RATIONS AND TAKINGS

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Andrew Coan's judicial capacity model explains many things about the pattern of U.S. Supreme Court opinions. Among other things, it perhaps inadvertently explains why the Court makes such wretched decisions about state and local government, particularly in connection with regulatory takings claims. As Coan explains, the Court defines these small-scale regulatory issues as "normal," not requiring anything more than sporadic intervention. But because it can dodge these issues, the Court never becomes familiar with them except in the most superficial way and has little incentive to come up with sensible solutions. Instead it episodically creates off-the-cuff categories that often disrupt state and local governance practices. This article will give a number of examples from takings cases, including several mentioned in Coan's book, e.g. the "physical invasion" and "total takings" categories, as well as the Court's vexingly intrusive decisions about conditions on land use permitting. Together these decisions create confusion, ignore the patterns in which property rights normally evolve, and impede state and local efforts to deal with major environmental problems such as waste management and adaptation to climate change. Many of the Court's decisions also strongly hint at an underlying prejudice against state and local government.

INTRODUCTION

Andy Coan's new book, *Rationing the Constitution*,[1] gives readers great insight into the ways that U.S. Supreme Court manages its own limited capacity, and the ways the Court effectively sidesteps or bars issues that would generate overwhelming volumes of litigation. But perhaps inadvertently, Coan's judicial capacity model also gives great insight into a less global question about the Court's jurisprudence: why it makes such inept decisions about state and local government. The Court's clumsy decisions hamstring several kinds of state and local authority, but one sees the pattern most clearly in the Court's decisions about regulatory "takings" of property.

In this article, I will review a number of the Court's takings cases and show how they create uncertainty, ignore basic patterns of the evolution of property rights, and impede state and local efforts to address important issues, particularly in environmental areas. I will conclude that these cases suggest an underlying disdain for state and local government that has long characterized the federal bench as well as many legal commentators.

I. TOUGH TALK ON TAKINGS

In describing his central model of judicial capacity, Professor Coan observes that the Supreme Court generally faces two kinds of constitutional cases that threaten to overwhelm its docket: either smallish-scale decisions that may come up very frequently, or cases involving especially important issues that are likely to act as magnets for multiple litigation.[2] To avoid floodtides of these sorts of cases, Coan argues, the Court adopts a pattern of deference to governmental actions for the most part, punctuated from time to time with decisions featuring sweeping but hard-edged constraining rules.[3] In his view, general deference fends off litigation while incidentally avoiding backlash against judicial meddling. Similarly, the occasional hard rules may be blunt instruments, but at least they provide clear answers to a range of constitutional problems, thus also staving off waves of clarifying litigation.[4]

One of Coan's major examples for his thesis is the category of property "takings" cases, especially against state and local regulation. Does the thesis work here? My answer is yes and no: yes, the Court does generally follow Coan's pattern with local land use cases; but no, it doesn't

1. ANDREW COAN, RATIONING THE CONSTITUTION: HOW JUDICIAL CAPACITY SHAPES SUPREME COURT DECISION-MAKING (2019).

2. *Id.* at 24–29.

3. *Id.* at 24.

4. *Id.* at 20–29, 65–66, 138–39.

work, precisely because the Court's interventions are too sporadic to create a sensible jurisprudence.

A. Takings Beginnings

I will start with a little primer on takings jurisprudence. The *ur*-document in takings cases lies in the Constitution's Fifth Amendment, in relevant part: "No Person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[5] Ever since an 1897 Supreme Court ruling, this provision has been held to apply to state governmental actions as well as federal ones.[6]

This of course leads to a thornier question: what governmental actions are constrained by this phrase, or rather, two phrases? Everyone agrees that governmental bodies cannot take title to an ordinary property without compensating the owner; that is a standard case of eminent domain. But is that all? A frequently cited case from the later nineteenth century is *Pumpelly v. Green Bay Co.*,[7] which held that, no, there is more.[8] *Pumpelly* ruled against a canal company whose dam left the plaintiff's farm property under water, and it is usually cited for the proposition that a physical invasion of property may also act as a taking.[9] But on closer consideration, *Pumpelly* might have meant that a taking could be something else—something like lessened value. Perhaps the case meant that *all* value of the property was gone, due to flooding, and this total loss would constitute a taking or at least its equivalent. On the other hand, the landowner still owned the flooded land, which would include the water column over it, and the *Pumpelly* owner might well have used the pond or lake for fishing, boating, and swimming, in which case only *some* value would be lost. But how much?

Soon enough, along came one of the Supreme Court's nostrums that Coan uses for his capacity model. In *Pennsylvania Coal Co v. Mahon*,[10] Justice Oliver Wendell Holmes, after stating that "the extent of the diminution" was a factor for consideration, threw off the infamously casual rule that if a regulation goes "too far," it will count as a taking.[11] In this case, in which a state statute basically revoked the plaintiff coal company's reserved right to mine under a landowner's property, he

5. U.S. CONST. amend. V.

6. *Chi., Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

7. 80 Wall (13 U.S.) 166 (1872).

8. *Id.* at 176–79.

9. *See, e.g.*, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427 (1982) (citing *Pumpelly*, 80 U.S. (13 Wall.) at 181).

10. 260 US 393 (1922).

11. *Id.* at 413, 415.

pronounced that it did indeed go "too far." Coan argues that Holmes' vague "too far" standard actually gave a lot of room to states and local governments during several decades in which the Court refrained from hearing any major takings cases.[12]

Now, there is much to be said about the *Penn Coal* case, and indeed much *has* been said, including by me,[13] but I will refrain from saying much more about it. What I will say is that the case could have been treated as a garden variety taking of title, since as Holmes observed, Pennsylvania recognized the surface support right as an independent element of real estate that could be transferred or retained separately, somewhat akin to an easement.[14] Instead, the case has become the poster child for the proposition that diminution of value can give rise to a regulatory takings case.

