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REGULATION OF WATER USE AND TAKINGS:
A GROWING BATTLEFIELD

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REGULATORY TAKINGS & RESOURCES:
WHAT ARE THE CONSTITUTIONAL LIMITS?

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I. INTRODUCTION

A. Summary

Water rights have been subject to considerable change over the past several decades, and the pace of change is likely to increase. Water users will be forced to reduce their current diversions, often by substantial amounts, to protect endangered species, water quality, or other environmental amenities. Efforts to eliminate harmful groundwater mining will force cutbacks in current withdrawals. The few hybrid states with significant remaining riparian rights will at some point try once again to limit their scope. Pressures for greater public access to waterways will challenge the asserted right of many holders of surface interests to exclude the public. The one predictable aspect of water law’s future is change—and publicly mandated change will inevitably invite takings challenges.

Changes over the last several decades have already brought a number of takings challenges. The results of these cases have been mixed, with water right holders winning only a few. Most of these cases, however, arose before the federal courts’ new takings activism. Water right holders stand a far better chance today of invalidating governmental regulations or changes than just ten years ago. Water cases, however, raise a number of unique issues
that make the future results of takings challenges difficult to predict with certainty.

A particularly interesting issue that has arisen in the water field is the constitutionality of "judicial takings." Many of the changes to water rights over the last decade have been the result of judicial decisions, and the same is likely to be true in the future. This central judicial role raises the question whether courts are subject to the same constitutional restrictions on the taking of private property as legislatures and administrative agencies. As I have argued elsewhere, courts should not be exempt from the constitutional restrictions, but how the restrictions should be applied to the courts remains a debated question.

B. References


David Hallford, Environmental Regulations as Water Rights Takings, NATURAL RESOURCES & ENVIRONMENT, Summer 1991, at 13


Dennis J. Herman, Note, Some Times There's Nothing Left to Give: The Justification for Denying Water Service to New Customers to Control Growth, 44 STAN. L. REV. 429 (1992)


II. A CONCISE BACKGROUND TOUR OF CURRENT TAKINGS JURISPRUDENCE

A. Pre-1982: The High Tide of Ad Hoc Balancing

In the 1970s, the United States Supreme Court rejected the view that there was or could be "any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government." Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978). The Court urged that takings cases must instead be handled as "ad hoc, factual inquiries" in which a number of different factors are weighed and balanced, including

• the "economic impact" of the governmental action on the
property owner,

• the extent to which the action "has interfered with distinct investment-backed expectations" of the owner, and
• the "character" of the action (e.g., does it result in a "physical invasion" of the property).

B. 1982-Today: A Search for More Crystalline Rules

The United States Supreme Court has not totally abandoned its ad hoc, balancing approach to determining when there has been a regulatory taking. But over the last ten years, the Court has tried to add some structure to its jurisprudence—in part by creating several *per se* categories of takings.

1. Physical occupations and invasions.
   
a. The doctrine

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court created its first *per se* category and, in the process, stratified takings analysis according to the character of the governmental action under attack. According to *Loretto*, takings analysis varies dramatically depending on whether a governmental regulation results in a "permanent physical occupation" of property, a "temporary physical invasion" of property, or neither:

• Regulations that result in "permanent physical occupations," according to the Court, are essentially the same as governmental condemnations and thus are *per se* takings.
• Where there is merely a "temporary physical invasion," there
is a "governmental invasion of an unusually serious character," presumably pointing toward a taking, but not necessarily being a taking; a bit of balancing still must occur. 
• Finally, where there is no physical occupation or invasion, the Court indicated that we're back at the Penn Central balancing test (and, some of the Court’s language suggested, will seldom find a taking).

