

CHAPTER 2

Current Constitutional Practice

A Preview of the Constitutional Arguments

In this chapter, I will detail my view of current takings doctrine. In chapter 3, I construct and then attack what I view as the strongest case for a more interventionist takings law that would demand that owners receive compensation when they must comply with costly regulatory mandates in a substantially broader range of cases than the Supreme Court would today.

The review of doctrine in this chapter will not be dominantly normative, though I will note some of what strike me as especially peculiar features of existing case law. Instead, this chapter largely describes how I believe today's Supreme Court would likely deal with owners' claims that a governmental entity may not impose simple regulatory mandates but must instead substitute some sort of tax-and-spend program that relieved the owners of the costs of regulatory compliance. The Court could direct that the state entity relieve these burdens either by banning the regulatory scheme altogether or, more plausibly, by directing that the owners be compensated for bearing compliance costs.

In discussing both the constitutional issues in the next two chapters and the prudential ones thereafter, I will quite frequently refer to the requirement under Title III of the Americans with Disabilities Act (ADA)¹ that public accommodation owners must take reasonable steps to insure that their places of business are accessible to people with disabilities without charging disabled customers any of the incremental or fixed costs of accommodation. Accommodation under the ADA is usually thought of as design accommodations that store owners are required to provide for the mobility impaired.² At least insofar as the issue is prospective design deci-

1. 42 U.S.C. §§12182 et seq. See also 28 C.F.R. pt. 36 (regulations construing Title III).

2. In such cases, the cost of accommodation, if positive at all, is typically a one-time fixed cost (e.g., the installation of ramps), and a marginal-cost pricer would not charge a positive price to any particular mobility-impaired customer. Questions about the appropriate allocation of the average cost to insure that the feature was built would certainly be important, however.

sions rather than retrofitting, though, public accommodation owners often bear no cost at all in these cases. Instead, they must simply rethink the way in which buildings are designed. Ramps may cost no more than stairs to install in new buildings, and though they may initially be unfamiliar to at least some nondisabled patrons, customer adjustment may be rapid.³

But there are certainly cases covered by the ADA in which the incremental cost of accommodation is indisputably positive, and it is lucid that public accommodation owners must still bear the cost as long as it is reasonable. For example, a doctor or lawyer serving a severely hearing-impaired client must, under prevailing interpretations of the ADA, provide someone to facilitate communication between the client and the lawyer if the lawyer cannot sign, without charging the client the cost of hiring a sign interpreter unless there were alternative, effective means of communication.⁴

The ADA example is an especially apt one to explore, even though, for reasons I will detail, there is no realistic chance that the Supreme Court would interfere with the federal government's substantive goal of increasing inclusiveness for those with disabilities either by forbidding regulations of public accommodation owners that require greater inclusiveness or by ordering that owners be compensated for the costs of increasing inclusion. First, though, it is a useful example even in regard to the takings discussion. Conceptually, it is surely the case that insofar as the ADA demands that private actors provide beneficial, non-market-rational treatment to certain customers (or workers),⁵ it could be said to function as a broad-gauged redistributive social program, designed to funnel social resources

3. Assuming that there are positive costs for those who must retrofit that would not be present if the owner had anticipated, before building, the needs of those with impaired mobility, one still might argue that these costs were engendered by the prior failure to account for the interests of those with impaired mobility. In this sense, some would argue that owners bear positive costs only when they must remedy their own prior negligence or bigotry.

4. See, e.g., *Nat'l. Disability L. Repr.* 4 (1993): 159; *Nat'l. Disability L. Repr.* 5 (1993): 142 (DOJ informs physicians that they must insure that there is effective communication with the patient, though there is no single proscribed means of communication: "A physician may not impose a surcharge on any particular individual with a disability to cover the cost of measures, such as providing auxiliary aids, that are required by the ADA."); *Mayberry v. Von Valtier*, 843 F. Supp. 1160 (E.D. Mich. 1994) (defendant cannot be granted summary judgment in suit where she protests obligation to provide medical services to plaintiff though she loses money when she does so, given the need to pay \$28.00 for an interpreter when her net receipts for the patient visit are only \$13.94).

5. The distinction between traditional antidiscrimination norms, which demand no more than impersonal market-rational treatment of customers and workers, and the more politically progressive views of the antidiscrimination norm embodied in the ADA's requirement

to a class of deserving beneficiaries. Such redistribution, though, should arguably be funded not by the narrow subset of public accommodation owners (or employers) who happen to deal directly with the beneficiary class but by the taxpaying public generally. Second, in terms of the prudential concerns, the ADA's inclusiveness mandates raise all three of the basic conceptual issues one must confront in evaluating the propriety of the regulatory tax. To what extent is an implicit tax on public accommodation owners a good one? To what extent is the implicit spending program enacted by the statute in which private parties bear the costs of providing accommodation services superior to alternative state-based spending programs designed to increase the ability of those with disabilities to participate in the marketplace? Finally, to what degree is the political process distorted by having a subset of private parties rather than the state bear the costs of providing accommodation services?

There seem to me to be two interpretations of the Takings Clause⁶ that would demand that the Court invalidate a considerably broader range of uncompensated regulations than it now does. The second of these interpretations will be the subject of chapter 3. The first of these interpretations is a libertarian one. In such a theory, any individual or group of individuals, no matter how large, must be immunized from any losses, whether a result of regulation or explicit taxation, if the regulatory or tax program diminishes the income the individual or individuals would have privately appropriated and controlled in a world in which the state did no more than protect some real (or imagined) common law (or natural) property, tort, and contract rights, and tax the individuals to provide a small set of legitimate public goods (police protection, contract enforcement).⁷

that sellers and employers make reasonable, positive cost accommodations to customers and workers with disabilities, requiring non-market-rational treatment when market-rational treatment is deemed unduly exclusionary, is the main theme in Kelman and Lester, *Jumping the Queue*, 199–213. Impersonal market-rational sellers treat customers as nothing more or less than sources of revenue, net of the costs of service, and care nothing about personal attributes, including ascriptive status; impersonal market-rational employers treats workers as nothing but embodied net marginal products.

6. The Fifth Amendment reads, in relevant part, “nor shall private property be taken for public use, without just compensation.” The Fifth Amendment was first applied to the states by virtue of the Fourteenth Amendment in *Chicago, B. and Q. R. Co. v. Chicago*, 166 U.S. 226 (1897).

7. It is beside the point for now that the gains from the traditional “night watchman’s state” functions are hardly evenly distributed among citizens: police must be deployed in particular ways, and the methods will redound more to the benefit of some potential victims than others; state subsidies for contract-enforcing courts help actual and potential disputants more than others; those more vulnerable to “force or fraud” are aided more by a state vigilant in preventing them.

I do not address libertarianism directly in this book, however. I largely ignore libertarian theories of the Takings Clause for three reasons, the last of which is most significant: First, I strongly suspect there is no realistic chance that today's Court would be tempted to adopt a libertarian outlook. It is not realistic to believe that the Court might reject redistributive taxation or cut all taxes that fund programs that do not provide traditional public goods. Nor will the Court forbid states from abating undesirable conduct that the common law of nuisance would have permitted.

Second, I have addressed what I take to be the moral and intellectual emptiness of libertarianism on many occasions in the past and see little reason to repeat or even mildly refine arguments that I have already made.⁸ To the degree that some quasi-libertarians derive libertarian con-

8. See, e.g., Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987); Mark Kelman, "A Critique of Conservative Legal Thought," in *The Politics of Law*, ed. D. Kairys, 2d ed. (New York: Pantheon Books, 1990), 436; Mark Kelman, "Taking *Takings* Seriously: An Essay for Centrists," *California L. Rev.* 74 (1986): 1829; Mark Kelman, "The Necessary Myth of Objective Causation Judgments in Liberal Political Theory," *Chicago-Kent L. Rev.* 63 (1987): 579. Essentially, the main arguments are as follows: (a) Libertarians inadequately acknowledge the deepest legal realist insight, ultimately refined and revised "economistically" by Coase, that entitlements are invariably set in situations in which parties make competing claims to the same resource and that the collective choice to favor one claimant over another must be grounded in consequentialist reasoning about the impact of favoring one class of claimants over another. Thus, it is inevitable that rights to exclude interfere with rights to access, that protecting monopolistic control over intellectual property interferes with freer use, and that expanding use rights for property owners interferes with neighbors' immunity from nuisancelike damages. Decisions to favor one or the other competing claimants follow no natural law order but involve the resolution of ordinary political policy disputes. (b) Libertarians inadequately acknowledge the impossibility of defining coercive behavior without reference to a predefined entitlement framework, believing wrongly that one can define a just natural-rights entitlement scheme as one in which people are free to do anything but coerce others, failing to recognize that one cannot define when one is acting coercively unless an entitlement scheme is already in place. Thus, it is transparently the case that an agreement to pay money to avoid being drowned is a product of illegitimate duress, but one cannot tell whether a contract to pay to have one's life saved is a product of duress without resolving the prior question of whether the lifesaver has a preexisting duty to save. (c) Libertarians are ill-advised to reason about the proper scope of the state by imagining that the state's conduct is permissible only if it enacts programs that simply collectivize the performance of duties individuals have in their dyadic relationships with one another. For example, the fact that one may believe that there are reasonable arguments why an individual may owe no duty of charitable beneficence to other discrete individuals in need (e.g., because such duties are hard to define in rulelike form or because they are not fully realizable in the sense that no individual could meet demands to alleviate all arguably similarly situated need) explains nothing about whether it is legitimate for the state to establish mandatory beneficent tax-and-spend programs to aid the needy: the duties the state imposes on individuals to pay redistributive taxes can, for example, be framed in quite rulelike form,

clusions less from a belief that there is some defined set of natural rights than a belief that any state that does not act as if there were such a set of defined rights will be subject to a nightmare of unproductive rent seeking by organized constituencies seeking to enrich themselves through politics rather than production, I have addressed some of these claims as well.⁹

Finally, and most important, libertarianism is as hostile, at the theoretical level, to broad-based taxes coupled with spending programs as it is to regulation and hence does not really attempt to address the precise problem I am dealing with in this book, the effort to force governmental entities to choose to tax and spend rather than to regulate. Richard Epstein, the most prominent modern proponent of a libertarian view of the Takings Clause, is, as a pragmatic matter, more tolerant of broad-based progressive tax-and-transfer programs than any other forms of government activity beyond the minimal state.¹⁰ But he still believes that redistributive welfare transfers, even if broadly funded, are illegitimate as a matter of principle and should be invalidated by the Court except for the reliance interests their beneficiaries have built up over the past half century.¹¹

Instead, I will, in chapter 3, describe what I believe to be the most plausible constitutional argument for a theory of judicial review of regulations that would be more activist than current jurisprudence—i.e., a theory that would lead the Court to demand compensation be paid to those whose income was adversely affected by a regulatory program in many more cases than I believe today's Court would.¹² Essentially, the activist argument that I will detail has three broad parts.

and both the individual's duty to pay such taxes and the collectivity's capacity to fully meet need are fully realizable.