B. The Battle of New York Part I: Penn Central and the Meaning of "Taking"

Coan cites my rather dyspeptic remarks that the regulatory takings rubric could be an endless source of antiregulatory litigation, given that virtually every governmental action has winners and losers, and losers can always claim that their losses go "too far."[15] Naturally, I agree. But beyond that, my view begins to diverge from Coan's. After *Penn Coal*, the Court's next major takings case occurred many years later, in the 1978 *Penn Central* case.[16] Here the Court upheld New York City's historic preservation regulation, which prevented the Penn Central railroad corporation from leasing the airspace above its Grand Central terminal for a much higher building.[17] Coan treats the Supreme Court's ensuing decision as a continuation of the deference pattern, with the majority issuing a vague set of "factors" under which regulatory bodies almost always win.[18] True enough, but what Coan misses is that the Court's fuzzy deference did not prevent backlash—one of the reasons for deference—but instead ignited conservative outrage, helping to set off the so-called property rights movement that is still with us.

Meanwhile, like many others, Coan skips over another feature of *Penn Central*: the U.S. Supreme Court was engaged in a *sub silentio* battle with the New York Court of Appeals for control of the federal property

12. COAN, *supra* note 1, at 141.

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

14. *Mahon*, 260 U.S. at 414.

15. COAN, *supra* note 1, at 152.

16. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

17. *Id.*

18. COAN, *supra* note 1, at 141–42.

takings rhetoric. Let me backtrack: Up to and including *Penn Central*, New York had had a perfectly sensible reading of the federal property clauses, even an old-fashioned one. Taking title, the quintessential example of eminent domain embodied in the second of the Fifth Amendment's two property-related clauses, counted as a constitutional taking of property and required compensation as such. Physical invasions were somewhat up in the air, but a physical invasion actually could be assimilated to title takings, in the sense that a physical invasion amounts to assertion of an easement. New York did not count diminutions of value as takings, comparable to eminent domain.[19] Instead, the New York courts looked to the Fifth Amendment's first property-related clause, and treated value-diminutions as potential violations of due process, calling for the usual due process issues of reasonableness and fairness.[20]

The New York courts thus recognized two kernels of truth in Holmes' *Penn Coal* nostrum: first, that even without taking title, regulation may treat some property so unfairly that some remedy is due; and second, that this kind of issue cannot be defined exactly in advance. Instead of cluttering up the eminent domain clause with the soft and necessarily ex post standards of fairness and balances, New York allocated diminution of value to a constitutional rubric in which fairness and balance are the normal questions. This is not to say that a due process/fairness discussion of diminution of value would be all sweetness and light, but by removing the diminution of value rubric from category of property takings, the New York approach would have parried the charge, led by Rehnquist's dissent and later resoundingly amplified in Richard Epstein's book, *Takings*,[21] that you can't say that *no* property is taken if *a little bit* is taken.

The U.S. Supreme Court affirmed the outcome but nevertheless rejected New York's bifurcated approach, treating the diminution of value issue as one of a taking of property *vel non*.[22] Consequently, federal takings cases have since turned into a hopeless *gemisch* of title, physical invasion, and diminution of value, and an equally messy *gemisch* of regulators' defenses, including nuisance prevention, implicit compensation via reciprocal benefits, and title definition.

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19. *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1278 (N.Y. 1977) (holding that a diminution of value is not a taking of property); *see also Fred F. French Investing Co. v. City of New York*, 350 N.E.2d 381, 385–86 (1976) (same).

20. *Penn Cent. Transp. Co.*, 366 N.E.2d at 1253.

21. *Penn Cent. Transp. Co.*, 438 U.S. at 149–50 (Rehnquist, J., dissenting); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

22. *See Penn. Cent. Transp. Co.*, 438 U.S. at 123–28.

C. The Battle of New York, Part II: Loretto and Physical Invasion

A few years after *Penn Central*, the U.S. Supreme Court found an occasion to take a rather less decorous swipe at the New York Court of Appeals' approach to takings, now on the issue of physical invasion. Coan describes the *Loretto* case, which arose because New York had authorized cable companies to string wires across rental residential buildings, giving a nominal payment to each landlord.[23] Together with some rooftop equipment, the wires used a total of an eighth of a cubic foot of space on Jean Loretto's building, which Loretto had not even noticed when she went up on the roof in the course of buying the building.[24] But because the wires were actually visible, presumably she could not sue the seller for failure to disclose a "latent" defect. Whom to sue? Ah, the cable company, for a taking authorized by New York's statute! The beauty part, as they say in New York, is that if she won the takings claim, she might be able to deny access until the cable company ponied up a larger portion of the value of cable to her tenants, and perhaps even to tenants in other buildings along this cable line.

The New York Court of Appeals dutifully followed the U.S. Supreme Court's new regulatory takings factors but held that no, this was not a taking but rather a normal regulation serving the public purposes of fostering communication, with negligible physical intrusion and minimal impact on the landlord's expectations, economic or otherwise.[25] The U.S. Supreme Court, however, played right into this rent-seeking scheme, reversing the New York Court and coming up with one of the blunderbuss rules that Coan's theory predicts: even the slightest physical invasion, said the Supreme Court, is a taking of property.[26] One can almost hear it: Take that, New York Court of Appeals!

The general academic reaction was, how dumb is that? And why is this dinky cube of air a bigger deal than the Penn Central Corporation's multimillion-dollar loss of a huge airspace lease over Grand Central Station?[27] Coan's view is that, dumb or not, the blunderbuss approach

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23. *Loretto v. Teleprompter Manhattan CATV Cable Corp.*, 458 U.S. 419, 421–24 (1982), *rev'g Loretto v. Teleprompter Manhattan CATV Cable Corp.*, 423 N.E.2d 320 (N.Y. 1981).

