

1-1-1994

Book Review [Grand Theft and the Petit Larceny: Property Rights in America]

Santa Clara Law Review

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>



Part of the [Law Commons](#)

Recommended Citation

Santa Clara Law Review, Book Review, *Book Review [Grand Theft and the Petit Larceny: Property Rights in America]*, 34 SANTA CLARA L. REV. 1089 (1994).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol34/iss3/7>

This Book Review is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

BOOK REVIEW

GRAND THEFT AND PETIT LARCENY: PROPERTY RIGHTS IN AMERICA, by Mark L. Pollot. Pacific Research Institute for Public Policy, San Francisco, California. 1993. Pp. 222. Hardcover. \$21.95

*Reviewed by Patrick Wiseman**

The meaning of the "Takings" Clause of the Fifth Amendment to the United States Constitution¹ has been the frequent subject of heated debate in recent years. The debate needs a voice of moderation. Unfortunately, Mark Pollot is not that voice. While there is much value to Pollot's discussion, his case is substantially weakened by his reliance on originalism as a theory of constitutional interpretation, and by his related reliance on the precepts of "natural law." His case is further weakened by his angry and defensive tone.

Pollot throws down the gauntlet in the frontispiece to his book, in which he quotes an address he gave to the National Federal Lands Conference in November 1990.² In those remarks, he takes the position that:

[w]hen regulation is the method by which the taking is achieved, it is no defense to a [sic] uncompensated taking to say that the government has not taken much, or that the owner of the property has some economically viable use left in the property when the government finishes regulating it. The Constitution forbids petit larceny as much as grand theft and it does not distinguish between the taking of some property, and the taking of all property.³

©1994 by Patrick Wiseman.

* Professor of Law, Georgia State University College of Law; B.A. (honors), 1971, University of Kent at Canterbury; Ph.D., 1980, University of Colorado; J.D., 1980, Columbia University.

1. "Private property [shall not] be taken for public use, without just compensation." U.S. CONST., AMEND. V. This clause, often referred to as the "Takings Clause," is also referred to as the "Just Compensation Clause."

2. MARK L. POLLOT, GRAND THEFT AND PETIT LARCENY iii (1993).

3. *Id.*

In essence, Pollot is rejecting the United States Supreme Court's consistent understanding of the Takings Clause in this century. Before 1922, when the Supreme Court decided *Pennsylvania Coal Co. v. Mahon*,⁴ it had hardly been recognized that a regulation of land use short of physical invasion could effect a taking; since *Mahon*, the Court has consistently treated regulatory takings as different from physical takings.⁵ Pollot rejects the distinction, arguing that it has no basis in the original understanding of the Constitution.⁶

The issue in *physical* takings cases, as the U.S. Supreme Court has approached them, is whether government has authorized an *actual occupation* of private property.⁷ If so, the Court has held, there is a compensable taking, however minor the physical invasion and whatever public interest it may serve.⁸ The issue in *regulatory* takings cases, by contrast, is how best to balance the harm to an individual property owner against the public benefit of a regulation of land use.⁹ Pollot would interpret the Fifth Amendment's Takings Clause to strike that balance presumptively in favor of the individual; the Supreme Court has, until quite recently, interpreted the Takings Clause to strike the balance more often in favor of government.¹⁰

4. 260 U.S. 393 (1922).

5. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

[T]he Court has often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest. At the same time, we have long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause. Our cases further establish that when the physical intrusion reaches the extreme form of a permanent physical occupation, a taking has occurred.

Id.

6. POLLOT, *supra* note 2, pp. 92-95.

7. See *Loretto*, 458 U.S. 419.

8. See *id.* at 441.

9. See, e.g., *Penn Central Transport. Co. v. New York*, 438 U.S. 104, 124 (1978) ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.").

10. Until recently, government has defeated most regulatory takings claims. See *id.* (finding in *Penn Central* a valid landmark designation even though its effect was to reduce significantly the value of the affected property). Recently, the Court has seemed more receptive to regulatory takings claims. See *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992) (finding that a regulation of land use, if it destroyed all viable use, effected a taking).

This review focuses on two strategies that Pollot adopts to strike the balance presumptively in favor of the individual. They are discussed under the following heads: (1) original intent and natural law; (2) judicial deference to legislative judgment; and (3) conceptual severance and the denominator problem. In each, Pollot relies on originalism and natural law arguments.

