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Still an Issue: The Taking Issue at 40

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STILL AN ISSUE: THE TAKING ISSUE AT 40

INTRODUCTION

*Patricia E. Salkin**

In 1973, the Council on Environmental Quality published a seminal report by Fred Bosselman, David Callies and John Banta: “The Taking Issue: A Study of the Constitutional Limits of Governmental Authority to Regulate the Use of Privately-Owned Land Without Paying Compensation to the Owners.” This is one of the three seminal reports issued in the 1970s that have continued to influence the practice of land use regulation today.¹ In October 2013, with the launch of Touro Law Center’s new Institute on Land Use and Sustainable Development Law, the *Touro Law Review* held a symposium to commemorate the 40th anniversary of The Taking Issue. We are indebted to Professor David Callies, who had the idea and vision for this important symposium. A highlight of the event was to be the presence of all three co-authors of the report. Sadly, weeks before the event, Fred Bosselman succumbed to cancer.² The land use and environmental law community is indebted to the *Touro Law Review* for dedicating this issue to the legacy of Professor Fred Bosselman. Fitting tributes by Professor David Callies, Edward J. Sullivan and Nancy Stroud are included in this issue, and they add to the published tributes by Chicago-Kent School of Law Dean Harold J. Krent,³ and while Fred was with us, by Professor Dan Tarlock, Pro-

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¹ For a discussion of the three reports, see David Callies, *Fred Bosselman and the Taking Issue*, 17 J. LAND USE & ENVTL. L. 3 (2001).

² See Obituary, *Fred Bosselman*, CHICAGO TRIBUNE, <http://www.legacy.com/obituaries/chicagotribune/obituary.aspx?pid=166331208> (last visited Mar. 31, 2014).

³ See Harold J. Krent, *In Memoriam: Professor Fred Bosselman*, IIT CHICAGO-KENT COLLEGE OF LAW (Aug. 6, 2013), <http://www.kentlaw.iit.edu/news/2013/in-memoriam-professor-fred-bosselman>.

fessor David Callies, and Professor Daniel Mandelker.⁴

The Foreword to *The Taking Issue*, published on July 9, 1973, begins with: “Few subjects are more fraught with emotion and less understood than the rights of private property and the Constitutional limits to public control of those rights.”⁵ Russell E. Train, then Chairman of the Council on Environmental Quality, concludes by writing, “We are hopeful that this study of ‘The Taking Issue’ will serve to clarify and inform public debate, in order that America’s future can be better served by a more rational system of land use policies and control.”⁶ This report was an outgrowth of the previous study by Bosselman and Callies, “The Quiet Revolution in Land Use Control.”⁷ In the Preface, the authors set forth that the “report traces the distinction between a valid regulation of the use of land and a ‘taking’ that requires compensation”⁸ The Introductory Note makes it clear that this report was born from the search to identify effective methods of environmental protection,⁹ and that “attempts to solve environmental problems through land use regulation are threatened by the fear that they will be challenged in court as an unconstitutional taking of property without compensation.”¹⁰ The authors note that “if the challenge posed by the taking issue can be overcome we believe it will make a very significant impact on environmental quality.”¹¹

Part I of *The Taking Issue* begins with an examination of “The Pervasiveness of the Taking Issue,” explaining how governments across the country have been grappling with the use of land use regulation to achieve environmental protection goals.¹² The authors

⁴ See Tribute to the Achievements of Professor Fred P. Bosselman, 17 J. LAND USE & ENVTL. L. 2 (2001), http://www.law.fsu.edu/journals/landuse/vol17_1/tribute.pdf.

⁵ FRED P. BOSSELMAN, DAVID L. CALLIES & JOHN BANTA, COUNCIL ON ENVTL. QUALITY, *Foreword to THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL* (1973) [hereinafter *THE TAKING ISSUE*].

⁶ *Id.*

⁷ FRED BOSSELMAN & DAVID CALLIES, COUNCIL ON ENVTL. QUALITY, *THE QUIET REVOLUTION IN LAND USE CONTROL* (1971). Two years ago, a similar symposium was held focusing on the 40th Anniversary of *The Quiet Revolution in Land Use control*. See Volume 45 of the *John Marshall Law Review* (Winter 2012).