9. See Mark Kelman, "On Democracy-Bashing: A Skeptical Look at the Theoretical and 'Empirical' Practice of the Public Choice Movement," *Virginia L. Rev.* 74 (1988): 199, 236–68 (arguing that the empirical evidence that a variety of seemingly public-interested programs are in fact ineffectual in meeting legitimate, public-regarding ends but are effective only to meet the ends of powerful, organized constituencies is paltry and persuasive only to those strongly ideologically predisposed to the conclusion).

10. See, e.g., Richard Epstein, "A Last Word on Eminent Domain," *U. of Miami L. Rev.* 41 (1986): 253, 272–75.

11. See Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Cambridge: Harvard University Press, 1985), 314–27.

12. The case I construct is inspired by my reading of Justice Scalia's dissenting opinion in *Pennell v. City of San Jose*, 485 U.S. 1, 15 (1988) (Scalia, J., concurring in part and dissenting in part), and his majority opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), as well as by some of the language in Justice Rehnquist's majority opinion in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). When I describe this as the "most persuasive" argument

First, proponents of this view, unlike libertarians, feel that the government is permitted great latitude in enacting broad-based traditional taxes (e.g., on income, consumption generally, consumption of particular commodities, property) and in spending these tax proceeds. Thus, on the taxation side, there is no natural, constitutionalized right to hold on to one's market wages or investment returns or to pay market-level commodity prices rather than prices that include explicit or implicit excise taxes. On the spending side, there are no significant limits on either the implicit or explicit spending power.¹³

Second, again distinct from libertarians, proponents of this view argue that the Court should be extremely deferential to regulation, despite its negative taxlike effects on the regulated party, as long as a challenged regulation at least arguably serves to rectify a market failure. A governmental entity's claim that it is correcting market failure should be heard extremely sympathetically. This belief holds true if the government seeks to stop the regulated actor from (helping to) generate a social cost or seeks to allocate a social cost to one of two responsible parties. Even if the regulated party is not causing harm in some moralistic or tortlike sense,¹⁴ the relevant point is that the regulated party and the beneficiary of the regulation interact in such a way that social costs are generated by their interaction: that is to say, the hypothetical sum of the value of their two ventures in isolation from one another is higher than the sum of their values given their interaction. The state entity's claim should also be heard sympathetically if it claims its regulation prevents sellers from exploiting buyers as a

I can construct, what I mean to say is both (a) that, as a predictive matter, the Court is most likely to adopt this argument if it adopts any substantially more interventionist approach, and (b) I believe this argument is most worthy of serious normative consideration, in the sense that it is (at least minimally) formally realizable, consistent with past case law, and grounded in the sort of genuine substantive concern with fairness and political process that should animate a constitutional theory of the Takings Clause. It is, nonetheless, ultimately quite unpersuasive in my view.

13. Thus, the Court is not expected either to put teeth into the currently hyperdeferential public use/public purpose limits on the exercise of the eminent domain power or to subject all spending programs to an invigorated public use limitation.

14. The relevant line in determining the legitimacy of the regulation is certainly not the traditional malfeasance-nonfeasance line, which Scalia explicitly disclaims in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1024–26 (1992). Even inaction will be deemed legitimately regulable as long as mandating changes in the regulated party's conduct would have a greater impact on third parties than would mandated shifts in the conduct of other citizens not forced to bear the cost of regulation.

result of consumer misinformation, some variety of monopoly power, or duress (once more, all quite broadly understood).¹⁵

What makes this theory less deferential than current takings jurisprudence to the government's decision to proceed through regulation? The third, and critical, point is that the Court will demand compensation for owners whose property declines in value as a result of any regulation that benefits others at the expense of the regulated party rather than avoids what a deferential court might think of as some form of harm growing out of the atypical, interactive relationship between the regulated party and the parties aided by the regulation. The Court may well be extremely deferential in deciding that regulated parties would, in the absence of regulation, worsen the position of some other party with whom they interact or exploit the regulation's beneficiaries under some theory or other of illegitimate contracting, but if the Court decides that there is nothing resembling this sort of quasi-tort or an (arguably) unjust contract, the regulation must be supplanted by a tax-and-spend program.

Current Practice: An Overview

Any interpretation of the Court's current takings jurisprudence will inevitably be both idiosyncratic and incomplete. Though I purport to do

15. There is one exception to this principle, carried over from current Supreme Court practice. Where the regulation renders the owner's property fundamentally valueless, the state will owe the owner compensation even though it might colorably claim that the regulation reduces or allocates a social cost, unless the regulation abates something that would be adjudged a nuisance under either traditional nuisance law in the relevant jurisdiction or some modest reinterpretation of historical nuisance law consistent with common law incrementalism. This is my view of the holding in *Lucas*. But in other regulation cases, the court will not require that the legislature track either the common law or libertarian interpretations of it. The legislature can, for example, protect underinformed consumers who have not been victims of fraud, conventionally understood.

The Court could theoretically, even if following this generally deferential theory, be somewhat stricter in scrutinizing whether beneficiaries of the regulation are adequately publicly dispersed than it would be in scrutinizing whether beneficiaries of an explicit spending program are adequately publicly dispersed, though it is not clear that the complaining property owners care a great deal about the spending side of the equation or that the theory really does demand stricter review of implicit spending than the remarkably modest scrutiny usually seen for explicit spending. The key case embodying the viewpoint that the courts ought to scrutinize the implicit spending in regulatory programs far more carefully than they would scrutinize a legislature's explicit expenditures is Judge Kozinski's opinion in *Hall v. City of Santa Barbara*, 833 F. 2d 1270 (9th Cir. 1987), cert. denied 485 U.S. 940 (1988), a case whose reasoning the Supreme Court failed to adopt in *Yee v. City of Escondido*, 503 U.S. 519 (1992).

little more than give as straightforward and impartial a description of current practice in this section as I can, I am aware that all the relevant texts can be read in many ways and that I read them in very few. I am also aware that some might view it as necessary, or at least most profitable, to describe current practice in terms of the broad animating principles from which particular results derive, believing, quite reasonably, that it is ordinarily difficult to understand legal rules without regard to the purposes that motivate them. I do not think, though, that current takings doctrine really meets any articulable goal or even a relatively small number of competing or skew goals.¹⁶ Nonetheless, it is not so chaotic that one cannot do a reasonable job predicting results. Instead, the Court seems to identify certain features of litigated cases that are treated as salient for decision purposes and then declares how it will deal with all those cases possessing these features. While cases characterized as having a particular decisive feature could be characterized instead as having some different salient feature, dictating a different outcome, there appears to me to be enough consensus among the justices in characterizing the features of the cases to permit us to anticipate how a case will be classified.

16. A number of scholars do believe that takings jurisprudence can be rationalized. Still others believe either that it represents an uneasy compromise between alternative visions or that it could be rationalized if principles distinct from those in use were adopted. I do not intend in this piece to criticize or endorse any of these more global theories of the Takings Clause. Many writers believe that practice can be explained on the basis of a single principle. See, e.g., Frank Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," *Harvard L. Rev.* 80 (1967): 1165 (existing practice can indeed be explained on utilitarian grounds, takings do and should occur when the benefits of the taking outweigh the costs, and compensation is and should be paid in those circumstances when the demoralization costs of not compensating an owner outweigh the administrative costs of compensating); Andrea Peterson, "The Takings Clause: In Search of Underlying Principles, Part II—Takings as Intentional Deprivations of Property without Moral Justification," *California L. Rev.* 78 (1990): 55 (courts do and should find a compensable taking when the government forces claimants to give up their property, whether through regulation, physical action, or formal condemnation, unless the government entity is seeking to prevent or punish conduct—or failure to act—that the community would consider wrongful). Many other writers believe that existing practice draws on a small number of competing currents. See, e.g., Bruce Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977) (courts oscillate between a lay, physicalist conception of property and a "scientific policymaker view" that focuses more on the value of ownership rights in deciding when property has been taken). For an example of a work suggesting the desirability of developing a takings law distinct from the present one and embodying a single principle, see Epstein, *Takings* (any time a citizen's distributive share is lower as a result of identifiable government conduct than it would have been had the government done no more than enforce something akin to Lockean/common law entitlements, a per se taking has occurred, and explicit compensation must be given unless the citizen has already received implicit in-kind compensation).

Takings cases currently fall into one of four basic patterns—that is, a case will be deemed to have one of four salient features. First, the court may find that the governmental entity has seized a traditional property interest (e.g., a fee, an easement, the right to devise a beneficial interest in land) by taking the title itself for its own use, permanently physically occupying the property or some portion thereof, granting a traditional interest to a third party or parties, or simply destroying the interest.¹⁷ These title seizures are *per se* compensable takings. If the government’s action is so characterized, the government will owe the owner compensation. The Court will not engage in any balancing tests in which it looks at whether the owner lost too much under the facts and circumstances of the particular case before deciding that the owner must be paid.

Second, an owner may claim that the governmental entity has applied regulations that so limit the owner’s ordinary use rights that the property is rendered essentially valueless. To decide this sort of case, the Court must first decide that the owner has not illegitimately disaggregated the property, either physically or conceptually, into unduly small parcels or unduly small legal rights whose value is virtually eliminated by the challenged regulation. If, though, the state has rendered all of some properly aggregated property valueless, the Court will typically demand that the state compensate the owner for this complete destruction of value. The state could avoid this ordinary obligation to compensate only by showing that the regulation that rendered the property virtually valueless abates what the regulating jurisdiction’s courts would historically have called a nuisance or might have called a nuisance under emerging nuisance law.