(1) ORIGINAL INTENT AND NATURAL LAW

Leonard W. Levy has argued that it was not the intent of the Framers of the Constitution that their original intent govern interpretation of the document.¹¹ He has also shown that reliance on original intent, either that of the Framers or that of the ratifiers, is impossible, because there is no reliable way to determine that intent; even if there were, there is every reason to expect that their intent would not be univocal.¹² Pollot dismisses Levy's argument in a footnote, and proceeds to rely on original intent in his interpretation of the Takings Clause.¹³ He offers the following argument for relying on the "original meaning" of the Constitution:

The idea that the most fundamental law of a nation, intended to ensure against infringement on liberty, was created without a fixed reference point from which its meanings could be ascertained is flawed from its inception. Such an idea is without any serious analogue in any other debate over the meaning of written words. The claim that the Constitution is an endlessly elastic document to be reinterpreted at will is a proposition calculated to free both the electorate and an activist judiciary from the constraints of the Constitution—precisely what a written constitution is designed to prevent.¹⁴

11. LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION* (1988).

12. *See id.*

13. POLLOT, *supra* note 2, at 8. It is mildly ironic that Pollot is so dismissive of Levy's argument, as there is some indication that Levy agrees *substantively* with Pollot's interpretation of the Takings Clause. *See* LEVY, *supra* note 11, at 388.

14. POLLOT, *supra* note 2, at 10. There is, of course, at least one "other debate over the meaning of words" in which the idea that the intent of the authors should be discounted is taken seriously, and that is the debate over the significance of legislative history to statutory interpretation. Justice Scalia has taken the position that, where the language of a statute is plain, legislative history is irrelevant. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 453 (1987) (Scalia, J., concurring).

This is a specious, if familiar, argument for originalism. Rejection of the notion that, in interpreting the Constitution, courts should try to discern its "original meaning" is not to take the view that the Constitution is "endlessly elastic"—after all, the *text* of the Constitution is the "fixed reference point," and it remains to be interpreted. Adding additional texts (the proceedings of the Constitutional Convention, etc.), themselves in need of interpretation, does not obviously recommend itself as a way to make the primary text clearer. Furthermore, originalists cannot themselves agree on the "original meaning" of the Constitution. Pollot, for example, argues that it "was clearly the view of the Framers and ratifiers [that] the Constitution . . . is a grant of limited authority to government in which people give up a small measure of [pre-existing] rights to secure the protection of a greater measure."¹⁵ Robert Bork, also an originalist, believes, according to Pollot himself, that "the Constitution provides a positive grant of liberty, revocable at any time, and individuals are entitled to no more."¹⁶ Nonetheless, Pollot claims that the original meaning of the Takings Clause *can* be ascertained and so *should* be relied upon.¹⁷

Pollot further argues that, in order to ascertain original meaning, we should examine the precepts of "natural law," as the Framers intended.¹⁸ Whether the Framers believed in natural law, its "precepts" are not so easily established as Pollot asserts. An example should suffice to show that Pollot's reliance on natural law begs the question and contributes nothing to the substantive analysis:

Natural law theory holds that an individual's rights in property can be interfered with only if compensation is provided except in the narrow circumstances in which the individual's use of his or her property worked an affirmative harm to other property owners or in which certain crimes were committed.¹⁹

15. POLLOT, *supra* note 2, at 11.

16. *Id.* Pollot cites Bork with apparent approval. See POLLOT, *supra* note 2, at 10, n.12, wherein he defers to Bork's rebuttal of the arguments against originalism (citing ROBERT BORK, *THE TEMPTING OF AMERICA* 183-85 (1989)). Moments later, he disagrees with Bork's understanding of the original meaning of the Constitution. See POLLOT, *supra* note 2, at 11.

17. POLLOT, *supra* note 2, at 11.

18. *Id.* at 34-37.

19. *Id.* at 102.

Pollot cites no authority for this assertion of what natural law "holds." One could, with equal authority, assert that natural law theory holds that an individual's ownership of property is as a trustee for the public, and so beg the question in the opposite direction.