⁸ See *Preface to THE TAKING ISSUE*, *supra* note 5.

⁹ “The complexity of environmental issues is notorious. . . . Solutions to environmental problems are like chains with many interconnected links. The taking issue is the weak link in many of these chains.” *Id.* at iv.

¹⁰ *Id.*

¹¹ *Id.* at v.

¹² *Id.* at 1-2.

point out that while the takings clause does not afford property owners unrestricted use of their land, the government's zeal to protect the environment has a real economic impact on people and a just solution must be realized.¹³ Parts II and III trace the historical roots of the takings clause from England to Colonial America up through then-modern day jurisprudence (1970s). Part IV offers five separate strategies for governments to address the takings issue and discusses each one.¹⁴ The conclusion in Part V begins with the twelve key words from the Constitution, ". . . nor shall private property be taken for public use without just compensation."¹⁵ It asks the reader why these words demand so much study, and notes that "[b]elow the surface lies the myth of the taking clause—a powerful public perception of the clause as the embodiment of every man's right to buy and sell land for a profit,"¹⁶ and that this impression is simply out of date with court rulings. The conclusion continues, "The taking clause has bedeviled some of our brightest and most lucid legal scholars. . . . We eventually came away with a sense of frustration"¹⁷ The assertion that "[t]he taking issue represents an inevitable conflict between two valid and important interests; the need for a livable environment and the importance of private property rights"¹⁸ still remains at the heart of the challenge forty years later.

The authors' final summary is worth repeating here to further make the point of how little has changed in forty years despite thousands of more reported decisions and countless state and federal legislative sessions where clarity could have been achieved:

A. The taking clause is a serious problem wherever there is substantial pressure for urban growth, and particularly

¹³ THE TAKING ISSUE, *supra* note 5, at 2.

¹⁴ *Id.* at 236-37 ("One approach would be a firm stand against liberal construction that Holmes and his followers gave the takings clause A second strategy would rely on a gradual increase in the weight given by courts to the environmental purposes behind land use regulations A third tactic would propose legislative standards to codify more precisely the line between regulation and taking Approach number four would not rely on any change in the substantive law but would count on careful drafting and factual presentation to resolve disputes over land use regulation Finally the takings issue can be avoided entirely if the government uses its land acquisition powers rather than its regulatory powers wherever it seeks to restrict severely the development of land.").

¹⁵ *Id.* at 318 (citing to U.S. CONST. amend. V).

¹⁶ *Id.* at 323.

¹⁷ *Id.* at 324-25.

¹⁸ THE TAKING ISSUE, *supra* note 5, at 326.

where the environment is sensitive.

- B. The popular fear of the taking clause is an even more serious problem than actual court decisions.
- C. There is little historical basis for the idea that a regulation of the use of land can constitute a taking of the land.
- D. The most recent court decisions, those of the '70's, strongly support land use regulations based on overall state or regional goals—regulations of the type we discussed in *The Quiet Revolution in Land Use Control*.
- E. More thorough consideration should be given to the possibility of statutory standards to determine when compensation must be paid. The British have found their experience with such standards highly satisfactory.
- F. Finally, there is a great deal that a good lawyer can do working with existing laws if he has access to good factual evidence and if he practices careful draftsmanship. These subjects deserve more detailed consideration in order to provide attorneys with the kind of expert assistance they need.¹⁹

It is with these thoughts in mind, that the *Touro Law Review* assembled some of today's leading luminaries to reflect on how the taking issue has evolved and to assess where we are today. What follows is a description of the contributions to this symposium issue.

Professor Richard A. Epstein provided the keynote address for the symposium, discussing common law foundations of the taking clause and highlighting the disconnect between public and private law.²⁰ He opines in his article that the takings clause has not, and will not be applied correctly by the United States Supreme Court because the Court disregards the common law foundations of property rights.²¹ Therefore, he concludes that with the protections afforded

¹⁹ *Id.* at 328-29 (internal citation omitted).