Third, an owner may claim that a regulation imposes too great a cost. To sustain this claim, the owner must first show that the property’s value declines by some (imprecisely defined) substantial amount as a result of the regulatory scheme. (The question of whether property declines substantially in value depends in part on whether owners derive reciprocal benefits from the regulation beyond those that ordinary citizens would derive; if owners derive such benefits, the net decline in the property’s value, which is the relevant decline that results from the presence of the regulatory scheme, will be lower than the difference in the value of the property alone, unregulated, and its value subject to the regulation in

17. It is somewhat more conventional, and not at all objectionable from my viewpoint, to say that this first class of cases consists of those in which the Court decides *either* that title was seized or that possession was taken through a permanent physical invasion. I treat the sorts of permanent physical invasions that the Court declares to be *per se* takings as a method of seizing title.

question. Thus, for example, a single property owner might benefit a great deal if her property were freed from zoning restrictions, but the benefit would be wiped out if all similarly situated properties were similarly exempted, and she bore the negative externalities of imprudent, unregulated land use. In such a case, the property does not decline in value as a result of the regulation.)¹⁸ If the regulation interferes with legitimate investment-backed expectations, the owner may well be entitled to compensation, depending on the purposes the government's regulatory scheme serves.

Fourth, developers may claim that they are subject to an illicit exaction.¹⁹ Read narrowly, as I will read them in this chapter on current practice,²⁰ the Court's two recent exaction cases (*Nollan* and *Dolan*) simply give lower courts guidance about how to sort out whether the relevant state entity has engaged in a per se taking of a traditional property interest or whether its conduct should be reviewed, more deferentially, as a regulation even though the developer has had to surrender title to some portion of its property. The problem (in the Court's view) posed by the exactions cases the Court has decided is as follows: Normally, if a governmental entity bans development outright, the ban would be reviewed under the third standard just described—that is, the owner would be entitled to compensation only if the development ban caused some unduly substantial

18. The challenged regulatory scheme most typically would limit common law use rights—for example, prohibitions on altering historical-landmark-status buildings or laws increasing duties to prevent lateral subsidence. But such a plan might also limit exclusion rights (e.g., a scheme demanding that political speakers have access to shopping center property or that public accommodations serve people in a nondiscriminatory fashion) or disposition rights (e.g., a scheme forbidding eviction of tenants without just cause or prohibiting a mobile-home-park landlord from rejecting a tenant's purchaser as a new tenant). Price controls would interfere with something that could be described as either use or disposition rights.

19. In typical exaction cases, developers are denied building permits by the relevant local governments unless some land, good, service, or money is provided. In some sense, though, most regulatory cases could be described as exaction cases: for example, the ADA case on which I often focus could be seen as an exaction case, particularly if the ADA is imagined as applying only prospectively. In exchange for permission to open a place of public accommodations, the developer must provide, for example, ramps that make the building more accessible to people with mobility impairments. (At the same time, of course, the ADA could be seen to establish a simple building code, regulating the features of acceptable buildings.) Similarly, shopping-center owners might say that they have to dedicate a portion of their center to use by speakers in order to open. However, the Court characterizes cases as exaction cases only when developers lose title control over some portion of what would otherwise be their property in exchange for permission to build.

20. This first reading is basically most consistent with, though not identical to, Frank Michelman's view of the *Nollan* case. See Michelman, "Takings, 1987," *Columbia L. Rev.* 88 (1988): 1600, 1608–14.

loss, interfering with legitimate investment-backed expectations. Conversely, if the governmental entity took a traditional property interest outright, either to keep it or to give it to others, the government would have to compensate the owners. Thus, in *Nollan*, for example, the Court assumes, predictably given current practice, that seizing an easement for public beach access would be reviewed as a per se taking.²¹ Thus, had the California Coastal Commission simply demanded that the Nollans permit lateral access to their beach, it could have done so only by purchasing an easement through the exercise of eminent domain. The question posed by exaction cases is what to do if the owner voluntarily gives that property interest to the government but does so to receive the government's agreement not to ban development outright. If the Nollans must permit lateral access to be allowed to build along the coast, or if Dolan must dedicate a portion of her property to build a bike path and to act as a greenbelt to help avert creek flooding to be allowed to expand her hardware store and pave over the parking lot, has the state taken lateral access, or a bike path, or a nondevelopment servitude? *Nollan* and *Dolan* suggest that the exaction will be reviewed under the more lenient standards applied to development bans (a form of regulation) if and only if the condition meets the same regulatory end that the ban on building would have met. If the state has not solved the problem that development causes by seizing the easement, it has not really engaged in (deferentially reviewed) regulation at all but rather has used the occasion of the owner's seeking a development permit to seize an easement that the state obviously wanted in any case. Seizing the easement will be reviewed (deferentially) as regulation if and only if doing so is simply a more efficient means of achieving the end that would have been met through deferentially reviewed regulation. In the exaction cases that the Court has decided to date, the property seizure arguably substitutes for a ban on development; conceptually, though, it appears that the relevant question is whether the seizure substitutes for some other deferentially reviewed regulation.²²

21. I question this assumption in the text accompanying chap. 2, n. 46 *infra*.

22. The reason the ADA and shopping-center-access cases would not be classified as exaction cases, given this narrow reading, is that the state has not, in the Court's view, seized a traditional property interest in either situation. Thus, it is not necessary even to get to the question of whether the state was entitled to do so without being subject to strict review because doing so met the same regulatory end that could have been met through banning or otherwise regulating development. Exaction cases, in this view, involve only cases in which the state clearly seizes property and then attempts to defend the uncompensated seizure as a substitute for noncompensable regulation.

Governmental Seizures of Traditional Property Rights

In the garden-variety condemnation case, the governmental entity simply purchases a fee interest in the owner's property, transferring title from the original owner to itself. The owner may challenge, generally without success, the entity's right to condemn the property on the grounds that the entity does not plan to make a public use of the seized property²³ or, more often, the owner might challenge the adequacy of the proffered compensation,²⁴ but the government is unlikely to contest the requirement that it pay some compensation, what it views as the fair market value of the property seized. The government would presumably simply purchase property in a voluntary transaction, without resorting to eminent domain, but for the problems of overcoming holdout problems, particularly in situations in which the state must assemble multiple parcels for large-scale public projects.²⁵

23. The Supreme Court is extremely deferential to governmental entities' judgment that they have exercised the eminent domain power for a public use, essentially holding that as long as the legislature has some rational public purpose in mind in acquiring and transferring property, the condemnation will be permitted. See, e.g., *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) (Hawaii's scheme to redistribute land from a concentrated ownership class to a broader constituency does not constitute an illicit taking for the benefit of the private parties who receive the land); *Berman v. Parker*, 348 U.S. 26 (1964) (the fact that the District of Columbia Redevelopment Act used eminent domain power to purchase slum property for lease or sale to private parties did not mean that the seizure lacked public purpose). Some state courts have been less deferential under parallel state constitutional provisions. See, e.g., *In re City of Seattle*, 96 Wn. 2d 616, 638 P. 2d 549 (1981) (city could not condemn property to be transferred to commercial retailers even though a stated purpose of the condemnation was to forestall inner-city decay and the condemned land was to be developed according to a city-approved plan containing public infrastructure, including a park and an art museum); *Estate of Waggoner v. Gelhorn*, 378 S.W. 2d 47 (Tex. 1964) (statute permitting landlocked owner ingress and egress easement over land of neighbor is unconstitutional not only because neighbor received no compensation but because "it purports to authorize the taking of private property for a private purpose").

24. For a discussion of issues involving the adequacy of compensation, see Julius L. Sackman, *Nichols on Eminent Domain*, 3d ed. (Albany: Bender, 1996), vol. 3, §8.06.

25. See Richard Posner, *Economic Analysis of Law*, 4th ed. (Boston: Little Brown, 1992), 56–57. Sellers of even single parcels might hold out as well if they owned land that the state has somehow precommitted to purchasing. It is difficult to say whether governmental entities bear higher costs than do private parties in altering plans to which governments become institutionally/bureaucratically committed and thus are vulnerable to sellers seeking to capture the buyer's site-specific surplus inherent in having precommitted to a particular site. Compare, e.g., Thomas Merrill, "The Economics of Public Use," *Cornell L. Rev.* 72 (1986): 61, 81–82 (assembly through private voluntary transactions, using buying agents, option agreements, and straw transactions, would typically be less plausible for governments because they usually seek to acquire larger, more site-dependent parcels than do private developers and because governments would find it difficult to maintain secrecy and control opportunities for corruption), with Patricia Munch, "An Economic Analysis of Eminent Domain," *J. of Pol.*

Takings-law controversies all concern transactions that do not so clearly fall into the “forced purchase of a fee” model. At times, the state or local government may enact what it views as a regulation of use, disposition, or exclusion rights, asserting that because it has left title in the hands of the owner, the government has not taken title but has simply changed (or regulated) the terms on which what remains the owner’s property may be enjoyed. Owners, however, will assert that the regulation amounts to the seizure of a traditional property interest, for which they are entitled to compensation.

The Court appears to evaluate the owners’ position based on what I would describe as narrow, law-school-graduates’ conventionalism. (The characterization is thus not based, in my view, on widely shared or even understood social conventions or on a conceptual, logical, or policy-based argument. The fact that the Court’s position is not, in my mind, socially conventional but intraprofessionally conventional makes me skeptical of Ackerman’s view that title seizure cases reflect an “ordinary observer’s” view of what property is, but I have rather little faith and no intellectual or moral investment in this skepticism.)²⁶ If the state has seized²⁷ the sort of entitlement that law students study and name in first year property classes, the state will owe compensation.²⁸ If, though, the state uses (or allows oth-

Econ. 84 (1976): 473 (eminent domain has not been demonstrated to be the most effective means of coping with parcel-assemblage issues).

26. See Ackerman, *Private Property*. To the degree that Michelman believes the title seizure cases make sense because citizens generally are more prone to be demoralized when simple ownership is compromised, I am obviously equally skeptical that the case law is comprehensible since the cases protect interests that are by no means the most conventional thing-ownership, exclusion-style interests.

27. Seizure occurs when the owner is forced to transfer title to the state. It can also occur if the state permanently occupies the property for its own use or terminates the owner’s title. The government is also deemed to seize property if it transfers title or a license to occupancy for the permanent use of some designated third party or parties.