24. *Loretto*, 423 N.E.2d at 424, 443.

25. *Id.* at 328–36.

26. *Loretto*, 458 U.S. at 435–38.

27. *See, e.g.*, Robert M. DiGiovanni, Note, *Eminent Domain*—Loretto v. Teleprompter Manhattan CATV Corp.*: Permanent Physical Occupation as a Taking*, 62 N.C. L. REV. 153, 159–60 (1983) (noting an inconsistency in the Court's treatment of a physical invasion, the oddity of treating a tiny infraction by comparison to the airspace development rights in *Penn Central*); *see also* John J. Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Takings Issue*, 58 N.Y.U. L. REV. 465, 506–15 (1983) (criticizing the rigidity of the Court's decision); Michael Gold, Note, Loretto v.

saved the Court from a lot of piddling questions.[28] But did it? Between *Penn Central* and *Loretto*, the Court had not found physical invasions in several other intrusions on property, leaving the category rather wobbly even after *Loretto's* solemn pronouncement.[29] As Justice Blackmun's dissent predicted,[30] *Loretto* itself generated a little mini-jurisprudence of physical invasion, not all of it very comprehensible. The most notable case came in 1992, when a California mobile home park owner charged that his town's rent control ordinance, together with the state's mobile home regulations, effected a physical invasion by permitting tenants or their successors to stay on his land permanently.[31] One might think that this claim would give the Court's increasingly conservative justices the opportunity to limit rent control, a type of measure that many economists see (and saw then) as a misguided impediment to housing development.[32] But no. The Court's majority held that the new tenant's occupancy was not a physical invasion because the landlord had leased the unit in the first place, and besides, the landlord could get out of his fix, albeit with a rather complex and lengthy procedure.[33] Apparently the problem was physical, but not an invasion. The message to the landlord was, better choose tenants more carefully. The message to other potential litigants was, so much for the clear rule about physical invasion.

D. There Will Be . . . Raisins?

Perhaps it is no wonder that the most recent episode of physical invasion is truly weird. This case involves raisins, yes, raisins.[34] Under legislation originally dating back to the New Deal's experiments with

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Teleprompter Manhattan CATV Corp.*: The Propriety of a Per Se Rule in Takings Claims*, 16 J. MARSHALL L. REV. 419, 427–30 (1983) (same).

28. *See* COAN, *supra* note 1, at 151.

29. *See, e.g.*, *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (holding that a California law requiring a shopping center to allow leaflet distribution was not a taking).

30. *Loretto*, 458 U.S. at 451 (Blackmun, J., dissenting) (arguing that litigants would search for ways to "shoehorn" regulations into the category of physical invasion).

31. *Yee v. City of Escondido*, 503 U.S. 519 (1992).

32. The Court had approved rent control in Washington, D.C. in the years just after World War I, in *Block v. Hirsch*, 256 U.S. 135 (1921), but that case could have been read to apply only to emergency situations (This was Holmes' own reading of the case in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)). For economists' views of rent control, see, for example, Edward L. Glaeser & Erzo F.P. Luttmer, *The Misallocation of Housing Under Rent Control*, 93 AM. ECON. REV. 1027 (2003) (criticizing rent control); ANTHONY DOWNS, RESIDENTIAL RENT CONTROLS: AN EVALUATION 1–2 (1988) (same); *cf.* Margaret J. Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350, 358, 364–65 (1986) (arguing that "personhood" considerations might outweigh the conventional economic approach).

33. *Yee*, 503 U.S. at 527–28, 532.

34. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2424 (2015).

production controls, a federally authorized but California-based Raisin Administrative Committee—dominated by California raisin farmers—could require raisin growers to give up substantial portions of their annual crops to a raisin "reserve" in order to stabilize prices—that is to say, make prices higher.[35] Aside from the raisin growers and apparently the U.S. Department of Agriculture, no one seemed to think this antiquated supply-limiting cartel was a good idea.[36] In fact, one of the crustier raisin farmers, the aptly-named Marvin Horne, didn't like it either, and he refused to hand over large portions of several years' of his raisin crop.[37] Horne alleged that the required hand-over constituted a taking of property.[38] This argument failed until the U.S. Supreme Court agreed to hear his case and then ruled that the legislation did effect a taking as—what else?—a physical invasion of his raisins.[39] For good measure, Justice Robert's opinion allowed as damages the market price of the forfeited raisins—a price presumably substantially lifted by the very same collective action scheme that *Horne* refused to join.[40]

Getting rid of this antiquated price-rigging arrangement is undoubtedly a benefit to the raisin-eating public, and probably to the raisin farmers themselves insofar as the scheme's demise may induce more modern approaches to raisin marketing.[41] But a physical invasion? Really? What got invaded? And if it was raisins, was everything lost? What about the compensatory aspects of the scheme, in the form of higher prices for the retained raisins, as well as a residual right to payment in case the Board could sell the forfeited raisins in international markets? And how many raisins did it take to count as an invasion? Or does the taking go raisin by raisin?[42]

In the end, one cannot read *Horne* without thinking that "physical invasion" acted as a makeweight for getting rid of something that the Court thought to be entirely obsolete, and in this case, with good reason. But given the current composition of the Court, the category of physical invasion is most likely simply to turn into another source of antiregulatory

35. *Id.*

36. *See id.* at 2438 (Sotomayor, J., dissenting) (observing that the regulation may be "outdated" or "downright silly").

37. *Id.* at 2424.

38. *Id.* at 2425.

39. *Id.* at 2428.

40. *Id.* at 2432–33.

41. *See* Jonah Engel Bromwich, *The Raisin Situation*, N.Y. TIMES (Apr. 27, 2019), https://www.nytimes.com/2019/04/27/style/sun-maid-raisin-industry.html [https://perma.cc/N5RS-6XM6] (describing the subsequent history of raisin industry).