²⁰ Richard A. Epstein, *The Common Law Foundations of the Takings Clause: The Disconnect Between Public and Private Law*, 30 TOURO L. REV. 265 (2014).

²¹ *Id.* at 265.

by the Fifth Amendment “effectively eviscerated in a large number of cases,” the impacts are not just felt by the individual property owners but rather by society as a whole.²² Professor Epstein asserts that “[t]he disconnect comes at a high cost, and so long as it remains the takings law will always be a muddle.”²³

The next two articles focus on the frustration with a lack of clarity and a rational approach to ripeness for federal takings claims. Nationally accomplished takings practitioner, Michael M. Berger, has continued to address ripeness in a compelling fashion with passion in law reviews and at conferences since 1985. Mr. Berger has spent nearly fifty years practicing taking law on the side of property owners, and he has argued four regulatory takings cases before the United States Supreme Court while submitting amicus briefs in nearly every other significant takings case. Mr. Berger once again asks, “Why?”²⁴ What has evolved is a takings jurisprudence that creates a procedural nightmare for litigants who desire to get their day in court—a ping pong ball being hit between state and federal courts for standing which often results in no court willing to address the substantive issue presented. Despite the attempts by Congress to address this conundrum and a continued lack of clarity in the courts, Berger makes the argument that the time is now for the Supreme Court to “act decisively to eliminate this carbuncle on the body of law.”²⁵

J. David Breemer contributes a second article on ripeness, addressing *Williamson County*'s²⁶ state litigation ripeness requirement, arguing that the approach is flawed and should be overruled.²⁷ Like Berger, Breemer expresses frustration with the state court litigation requirement before a case can be ripe for federal court review since in practice the rule has proven to be “self-defeating and unfair . . . because it nullifies, instead of secures, federal court review.”²⁸ Like Berger, Breemer is a seasoned and well-respected property rights attorney who has argued takings cases before the circuit courts and the

²² *Id.* at 295.

²³ *Id.*

²⁴ Michael M. Berger, *The Ripeness Game: Why Are We Still Forced to Play?*, 30 *Touro L. Rev.* 297 (2014).

²⁵ *Id.* at 301.

²⁶ 473 U.S. 172 (1985).

²⁷ J. David Breemer, *The Rebirth of Federal Takings Review? The Courts' "Prudential" Answer to Williamson County's Flawed State Litigation Ripeness Requirement*, 30 *Touro L. Rev.* 319 (2014).

²⁸ *Id.* at 319.

United States Supreme Court, and he has authored countless amicus briefs to the courts on takings issues. Breemer concludes his article by asserting that “*Williamson County*’s decision to hinge the accrual and ripeness of a federal takings claim on a state court’s denial of damages is doctrinally bankrupt and unworkable in practice.”²⁹ In essence, Breemer asserts that the practical effect is that property owners have lost access to the very courts established to protect their Fifth Amendment rights.

The next two articles focus on the categorical rule enunciated in *Lucas*, examining the murky background principles exception to the categorical takings rule. In the first article, Professor Carol Necole Brown reports the results of her survey of nearly 1,600 reported takings decisions post-*Lucas* involving a *Lucas* takings challenge where she analyzes the use of the nuisance exception.³⁰ Professor Brown asserts that the perceived openings in *First English* and *Tahoe-Sierra* for temporary takings have essentially been closed by *Lucas*.³¹ Professor Brown found that since the *Lucas* decision, out of the 1,600 reported cases where a categorical taking was raised, in only four cases was the property owner able to succeed in proving a categorical taking resulted from the application of a state nuisance abatement statute.³² After discussing each of the four cases, Professor Brown concludes that the nuisance abatement cases “are likely outliers and prospectively hold little potential for enhancing private property rights protections in the future.”³³

Professor David Callies and David Robyak examine the application of the two exceptions to the categorical rule in *Lucas*: nuisance and background principles of state property law.³⁴ Concurring with Professor Brown’s findings with respect to nuisance, the authors note that in the area of background principles, specifically as it relates to the public trust doctrine and customary law, there has been considerable traction, the outcomes of which tend to favor the government

²⁹ *Id.* at 346.