28. The borderline cases involve private land-use-planning devices: easements appear to the Court relatively, though incompletely, property-like. That easements represent the borderline case was clear in Justice Marshall’s discussion in *Loretto*, where he writes: “Although the easement of passage, not being a permanent occupation of land, was not considered a taking *per se*, *Kaiser Aetna* reemphasizes that a physical invasion is a government intrusion of an unusually serious character” (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437 [1982]). Historically, the benefits of covenants and equitable servitudes appeared to courts to be merely valued entitlements deriving from contract rather than titlelike property interests and owners did not receive compensation when their value was impaired or destroyed by government action. See e.g., *Freisen v. Glendale*, 209 Cal. 524, 288 P. 1080 (1930), *Moses v. Hazen*, 69 F. 2d 842 (App. D.C. 1934). The trend in modern cases, however, is to compensate when the state conduct destroys the benefit of a covenant or servitude. See, e.g., *Southern California Edison Company v. Bourgerie*, 9 Cal. 3d 169, 107 Cal. Rptr. 76, 507 P. 2d 964 (1973); *Horst v. Housing Authority*, 166 N.W. 2d 119 (Neb. 1969). For a good summary of the changes in the case law, see Sackman, *Nichols on Eminent Domain*, vol. 2, §5.07(4).

ers to use or terminates) some other entitlement, no matter how valuable, that is not traditionally deemed a property right, in a conventional property course, rather than a traditional or contract-based interest,²⁹ the state will simply be deemed to regulate. (Thus, owners may well be as interested in the right to sell property at market prices as they are in the right to devise it or to exclude some undesired class of patrons while allowing others in, but the Court does not find that owners stripped of the traditional entitlement to charge willing buyers what they will pay or traditional exclusion rights have a tenable takings claim.)³⁰

I believe that recognizing intraprofessional conventional ideas of core property interests should help predict the distinctions drawn in current takings jurisprudence. Nonetheless, the idea that this or any other account of the cases is complete would be misleading: the results of the cases are surely radically underdetermined given any theory. It would surely be eminently reasonable for a legal conventionalist to describe each of the cases in which the Court found that a traditional, conventional property interest had been seized as enacting mere regulations and, conversely, to describe a substantial number of regulations that are immunized from per se takings treatment as seizures of traditional, legally conventional property rights.

Take, for example, *Loretto v. Teleprompter Manhattan CATV Corp.*,³¹ which concerned a New York City ordinance requiring that apartment owners allow installation of cable television cables and boxes on their buildings to benefit tenants desiring cable access. In his majority

29. Thus, in *Andrus v. Allard*, 444 U.S. 51 (1979), the Court upholds provisions of the Eagle Protection Act and the Migratory Bird Treaty Act that precluded the sale of eagle feathers, including those acquired before the act. Obviously, the ordinary entitlement to be able to sell property is highly valued, but the right to sell is not studied in conventional property courses in the same way as the devise and bequest of traditional interests (which were limited by the statute invalidated in *Hodel v. Irving*). Of course, Justice Scalia, joined by Chief Justice Rehnquist and Justice Powell, believed the distinction between the lost entitlements in *Hodel* and *Andrus* was unduly slender to sustain and therefore argued that *Andrus* should be limited to its facts (*Hodel v. Irving*, 481 U.S., 704, 719 (1986)), but the more law-school-conventionalist view held sway.

30. See, e.g., *FCC v. Florida Power Corp.* 480 U.S. 245 (1987) (upholding price limits on utility companies' charges for cable TV operators); *Block v. Hirsh*, 256 U.S. 135 (1921) (upholding a rent-control statute). Similarly, neither owners who wish to discriminate against African American patrons nor those who want to exclude political speakers from a commercial shopping center have been able to make a tenable takings claim, since it appears awkward, conventionally, to describe the state in these cases as having seized an easement for use of the property by undesired patrons rather than having limited the ways in which the owner could exercise the access license already granted to the undifferentiated mass of public licensees. In physicalist property terms, the regulation did not mandate any increase or significant change in the physical use of the land. See *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 261 (1964); *Prune Yard Shopping Center v. Robins*, 447 U.S. 74 (1980).

31. 458 U.S. 419 (1982).

opinion, Justice Marshall found that the ordinance seized the owner's property, entirely on the ground that what the Court presumed to be permanent physical occupancy of a portion of the landlord's building by the authorized third-party cable company amounted to the loss of a fee interest in a very small space via transfer to the cable company.³²

The Court distinguished the regulations at issue in the case, rather unpersuasively, from a seemingly parallel set of regulations that required landlords to provide certain physical goods on their premises (e.g., mailboxes, fire extinguishers, smoke detectors) on the ostensible ground that the owners required to provide mailboxes and the like maintain title to the property containing the mailbox or smoke detector.³³ But it is hardly clear that an owner's property is fully physically occupied by the relevant third party (cable company) in this case since the company does not gain title to the portions of the building on which the objects sit and would have to remove the cable boxes if, say, the landlord no longer served residential tenants in the building. Conversely, it is not clear that the owner's property is not occupied when a third party's wishes and agenda absolutely dictate how landlords can use their nominal space, and landlords cannot remove their mailboxes, smoke alarms, or fire extinguishers from the space regardless of the landlords' desires. The distinction between the regulations that are permitted without compensation and those that require payment, then, is hardly an obvious one to those attempting to track conventional understandings of property rights in making constitutional judgments.³⁴

Not only does the mandate that was invalidated in *Loretto* closely resemble regulations requiring that landlords provide certain services and physical amenities to their tenants, but it could also readily be interpreted as a price-control statute, which the Court has invariably upheld against Takings Clause challenges.³⁵ One would expect that in a fully competitive

32. *Ibid.*, 435 n.12 ("Property rights in a physical thing have been described as the rights to possess, use and dispose of it. . . . To the extent that the government permanently occupied physical property, it effectively destroys *each* of these rights.").

33. *Ibid.*, 440 (Such regulations "do not require the landlord to suffer the physical occupation of a portion of his building by a third party.").

34. To track the Court's language in *Loretto* condemning only the regulatory program mandating cable access rather than those mandating mail or utilities access, one would note that the landlord has lost all of the same possession, use, and disposition rights to the space he must devote to utility hookups or mailboxes as he has as to the cable connection.

35. See, e.g., *Block v. Hirsh* (upholding a regulation that forbids landlords from evicting tenants, even when their leases terminate, so long as the tenants are willing to pay the sub-market prices set by a rent-control commission); *FCC v. Florida Power Corp.* (upholding against a takings challenge a decision by the federal government that substantially reduced the rent a utility charged to a cable TV operator).

market, the price that tenants would have to pay to induce their landlords to permit them to hook up to cable would approximate zero, since competitive prices should drop to the cost of provision of a service. The landlords bear no costs from permitting unobtrusive cable hookups, particularly since the statute required that the cable company compensate the landlord if installation caused any real physical damage to the building.³⁶ The fact that the landlords were able, in an unregulated market, to charge a positive price for the service clearly reflects market failure that is inevitably inherent in the market for housing services, regardless of how many providers of such services are available. All particular landlords have a certain level of quasi-monopoly power over current tenants, given that moving is costly (both directly, with the cost of moving vans, shopping for a new unit, and so forth, and indirectly, as in breaking neighborhood ties, personal attachment to a unit, and so on). Landlords may use high, non-cost-related charges for services that tenants value highly (like cable hookup) as a technique to capture some of the tenant's site-specific surplus, particularly if there are either legal restrictions on raising rents directly or market-based restrictions (explicit or implicit contracts restricting renewal rent increases).

It is possible, too, that the tenants bore none of the costs of the cable hookup, that the cable company already charged a profit-maximizing monopoly price and the landlord simply negotiated with the company to capture some of the company's monopoly rents. Landlord charges to the company, though, might still be regulated for four reasons. First, they might interfere with the city's capacity to regulate cable charges. Second, while the prospect of earning economic rents in the media-access industry may provide desirable incentives to media-access developers, dissipation of these rents by those who hold the land over which the delivery mechanisms must travel serves no obvious social purpose. Third, if the building owners and cable companies fail to agree on how to divide the monopoly surplus, tenants will be deprived of a service for which they would willingly pay. It may be prudent to avoid giving property rights that are of value only to permit an owner to hold up another party for fear that strategic behavior will frustrate efficient transfers.³⁷ Finally, the cable companies,

36. In fact, it is likely that the installation of the cable hookups increased the value of the property as a residential building.

37. Think about the parallel case in which airlines have been granted what could be seen as regulation-grounded passage easements to fly over (and invade the traditional airspace above) parcels. If the ground-dwelling parcel owners maintained the right to exclude the planes, though overflight caused no actual damage, one would expect some to try to hold up

even if unregulated, might well charge a uniform fee that would preclude them from charging all tenants their full reservation prices, as landlords might: obviously, there are some efficiency advantages to increasing price discrimination, but to the degree that the city distributively favors the buyers here, barriers to price discrimination are desirable.

There are several other recent cases in which the Court has assumed, rather hastily, that a *per se* taking has occurred on the assumption that title has been seized. In each case, though, what is labeled a title seizure could readily be recharacterized. One is *Hodel v. Irving*,³⁸ in which the Court held that Congress must compensate owners of fractionated beneficial interests in land held by the federal government in trust for Native Americans when the government abrogates the traditional rights either to devise these beneficial tenancies in common or have them pass by descent. But the Court never even considers that the federal government could well have accomplished the same end—stopping all owners of fractionated beneficial shares from passing these interests along at death—simply by charging user fees equal to the costs of administering the distribution of income to fractionated beneficial owners.³⁹ The failure to see that Congress might have dealt with the problem of fractionation by refusing to continue to subsidize owners who rely on the federal government to provide free accounting services, with precisely the same impact on the effective right to retain, let alone transfer at death, fractionated beneficial interests, misses the conceptual point that the *Nollan* Court aptly recognized in the limited context of development exactions. The government can substitute a traditional taking for a regulatory option (and in this regard, charging user fees might be thought of as akin to regulation) without triggering *per se* taking treatment as long as doing so is simply a more effective way of meeting the same, permissible regulatory end.

At the same time, the Court frequently characterizes government conduct as merely regulatory when owners might well argue with great force that they have been deprived of a core traditional property right. The

the airlines once they had precommitted themselves to a particular flight path. Though the airline company would willingly pay more for overflight rights than the parcel owner's reservation price, some deals might not be struck because of strategic behavior.