42. Justice Breyer's opinion focused on the compensatory aspects of the scheme, which could negate a taking claim. *Horne*, 135 S. Ct. at 2433–36 (Breyer, J., concurring in part and dissenting in part). Moreover, by ignoring compensation for the remaining raisins, the majority's opinion suggests that the property taking was raisin by raisin, rather than Horne's harvest as a whole.

ammunition, to be deployed when the Court is so inclined, which could be rather often. For Coan's capacity model, the point is that this seemingly draconian category has become less a clarifying rule than an invitation to a quite peculiar new casuistry.

E. Moving to the Beach: Total Takings

Much the same fate has overtaken the other supposedly clear takings rule, first announced in *Lucas v. South Carolina Coastal Council*.[43] If one says, as Justice Scalia did in *Lucas*, that a loss of "all economic value" is a taking, the objective presumably is to nail down at least one more kind of diminution of value that will count. But of course it does no such thing. All economic value of what? Total taking of what? What is the underlying property?

Lucas revolved around South Carolina's effort to keep new seaside construction behind a projected flood line, a measure that would have kept Lucas from building his dream house on his two beach lots.[44] Poor Lucas, he lost everything. But wait, did he? As Vicki Been (among others) pointed out, Lucas was a real estate developer, and he himself had been a partner in the firm that sold off the nearby land.[45] What was the relevant property to which to compare the loss? The lots he so thoughtfully acquired for himself? The entire area he had been helped to develop? Something in between? This is of course the notorious "denominator problem" that dogs any case about diminution of value, including supposedly total diminutions of value. Total diminutions in value *of what*?[46]

Thus, here too a blunderbuss rule has not so much clarified future decisions as created a new cottage industry in defining the relevant property rights that are supposedly totally diminished.[47] A similar cottage industry has emerged to define the potential defenses that Scalia scattered out as crumbs to local regulators. One defense is that even total losses are not takings if the relevant regulation abates a nuisance.[48] But what kind of

43. 505 U.S. 1003 (1992).

44. *Id.* at 1006–09.

45. Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promore More Efficient Regulation*, *in* PROPERTY STORIES 229, 303–06 (Gerald Korngold & Andrew P. Morriss eds., 2d ed. 2009); Carol M. Rose, *The Story of* Lucas*: Environmental Land Use Regulations Between Developers and the Deep Blue Sea*, *in* ENVIRONMENTAL LAW STORIES 237, 263–64 (Oliver A. Houck & James Lazarus eds., 2005) [hereinafter Rose, *Deep Blue Sea*].

46. For the denominator problem, see Stuart Banner, Murr *and Merger*, in 7 BRIGHAM-KANNER PROPERTY RIGHTS CONFERENCE J. 185, 186–90 (2018) (describing the denominator problem in the context of the Supreme Court's decision in *Murr v. Wisconsin*).

47. *See, e.g.*, *id.* at 189–90 (describing the denominator arguments in the recent Supreme Court case).

48. *Lucas*, 505 U.S. at 1029–30 (describing nuisance exceptions).

nuisance? Is it only the kind recognized in later 19th Century common law, as Scalia would have it? Or is it something reflecting evolving modern practices, as Justice Kennedy opined?[49] Another defense protects regulations that affect something not included in a state's definition of the owner's title.[50] Litigators now debate what an owner's title includes, particularly in the beach cases that question whether private title was always subject to a "public trust"—effectively a public easement over beachfront property.[51]

Quite aside from the confusion swirling around the category of total economic loss, the *Lucas* case has cast a pall over state and local efforts to address one of the most serious issues of our time: climate change. South Carolina's beachfront management law was a relatively early effort to adapt to rising sea levels. The ever-encroaching sea puts beachfront structures at risk, and this fact increases owners' clamor for counterproductive beachfront armor before big storms, and for assistance with cleanup and reconstruction afterwards—or ultimately, for costly taxpayer-funded insurance and buyout programs that may still leave the most vulnerable households to lump their fate.[52] But how to make owners retreat from the waterfront without running afoul of takings doctrines? Established land use law holds that regulators cannot require existing properties to be torn down without compensation;[53] instead, new land use regulations have to grandfather pre-existing uses, an idea that actually enjoys considerable intuitive support, despite the headaches it has caused on numerous regulatory fronts.[54] In the face of that well-established doctrine, South Carolina reached for a next-best and gradualist solution: it established a setback line from the ocean; seaward of that line, it prohibited new construction as well as replacement of storm-demolished structures.[55] The idea was that over time, the beachfront could be cleared of high-risk and demanding structures, without disrupting existing properties so long as their structures remained intact.[56] Scalia's *Lucas* opinion treated this

49. *Id.* at 1035 (Kennedy, J., concurring) (arguing that takings jurisprudence permits evolving regulation beyond common law nuisance prevention).

50. *Id.* at 1027–29.

51. *See* Robin Kundis Craig, *Public Trust and Public Necessity Defenses to Takings Liability for Sea Level Rise Responses on the Gulf Coast*, 26 J. LAND USE & ENVTL. L. 395, 403 (2011).

52. *See* Rose, *Deep Blue Sea*, *supra* note 45, at 261–62; Eric Roston, *FEMA May Have to Buy Millions of U.S. Homes, Due to Climate Crisis*, AL JAZEERA (Oct. 9, 2019), https://www.aljazeera.com/ajimpact/fema-buy-millions-homes-due-climate-crisis-191009183328285.html [https://perma.cc/92RB-6L5L].

53. *See, e.g.*, *Hawkins v. Talbot*, 80 N.W.2d 863, 864–65 (Minn. 1957) (citing an established principle of exempting pre-existing uses from new land use regulations).

54. Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1223–27 (2009).