Since Loretto, federal decisions have shed no additional light on the Supreme Court's tenuous distinction between "permanent physical occupations" and "temporary physical invasions." Federal courts, however, have continued to hold that virtually all governmental orders that deprive landowners of their right to exclude others from their property constitute per se takings. See, e.g., Nollan v. California Coastal Comm’n, 483 U.S. 825, 831-32 (1987); Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991) (EPA order authorizing access to plaintiffs’ property to install and maintain monitoring well constituted a per se taking).

b. Limits to the doctrine

Because of the per se rule against permanent physical occupations, attorneys for landowners have diligently tried to fit every possible regulatory action into the "physical occupation" category. In Yee v. City of Escondido, 112 S. Ct. 1522 (1992), the Supreme Court indicated that it would be adopting a quite narrow definition of physical occupations. Plaintiffs argued that a city ordinance imposing below-market rental rates for mobile home pads,
when combined with state laws that made it virtually impossible to evict mobile home tenants, effectively gave the tenants a fee interest in the land and thus constituted a physical taking. Two federal circuit courts of appeal had previously agreed with this argument. The Supreme Court, however, disagreed (although it left open the possibility that the plaintiffs could establish a regulatory taking through the *Penn Central* balancing test).

2. **Other types of per se intrusions?**

According to the Court in *Loretto*, physical occupations or invasions constitute particularly serious intrusions into property rights because a property owner’s right to exclude others from her property is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." 458 U.S. at 433, quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). This logic has raised the question whether there are other "essential sticks" in a property owner’s bundle of rights that are also categorically protected against governmental regulation.

In *Hodel v. Irving*, 481 U.S. 704, 716-18 (1987), the Court strongly suggested that the "right to pass on property" at one’s death is also a core property interest and that any regulation abolishing that right is a per se taking. See also *Sintra, Inc. v. Seattle*, 829 P.2d 765, 771 (Wash. 1992) (courts must determine whether a challenged regulation "destroys one or more of the fundamental attributes of property ownership--right to possess, to exclude others, and to dispose of property").
3. **Denial of all "economically viable use"**

1992 brought a new *per se* test: regulations that deny a property owner all "economically viable use of his land" require compensation without any need for case-specific balancing. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992). Although the new "economically viable use" test seems quite narrow on the surface, the opinion that announced it raises numerous questions and is bound to generate considerable litigation in the lower courts. Two questions are likely to be particularly relevant to takings challenges to various water regulations:

(a) What is the relevant parcel of property in determining whether the owner has been deprived of "all economically beneficial use"? For example, if a property owner buys a piece of property composed of two adjacent lots and a regulation prevents her from using one of the lots, has she been deprived of all use of one lot or only partial use of the entire parcel? Would it make any difference if the property were one lot, subdividable into two? one lot that is not subdividable? The Supreme Court recognized in a footnote to its *Lucas* opinion that this is a difficult question, but concluded that it did not have to resolve the question since the *Lucas* facts did not raise it.

(b) How should courts determine whether the "proscribed use interests" were part of the landowner's "title to begin with"? Here the Court provided the most guidance, although the guidance leaves us with yet other questions. A landowner subject to a total
deprivation is entitled to compensation unless the challenged regulation does "no more than duplicate the result that could have been achieved * * * under the state law of private [or public] nuisance * * * or otherwise." 112 S. Ct. at 2900.

In short, the state must show that any economic use to which the landowner wishes to put his property would be a common law nuisance (or otherwise banned under the common law) and thus not a property right to begin with. And Lucas leaves it quite clear that state courts cannot uphold regulations simply by asserting without precedential support that the regulations do nothing that nuisance law wouldn't have done:

We emphasize that to win its case South Carolina must do more than proffer * * * the conclusory assertion that [the uses Lucas desires] violate a common-law maxim such as sic utere tuo ut alienum non laedas. As we have said, a 'State, by ipse dixit, may not transform private property into public property without compensation * * *.' Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980). Instead, as it would be required to do if it sought to restrain Lucas in a common-law action for public nuisance, South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found.

Id. at 2901. The Court, moreover, indicated that courts should normally look to state nuisance law as it stood before the regulation at issue (id.), although "changed circumstances or new knowledge may make what was previously permissible no longer so" (id.).

Despite this guidance, the Court again leaves us with many questions. Does the Court mean to freeze the state common law of property and nuisance (except to the extent that applying preexisting legal rules to new knowledge perhaps leads to different
results)? This is how Justice Stevens interpreted the majority opinion. Id. at 2921 (Stevens, J., dissenting).