38. 481 U.S. 704 (1987).

39. The Court refers to one of the fractionated tracts in its opinion. The annual income from the tract is eight thousand dollars; the largest interest holder receives \$82.85 annually. Two-thirds of the owners receive less than one dollar of income a year. Yet the administrative costs of handling the tract are estimated at \$17,560 annually, roughly forty dollars per owner (*Hodel*, 712–13).

Court's characterization of the property right the owners were asked to dedicate in *Nollan*—the statement that a physical taking occurs whenever unnamed individuals receive a permanent and continuous right to pass to and fro over the owner's property—seems to apply reasonably well⁴⁰ to what the Court deems a regulation rather than a per se taking in *Prune-Yard*. The fact that particular political speakers will leave the shopping center at some point would seem to be of little moment (particular ocean gazers leave the *Nollan*'s backyard too) since speakers, as a group, retain a permanent right to pass to and fro over the center's property and stay in particular places at the center, against the owner's wishes, as long as the center remains in operation.

Similarly, it strikes me that there are at least four plausible interpretations of the statute that the Court validated in *Keystone Bituminous Coal Association v. DeBenedictis*,⁴¹ which sought to prevent subsidence of adjacent property by forbidding coal companies from mining more than half the coal found beneath the ground they owned. The regulation might have been deemed a seizure of two distinct traditional estates held by the companies: first, the neighbors' right of lateral support, which the coal mining companies had previously purchased from adjacent surface owners, an estate that the companies in effect saw transferred back to the initial sellers by the statute; and, second, the subsurface mineral rights to that physical portion of the subsurface area that could not be mined given the regulation. The second possible interpretation is to characterize the action as the seizure of that portion of the coal that could not be mined. Third, it could also be characterized, as a bare majority of the Court did, as a regulation forbidding the noxious misuse of subsurface rights with no cognizable effect on Pennsylvania's support estate, which was invariably incident to either the surface holder's fee or the subsurface mineral rights' holder's. Fourth and finally, it might have been characterized differently than the Court or the parties did. It might have been viewed as a general technique to undo what the legislature characterized as (by and large) unconscionable contracts between subsurface miners and surface owners; rather than resolve, at great cost, questions about whether surface owners were adequately informed about the risks of subsidence or were compensated

40. The facts of the cases are, of course, distinguishable. First, there is a higher level of privacy intrusion in *Nollan* than in *Prune Yard*. Arguably, the regulation in *Prune Yard* affects only what invitees may do on property to which they already have access, while the *Nollan* regulation opens up the property to those who might otherwise be excluded.

41. 480 U.S. 470 (1987).

adequately for waiving support rights, the legislature simply undid contracts that it presumed were (nearly) invariably exploitative.⁴²

It is reasonably predictable, though, how many cases, including our ADA case, would be dealt with under this first test. Imagine grocery store owners arguing that they should receive compensation when forced, by Title III of the ADA, to widen the aisles of their establishments to permit wheelchairs to pass. Even if the concomitant loss of shelf space decreases the value of the property, the fact that the wheelchair users will use but not have full-blown title to the widened aisles will almost surely induce the Court to treat this case, in terms of the physical invasion/title seizure line of cases, as more like the mandatory mailbox than the cable hookup.⁴³ The ADA's demands that a store be physically altered will almost surely be deemed a building regulation, not a transfer of property to a third party.⁴⁴

42. Some might argue that if the state were to adopt this last view, the state would concede that it had violated not the Takings Clause but the constitutional prohibition on impairing contracts. See, e.g., Douglas Kmiec, "The Original Understanding of the Takings Clause Is Neither Weak nor Obtuse," *Columbia L. Rev.* 88 (1988): 1630, 1645–46. The view that the contract was unconscionable, though, can readily be understood as a declaration that it was void ab initio and gave rise to no vested contractual rights.

Similarly, the property owners in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) lost use and disposition rights in the airspace over Grand Central Terminal, which was just as much a physical part of their parcel as the portions of the building the Court thought were seized in *Loretto*. Conventional property norms hardly dictate the idea that the fee is invaded in *Loretto* because a third party authorized by the state physically occupies the fee but that the fee is not invaded in *Penn Central*, where the state itself takes over a portion of the fee and forbids that any use be made. This characterization would hold not just for *Penn Central* but for garden-variety zoning cases in which, for example, a municipality restricts the height of a building.

Similarly, *Miller v. Schoene*, 276 U.S. 272 (1928), is typically characterized as an early regulatory takings case that upholds the state entomologist's decision under the Cedar Rust Act that owners of certain ornamental red cedar trees had to cut down the trees to prevent the spread of rust disease to nearby apple orchards. The decision would still be upheld, I believe, if it were decided that the owner's relevant property was the land, not the cedar trees, because the decline in value of the land was probably not unduly substantial, especially given the corresponding regulatory gain; however, the title in the trees was certainly destroyed by an order to cut them down as much as landholders' titles in their land were destroyed by floods in the cases Marshall cites as authority in *Loretto* for the proposition that the state cannot seize title in property by destroying it. See *Loretto*, 427–28 citing, for example, *Pumpelly v. Green Bay Co.*, 13 Wall 166 (1872) *Sanguinetti v. United States*, 264 U.S. 146 (1924).

43. For a district court case making precisely this finding, see *Zahedi v. Pinnock*, 844 F. Supp. 574, 586–87 (S.D. Cal.1993).

44. It is also even clearer that public accommodation owners' desire to exclude the disabled as a result of either their own aversive prejudice or of their belief that other customers might be averse to people with disabilities will not raise a takings issue, even though it limits historic fuller-blown rights to exclude. See *Heart of Atlanta Motel*. While an owner may be permitted to exclude the public entirely, his interest in picking and choosing which members of the public to serve has not been treated as a basic incident of property.

Though I am fairly confident in this conclusion, it is hardly unexceptionable. Obviously, the aisle dedication can be distinguished from the transfer in *Loretto* itself, in which the third party (cable company) received full title to a very small portion of the owner's land, at least as long as the owner operated the building as an apartment block. But the harder claim for ADA proponents to counter would be that Title III demands the granting of an easement much like the bike path easement demanded in *Dolan*, an easement that the Court simply assumes constitutes a *Loretto*-style compensable taking.⁴⁵ Thus, regulated public accommodation owners will claim that just like *Dolan*, they retain general fee ownership of their property but must leave a portion of it undeveloped so that third parties (bikers in *Dolan*, the physically disabled in this case) can cross it.

Public accommodation owners will further argue that the most straightforward, ready-at-hand arguments on behalf of Title III—that it is no different than any structural regulation in a building code (e.g., a requirement to leave space open near fire exits) or use regulation (e.g., the *Prune Yard* requirement to allow orderly picketing by invitees or the *Heart of Atlanta* requirement that public accommodation owners not discriminate among invitees on the basis of race)—are inadequate. Pickets or African American patrons with whom the racist owner would otherwise refuse to deal add no physical intrusion nor do they require any change in the building's physical structure. And traditional building codes (e.g., those requiring space around fire exits) may be necessary to protect against traditional harm causing: in this sense, despite the ostensible separation of *Loretto* from the rest of the takings cases, it may be impossible to assess *Loretto* claims without some inquiry into distinct, nonphysicalist issues like whether the disputed regulation confers general benefits or precludes harms.

Still, I am quite sure of my prediction that owners would be granted no compensation for the costs of complying with Title III if the Supreme Court were to review the statute. The Dolans are not allowed to exclude bike riders generally; they are not just unable to exclude bike use by people who would be on their land anyway. On the other hand, the easement purportedly granted by Title III is enjoyed only by invitees, who gain no

45. Such a per se taking may nonetheless be noncompensable if it simply substitutes for an alternative permissible regulation. I addressed and will address in more detail how current takings jurisprudence would deal with such an exaction.

title or access rights beyond that of any other invitee.⁴⁶ Moreover, I strongly suspect a public accommodation owner's *Loretto* claim will fail in part because if it succeeded, the Court's jurisprudence in this area would unravel even further than it has already: the requirement that the owner make certain architectural modifications (e.g., building ramps) would be immune from review (since no obvious property right like an easement is granted to third parties), while a precisely functionally parallel requirement, typically part of the same judicial or administrative order, that barriers be removed to empty out space for mobility-impaired customers to navigate might lead to a claim for compensation.

Government Destroys Virtually All Property Value

Assume now that the government clearly leaves formal title in the hands of the owner. Moreover, the government does not permanently physically occupy or authorize the occupation of the property or destroy it. The government will still presumptively be deemed to have taken the property if the property is subject to regulations that deny an owner "all economically beneficial or productive viable use of [his] land."⁴⁷ The state may rebut the presumption that it owes the owner compensation only by showing that the regulation takes nothing the owner really owned because it simply precludes conduct that would not be allowed in any case, given the state's law of property and nuisance.⁴⁸

46. Moreover, I suspect (though I think it is by no means settled law) that if all people in Tigar, not just the Dolans, whose land abutted the Fasano Creek had to dedicate some land to a bike path (or if all coastal owners in California had to allow access from the road in the *Nollan* context), one would not say that the state had seized an easement. What animates Dolan's claim is that some creek-fronting owners are singled out to dedicate some portion of their land to a third party, while others are exempt from that requirement. The fact that all store owners must insure accessibility rather than some particular owner or small subset of owners being asked to redesign badly hurts the hypothetical owner's *Loretto/Dolan* claim.

47. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). See also *Agins v. Tiburon*, 447 U.S. 255, 260 (1980).

48. Thus, in *Lucas*, Justice Scalia states that new legislation or declarations that prohibit all economically beneficial use of land are invalid (in the absence of compensation) unless the limitations "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally" (505 U.S. 1029).

The test is ambiguous in application, both because of the problems of severance (could the owner subdivide property interests, whether spatially or conceptually, in such a fashion that there is no economically viable use of the subdivided property?)⁴⁹ and because of the problems of determining whether the sorts of regulations most likely to be reviewed in these contexts, environmental protection–based bans on development, proscribe behavior that an emerging law of nuisance might proscribe.⁵⁰ The test may be unappealing as well: whether a modern legislature’s determination that certain behavior is unacceptable ought to be weighed less highly than the judgment of the nineteenth-century judges who framed traditional nuisance-abatement law is questionable.⁵¹

49. This is the dominant theme in Justice Stevens’s dissent in *Lucas*. (“[D]evelopers and investors may market specialized estates to take advantage of the Court’s new rule. The smaller the estate, the more likely that regulatory change will effect a total taking. Thus, an investor may, for example, purchase the right to build a multifamily home on a specific lot, with the result that a zoning regulation that allows only single-family homes would render the investor’s property interest ‘valueless’” [ibid., 1065–66].) The concept of conceptual severance derives from Margaret Jane Radin, “The Liberal Conception of Property: Cross-Currents in the Jurisprudence of Takings,” *Columbia L. Rev.* 88 (1988): 1667, 1676.