55. *See* Rose, *Deep Blue Sea*, *supra* note 45, at 261–63.

56. *See id.*

gradualist approach as a taking, clearly finding it illegitimate that the law would have stopped Lucas from building the same kind of house that the neighbors already had.[57] South Carolina thus was caught in a takings clause squeeze: because of long-settled takings jurisprudence, the state could not require that existing structures be removed without compensation. But because the existing structures acted as the model of what was allowable, the state could not prevent Lucas' new construction either—unless, of course, it also paid takings compensation. No wonder that Robin Craig, one of the nation's most prominent scholars of ocean and water law, describes the takings clause as a notable impediment to public measures to adapt to climate change.[58]

It is worth noting that Scalia's reference to existing structures as a standard reflects the misguided view that fairness in this context involves a kind of crude equality. This view does not account for increasing marginal costs when common pool resources face increasing pressure from users; I have described the problem as the unfortunate confrontation of the equality norm with the evolution of property.[59] As a number of economists have observed, successful property regimes have an evolutionary pattern, in which property limitations become more sharply defined as resource use becomes more intense.[60] When users are few and casual, their uses of common pool resources—like air or water or even space—likely have low spillover costs; but every combination of more users and more intense uses brings marginally higher costs. If successfully managed, changes in property rules will reflect those rising higher costs. Customers freely enter a little-used dance hall, but if the place grows popular, those customers will face rationing measures in the form of ticket prices and waiting lines. Similarly, no one used to care much whether one beachfront homeowner constructed a berm to catch sand over a ten-mile stretch of beach, but later would-be berm-builders can expect greater regulation or even prohibition—especially as we learn more about the ill-effects of placing hardscape on the beach, and especially in an overall environment of rising seas. In these evolutionary patterns, what was fair

57. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1008, 1031 (1992).

58. *See* Robin Kundis Craig, *"Stationarity is Dead"—Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENVTL. L. REV. 9, 61 (2010).

59. Carol M. Rose, *The Equality Norm Meets the Evolution of Property in the Law of "Takings,"* 35 SOC. PHIL. & POL'Y 149–53 (2018) [hereinafter Rose, *Equality Norm*].

60. *See, e.g.*, Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. (1967) (describing the evolution of property rights under a greater intensity of resource use); Terry Anderson & P.J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J.L. & ECON. 163 (1975) (same).

for earlier users cannot be taken as a benchmark for later users under more intense resource pressure, and *Lucas* did a disservice to suggest the opposite.[61] It is a disservice that is doubly problematic in light of local and state efforts to deal with the effects of climate change.

II. MAD EXACTITUDE ABOUT EXACTIONS

Closely related to the takings cases are the property cases involving state or local conditions on land use development. These are the unlovely offspring of takings jurisprudence: the so-called "exactions" cases, where Coan candidly confesses that his rationing pattern comes loose at the seams.[62] These cases reflect the concern that local governments might use their permitting powers to make excessive demands on new development. They are sometimes dubbed cases of "unconstitutional conditions"; the idea, roughly, is that if regulators insist that developers meet conditions that could not have been required without compensation outside the permitting process, regulators cannot leverage the permitting process to get those conditions for free.[63] As Professor Tim Mulvaney points out, however, this formulation can overlook the point that regulators actually do have some permitting powers, and that instead of negotiating over permits, they could simply deny permits outright.[64] That is to say, the regulators do bring something to the table. The nub of the exactions problem is whether regulators might use that something to bargain with developers for something else.

Exactions or unconstitutional conditions cases started with *Nollan v. California Coastal Commission*,[65] in which the state Commission insisted that as a condition for redevelopment, a shoreline owner should allow a beach walkway between two state parks on either side of the property.[66] One might imagine that park-goers had been walking across this beachfront between parks already, or at least trying to do so,[67] but Justice Scalia's majority opinion huffed about physical intrusion and then scoffed

61. Rose, *Equality Norm*, *supra* note 59, at 149–53; Rose, *Deep Blue Sea*, *supra* note 45, at 275–76.

62. COAN, *supra* note 1, at 158–61.

63. Timothy M. Mulvaney, *The State of Exactions*, 61 WM. & MARY L. REV. 169, 181–82 (2019).

64. *Id.* at 183–84.

65. 483 U.S. 825 (1987).

66. *Id.* at 827–28.

67. If so, there might have been a case for "implied dedication" to public use, which California law has recognized in the past for coastal properties. *See Gion v. City of Santa Cruz*, 465 P.2d 50 (Cal. 1970) (recognizing the doctrine on the beach); *Friends of Martin's Beach v. Martin's Beach 1, LLC*, 201 Cal. Rptr. 3d 516, 540–48 (Cal. Ct. App. 2016) (discussing doctrine and limitations), *review denied and ordered not published by Friends of Martin's Beach v. Martin's Beach 1, LLC*, No. S235039, 2016 Cal. LEXIS 5099 (Cal. 2016).

at the idea put forward by the Commission, namely that the walkway would offset the new house's obstruction of the view of the ocean.[68] The development condition, said the Court, had to have a "substantial nexus" to the purported harm to the public—that is to say, the condition had to be of a like kind with the claimed loss to the public.[69]

A follow-up case came in *Dolan v. City of Tigard*,[70] in which the city conditioned expansion of what sounded like a mom-and-pop plumbing store—in fact part of a well-known plumbing supply chain in the Portland, Oregon area—on dedicating some of her property for a greenway and bike path across the streamside back portion of the property.[71] No, no, an unconstitutional condition, said the majority of the sharply divided Court.[72] It was to no avail that the city, dutifully trying to satisfy the "nexus" requirement, had argued that the dedication was not only part of a floodplain protection plan but that the bike path also counterbalanced additional traffic expected from the store expansion. Well, maybe, said an obviously skeptical Justice Rehnquist for the 5-4 majority—but you have to prove it.[73] Rehnquist himself may have thought that no reasonable person would substitute a ride on a bike for a ride in a nice warm car.