If this is the correct interpretation of *Lucas*, does the Court intend to second guess state court determinations of common law in future takings cases? The Court has always reserved for itself the right in takings cases to reconsider a state court’s determination of whether a property right existed. See *Demorest v. City Bank Farmers Trust*, 321 U.S. 36, 42-43 (1944).

Can a property owner challenge a judicial change in property or nuisance law as a "judicial taking" even when no legislative or administrative action is involved? This issue is discussed in Section V below. If the Court does not mean to freeze the common law, however, why should courts have more power than the legislature to change the law to meet evolving needs or views?

C. *Can a Property Owner Challenge a Regulation on the Ground of Insufficient Governmental Justification?*

The Supreme Court developments discussed so far all focus on the impact of a regulation on the property owner: does the regulation strip the property owner of a core interest or eliminate all the "economically valuable" use of his property? The Court has also expressed an increasing interest in the purposes behind the governmental regulation. Reading between the lines, one comes away from recent decisions with the distinct impression that some members of the Court—Justice Scalia in particular—believe that local and state legislatures and administrative agencies are often using their "police power" as a screen for unprincipled redistrib-
Nollan v. California Coastal Comm’n, 483 U.S. 825 (1987), best embodies the Court’s interest in regulatory purpose. Quoting language from prior opinions, the Court emphasized that regulations are takings if they do not "substantially advance legitimate state interests." Id. at 483. In response to Justice Brennan’s suggestion that this language simply embodies the minimum rationality test of due process and equal protection, moreover, the Court stressed that the takings test was purposefully higher:

[O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State 'could rationally have decided' that the measure adopted might achieve the State’s objective." ** ** ** [T]here is no reason to believe *** that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical.

Id. at 834-35 n.3 (citations omitted).

Lower federal and state courts, however, have shown considerable reticence about increasing their scrutiny of land use regulations. Most courts have chosen either to distinguish Nollan on the facts before them or to argue that Nollan really did not mean to impose a heightened scrutiny on land use regulations. See, e.g., Commercial Builders of Northern Cal. v. City of Sacramento, 941 F.2d 872, 874-76 (9th Cir. 1991) (Nollan does not require heightened scrutiny); Blue Jean Equities West v. City & County of
San Francisco, 3 Cal. App. 4th 164, 4 Cal. Rptr. 2d 114 (1992) (Nollan applies only "to possessory rather than regulatory takings cases").

III. TAKINGS CLAIMS INVOLVING PRIVATELY HELD WATER RIGHTS

Although Lucas was generally strongly protective of property rights, dictum in the case suggests that the Court may be willing to differentiate among different types of property rights and accord some forms of property less protection than others. In particular, the Court noted that its takings jurisprudence had traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property," and indicated that personal property might be entitled to less protection than land. 112 S. Ct. at 2879.

This section describes how the courts have historically dealt with takings challenges to the regulation of privately held water rights, and examines how the courts might deal with future challenges.

A. The Case Law

Numerous attempts to limit or regulate water rights have come under constitutional attack as "takings." Until quite recently, such attacks were no more successful than takings challenges to zoning and other regulations of real property--indeed, less successful. In recent years, water users have enjoyed a greater
level of success, although the road is still steep.

1. **State efforts to abolish or limit riparian rights.**

Six states, including Washington, have tried to abolish unexercised riparian rights through legislation. In every state, riparians challenged the legislation as a taking of their rights.

   a. **Decisions upholding state legislation**


   b. **California**

   In California, the court invalidated the legislation not on takings grounds but because a 1928 constitutional amendment,
according to the court, expressly protected unused riparian rights. See *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.*, 3 Cal. 2d 489, 45 P.2d 972 (1935); see also *In re Waters of Long Valley Creek Stream System*, 25 Cal. 3d 339, 158 Cal. Rptr. 350, 599 P.2d 656 (1979) (distinguishing *Tulare* in a fashion that suggests the case is no longer viable law in California).