³⁰ Carol Necole Brown, *The Categorical Lucas Rule and the Nuisance and Background Principles Exception*, 30 TOURO L. REV. 349 (2014).

³¹ *Id.* at 351.

³² *Id.* at 351-52.

³³ *Id.* at 370.

³⁴ David L. Callies & David A. Robyak, *The Categorical (Lucas) Rule: “Background Principles,” Per Se Regulatory Takings, and the State of Exceptions*, 30 TOURO L. REV. 371 (2014).

defendants.³⁵ The authors conclude that while the ability of a property owner to prove a *Lucas* categorical taking will be rare and that it is more likely that more property owners may be successful under the partial takings analysis in *Penn Central*, assuming they can get past the ripeness doctrine explained by Berger and Breemer, property owners are at the mercy of unpredictable and uniform application of law.³⁶ The authors state that “the protections afforded private property from wholesale regulatory confiscation by government are fragile enough without their evisceration by courts and legislatures seeking to protect their version of public rights by short cuts without paying compensation.”³⁷ They conclude, “In an America where the judiciary protects penumbras and emanations derived from written language in our Bill of Rights, rights which are clearly spelled out in the Constitution’s Fifth Amendment demand no less.”³⁸

The symposium then shifts its focus to substantive due process and takings law, specifically with respect to exactions and the recent *Koontz* case. Professor Mark Fenster asserts that the controversial decision in *Koontz* should best be viewed not as a new direction in takings law, but rather as consistent with the Court’s exactions jurisprudence emanating from the landmark *Penn Central* case.³⁹ Professor Fenster argues that the *Koontz* decision “completes the move that the Court’s 2005 decision in *Lingle v. Chevron U.S.A.* began, rendering the exactions decision in *Nollan*, *Dolan*, and now *Koontz*, as conceptually and practically outside of the federal constitutional takings realm entirely”⁴⁰ Noting that the recent decision will challenge state and federal courts to fashion a remedy besides the just compensation required for a taking, and that the practical effects will not necessarily help property owners, Professor Fenster concludes that while it is too soon to predict the effects of *Koontz* on land use regulation, he expects “that they will vary across jurisdictions and, like *Nollan* and *Dolan*, will, in some instances lead to more regulation and in others, lead to less.”⁴¹

Frank Schnidman, who forty years ago was working for New

³⁵ *Id.* at 400-02.

³⁶ *Id.*

³⁷ *Id.* at 402.

³⁸ *Id.*

³⁹ Mark Fenster, *Substantive Due Process by Another Name: Koontz, Exactions, and the Regulatory Takings Doctrine*, 30 *TOURO L. REV.* 403, 404 (2014).

⁴⁰ *Id.*

⁴¹ *Id.*

York State government, the Council of State Governments and other governmental entities, grappling with metropolitan and regional planning issues, offers a personal account of the legal scene in the mid-1970s and reflects on New York Court of Appeals Judge Charles Breitel and the Judge's contributions to takings jurisprudence.⁴² Specifically, Mr. Schnidman provides a never-before published transcript of the Judge's keynote address at a 1979 ALI-ABA Land Use Institute. Judge Breitel asserts that "the old concepts of private property in regard to land not only have already changed, but the change in the future will be greater."⁴³ The Judge briefly reflected on the *Fred French* and *Penn Central* cases that had been before the Court, and he concludes that the law is evolving in this area, that effective lawyers need to be "statesmen," and he noted that briefs resembling a "Brandeis brief" would be helpful to the courts.⁴⁴ Based on the other articles submitted for this symposium, it seems as though the statesman approach has not entirely succeeded from the property rights perspective.