These cases impose on regulatory authority what Justice Brennan's *Nollan* dissent called an obsolete "standard of precision" and inappropriate "degree of exactitude."[74] As such, they put substantial obstacles in the normal path of local planning and development control. *Nollan*'s demand that conditions be like-kind—disallowing walkways to offset a loss of view, or perhaps even bike lanes to offset expected increased auto traffic—is out of line with the kinds of tradeoffs that routinely occur in local land use planning. No one believes any more that planners can see far into the future and concoct a set-piece plan to cover all the anticipated changes to a whole locality; instead, local officials at best follow a rolling plan, waiting for developers and others to come up with various schemes and then trying to adjust.[75] The basic encounter between regulators and developers is the deal rather than the plan, as land use officials try to maintain a balance of amenities and services with economic growth. Thus, for example, New York City has long bargained for a kind of substitute performance, exchanging one kind of amenity for another; a "zoning

68. *Nollan*, 483 U.S. at 831–32 (holding a physical intrusion is a taking); *id.* at 836–37 (permit condition mismatched to view).

69. *Id.* at 837.

70. 512 U.S. 374 (1994).

71. *Id.* at 377–79.

72. *Id.* at 375, 396.

73. *Id.* at 392–96.

74. *Nollan*, 483 US. at 842–43 (Brennan, J., dissenting).

75. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 875–76 (1983) [hereinafter Rose, *Planning and Dealing*].

bonus" might permit an extra story on a tower in exchange for a ground-level plaza or arcade.[76] Similarly, planners have used another substitute performance device, transferable development rights or TDRs, to safeguard New Jersey's Pinelands region.[77] The Court's demand for a "nexus" in *Nollan* threatened to narrow the trades that can go into these bargains. What is the nexus between an extra story and a plaza? What nexus connects a restriction in the Pinelands with zoning relaxation on a building elsewhere? The nexus requirement potentially undercuts local officials' ability to bargain for these kinds of substitute performances.

Aside from *Nollan*'s disruption of land use bargaining patterns, *Dolan*'s additional demand that land use regulators *prove* the nexus pushes a big chip to the developers' side of the table, especially when one considers the extensive planning consideration that had already gone into the City of Tigard's demand for a greenway and bike path. What more do local land use regulators have to do to prove the connection, and how many more expenses do they have to undertake?

The most egregious of these cases was yet to come, however, in *Koontz v. St. Johns Water Management District*.[78] Here the Management District offered several proposals for offsets through which a developer might secure a permit for wetlands fill, including the possibility of paying for some wetlands elsewhere—whereupon the developer accepted none but filed suit instead.[79] The Court's majority agreed with the developer that the case was one of unconstitutional conditions, but more than that, it implied that the District should not have brought up any possible tradeoff scenarios without meeting the nexus and proof requirements for each.[80] As Justice Kagan pointed out, this demand interferes massively with local practice and could sufficiently intimidate regulators that they might simply deny the permit, without even attempting to find compromise tradeoffs.[81]

A couple of questions: first, will these decisions halt everything? No, undoubtedly not; repeat players in local development will very probably arrive at compromise solutions with planners and regulators. Highly desirable localities, like Palo Alto, California, or Cambridge, Massachusetts, should be able to threaten to say no, just in order to achieve the conditions they want. Professor Mulvaney's recent study concluded

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76. Jerold S. Kayden, *Market-Based Regulatory Approaches: A Comparative Discussion of Environmental and Land Use Techniques in the United States*, 19 B.C. ENVTL. AFF. L. REV. 565, 568–69 (1992).

77. *See, e.g.*, Richard B. Stewart, *Models for Environmental Regulation: Central Planning Versus Market Based Approaches*, 19 B.C. ENVTL. AFFS. L. REV. 547, 556 (1992) (describing the Pinelands program in the context of tradable environmental rights programs).

78. 570 U.S. 595 (2013).

79. *Id.* at 600–02.

80. *Id.* at 599, 601–02, 611–12.

81. *Id.* at 631–34 (Kagan, J., dissenting).

that after five years, *Koontz*'s has had only marginal impact in federal courts so far.[82] But it is inappropriate to suppose that an absence of litigation means that the Court's decisions make no difference to the bargaining process.[83] In this area as in others, the parties bargain in the shadow of the law and tailor their bargaining demands in some measure to match their litigation chances—along with litigation costs. Palo Alto may get the conditions it wants, but one wonders about Bridgeport, Connecticut or Paterson, New Jersey, just to mention a few currently struggling communities.

There is of course a nagging second question: are there not in fact some instances of gross overreaching by local land use regulators? Of course, there are. Regulators may be tempted to stick new development disproportionately to provide local desiderata, as opposed to taxing their own residents; once again, the most desirable communities are those most likely to get away with it. The Court's exactions case, while more numerous than Coan's theory normally predicts, do seem to be following the other part of Coan's theory, that is, they seem to be searching for a big clunky doctrinal basis to curb local regulators' extortionist impulses. But even more than the physical invasion and total economic loss categories in the takings context, the exactions formulations leave a great residue of uncertainty, including questions on how money exactions might be distinguished from user taxes, and whether general legislation as well as individual permits might be treated as exactions. The big trouble, however, is that the exactions cases seem to be creating such devastating cannonades at extortionate bargaining that they effectively shut down bargaining altogether.