c. Oklahoma

Only Oklahoma, in a very recent decision, has held that such legislation constitutes a taking. *Franco-American Charolaise, Ltd. v. Oklahoma Water Resources Bd.*, 855 P.2d 568 (Okla. 1990). By a five to four vote, the Oklahoma Supreme Court invalidated 1963 state legislation limiting future riparian water use to (1) water used for domestic purposes and (2) any pre-1963 beneficial uses that the riparian properly validated. The court’s logic was straightforward: Riparian rights are private property and thus protected by the Oklahoma constitution from takings. The 1963 water code amendments did not simply "restrict" unused riparian rights, but "took" them "for public use" by permitting appropriators to divert the water.

*Franco-American* represents an interesting example of how *Lucas* might be applied to the water field. The Oklahoma Supreme Court essentially took the riparian right and divided it into two parts: (1) any currently exercised portion of the right, and (2) the unused portion of the right which, under the common law, can always be exercised in the future. In the court’s view, the unused por-
tion of the right had a unique importance of its own: the "heart of the riparian right is the right to assert a use at any time." Having narrowed the relevant water right down to the unexercised right, the court could conclude that the state had totally stripped riparians of this right rather than merely "regulating" the right—and thus had taken riparians' property without compensation.

2. **State and local groundwater regulation.**


An exception to the rule highlights the potential importance to takings claims of the purpose behind the challenged governmental action. In McDougal v. County of Imperial, 942 F.2d 668 (9th Cir. 1991), the plaintiffs, who operated a commercial water business in which they pumped and sold groundwater, and the County of Imperial had long been involved in a dispute over plaintiffs' sale of water to farmers across the border in Mexico. The County had first tried to directly ban such sales, but the plaintiffs successfully chal-
lended the ban in court. After plaintiffs bought a new well in 1977, the County passed an ordinance which, purportedly to avoid groundwater overdraft, required the plaintiffs to stop pumping water from the well by 1986; in 1984, moreover, the County declared the property a "floodway," effectively preventing plaintiffs from developing the property. When the County refused to lift its ban on post-1986 pumping except on onerous conditions that plaintiffs could not meet, plaintiffs sued.

The district court rejected plaintiffs' taking claim on the ground that the county regulations were designed to advance a legitimate state interest. The Court of Appeals, however, reversed and remanded for consideration of two issues. First, the Court of Appeals ordered the lower court to determine whether the public interest outweighed the severity of the private deprivation. Id. at 676. Second, and of perhaps greater longterm significance, the Court of Appeals ordered the lower court to consider whether the county acted out of an illegitimate purpose--in particular, "to retaliate against [the plaintiffs] and halt the sale of water to Mexico." Id. at 676-77, 679-80.

3. Other governmental regulations or actions.
   a. Registration of water rights

State courts have rejected state legislation requiring water right holders to register their water rights (at the cost of otherwise forfeiting the rights). See, e.g., Department of Ecology v. Adsit, 103 Wash. 2d 698, 694 P.2d 1065, 1069-70 (1985); Matter
of Yellowstone River, 253 Mont. 167, 832 P.2d 1210 (1992); see also Texaco, Inc. v. Short, 454 U.S. 516 (1982) (upholding the Indiana Dormant Mineral Act which eliminated severed mineral interests that the owner did not use for 20 years unless the owner filed a statement of claim).

b. Retroactive application of forfeiture statutes

The Nevada Supreme Court has held that it is not unconstitutional for a state to retroactively apply a forfeiture statute. Town of Eureka v. Office of State Engineer, 108 Nev. 163, 826 P.2d 948, 950-52 (1992).

c. Requantification of water rights

The Montana Supreme Court has held that a state, without running afoul of the takings protections, can take water rights that are quantified only by diversion rate and requantify them by both rate and total annual volume. McDonald v. State, 220 Mont. 519, 722 P.2d 598 (1986).

d. Use of aquifer storage capacity

The Nebraska Supreme Court has held that the government does not have to pay compensation for the use of aquifer storage space underlying private land. In re Application U-2, 226 Neb. 594, 413 N.W.2d 290, 298-99 (1987).
B. Are Water Rights Subject to as Much Constitutional Protection as Rights to Land?

