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Foreword: How Far is Too Far? The Constitutional Dimensions of Property

Roger W. Findley

FOREWORD: HOW FAR IS TOO FAR? THE CONSTITUTIONAL DIMENSIONS OF PROPERTY

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Private property is the principal institution adopted by Western societies to allocate land and other scarce resources among private persons, as well as to provide individuals some security against governmental domination. The United States Constitution provides that private property shall not be taken for public use without just compensation.[1] However, the definitions of "property" and of what constitutes a "taking" are elastic, and have been expanded and contracted by the United States Supreme Court over the years.

In *Pennsylvania Coal Co. v. Mahon*,[2] decided by the Supreme Court in 1922, Justice Holmes said, "[t]he general rule . . . is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[3] The continuing issue since that time has been, when does regulation go too far?

Two cases heard by the Supreme Court this term provided opportunities for the Court to give substantial guidance concerning the resolution of this issue. They are *Lucas v. South Carolina Coastal Council*[4] and *Yee v. City of Escondido*.[5] Briefly stated, the facts in these cases are as follows.

David Lucas purchased two vacant oceanfront lots zoned for single family houses. Thereafter, to combat erosion, South Carolina enacted a Beachfront Management Act limiting construction within the beach/dune system. As applied to the Lucas lots, the Act prohibits, through statutorily mandated setback lines, construction of any permanent structure other than a small deck or walkway. Lucas sued in the state court, claiming that the Act constituted a taking of his property without just

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1. U.S. CONST. amend. V.

2. 260 U.S. 393 (1922).

3. *Id.* at 415.

4. 404 S.E.2d 895 (S.C.), *cert. granted*, 112 S. Ct. 436 (1991).

5. 224 Cal. App. 3d 1349, 274 Cal. Rptr. 551 (1990), *review denied*, 1991 Cal. LEXIS 353 (Cal. Jan. 24, 1991), *aff'd*, 60 U.S.L.W. 4301 (U.S. Apr. 1, 1992).

compensation. The trial court agreed and awarded him $1.23 million. However, the state supreme court reversed, holding that there is no taking when a state regulates land use to prevent a serious public harm.

John Yee owns a mobilehome park. In 1988 the City of Escondido adopted a rent control ordinance limiting the amount by which park owners could increase rents, even when tenants sell their mobilehomes. Under the California Mobilehome Residency Law, park owners are required to accept the successor tenants who purchase mobilehomes unless they lack financial ability to pay the rent or have demonstrated an unwillingness to comply with park rules. Yee filed suit in the state court, claiming that because of the ordinance, selling prices of used mobilehomes increased dramatically. He contended that the Escondido ordinance constitutes a "taking" because it enables selling tenants to capture for themselves the monetary value of living in the rent-controlled park, thereby working a transfer of this monetary interest from the park owner, who normally would capture the value through increased rent. The California trial and appellate courts rejected Yee's claim.

On April 1, 1992, the Supreme Court decided *Yee* but ducked the "regulatory taking" issue:

> We granted certiorari on a single question pertaining to the Takings Clause: "Two federal courts of appeal have held that the transfer of a premium value to a departing mobilehome tenant, representing the value of the right to occupy at a reduced rate under local mobilehome rent control ordinances, constitute[s] an impermissible taking. Was it error for the state appellate court to disregard the rulings and hold that there was no taking under the fifth and fourteenth amendments?" This was the question presented by petitioners. It asks whether the court below erred in disagreeing with the holdings of the Courts of Appeals for the Third and Ninth Circuits in *Pinewood Estates of Michigan v. Barnegat Township Leveling Board*, and *Hall v. City of Santa Barbara*. These cases, in turn, held that mobile home ordinances effected physical takings, not regulatory takings. Fairly construed, then, petitioners' question presented is the equivalent of the question "Did the court below err in finding no physical taking?"
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> Whether or not the ordinance effects a regulatory taking is a question *related* to the one petitioners presented, and perhaps *complementary* to the one petitioners presented, but it is not "fairly included therein." Consideration of whether a regulatory taking occurred would not assist in resolving whether a

> physical taking occurred as well; neither of the two questions is subsidiary to the other. Both might be subsidiary to a question embracing both—Was there a taking?—but they exist side by side, neither encompassing the other.[6]

The Court held that there was no "physical taking" because the City of Escondido had not "*require[d]* the landowner to submit to the physical occupation of his land. . . . Petitioners voluntarily rented their land to mobile home owners."[7]

At the time this Foreword was written, the Supreme Court had not yet decided *Lucas*. Perhaps that decision will shed some light on the regulatory taking issue.

It is unusual for a law review to publish briefs submitted to a court, even in important cases. However, there is good reason for doing so in this situation. On March 20, 1992, Loyola Law School presented the First Annual Fritz B. Burns Lecture. This lecture took the form of a debate between Professor Richard Epstein of the University of Chicago Law School and Professor Joseph Sax of the University of California at Berkeley School of Law. The debate was titled "The Constitutional Dimensions of Property: Rent Control, Coastal Management and Regulatory Takings." The *Lucas* and *Yee* cases were the starting points for this debate between two of the country's most vocal and preeminent scholars concerned with the constitutional dimensions of real property law. Professors Epstein and Sax were invited to participate in the debate, in part, because each of them had filed an *amicus curiae* brief in one of the cases. Those are the briefs which are herein presented.[8]

The briefs are offered as a "first installment" of the authors' views on the legal issues involved in the two cases, including the still-open "regulatory taking" issue in *Yee*. In the next issue of the *Loyola of Los Angeles Law Review*, to be published in the fall of 1992, the same authors will present further discussions of these problems, in light not only of their Loyola debate but also of the Supreme Court's decisions in the *Lucas* and *Yee* cases. Thus, while the briefs appearing herein do not present a direct clash of views between Professors Epstein and Sax—because they submitted briefs in different cases—the follow-up articles will do so.

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6. *Yee*, 60 U.S.L.W. at 4306 (alteration in original) (citations omitted).

7. *Id.* at 4303.

8. [Editor's note: The briefs have been reprinted as submitted to the United States Supreme Court. They have not been changed to conform to usual law review citation form.]