As a matter of substance, the Court's exactions or unconstitutional conditions cases not only hamstring local practice more generally, but they also impede local regulators from using one of the more creative ideas in contemporary regulatory practice, that of trade-offs or substitute performance. Local governments played a major role in developing the regulatory innovation of substitute performance, particularly in the idea of transferable development rights or TDRs mentioned above—that is, permitting the relaxation of some regulatory limits in exchange for substitute benefits in another domain.[84] To be sure, TDRs can look like

82. Mulvaney, *supra* note 63.

83. Robin Kundis Craig, *Using a Public Health Perspective to Insulate Land Use Related Coastal Climate Change Adaptation Measures from Constitutional Takings Challenges*, 66 PLAN & ENVTL. L. 4, 4 (2014) (describing local governments' fear of the costs of takings litigation even if successfully defended).

84. *See* John J. Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 577–79 (1972); *see also* John McLaughry, *The Land Use Planning Act: An Idea We Can Do Without*, 3 ENVTL. AFF. 595, 613–14 (1974) (proposing TDRs as an alternative to federally-supported zoning measures).

funny money in local regulatory contexts,[85] but their intellectual redemption came when they migrated to larger environmental control measures. That is particularly the case as the TDR idea morphed into tradable emission permits under the federal Clean Air Act Amendment of 1990. The Act's acid rain program is widely regarded as a leading example of emissions trading, providing greater flexibility and cost saving for the regulated parties by comparison to the old command-and-control regulations on air pollution.[86] Now, however, at the local level, substitute performance is under siege because of the Court's ongoing assaults on bargaining tradeoffs.

By undercutting the bargaining process, the Court is adopting an exceedingly crude method to manage overreaching by local land use regulation. A more sensible approach would be to do what in fact most courts generally do: to ask whether the regulation exceeds the bounds of fairness, in light of the owner's reasonable expectations.[87] Reasonable expectations should include the expectation that regulations change with circumstances, as argued above, as well as the expectation that land use bargains deploy substitute performance. The bargain is not an eye for an eye, as in like-kind regulatory demands, but rather a looser tit for tat—weighing the local regulatory demands against the likely additional burdens from the new development in question, and considering the *marginal* costs of those burdens as opposed to *past averages*.

Fairness, reasonable expectations, and substitute performance all delineate a due process approach to development bargains, rather than the semi-prohibitionist approach that the Court seems to be struggling to define. Such an approach would diverge from Coan's recipe for big clunky guidelines; but then, the exactions cases have already diverged from that recipe by their sheer number of intrusions. Can U.S. courts manage a more flexible approach instead? Well, our own state courts generally can, even with some diversity of views, because they have considerably more experience with local land use issues. Coan's rationing analysis explains why the Supreme Court has never generated that experience. As to the lower federal courts, we are about to find out a great deal more about their capacities to manage local land use regulation, because the Supreme Court's latest salvo allows takings claimants to seek redress directly in

85. *See* Roderick M. Hills, Jr. and David Schleicher, *Building Coalitions Out of Thin Air: Transferable Development Rights and "Constituency Effects" in Land Use Law* J. LEGAL ANALYSIS (forthcoming), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3504372 (criticizing TDRs as compensation but seeing them as useful in building political constituencies for land use improvements).

86. *See, e.g.*, Richard E. Ayres, *The 1990 Clean Air Amendments: Performance and Prospects*, 13 NAT. RES. & ENVT. 379, 380–81 (1998) (describing acid rain emissions trading as a "resounding success").

87. Banner, *supra* note 46, at 186.

federal courts, without first seeking state remedies.[88] But in those federal courts, the prospects are rather bleak for flexible, well-informed and environmentally sensitive land use decisions.[89]

III. CONCLUSION: HOW COME THE COURT GIVES STATES AND LOCALS THE BACK OF ITS HAND?

I have confined my complaints to the Court's treatment of state and local regulation in takings and exactions cases, but if I had space, I would rail at length about some of the Court's Dormant Commerce Clause decisions. These often seem to me very closely related to the takings cases, showing much the same pattern of tolerance punctuated by cannonades that undermine state and local resource management, from wildlife[90] to water[91] to trash.[92] Outside the environmental context, I could add some of the Court's decisions on the First Amendment (about adult entertainment) or Second Amendment (about gun ordinances).

So what is the reason for these casual dismissals of state and local regulatory authority? The best I can so is to come up with some guesses. Here are a few:

A. The Legacy of Civil Rights

The long and abysmal record of many states and localities with respect to racial discrimination undoubtedly has left a lingering distrust of these levels of government. Most of the cases that I find most irksome have come in the last fifty years, in the aftermath of the civil rights activism of the 1960s and later, perhaps reflecting a more general view that state and local governments deserve little respect.

B. Blame the Federalist

Madison's famous Tenth Federalist described how the national legislature would overcome petty faction sheerly by its size and diversity, with the clash of interests undermining the power of any one faction to

88. *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019).

89. David A. Dana, *Not Just a Procedural Case: The Substantive Implications of Knick for State Property Law and Federal Takings Doctrine* 2 (Northwestern Pub. Law Research Paper No. 19-26, 2019), https://poseidon01.ssrn.com/delivery.php?ID=062021004021120117110008118126029090.

90. *Hughes v. Oklahoma*, 441 U.S. 322 (1979), overturning *Geer v. Connecticut*, 161 U.S. 519 (1986).

91. *Sporhase v. Nebraska*, 458 U.S. 941, 955 (1982).

92. *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res.*, 504 U.S.353 (1992).

impose its will on everyone else. Implicit in his analysis is a critique of state and local governments—too small and internally uniform to prevent factional domination.[93] Quite a number of academics have echoed the Madisonian critique of sub-federal government, ignoring the point that the majority of modern states are as large and diverse as the entire nation in 1787, and more importantly ignoring that local governments have other sources of legitimacy, in what economic historian Alfred Hirschman called "voice" and "exit."[94] Repeat the misleading Madisonian mantra enough times, perhaps, and a certain contempt for states and localities clouds the view from inside the Beltway, where of course the Court resides.