In his opinion for the Court, *id.*, 1045, n. 7, Justice Scalia argues that the court should forbid some forms of conceptual severance (the division of property into novel use rights not historically recognized). He does not directly address either the issue of physical severance, which is not germane to the *Lucas* case itself, or issues of severance into property rights that were historically recognized (e.g., subsurface mineral extraction rights or support rights), which might be rendered substantially valueless, though the underlying fee was not, by the regulations that were subject to balancing tests in both *Pennsylvania Coal v. Mahon* (260 U.S. 393 [1922]) and *Keystone Bituminous Coal Association v. DeBenedictis* (480 U.S. 470 [1987]). The Court in *Keystone* upheld a Pennsylvania regulation that required coal-mining companies to leave 50 percent of the coal beneath the land supporting certain buildings in place, notwithstanding the facts that the company could not use a large physical portion of the subsurface and that all purchased support rights were rendered valueless since the company was now required by statute to do what it would have had to do but for the purchase of the support rights.

50. Justice Scalia solves this second problem pretty much by fiat, declaring that certain “extensions” of nuisance law to novel settings do not represent “objectively reasonable application of relevant precedents” (*Lucas v. South Carolina Coastal Council*, 1032, n. 18). I think he is right to say that one can predict what Justice Scalia would call a reasonable application of nuisance law, and if the decision is read to hold that the state can avoid the obligation to pay compensation only if it is abating what a conservative judge with a strong libertarian bent is likely to think is a nuisance, it is probably coherent. But state courts have extended nuisance law in fashions that would doubtless have seemed objectively unreasonable to Justice Scalia. For example, holdings that builders might create a nuisance when they block access to light needed to operate solar-powered batteries, as in *Prah v. Maretti*, 321 N.W. 2d 182 (Wis. 1987), would not seem to all readers to be applications of precedent.

51. This is probably the main concern animating Justice Blackmun’s dissent in *Lucas*. (“Even more perplexing . . . is the Court’s reliance on common-law principles of nuisance in its quest for a value-free takings jurisprudence. In determining what is a nuisance at common

There is no doubt in my mind, though, that the test will not apply to the vast bulk of the regulatory taxation I will examine in this book: whether the test applies to any regulations other than hyperrestrictive use plans designed to protect fragile ecosystems is dubious.⁵² Clearly, for example, public accommodation owners whose profits might be lower because of the requirement to comply with the ADA by installing costly ramps or widening aisles in a fashion that reduces space for inventory will not be able to claim that there is no economically viable use of their property once the regulatory scheme is enforced or to argue that an inquiry should be conducted about whether the portion of her property now devoted to access is valueless.⁵³

Standard Regulations

If the Court decides that the regulation does not seize title in the sense I have described or destroy all economically viable uses, the regulation will be evaluated under the balancing test best articulated in *Penn Central*

law, state courts make exactly the decision that the Court finds so troubling when made by the South Carolina General Assembly today; they determine whether the use is harmful. Common-law public and private nuisance law is simply a determination whether a particular use causes harm. . . . There is nothing magical in the reasoning of judges long dead” [*Lucas v. South Carolina Coastal Council*, 1054–55] [citations omitted]). To the degree that Justice Scalia was arguing, at least implicitly, that current owners were themselves to blame if and only if they paid the price the property would command if it could be developed in a situation in which prior judicial holdings made the belief it could be developed unreasonable, he is moving away from the per se rule he announces to a balancing test demanding that owners show they have been deprived of legitimate investment-backed expectations.

52. Even then, the test applies only on the assumption that the more passive forms of ownership are not reasonably valuable. Justice Kennedy, concurring in *Lucas*, expressed substantial skepticism about the finding by the South Carolina Court of Common Pleas that the regulated property had no significant market value or resale potential (*Lucas v. South Carolina Coastal Council*, 1033–34), and Justice Blackmun, in dissent, emphasizes that the parcel certainly has consumption value, which he believed rendered the lower court’s finding “clearly erroneous” (505 U.S., 1044: “Petitioner can picnic, swim, camp in a tent, or live on the property in a movable trailer. State courts frequently have recognized that land has economic value where the only residual economic uses are recreation or camping.”)

53. See *Zahedi v. Pinnock*, 587–88. It is a quirky academic question, of no practical moment, whether owners would succeed even if the Court allowed them to sever their property (physically rather than conceptually) and analyze whether the empty aisle space was truly rendered valueless by the regulation in question. While it is lucid that owners would generate more revenue if they could use the space for inventory rather than for wider aisles—otherwise, they would make the change spontaneously, without the regulation—wider aisles may well draw both disabled and nondisabled customers to the store, thus generating some value. The regulation is not akin to a hypothetical regulation in which the state demanded that a portion of the store had to be simply walled off, of no use to anyone.

Transportation Co. v. City of New York.⁵⁴ While the Court will not declare such regulations to be per se compensable takings, it might nonetheless demand the governmental entity compensate owners taking due account of (a) the economic impact of the regulation (the degree to which the net value of the owner's properly aggregated property value diminishes, accounting not only for the losses the owner suffers as a result of the limitations on use rights but the gains the owner enjoys because similarly situated property is subject to the same regulations); (b) the character of the government action (particularly whether it meets some significant public end to alter the conduct of the particular owner); and (c) whether the action interferes with reasonable investment-backed expectations (that is, whether the owner will bear an out-of-pocket loss as a result of paying a price for the property that reflected a reasonable expectation of being able to develop it in the now-proscribed fashion).⁵⁵

There is not a great deal to say about how a particularistic balancing test will work in practice. The Court has never articulated quantitatively what constitutes the sort of substantial decline in property value⁵⁶ that

54. 438 U.S. 104 (1978) (upholding a historic-preservation ordinance that precluded owners of Grand Central Station and other "historic monuments" from altering the external structure of the building without approval, as applied to a city agency decision to prohibit the owner from building a skyscraper in the airspace over the station).

55. The Court has never adequately explained why it is so much more solicitous of those who bear out-of-pocket rather than opportunity-cost losses. (The solicitousness extended, quite early on, to zoning cases where there was thought to be substantial constitutional protection for nonconforming uses but almost none for owners who planned but had not yet made uses banned by the zoning plan.) It seems reasonably clear why one would be more solicitous of those out-of-pocket losses not caused by owners' negligent beliefs that they would forever be free from the challenged regulation than of those losses grounded in such negligence. There would, in the absence of such a rule, be a serious moral-hazard problem: just as it is undesirable to have a party construct an expensive home on an empty parcel just before the state condemns the fee, and just as it is reasonable to restrict compensation awards under the belief that the home was constructed after the party did or should have known that the condemnation would occur, any rule that compensates people for all they have spent encourages people to spend without regard to the possibility of the relevant casualty (condemnation or regulation). This point is emphasized in Louis Kaplow, "An Economic Analysis of Legal Transitions," *Harvard L. Rev.* 99 (1986): 509, 529–30, 537–42. However, any rule that protects only those who have invested more money than the property is now worth given the regulation, rather than those who experience equally substantial paper losses, seems to distinguish, for reasons that are not especially clear, between recent property buyers and those who have held property for a substantial period.

56. The Court has also not given precise conceptual or practical guidance that would permit judgment of whether owners have gained the sort of special benefits from the existence of the regulatory scheme being challenged that would give pause in measuring the net losses suffered simply by ascertaining the difference between the postregulation value of the property and its value if freed from regulation. Take the *Penn Central* case: if the owner could sell the

would typically trigger careful scrutiny,⁵⁷ let alone standards that would help to determine whether particular levels of private losses are nonetheless acceptable because legitimate public purposes are served by regulating this particular party. At some level the Court is trying to figure out when a particular owner is unduly singled out to bear burdens that ought to be more widely spread, but stating this fact does little more than restate a general purpose of the Takings Clause.

Many cases, though, are readily decided once classified as garden-variety regulations cases, in part because it is quite clear that the Supreme Court will rarely, if ever, find that a garden-variety regulation causes a compensable taking.⁵⁸ It is clear, for instance, that the ADA, on its face, will be held not to take property, since it demands only reasonable accommodations and a Court would limit public accommodation owners' obligations in such a way that they would never be deemed to lose too much.

property for 100 percent more if permitted to build in the airspace over Grand Central Station, did the regulation cause a 50 percent decline in the property's value? What if the property would not be worth 100 percent more than its current value without the existence of historic-preservation regulations that improved real estate values in the immediate vicinity? In New York City more generally? What if the value of the regulated property is substantially enhanced by the presence of land-use planning regulations more generally, though not the historic-preservation program in particular, some of which bears more heavily on other owners than it does on these owners?

57. Courts were inconsistent in deciding when a particular loss of value was excessive. "Ordinances which variously diminished property values from \$1,500,000 to \$275,000, \$450,000 to \$50,000, and \$65,000 to \$5,000 have all been upheld. Ordinances that reduced property values from about \$48,750 to about \$11,250 and from \$350,000 to \$100,000 have been struck down" ("Developments in the Law—Zoning," *Harvard L. Rev.* 91 [1978]: 1427, 1480). Generally, owners have been unsuccessful in inverse-condemnation cases even when the property's value declined substantially. See, e.g., *William C. Haas and Co. v. City and County of San Francisco*, 605 F. 2d 1117 (9th Cir. 1979) (upholding rezoning that reduced value of property by roughly 95 percent); *HFH Ltd. v. Superior Court*, 15 Cal. 3d 508, 125 Cal. Rptr. 365, 542 P. 2d 237 cert. denied 425 U.S. 904 (1975) (upholding regulation resulting in an 80 percent decline in property value); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F. 2d 1023 (3d Cir. 1987) (upholding regulation that led to 89 percent reduction in property value). There are exceptions, particularly in somewhat older cases. See, e.g., *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 167 N.E. 2d 406 (1960), and *Pearce v. Village of Edina*, 263 Minn. 553, 118 N.W. 2d 659 (1962) (rezoning causing roughly 75 percent decline in value held to be compensable inverse condemnation).