(2) JUDICIAL DEFERENCE TO LEGISLATIVE JUDGMENT

Pollot argues that the Framers were justifiably suspicious of legislatures, and so would expect courts not to defer to legislative judgment when property rights were at stake.²⁰ However, as Pollot notes, the U.S. Supreme Court has, until recently, been extremely deferential to legislative judgment.²¹ Although the Court applied a "substantial relationship" test (between the legislative purpose and the legislative means to achieve it), the Court has consistently held in land use regulation cases that, "[i]f the validity of the legislative classification . . . be fairly debatable, the legislative judgment must be allowed to control."²² In a representative democracy, it is surely appropriate for courts to defer to the political and economic judgments of properly constituted legislatures conducting their business appropriately, within the substantive limits of the Constitution. Pollot worries, however, that deference to legislative judgment allows governments to take property at will.²³ Pollot's worry arises because he confuses two separate and distinct questions: (1) whether the government regulation violates due process; and (2) whether the government regulation effects a taking.²⁴ Deference to legislative judgment is appropriate at the due process stage of the inquiry, because due process only requires government to act rationally; as the Court said in *Euclid*, if the question "be fairly debatable, the legislative judgment must be allowed to control."²⁵ If a government regulation fails the rationality test, it is a violation of due process, and the analysis ends. There is no further takings analysis to be done, as the Tak-

20. *Id.* at 27-31, 52-63.

21. *Id.* at 63-66.

22. *Village of Euclid v. Ambler Realty*, 272 U.S. 365, 388 (1926).

23. *See, e.g.,* POLLOT, *supra* note 2, at 28.

24. The analysis in the remainder of this paragraph is presented in more (and slightly different) detail in Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 St. John's L. Rev. 433 (1989).

25. *Village of Euclid*, 272 U.S. at 388.

ings Clause prohibits taking private property "for *public use*, without just compensation,"²⁶ and a regulation that serves no public purpose *ipso facto* fails the public use test of the Takings Clause. But a rational government regulation may nonetheless effect a taking, for which compensation must be paid. Thus, an appropriate deference to legislative judgment at the due process stage of the inquiry does not preclude finding a taking at the next stage.

(3) CONCEPTUAL SEVERANCE AND THE DENOMINATOR

As previously noted, Pollot rejects the distinction (on which the Supreme Court has relied since *Mahon*) between government-authorized physical invasion or occupancy of private property and regulation of private property that results in a diminution in value.²⁷ It is Pollot's view that any interference with private property rights that could be characterized as destruction of a property *interest* is a taking of that interest. So, when New York City denied Penn Central the opportunity to develop its air rights,²⁸ it had thereby acquired an "easement" in Penn Central's property.²⁹ Pollot suggests that so treating the case avoids the vagueness inherent in the notion of "reasonable, investment-backed expectations," on which the *Penn Central* court relied.³⁰ But, of course, it does no such thing—*any* diminution in value caused by regulation *could* be conceptually severed from the remainder of the property and be characterized as an "easement" insofar as it interferes with an owner's use.³¹ Either Pollot is suggesting that government must compensate land owners for any and all diminutions in value caused by regulation of land use,³² or he must acknowledge the need to distinguish between those diminutions in value that amount to the

26. U.S. Const., Amend. V (emphasis supplied).

27. POLLOT, *supra* note 2, at 93-95.

28. *See Penn Central Transport. Co. v. New York*, 438 U.S. 104 (1978).

29. POLLOT, *supra* note 2, at 126-28.

30. *Penn Central*, 438 U.S. at 124.

31. For a discussion of "conceptual severance," see Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 Colum. L. Rev. 1667 (1988).

32. He sometimes seems to go so far. *See POLLOT, supra* note 2, at 92 ("The Holmesian view of property [which Pollot endorses and contrasts with the Brandeis/Brennan view] requires compensation for *any* interest actually taken from the property owner, without regard to the fact that some property interest or value remains in the hands of the affected party.").

“taking” of a property “interest” and those that do not. The suspicion is that Pollot would endorse the first position—but even Holmes acknowledged that government could not operate were it not able to regulate land use, and that only *some* regulation goes “too far.”³³ When it comes to regulatory takings, Justice Brennan correctly noted that takings jurisprudence “does not divide a single parcel into discrete segments.”³⁴ It could not—for if it did, *any* government regulation that caused a diminution in land value could be treated as a taking. Once he has rejected the distinction between regulatory diminutions in value and physical occupations, Pollot is able to cite many historical documents to the effect that a taking of “any part” of a person’s property requires compensation.³⁵ These documents, however, are irrelevant to the question that Pollot begs by citing them: whether a diminution in value is properly characterized as a “part” of one’s property. The Supreme Court has *never* held that it is, and only Justice Scalia has ever seriously suggested it.³⁶

