Chapter 6

Unconstitutional Takings of Private Property

Since the Penn Central decision in 1978, there have been occasional indications that the economic liberties of the constitution might be given a new life. But through it all, the now ageless question of whether a regulation of private property has gone too far has remained the defining issue in property rights jurisprudence. Without a marker to determine when a regulation has gone too far, there is nothing left but “sifting facts and weighing circumstances,”1 all in service to the Penn Central balancing test.

Of course the reality is that such balancing rarely occurs in the courts. For the most part it occurs in the political negotiations surrounding every regulation, with regulators knowing that if they can win the political battle, there is little chance that the affected property owners will prevail should they object in the courts that their property has been taken in contravention of the 5th Amendment. But because there are a few property owners who have the will and resources to challenge government on principle and a network of property rights advocates organized for the same purpose, cases have continued to find their way to the Supreme Court over the last three decades.

How Far Is “Too Far”?

In the term following its Penn Central decision, a divided Supreme Court in Kaiser Aetna v. United States2 evidenced the lack of clarity inherent in the balancing approach, even though the majority could have avoided a foray into public policy by ruling on the simple and clear physical invasion principle later confirmed in Loretto v.
Teleprompter Manhattan. Kaiser Aetna involved an indisputably private pond that had been dredged to create a marina with access to navigable, coastal, waters. The United States subsequently ruled that the pond had been made navigable and that public access must therefore be allowed. The owner of the pond claimed a taking of private property and sought compensation. Writing for the majority and ruling in favor of the property owner, Justice Rehnquist cited Penn Central in confirming that the takings doctrine requires the court to engage “in essentially ad hoc, factual inquiries,” notwithstanding the fact that the effect of the government regulation was to deprive the property owner of “one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others,” and that “the shifting back and forth of the Court in this area... bears the sound of ‘Old, unhappy, far-off things, and battles long ago,’ ” and “that the strict logic of the more recent cases... might completely swallow up any private claim for ‘just compensation’ under the Fifth Amendment.”

Rehnquist suggested no standard or principle that might guide the Court away from these hazards in future cases. Rather he noted that “as Mr. Justice Holmes observed in a very different context, the life of the law has not been logic, it has been experience.” Experience demonstrated to Rehnquist and the Kaiser Aetna majority that the government’s demand for public access “collides with not merely an ‘economic advantage’ but an ‘economic advantage’ that has the law back of it to such an extent that courts may [require compensation].” Although the property owner prevailed, Rehnquist’s implication that the law could be “back of” a legal claim but not sufficiently to warrant judicial enforcement and that, in any event, the courts may or may not require compensation, leaves property rights in a precarious position. There is nothing in Rehnquist’s statement to give confidence that the law will deliver tomorrow what it promises today. Absent that, balancing, not the rule of law, remains the judicial task. Not surprisingly, Justices Blackmun, Brennan and Marshall “reach[ed] a different balance of interests.” Justice Rehnquist could have avoided this tug of war by finding that an unconstitutional taking resulted from the government’s effective physical invasion of the plaintiff’s property, and saying nothing more.

A year later, the Court faced a similar issue in a challenge to a California Supreme Court finding that no taking resulted when a private shopping center was required to allow political protestors access to shopping center property. Had Rehnquist’s Kaiser Aetna opinion relied wholly on the fact of physical invasion and the resultant