1. Cases holding water rights to be protected property.
   In most of the cases upholding water regulations, courts have relied on the conclusion that the regulations were "reasonable" restrictions on water rights or legitimate exercises of the state's "police power." Virtually every court has recognized that water rights are property and thus entitled to at least some degree of constitutional protection. See, e.g., Department of Ecology v. Adsit, 103 Wash. 2d 698, 694 P.2d 1065, 1069-70 (1985); Public Service Comm'n v. FERC, 754 F.2d 1555, 1564 (10th Cir. 1985), cert. denied, 474 U.S. 1681 (1986); Fallini v. Hodel, 725 F. Supp. 1113, 1123 (D. Nev. 1989), aff'd on other grounds, 963 F.2d 275 (9th Cir. 1992); Town of Eureka v. Office of State Engineer, 108 Nev. 163, 826 P.2d 948, 951 (1992); Hale v. Colorado River Muni. Water Dist., 818 S.W.2d 537 (Tex. Ct. App. 1991). Indeed, most courts have viewed water rights much like real property for takings purposes, and have used the same general standards and terminology in takings challenges to both types of rights.

2. Cases suggesting less protection for unused water rights.
   Some courts and commentators, however, have suggested that water rights might be subject to less protection than real property. A number of cases, for example, have suggested that unexercised riparian or groundwater rights are entitled to virtually no constitutional protection. See, e.g., State v. Knapp, 167 Kan.

This suggestion is not totally unique to water law: a similar distinction is found in zoning cases where courts readily award compensation if a zoning ordinance forces an existing use to stop immediately, but seldom award compensation if the ordinance simply forecloses a future use. The presumable logic is that people have a far greater reliance expectation, and thus compensation claim, in rights that they are using.

3. **Cases suggesting less protection for water rights generally.**

Some courts have also suggested that there is something intrinsically different about water rights that entitle them to less protection than real property even when the water is actively being used. If correct, these opinions will be quite important in future cases which are far more likely to involve state actions requiring current water users to reduce their diversions or withdrawals than to involve the limiting of unexercised rights.

a. **Strong public interest in water**

One major justification often given for providing less protection to water is that there is a greater public interest in water than in other property. Justice Holmes' opinion in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) is typically
Few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. ** The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

In this same vein, state courts in many western states have often pointed to the unique importance of water to the West as a justification for limiting water rights without paying compensation. See, e.g., Baumann v. Smrha, 145 F. Supp. 617, 625 (D. Kan. 1956), aff'd, 352 U.S. 863 (1956); Baeth v. Hoisveen, supra, 157 N.W.2d at 733; In re Hood River, supra, 227 P. at 1092-93.

Response: To the extent that no per se test for a taking is involved, such considerations may be relevant. See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 492 (1987) (suggesting that courts must consider the benefit of a government action in deciding whether the action is a taking). "But the special importance of water should not be emphasized too much, lest courts forget Justice Holmes' oft quoted warning that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).
b. Usufructuary versus possessory rights

Perhaps the justification given most frequently by courts for according water rights weaker constitutional protection is that water users have only usufructuary rather than possessory rights to water. See, e.g., Town of Chino Valley v. City of Prescott, 131 Ariz. 78, 638 P.2d 1324, 1328, appeal dismissed, 457 U.S. 1101 (1982); Pratt v. State Dept. of Natural Resources, 309 N.W.2d 767, 772 (Minn. 1981).

Response: Other non-possessory property rights such as easements and leases, however, are fully protected by the takings protection. The mere fact that water is a usufructuary right thus is an unconvincing distinction.

c. Public "ownership" of water rights

Courts wishing to distinguish water from real property also sometimes emphasize state constitutional or statutory provisions reciting that water is the property of the public. See, e.g., F. Arthur Stone & Sons v. Gibson, 230 Kan. 224, 630 P.2d 1164 (1981); Pratt v. State Dept. of Natural Resources, supra, 309 N.W.2d at 771. The United States Supreme Court has lent some support to this argument both in its frequent emphasis on "investment-backed expectations" and by holding that the takings protections do not apply where a property right is expressly conditioned on the right of the government to nullify the right. See, e.g., Dames & Moore v. Regan, 453 U.S. 654, 674 n.6 (1981).