Pollot’s insistence that a diminution in value is equivalent to the loss of a property “interest” (i.e., his reification of the slightest impairment of land use or value) blinds him to the distinction between physical and regulatory takings.³⁷ As a consequence, he misinterprets the Court’s opinion in *Nollan v. California Coastal Commission*.³⁸ In *Nollan*,

33. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

34. POLLOT, *supra* note 2, at 93. This is the “denominator” problem: in deciding whether property has been taken, does a court focus on that “part” of the property affected by regulation, or on the affected owner’s whole property? In *Pennsylvania Coal*, the Court arguably focused on the former. *Pennsylvania Coal* (referring to “certain coal”); in *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470 (1987), the Court, in a case that reprised *Pennsylvania Coal*, made it quite clear that the focus should be on the owner’s entire holdings, and not on the coal that was required by regulation to remain in place. See *id.* at 498 (“The 27 million tons of coal [required by the challenged statute to remain in place] do not constitute a separate segment of property for takings law purposes.”).

35. See POLLOT, *supra* note 2, at 95-100.

36. See *Pennell v. City of San Jose*, 485 U.S. 1, 15-24 (1987) (Scalia, J., dissenting), which Pollot never mentions.

37. Pollot pays lip service to the notion that “government can[] regulate without causing a taking in every instance.” Pollot, *supra* note 2, at 103. However, it is clearly his view that *any* diminution in value caused by government regulation is a taking. Presumably, government can regulate without causing a taking only if its regulation of land use is value-neutral or value-enhancing, an absurd proposition on its face.

38. 483 U.S. 825 (1987).

Pollot claims, the Supreme Court indicated that it was willing to accept his view that a taking may occur even when economically viable use remains in the land regulated;³⁹ *Nollan*, properly understood, stands for no such proposition. *Nollan* was a physical invasion case, and a taking has always been found in physical invasion cases, *regardless* of any diminution in value.⁴⁰ Pollot claims that the Court did not treat *Nollan* as a physical invasion case, ignoring the Court's citation of *Loretto* to precisely this effect:

We think a "permanent physical occupation" has occurred, for purposes of [the *Loretto*] rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.⁴¹

In *Nollan*, the Court concluded that if the California Coastal Commission wanted an easement across the Nollans' property, "it must pay for it."⁴² The Court thus acknowledged that the California Coastal Commission proposed to authorize a physical invasion of the Nollans' property, for which compensation must be paid, however minor the invasion and regardless of the public interest served. *Nollan* simply does not support the view that a *regulatory* taking will be found when the regulated property retains an economically viable use.

CONCLUSION

Pollot's refusal to distinguish between physical and regulatory takings on the basis that the Framers of the Constitution recognized no such distinction undermines his entire thesis. While it is undoubtedly true that the Framers valued property rights highly, it is equally clear that they did not anticipate the modern need to regulate land use. The notion of a regulatory taking was novel in 1922 when Justice Holmes suggested it in *Pennsylvania Coal*, and it was a sensible response to substantially changed circumstances. The problem with Pollot's insistence that we give the Constitution

39. POLLOT, *supra* note 2, at 190.

40. *See*, in particular, *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 (1982).

41. *Id.* at 832 (footnote omitted).

42. *Nollan*, 483 U.S. at 841-42.

the meaning its Framers and ratifiers intended is that the intent of its Framers and ratifiers is thoroughly ambiguous and is as much in need of interpretation as the meaning of the Constitution itself. Given that modern land use regulation was unknown to the Framers and ratifiers, it is at least as plausible to suggest that they *had* no intent when it came to intrusive regulation of land use as it is to say that they intended that any diminution in value caused by regulation be treated as a taking. Thus, even if the historical evidence supported Pollot's libertarian interpretation of the Framers' views, the text of the *Constitution* would still require modern interpretation in light of modern needs.

It is unfortunate that Pollot's case is so undermined by his resting on the shaky foundation of originalism. As he demonstrates in his first chapter, governments have been allowed to get away with abusive and destructive regulation of land use. Pollot's anger at these cases is entirely justified. Regrettably, he does not temper his anger in the interest of rational analysis, and his book suffers as a result.