58. There are exceptions. See *Pennsylvania Coal Co. v. Mahon* (first case to hold that a state must compensate for a regulatory taking that went too far as well as for direct appropriations of property, invalidating Pennsylvania's Kohler Act, which forbade the mining of anthracite coal in such a fashion as to cause the subsidence of most human habitations, even where the mining companies had purchased waivers of damage claims by surface owners). But the case might well be deemed to be restricted to its facts given the holding in *Keystone Bituminous Coal*.

It is implausible that the Court could construe the ADA to impose the sorts of large-scale losses on property that trigger effective demands for compensation.⁵⁹

Exactions

In certain circumstances, developers will be permitted to develop their property if and only if they comply with a particular condition. In exchange for permission to develop, they must supply something the governmental entity wants: an easement, parks, sewage connections, money for the city to construct new infrastructure. Reading these cases narrowly, the Court analyzes exactions in three steps.

First, the Court asks whether the government could take the thing the developer agrees to supply in exchange for the building permit, without paying compensation, assuming that there were no reciprocal promises by the government to grant the owner some privilege to which it has no categorical entitlement. Thus far, Supreme Court exactions cases involve situations in which the governmental entity conditions development on the owner agreeing to surrender title to some portion of his property.⁶⁰ Thus, in *Nollan*, for instance, the Court assumes that the California Coastal Commission could not have made the Nollans allow public access to the ocean across their property without condemning the property and paying for the public right of way. (In my view, the assumption is not clearly justified, but it was not called into question by the dissenters in the case. While the state of California almost surely lacks the constitutional authority to demand public access from a *subset* of similarly situated beachfront property owners, a state rule that more generally redefined the incidents of owning oceanfront property, limiting, for example, the capacity to exclude those who cross from the road, much as owners at common law have been unable to exclude many of those seeking lateral access, below the high-tide mark, should have been unproblematic under any nonlibertarian view of the Takings Clause.)⁶¹ Similarly, in *Dolan*, the Court assumes that the city of Tigard would have had to condemn some of the store owner's property

59. For conclusions consonant with this view, see *Zahedi v. Pinnock*, 588.

60. One could imagine, hypothetically, a municipality conditioning development on compliance with a regulation that constituted a taking under *Penn Central*, but such cases have not arisen. It is impossible even to imagine what it might mean to condition a development permit on compliance with a regulation that rendered the property economically valueless, under *Lucas*, since no rational developer would accept such an offer.

61. See Michelman, "Takings, 1987," 1610–12, for a parallel argument.

to permit a bike path to be built over it or to dedicate some to a structure-free floodplain to permit improvement of the storm-drainage system along the creek.

Second, the Court asks whether the governmental entity should be permitted to escape its *prima facie* obligation to pay compensation for the seizure of the property interest. The government may do so if and only if the property seizure is nothing more than a more efficacious substitute for permissible direct regulation of the owner's activity. (It is tempting, but I think ultimately less helpful, to ask whether what is exacted from the developer solves the problem that development creates. It often will not matter which way one formulates the test, but one can imagine plausible hypotheticals in which the distinct formulations matter. For example, imagine a municipality that demanded that a developer of low-income housing provide funds for social services more frequently needed by low-income residents or private security forces to deal with what is presumed to be a higher crime rate associated with poverty, just as developers must often pay infrastructure fees. A court could distinguish the cases factually—arguing that it is more difficult for a municipality to prove either that low-income residents use any class of services or commit crimes more frequently than do other residents or that the presence of a particular low-income housing project in the municipality increases rather than relocates the low-income population than it is to prove that new housing increases the need for sewage or utility lines. But I suspect that it is not necessary to reach the factual issues. Whether it is the case, in fact, that many zoning decisions that effectively squeeze out low-income housing are predicated on desires for social segregation and service-cost avoidance, such are not permissible municipal goals. Since one could not ban low-income development to avoid social problems associated with the poor, one cannot condition a building permit to house them on solving those social problems.)

Direct regulation is almost always permissible under the *Penn Central* test. Thus, if the governmental entity can demonstrate that the seizure of title is nothing more than an alternative mechanism for meeting a goal that might otherwise have been achieved through direct regulation, it is overwhelmingly likely that the seizure will be sustained. Thus, in *Nollan*, the Court asks first, in this regard, whether the Coastal Commission could have forbidden the owners from building altogether.⁶² Assuming, as the

62. "Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment . . . [w]e assume, without deciding, that . . . the Commission unquestionably would be able to deny the Nollans their permit outright"

Court does, that the answer to that question is the predictable yes, the Court next asks whether the governmental entity accomplishes the end it would have met through the development ban by seizing the title the owner surrendered. Had the Coastal Commission decided to ban development to protect the public's visual access to the beach, the commission could have, without compensation, instead demanded that the developer provide a viewing place (on or off the property) as a condition of development, since to do so would simply be an alternative means to meet a permissible regulatory end. But because the Coastal Commission demanded physical access, it did not attempt to meet the same regulatory end but simply to extort an easement from a party dependent on the state for a building permit.⁶³ (As the dissenters and a number of commentators have noted, the *Nollan* majority takes a rather narrow view of the required

(*Nollan v. California Coastal Commission*, 834–35). The Court's decision in this regard is premised both on the supposition that the Coastal Commission would have a reasonable purpose in forbidding the building—that the commission's claim that it was reasonable to protect the public's ability to see the beach to overcome "psychological barriers" to using the beach—and on the supposition that such a development ban would not interfere drastically with the Nollans' use of the property. That is simply to say that the decision would be reviewed under the deferential standard of *Penn Central*. The reason the denial of the building permit would not have given rise to a *Lucas* claim—that a per se taking had occurred unless the regulation abated a common law nuisance because it left the owner without any viable use of his property—is that the owners of the Nollans' property (the Nollans' landlords) could themselves have repaired the bungalow on the property without applying for a permit to construct a brand-new structure.

63. "[T]he condition would be constitutional even if it consisted of 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. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. . . . It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house" (*ibid.*, 836–38).

Viewed as a case about unconstitutional conditions, it would be helpful, perhaps, to follow up on the analogy the Court itself uses. It would be permissible, presumably, to forbid a person from shouting "Fire!" in a crowded theater. But it would not be permissible to say that the government could condition the right to shout "Fire!" in a theater on payment of a hundred dollars, though doing so is a less restrictive regulation of speech. Forbidding shouting "Fire!" is permissible under the First Amendment, given various balances between public-safety interests and desires to protect expressive speech. Similarly, forbidding development without compensation may be permitted under the Takings Clause of the Fifth Amendment, given the state's police power. But conditioning the exercise of First or Fifth Amendment rights on the payment of money (or property) is unacceptable, largely to insure government evenhandedness and the preservation of a strong private sphere immune from indirect government control. See Kathleen Sullivan, "Unconstitutional Conditions," *Har-*

nexus between the exaction and the regulatory alternative, assuming that the Coastal Commission could have banned to protect only view and thus could exact only property rights that restored view. If, however, the state seeks to retain a certain degree of psychic public access to the ocean or nonexclusivity, increasing the ability to walk across the beach may partly offset the existence of a bigger private home.⁶⁴ Of course, if a nexus test is going to make any sense at all, there must be some limits on substitutability: if all psychic end states can be commodified, the losses from development can always be stated in dollar terms, and the developer can always be asked to provide some service or property worth an equivalent amount in dollar terms or the dollars themselves. The Court, though, would be in no position at all to review the locality's claim that development generated a particular dollar level of psychic loss.)

Third, the Court asks whether the exaction more than substitutes for the regulatory alternative, whether the state entity not only meets the regulatory purpose by demanding payment in cash or property but gains something additional.⁶⁵ Thus, in *Dolan*, the Court concedes that the

vard L. Rev. 102 (1989): 1413, 1492–97. One knows that the state is simply conditioning the exercise of such rights on payment of money or property rather than meeting a proper regulatory purpose if the condition does not advance the regulatory purpose. To follow the analogy with a rather odd hypothetical, it might be constitutionally acceptable for a state to condition the right to shout “Fire!” on adding wider aisles and doors or other things that would better insure that no one was hurt during panicky mass escapes, because the condition would be an alternative method of meeting the permitted (First Amendment) regulatory purpose (public safety), just as a view easement (but not an access one) is an alternative way of meeting the permitted (Fifth Amendment) regulatory purpose (insuring public view).

64. *Nollan*, 845–87 (J. Brennan dissenting), 865 (J. Blackmun dissenting). Whether one believes the state is really solving a problem or engaging in a plan of extortion depends in significant part on whether one believes the state is fundamentally benevolent or a roving thief. See Margaret Jane Radin, “Evaluating Government Reasons for Changing Property Regimes,” *Albany L. Rev.* 55 (1992): 597, 600–603.

65. The Court assumes, without much argument, that the developer can be asked, constitutionally, to undo the entire incremental impact of its development in exchange for permission to develop, even though there is little reason to believe the developer is, in any discernable sense, the unique source of a problem simply because it is last in time. Assume, for example, that the hardware store expansion the *Dolan* petitioners propose will bring in one hundred new cars each afternoon; the Court is clear that the city can seize a bikeway easement whose effect is to get (somewhere not much in excess of) one hundred additional citizens of Tigard to switch from cars to bikes. (If substantially more people switch, the exaction will fail the rough proportionality test that the required dedication is related in “extent to the impact of the proposed development” [*Dolan v. City of Tigard*, 391].) But the congestion problem is caused just as much by the preexisting store owners as the developer; if the developer has any sort of cognizable fairness claim that citizens generally should pay for an easement that takes more than a hundred cars off the road, the developer would seem to have just as good a fairness claim that other store owners should contribute to easements that cover one hundred car displacements.

seizure of the bike path easement may well meet the same sort of regulatory end that banning the expansion of the owner's downtown hardware store would (avoiding auto traffic congestion) and that seizing land for the floodplain also met the same end as the ban on paving over the parking lot would meet (minimizing flood danger). But the Court worried that the *Nollan* test would become procedurally a mere formal pleading requirement and that municipalities would attempt to seize property without compensation, using as a pretext the possibility that seizing the property simply served a regulatory end.⁶⁶ Perhaps, too, the Court worried that even if the governmental entity was not using the seizure as a pretext—that it actually would have chosen to ban the development rather than permit it without some compensating property right—the government should not seize too much of the owner's development surplus but simply end up indifferent between development with the condition and nondevelopment or in a better position if and only if the government could not tailor a less intrusive exaction that simply met more precisely the problem development created.

