relationship between the access demand and the purpose it serves.[18] Even so, the segmentation of the right to access as a critical element in these cases highlights the importance of the segmentation problem in takings law.

C. THE SUPREME COURT REVERSES ITSELF ON VERTICAL SEGMENTATION

Kaiser Aetna and *Nollan* are difficult to understand. Before it decided these cases, the Court had decided *Penn Central Transportation Co. v. New York City,*[19] in which it reversed itself on the vertical segmentation issue. *Penn Central* seemed to signal the Court was not interested in segmenting property rights as the basis for deciding takings cases.

In *Penn Central* the city declared Grand Central Terminal a historic landmark under the city's Landmarks Preservation Law. As those who know it are aware, Grand Central Terminal ("Terminal") is in midtown Manhattan and surrounded by high-rise office buildings.

Not surprisingly, the owners of the Terminal decided it would be a good idea to build a high-rise office building over the Terminal. There was evidence the Terminal was built to provide for this possibility. However, the city's Landmarks Preservation Commission rejected the high-rise proposal as an "aesthetic joke." The owners of the Terminal then sued, claiming compensation for the taking of the airspace over the Terminal because they could not build in it. Justice Brennan, writing for the majority, rejected the segmentation argument implicit in this claim: "'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."[20] Instead, he added, takings ju-

18. Justice Scalia suggested in *Nollan* that the Commission could have imposed "the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." Nollan, 483 U.S. at 836. Providing a viewing spot, of course, would have required public access to the Nollan property.

19. 438 U.S. 104 (1978).

20. *Id.* at 130. Justice Brennan pursued this theme in a footnote just before this quotation, where he commented on earlier Supreme Court takings cases:

> These cases dispose of any contention that might be based on *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably—i.e., irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a "taking."

risprudence focuses on "the parcel as a whole."

Because the owners of the Terminal stipulated it was earning a reasonable return, Justice Brennan could apply the whole parcel rule and hold a taking had not occurred. His opinion adopted Justice Brandeis' view of segmentation from his dissent in *Pennsylvania Coal,* although he did not cite it. *Penn Central* is inconsistent with *Kaiser Aetna* and *Nollan.* What is the difference between airspace as a property segment and the right to exclude as a property segment?

The Court also rejected vertical segmentation in *Keystone Bituminous Coal Ass'n v. De Benedictus*,[21] a case decided at the same time as *Nollan. Keystone* held a Pennsylvania statute that prohibited subsidence from mining, which was similar to the statute held invalid in *Pennsylvania Coal,* was not a taking of property. *Keystone*, however, was not a case of a "single house." The plaintiff was a coal association that made a facial takings challenge to the statute.

The parties stipulated that enforcement of the statute would leave approximately 27 million tons of coal in place to prevent subsidence. Holmes' held in *Pennsylvania Coal* that the statute was a taking there because it made the mining of "certain coal" impracticable. The coal association relied on this holding to claim the statute attacked in *Keystone* was a taking. They claimed a taking had occurred because Pennsylvania appropriated the coal required to remain in place for the public purposes described in the subsidence act. Justice Stevens rejected this argument:

> The 27 million tons of coal do not constitute a separate segment of property for takings law purposes. Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property.... There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property.[22]

Stevens viewed Justice Holmes's holding in *Pennsylvania Coal* as a holding that the statute there was a taking because it prohibited profitable coal mining. Stevens concluded the plaintiffs had not "come close" to proving a denial of economically viable use when the coal remaining in place "is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations."[23]

Id. n.27.

21. 480 U.S. 470 (1987).

22. *Id.* at 498. Justice Stevens also relied on *Andrus v. Allard*, 444 U.S. 51 (1979) (ruling that a prohibition on the sale of Indian artifacts not a taking).

23. Keystone, 480 U.S. at 499.

D. THE SEGMENTATION MUDDLE

This review of the cases shows that the Court's acceptance of the segmentation principle in takings law is incomplete. The Supreme Court has applied segmentation to hold a taking occurred in some land use cases. In other land use cases the Court rejected segmentation and held a taking had not occurred, although it was not clear to what extent this rejection decided the case.

Not surprisingly, conservatives on the Court who favor landowner takings claims accept segmentation, while liberals on the Court who favor government reject segmentation and minimize its significance.[24] The reason is that segmentation of property rights can support a taking claim if the court defines the affected property segment as the property interest destroyed by the government regulation.

How should the Court resolve the segmentation muddle? The Supreme Court's views on this issue are conflicting, and no principled basis for determining the segmentation of property interests has emerged.

One alternative is to reject segmentation of property rights as a basis for deciding takings cases. A court would still need to identify the denominator in takings cases so it could determine the economic effect of a regulation on a landowner's property interest. The *per se* takings rule adopted in *Lucas* especially requires this analysis, because it holds a taking occurs when a regulation prohibits any economically viable use of the land. A court could then apply the whole parcel rule advocated by Justice Brandeis, and later adopted in *Penn Central,* to minimize the economic impact of a land use regulation on the landowner's property.

Because this approach to segmentation would reduce the number of takings claims likely to succeed in court, it has attracted criticism as a "deep pocket" theory of the taking clause.[25] If a court looks at all of the property held by a landowner, the wealthiest landowners with large land holdings are often likely to be on the losing side.

The *Penn Central* case is an example because the owner of Grand Central Terminal was a major corporation. Its "whole parcel" holdings overcame the takings objection to the city's designation of the Terminal as a historic landmark, and its refusal to allow a high-rise office building in the airspace over the Terminal. The case might have come out dif-

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24. Compare Justice Brennan's decision in *Penn Central*, where he rejected segmentation, with Justice Rehnquist's decision a year later in *Kaiser Aetna*, where he accepted segmentation.

25. Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 568 (1984).

ferently had the plaintiff been the owner of a small railroad station in a rural area who had no other real property assets.

Another approach to the segmentation problem is to take just the opposite view and apply an extreme segmentation rule in land use cases.[26] Under this extreme rule, any restriction on the right to possess, use and dispose of land is a prima facie taking unless government can show the use proposed for the land is a nuisance. This application of the segmentation principle dramatically increases the number of cases in which courts can find a taking. A court could find that any government action that isolates a parcel of land for regulation is a taking.

This extreme result would occur even though the regulation did not deprive the property owner of all economically beneficial use of his land. In *Kaiser Aetna*, for example, opening the private marina to public access probably marginally affected the use and value of the remainder of the development. Likewise, in *Nollan* the economic impact of public access on the enjoyment of the plaintiffs' dwelling was limited.[27] Even so, the denial of the right to exclude was enough for a taking in these cases.

In his opinion for the Court in *Kaiser Aetna*, Chief Justice Rehnquist adopted another view of segmentation in takings cases that may moderate these extremes. There, as noted earlier, he held it is the "expectancies" in property that determine the fundamental property interests entitled to protection under the taking clause. Justice Scalia later expanded on this suggestion in *Lucas v. South Carolina Coastal Council,*[28] where the Court held an absolute prohibition on building in coastal setback legislation was a *per se* taking of property.

Scalia recognized that determining the property interest protected by the taking clause was essential to the application of his *per se* taking rule that finds a taking when a regulation destroys all economically viable use. He noted inconsistencies in Supreme Court decisions that defined the property expectancies entitled to taking clause protection. He then addressed this problem in a footnote:

> The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of

26. This is Professor Richard Epstein's view. *See* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 58-59, 65, 252-253, 304 (1985). *See also* Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970 (1985).

27. The Court did not consider the economic impact of the easement but focused on the legitimacy of the easement as an implementation of the governmental purpose in regulating coastal areas.

28. 505 U.S. 1003 (1992).

> property—i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.[29]

The expectations approach to the segmentation problem seems attractive. Expectations have always defined the interests individuals enjoy in property, so that using expectations to define property interests protected by the takings clause has a historic basis. But the expectations approach to the taking clause also has problems, as Justice Kennedy argued in his concurring opinion in *Lucas*: "[I]f the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is."[30] This comment suggests there is an unacceptable circularity in using expectations to define property in takings cases.

There is yet another objection to relying on landowner expectations defined by state law to define property segmentation in takings cases. Why should state law define the property interests entitled to protection under the taking clause of the federal constitution? Justice Scalia had second thoughts on this issue in a later case in which he dissented to a denial of certiorari. He argued that federal courts should not always accept state court definitions of the background property rights that determine whether a *per se* taking has occurred.[31]

E. RESOLVING THE SEGMENTATION MUDDLE

The Supreme Court is clearly aware that segmentation is an important issue in takings cases, but has not been consistent in deciding when segmentation occurs or how it should affect its decisions. I would argue that the Court's muddle and confusion on the segmentation problem should not be a surprise, and that the Court's disorder over the role of segmentation merely reflects a greater confusion in takings law.

As other commentators have noted, there is no room for consensus on conflicting theories when competing political values share little

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29. *Id.* at 1017 n.7.

30. *Id.* at 1034. This kind of commentary leads directly to a consideration of investment-backed expectations as a taking factor, which *Penn Central* mandates. As Justice Kennedy suggests, however, investment-backed expectations also presents difficulties as a basis for evaluating takings claims. *See* Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW 215 (1995).

31. *See* Stevens v. City of Cannon Beach, 510 U.S. 1207 (1994). Justice Scalia argued that a state could not "transform private property into public property without compensation" either through judicial decree or legislation. *Id.* at 1212.

common ground.[32] Takings law is an example. Supreme Court justices hold extreme views on the value judgments required in takings cases, while shifting coalitions produce very different results in the decisions. These divisions in the Court have surfaced in many recent land use takings cases, which the Court often decided by 5-4 majorities.

Segmentation remains, nevertheless, a troublesome problem that demands closer attention from the Court. To return to the question I asked at the beginning of this article, is segmentation a useful or wise part of takings law? I think not. Pursuit of segmentation as a basis for deciding takings cases can lead the Court to extreme positions. It can dramatically expand landowners' rights or isolate government regulation from takings claims. Even more serious, deciding takings cases on the segmentation principle is an escape from hard thinking on the taking clause that avoids the critical issues.

The Court says it must define a landowner's property interest to determine whether a taking has occurred, but defining this interest often decides the case with no further analysis. This arbitrary approach to applying the taking clause is not the correct way to decide takings cases. Neither has the Court been consistent in deciding whether it should find a taking when a government action extinguishes one strand in the bundle of property rights. The Court found a taking when government prohibited the right to exclude, but did not find a taking when the City of New York prohibited a developer from using the airspace that was available over its property.

The Court needs to return to the hard, pragmatic, ethical question: when is it fair to ask owners of land to bear costs that society as a whole must accept? It has always said the taking clause serves this purpose by providing a restraint on government regulation. The Court has also said there is no "set formula" for takings cases, and that it must decide them case-by-case.

This view of the takings clause makes the segmentation problem the beginning, not the end, of takings analysis. The Court should not make the rules on property segmentation a "set formula" that determines whether a taking has occurred. Instead, the Court must decide takings cases by making explicit value choices in the wide array of land use conflicts in which taking claims arise.

This view of the takings clause asks hard, not easy, questions, and the answers are not obvious. Yet the Court must answer these ques-

32. *See* Richard H. Pildes, *Conceptions of Value in Legal Thought*, 90 MICH. L. REV. 1520 (1990).

tions if the taking clause is to allocate fairly the burdens and benefits of land ownership in a regulated society.