C. The Property Rights Backlash

Abortion was not the only issue roiling conservative Americans in the 1970s and later. What seemed to be an attack on property rights was another, epitomized in the failed effort to pass a national Land Use Planning Act in the early 1970s. The proposed act actually was not at all opposed to state-level land use control; it would have provided funds and institutional support to state governments' comprehensive planning efforts. But its purported threats to property rights created howls of objections over the several years in which Congress debated it.[95] The Act survived only in fragmentary form like the Coastal Zone Management Act, but the opposition has lived on quite robustly, in a property-rights movement that one set of authors has called the "Takings Project."[96] That project includes conservative think tank participation in several of the cases described above. State and local land use regulations are among the

93. THE FEDERALIST NO. 10 (Madison).

94. I have called this Federalist-based critique a pattern of "localism-bashing." *See* Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1131–33 (1996) [hereinafter Rose, *Takings, Federalism, Norms*] (reviewing WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS (1995)); *see also* Rose, *Planning and Dealing*, *supra* note 75, at 882–87 (describing alternatives to the Federalist for sources of local legitimacy). The population of the United States in 1787 is estimated at 3.9 million. *See* Nat'l Constitution Ctr., *How Things have Changed in Philadelphia Since the 1787 Convention*, CONSTITUTION DAILY (May 25, 2016), https://constitutioncenter.org/blog/how-things-have-changed-since-1787/ [https://perma.cc/ZY99-QU58]. Estimated figures for 2019 state population place twenty-seven states at over four million and thirty-four at over three million, with two more coming in at just under three million. *See US States-Ranked by Population 2020*, WORLD POPULATION REVIEW, http://worldpopulationreview.com/states/ [https://perma.cc/28FN-LUL8].

95. *See, e.g.*, McLaughry, *supra* note 84, at 595–96, 599–600, 618–19 n.3 (describing opposition to the proposed Act's supposed invasions of private property rights).

96. Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 539–45 (1998).

chief targets, and property rights proponents like the Pacific Legal Foundation are repeat players to an increasingly conservative Supreme Court.

D. Exhaustion

There is only one federal government, but there are fifty state governments, and according to Wikipedia, there are 89,004 local governments. The latter figure includes special districts, but simplifiers will be happy to know that the figure is down from the 89,476 reported in 2007. Nevertheless, that is rather a lot, to put it mildly. These numbers feed what one might call the Beltway Bias, which leads academics to disregard states and local governments, and instead to zero in on national solutions to almost any issue. Perhaps something of the same attitude affects the members of the Court: there are just too many of these dinky jurisdictions to pay close attention to their efforts.

Which if any of these factors explains the Court's cavalier decision-making with respect to state and local land use and resource regulation? I am on record as blaming the second factor, the *Federalist* fixation, which treats state and local efforts with suspicion,[97] but Coan's book argues persuasively that the fourth factor, exhaustion, must be a part of the picture. The exhaustion factor explains why the Court never gains the experience that might generate more nuanced decisions, and that factor, together with the others, explains the Court's distaste for bothering.

The Court, then, confines its approach to local land use issues to hands-off on the one hand or blunderbuss on the other. My objections chiefly fault the blunderbuss decisions, and if Coan is right, the only alternative is hands-off. But in an era of federal gridlock, and in which the only serious environmental initiatives appear to be coming from state and local sources, perhaps hands-off is preferable.

It is notable that in one takings area, that of classic eminent domain takings of title, the Court has actually taken the hands-off approach consistently. In the last few decades, the most contentious issue has been the use of eminent domain for what is called "economic development," which usually involves involuntary sales and transfers from one private owner to another private party for the sake of some larger planned project. Here, over several vociferous dissents, the Court has refrained from interfering, however unpopular and misguided some state and local eminent practices have proved to be.[98]

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97. Rose, *Takings, Federalism, Norms*, *supra* note 94, at 1131–33; Rose, *Planning and Dealing*, *supra* note 75, at 882–997.

98. *Kelo v. City of New London*, 545 U.S. 469 (2005); *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1964); *see also* Thomas W.

This pattern may really reflect an unstated deference to the federal government, however. This is because the federal government shares a great deal of the blame for the Original Sin of eminent domain for local economic development: the Urban Renewal program of the 1950s and early 1960s.[99] Alternatively, the Court's deference may be rooted in the local aspect of Coan's rationing model: the Court's majorities have found it too difficult to say what is economic development and what is not, and fear a landslide of requests to do so. The most recent and most contentious of these cases was *Kelo v. City of New London*,[100] which let stand an exercise of eminent domain transferring a private home to a planned industrial park development; but as the *Kelo* majority strongly suggested, the states on their own could ban eminent domain for economic development.[101] In the wake of *Kelo*, several state legislatures and courts quickly did so.[102]

The states' response to Kelo seems to me to carry a lesson: states and localities can figure out their own approaches to land use practices, and they do so with considerable variety, with both successes and mistakes. The Court has good reason to intervene in these practices in cases of interstate externalities, civil rights violations, or substantial departures from due process. In the absence of those factors, the Court's interventions have been confusing, intrusive, and disruptive of experimentation. The Court's pattern of decisions may have generally followed Coan's model, but the Court's decisions on state and local land use measures show how costly that model can be.

Merrill, *How to Reform Eminent Domain*, 57 PLAN. & ENVTL. L. 9 (2005) (defending the *Kelo* decision and arguing that eminent domain decisions should remain local).

99. *See* MARTIN ANDERSON, THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949–1862 (1964) (sharply criticizing federal urban renewal programs).

100. 545 U.S. 469 (2005).

101. *Id.* at 483–85.

102. *See* James W. Ely, Jr., *Post*-Kelo *Reform: Is the Glass Half Full or Half Empty?* 17 SUP. CT. ECON. REV. 129 (2009) (describing state legislation and judicial decisions responding the *Kelo* decision).