Practitioners Edward J. Sullivan and Karin Power assert that to achieve fairness in the regulatory takings context, "the selection of the precise parcel on which a takings analysis must [be the] focus when evaluating a takings claim."⁴⁵ However, the authors conclude that it is likely "impractical to believe that an objective relevant parcel takings test can be construed from . . . highly fact-specific cases often driven by changing regulatory priorities."⁴⁶ They note that it is incumbent upon the bench to "balance an open-ended number of factors" in order to fairly arrive at the appropriate investment-backed expectations of property owners.⁴⁷

Returning to the recent *Koontz* decision, practitioners Julie Tappendorf and Matthew DiCianni explore the doctrine of unconstitutional conditions as an evolving part of the Supreme Court's exactions decisions.⁴⁸ After reviewing the body of exactions case law and

⁴² Frank Schnidman, *A Trip Back in Time, Including Judge Charles D. Breitel's Rationale for His Fred French and Penn Central Decisions*, 30 TOURO L. REV. 421 (2014).

⁴³ *Id.* at 425.

⁴⁴ *Id.* at 427-29.

⁴⁵ Edward J. Sullivan & Karin Power, *The "Parcel as a Whole" in Context: Shifting the Benefits and Burdens of Economic Life – Or Not*, 30 TOURO L. REV. 431, 431 (2014).

⁴⁶ *Id.* at 451.

⁴⁷ *Id.* at 452.

⁴⁸ Julie A. Tappendorf & Matthew T. DiCianni, *The Big Chill?—The Likely Impact of Koontz on the Local Government/Developer Relationship*, 30 TOURO L. REV. 455 (2014).

the facts leading up to the *Koontz* decision and the impact of the decision of the doctrine of unconstitutional conditions, the authors explore the potential practical effect of *Koontz* going forward. Specifically, the authors discuss why some have characterized the decision as the “worst takings decision of all time.”⁴⁹ They point to the shaky legal foundation upon which the decision rests and assert that the decision “makes an orderly system of land use regulation significantly more difficult.”⁵⁰ Most importantly, the authors point to the belief that the decision will change the relationship between local governments and developers as pre-permitting collaboration and negotiation may no longer be welcome.⁵¹ The authors conclude with advice for local governments in a post-*Koontz* world.⁵²

The symposium concludes with a student note by Toni Kong reviewing a recent trial court decision in Richmond County, New York addressing whether freshwater wetlands regulations as applied to plaintiffs’ property constituted a taking.⁵³ The Court concluded that there was no categorical taking under *Lucas*, so the ad hoc test under *Penn Central* applied.⁵⁴ In finding an 82% diminution of value and taking other factors into consideration, the court awarded \$810,000 in just compensation.⁵⁵ Kong goes through the opinion in detail highlighting the application of many of the cases discussed in the articles in this symposium, making a nice case study in current New York application of key takings concepts.

As a point of personal privilege, the planning for this symposium took about a year. I arrived at Touro Law Center in the summer of 2012 with the idea of collaborating with my friend and mentor, Professor David Callies, on a law review symposium commemorating the important anniversary of The Taking Issue. Professor Callies has had a remarkable career, entering the land use law and policy field as a young practitioner and for decades he has been a leading luminary for law students, lawyers, planners and judges who grapple with complex issues surrounding the regulation of land. He is clearly an intellectual icon in the field. Thank you to the *Law Review* staff

⁴⁹ *Id.* at 467.

⁵⁰ *Id.* at 470.

⁵¹ *Id.*

⁵² *Id.* at 476.

⁵³ Toni Kong, *The Art of Stripping: How the Government Applies the Takings Clause to Strip You of Your Property*, 30 TOURO L. REV. 479 (2014).

⁵⁴ *Id.* at 480.

⁵⁵ *Id.* at 495.

from last year, led by former editor-in-chief Tiffany Frigenti, and this year's editor-in-chief Vincent Costa, for their unwavering support. Of course, the symposium and coordination related thereto would not have happened without symposium editor Evan Zablow who was both patient and constantly pushing forward on deadlines at the same time. I am indebted to the entire staff of the *Law Review* who attended the symposium, helped to welcome our speakers and guests, and edited the wonderful articles contained in this issue. Given the continuing lack of uniformity and clarity in the world of takings law, it is Touro Law Center's hope that this issue can shed some light on the opportunities for reform to advance the Taking Issue, first identified by the federal government forty years ago as an important constitutional protection in need of attention.