I believe that *Dolan* was a very badly decided case, even accepting both the legal and persuasive authority of *Nollan*. This is partly true for institutional competence reasons. *Nollan* demands a task that judges can readily accomplish: it asks only whether there is a conceptual nexus between the exaction and the aim of the regulation for which the exaction might arguably substitute. If not, the exaction is a taking. A modest extension of *Nollan* might have been possible: trial courts might be competent to ascertain whether a governmental entity fabricated a regulatory purpose for an exaction pretextually. The courts are simply not competent to ascertain, however, whether the entity wound up in a substantially better position as a result of the exaction than it would have had it simply banned the development and thereby violates *Dolan*'s rough proportionality test. Thus, for example, the Court recognizes that the expanded store will

66. Owners have a legitimate fear: *Nollan* says that the state cannot seize an easement without paying by conditioning issuance of any old building permit on the owner's granting the easement. Only if the easement seizure meets the same purpose that denying the permit would have met can the state seriously claim that it did not have an independent plan to seize the easement, unconnected to the development, that should be funded out of general tax funds because it was a general, independent public project. But what if the state really wants the easement (for the greenway or the bike path in *Dolan*, for lateral access in *Nollan*) for completely independent reasons but is able to show a tenuous relationship between the conditions and the problems that building would have created? If one could not seize the greenway if building did not at all contribute to flooding, why should doing so be possible if it contributed a thimbleful of water to the flooding problem?

increase traffic but notes that “the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner’s development reasonably relate to the city’s requirement for a dedication of the pedestrian/bicycle pathway easement. . . . No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication . . . beyond the conclusionary statement that it could offset some of the traffic demand generated.”⁶⁷ It is completely unclear how to implement the Court’s order: estimates of the marginal number of car users that will come into town (especially at peak congestion hours) as a result of the store’s expansion are guesswork at best, and estimates of the long-run impact of any bike path on car use, let alone a bike path that includes the land the developer must dedicate, are no better. The standard will likely be interpreted hyper-deferentially, given the realistic difficulties of quantification, but enormous costs will be borne developing extensive records.

While it may seem odd to argue that the Court should be satisfied with what might pejoratively be called a pleading requirement or an exercise in cleverness, the Court is in fact competent to do no more than ascertain whether there is a conceptual nexus between the exaction and the problems caused by development. In the takings area the Court generally is content to deal with conceptual issues rather than to try to perform a more substantive analysis of whether implicit or explicit tax burdens are fairly distributed. Thus, the Court finds a compensable taking when it finds that, conceptually, property interests are seized or possession taken—*Hodel*, *Loretto*—despite the fact that these seizures do not maldistribute tax burdens in any substantively significant way, and the Court looks quite loosely and deferentially at what might plausibly be seen as the maldistribution of tax burdens as long as the state engages in regulation. *Nollan* says that an exaction must be labeled as a regulation or a per se taking (property seizure), but since the line between per se takings and loosely reviewed regulations is itself conceptual and not based on a factual review of the effects of the regulation, it would seem unsurprising to find that the review of whether an exaction is a seizure or regulation should likewise be conceptual. The Court may be competent to do no more than say that a floodplain easement is logically related to paving and developing, just as it is competent to label the *Loretto* regulation as the seizure of physical possession.

67. 512 U.S. 374, 395–96 (1994).

Dolan is far worse than unadministerable, though. Demanding this sort of precision in exactions drives a needless wedge between the rules for regulation and the rules for exactions, driving the city to substitute regulations that are inferior from the vantage point of both the city and the developer for exactions. It is clear that the city could ban development on a general nonquantified showing that the development caused harm (congestion, flooding risk)—that is, the city would not have to show that the implicit tax levied by the development ban (the difference in market value of developed and undeveloped property) was proportional to the harm that would have been caused by development. (Some commentators writing right after *Nollan* was decided believed that the case signaled a marked increase in review of all economic regulations, demanding that the Court believe that the regulation was precisely tailored so that owners bore no more burdens than their own unregulated conduct would have caused,⁶⁸ but this view has simply not been sustained.) If the municipality is genuinely worried about flooding and congestion (i.e., this exaction, even if disproportionate, is not pretextual), it will ban the development if it cannot choose the Pareto-superior exaction route because the Court forbids it.

If the Court demands that despite its genuine concern about traffic or flooding, the city back off the demand for a bike path or greenway concession unless it can show that it receives no net benefits from either (i.e., that the bike path or greenway do no more than keep the city in the position it was in prior to development), the city will tend to take instead a step to which the Court will defer that obviously insures that the city stay in the position it was in prior to development (i.e., to ban development). The city will do so even if both it and the developer would prefer the exaction compromise. One interpretation of the rule the Court announces is that the city disgorge all net benefits—benefits in excess of harm caused—from a development exaction. The city would then be indifferent between a ban and an exaction unless it benefits from development itself. Given that the city will bear transaction costs in ascertaining net benefits and compensating owners, it will choose nondevelopment, even though it obviously would prefer

68. See, e.g., Nathaniel S. Lawrence, “Means, Motives, and Takings: The Nexus Test of *Nollan v. California Coastal Commission*,” *Harvard Envtl. L. Rev.* 12 (1988): 231, 242–48, 253–59; “Comment, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* and *Nollan v. California Coastal Commission*: The Big Chill,” *Albany L. Rev.* 52 (1987): 325; Timothy A. Bittle, “*Nollan v. California Coastal Commission*: You Can’t Always Get What You Want, but Sometimes You Get What You Need,” *Pepperdine L. Rev.* 15 (1988): 345, 361–64.

the net benefit situation to the zero-development situation and the developer would obviously prefer development with exactions to nondevelopment.

The Court's response, I suspect, is that the city should be forced into electing between (otherwise undesirable from the city's vantage point) bans on development and general taxes when the nexus is insubstantial. When the nexus is insubstantial, the owner will argue, the city will not really ban the development just to meet its (by hypothesis trivial) interest in traffic and flood control. Since the city's real interest is in getting a bike path and greenway, the city will tax citizens generally and acquire those easements; since the city has no real interest in banning the development, it will not be banned. Thus, the city will move from exaction not to the (concededly less optimal) world of no development but to a more optimal one of development (modestly) tempered by real user fees and quasi-nuisance fines plus general taxes to fund recreational bike paths and general public-safety programs. The city's response, though, is that this outcome would occur if the exaction demands were pretextual but need not by any means occur whenever the city is a net beneficiary of the exaction (i.e., the city gets more benefits than it was harmed by development) but would actually be harmed by unconditional development.

Not only does *Dolan* force parties to bear high administrative costs of quantifying both the harms of development and the impact of the purported remedy and push local governments toward needless development bans, but any requirement to map conditions to problems caused by development on a parcel-by-parcel basis will lead to irrationally uncoordinated exactions. The basic underlying point is that if one is going to create a bike path, it must go in some sort of a gapless line (or bikes will need to fly). If one of the owners of property abutting the creek does not create enough extra traffic to justify seizing the bike path (given a precise quantification test), one still wants to demand that this owner fill in the bike path rather than make some other concession more specifically attributable to the changes caused by this particular development. The city is saying, in effect, that downtown development, broadly speaking, causes flood problems, traffic problems, loss of open space, and so on and that downtown developers can donate property in patterns that remedy these problems; however, tailoring each remedy to the particular problem without regard to the most economical form of concession is once more to force the city into "solutions" that harm everyone. Thus, the greenway/bike path concession may damage the owners of creek-abutting land rather little, while demand-

ing that they purchase parkland because they have interfered with recreational areas or build viewing areas because they have harmed views may be constitutionally permitted (if there's a tighter nexus between these developments and view or park space loss) but worse for everyone involved.

Given the narrow reading of the exactions cases I have advanced here, the ADA's accommodation requirement almost surely does not raise an interesting takings issue. Owners simply cannot get past the first step of the analysis and show that what the state has demanded that they do to be free to operate their stores—provide greater access for those with mobility impairments—would constitute a taking if the state demanded such access without granting an explicit or implicit license⁶⁹ to operate a public accommodation.

Even if the owners did get past this first hurdle, their exactions claims would still fail: the government would meet its burden of saying that its easement seizure (assuming, for now, that it is so characterized) meets the same end as a valid regulation. The ADA proponents' claim would be most readily sustained if they were able to argue that the easement seizure substitutes for other regulations of public accommodation owners that permit those with disabilities to shop more readily (e.g., mandatory shopping assistants). In such a case, there would be a close fit between regulations that are permitted—cost-increasing demands for shopping aides—and a *Loretto* seizure that meets the same end.

In both *Nollan* and *Dolan*, of course, the regulation for which the easement seizures substituted was non-development, and it is a trickier question whether demanding access meets the same regulatory end as banning development of a nonaccessible store on the assumption that the existing exactions cases are read (narrowly) to ask simply whether the seized easement meets the same end as nondevelopment rather than the same end as any deferentially reviewed regulation.

The question of whether ADA access requirements meet the same end as nondevelopment becomes more unavoidable in the next chapter, which examines Justice Scalia's view, articulated at the intersection of the *Pennell* dissent and *Nollan*, that regulations can only legitimately avert exploitation or attempt to diminish or allocate social costs. But to preview the point I will raise in more detail, under one view, banning the store from

69. It is also by no means clear that the Court will extend the exactions analysis to encompass the more general, implicit permission granted by all jurisdictions to operate a concern if and only if one complies with relevant regulations.

opening would not serve the needs of the disabled community at all since if it were not open at all, no disabled patrons would have access to goods. In this view, the demand for the easement does not serve the same regulatory end as a ban would serve, since the ban serves no real end at all. But under an alternative view, which I find quite appealing, what those with disabilities seek, above all, is equality, and making the stores accessible to all is simply a more efficacious means of meeting the regulatory demand for equality. Nonaccessible stores would be banned from opening so that those with disabilities would not be excluded from the range of opportunities available to those without disabilities; that end can be met by making accessible the stores that do open.