Response: Nonetheless, there is something quite troubling
about this argument standing by itself: can states exempt themselves from the Constitution’s takings protections merely by declaring that they are the ultimate "owner" of a resource that, for all practical purposes, the states treat like a privately owned resource? For arguments that the Constitutional protections are not that easily evaded, see my article on Judicial Takings, 76 Va. L. Rev. at 1527-30. Despite various state statutory and constitutional provisions stating that water resources ultimately belong to the state or the public, states have historically treated water rights like private property--creating expectations in the holders of the water rights that should be honored.

**d. Extensive prior regulation**

Less troubling as a general proposition is the argument that states have considerable room to regulate appropriative water rights without paying compensation because such rights are subject ab initio to a variety of broad restrictions. There is room for play, for example, in the traditional appropriation requirement that water be used only for a reasonable and beneficial use. If a state chooses to require current appropriators to reduce their diversions to increase instream flows, a state might argue that prior diversion levels were "unreasonable" and thus not protected property to begin with. Lucas' suggestion that personal property might not be entitled to as much protection as land, because personal property has been subject to a "traditionally high degree of [governmental] control," lends some support to this argument.
See p. 11 supra; 112 S. Ct. at 2879; Broughton Lumber Co. v. United States, 30 Fed. Cl. 239 (1994) (denying compensation because of doubts whether water right holder could use water for hydroelectric purposes).

Response: Lucas, however, also suggests that states cannot escape the takings protections merely by stretching traditional doctrines to novel lengths. As discussed earlier, the Court held that a regulation is not unconstitutional if it merely duplicates common law restrictions. But the Court emphasized that a state could not justify a regulation merely by invoking vague or conclusory common law doctrines. The state must point to "existing rules or understandings" and cannot "by ipse dixit * * * transform private property into public property without compensation." In the water field, therefore, states should not be able to elude paying compensation by reading new or significantly expanded meaning into traditional common law doctrines.

C. Do the Same Takings "Principles" Apply to Water Cases?

Accepting that water rights are entitled to some degree of takings protection, an additional question is whether current takings jurisprudence should be applied, or even can be applied, to the water context. Takings jurisprudence was developed to address land cases, not the quite different resource of water. Attempts to apply current takings jurisprudence to water cases, therefore, can raise difficult issues.

Assume that to protect an endangered species, the government
orders a water user to cut her historic water use by half. Is this a physical taking or a regulatory taking? In a property context, if the government forbids you from building on half your land, the courts would treat the action as a regulatory taking. But water is different from land because your only right is to use the water. Thus the government order has deprived the water user of all her legal rights to half her water, which sounds very much like a physical taking.

If the court concludes that the government order is not a physical taking, does the order fall within any of the per se takings categories? Does the action, for example, deprive the water user of an "essential stick" in her bundle of rights? What is an "essential stick" might well differ between land and water. Alternatively, does the action deprive the owner of all economically viable use of her water? That, of course, depends on how you define the parcel of water at issue.

IV. TAKINGS CLAIMS INVOLVING PUBLIC DELIVERY OF WATER

Public delivery of water supplies has generated its own unique set of takings claims. In the past, most claims have involved property owners who were denied water by the local public water supplier and had no alternative source of water. Today, attempts to reform the federal reclamation program by increasing water rates and reducing water deliveries are provoking a separate wave of takings challenges.
A. Nondelivery by Public Water Suppliers

The California courts have frequently been confronted by the question whether property owners have any constitutionally protected right to receive water from a public water supplier. Largely in response to anti-growth sentiment, a number of California water suppliers have declared water moratoriums and denied applications for new or additional service connections. Property owners who have needed water in order to develop or use their land, not surprisingly, have often responded with challenges based on takings and other claims.

Until recently, courts uniformly rejected such claims. The typical basis was that, under state law, property owners do "not possess any absolute right to be afforded water service." Swanson v. Marin Muni. Water Dist., 56 Cal. App. 3d 512, 128 Cal. Rptr. 485, 491 (1976); see also Hollister Park Inv. Co. v. Goleta County Water Dist., 82 Cal. App. 3d 290, 147 Cal. Rptr. 91, 93 (1978).

In a recent opinion, however, the Ninth Circuit has given property owners a glimmer of hope that they might be able to raise a successful constitutional claim. In Lockary v. Kayfetz, 917 F.2d 1150 (9th Cir. 1990), the Court of Appeals—in a prequel to Lucas—held that a property owner can establish a taking if she can show that a moratorium prevents "all practical" or "economically viable" use of her land (defined not to include just looking at or walking on the land). The court also suggested that, if a district has been wasting water and has sufficient water to permit additional hookups, a moratorium might be arbitrary and thus a violation of
due process or equal protection.

B. Changes in Federal Reclamation Contracts

Beginning with the 1982 Reclamation Reform Act, Congress has set out to increase water rates and restrict deliveries to at least some water users. In many cases, Congress' changes have clashed with what water recipients claim to have been their contractual rights with the federal government. If the dispute involved alleged state changes to a state contractual obligation, water recipients could challenge the action under the Contract Clause of the federal Constitution, but in one of the peculiarities of the federal Constitution, the Contract Clause does not apply to the federal government. Water recipients, therefore, have been forced to argue that they have a property interest in their federal reclamation contracts and that the government's reform efforts thus violate the takings protections.

Federal courts have agreed that water recipients have a property interest in their contracts with the federal government, and that federal abrogation of contractual obligations can violate the takings protections. Beyond that, however, the courts have held that the federal government must be given substantial leeway in revisiting reclamation contracts. According to the courts, three principles make it very unlikely that reclamation reforms will constitute takings:

First, "sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms." Thus,
"contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign." Second, governmental contracts "should be construed, if possible, to avoid foreclosing exercise of sovereign authority." Third, governmental contracts should be interpreted against the backdrop of the legislative scheme that authorized them.

* * *


Given this wide latitude, federal courts to date have upheld Congress' various reform measures. In Peterson, the Ninth Circuit upheld the "hammer provisions" of the 1982 Reclamation Reform Act. More recently, in Madera Irrigation Dist. v. Hancock, the Circuit Court held that the federal government could impose a higher water rate in a renewal contract in order to recoup operation and maintenance costs that it had not recovered under an initial 40-year contract.

In neither of these cases, however, was the government violating a clear contractual obligation. Where the government tries to do so (e.g., perhaps by reducing promised water deliveries), the courts will be confronted by a stronger takings claim.

V. JUDICIAL TAKINGS

As noted in the Introduction, judicial changes to water rights raise their own unique set of takings issues.

A. Some Examples

To illustrate the question of judicial takings, consider a few
examples.


*McBryde* begot the longest and best known of the recent judicial takings challenges. In *McBryde*, the Hawaiian Supreme Court appeared to radically change its state water law. Prior to *McBryde*, Hawaiian judicial decisions suggested that water rights were both severable and transferable; indeed, agricultural interests spent large sums buying water rights and moving the water to their fields. All of this changed with *McBryde* which held that water rights could not be sold nor water transported out of its watershed.

Private water users petitioned for rehearing, arguing that *McBryde* was an unconstitutional judicial taking. The Hawaiian Supreme Court denied the petition without opinion; two judges dissented, agreeing that the court could not impose its vision of a "better" water rights system on current water users without compensating users for their loss. 55 Haw. 260, 517 P.2d 26 (1973).

The private water users then took their challenge to federal court, where both the district court and the Ninth Circuit Court of Appeals held that *McBryde* violated the takings protections. *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Haw. 1977), aff'd, 753 F.2d 1468 (9th Cir. 1985). The U. S. Supreme Court, however, vacated the Ninth Circuit's decision and remanded for consideration of whether the takings issue was ripe for review. 477 U.S. 902
On remand, the Ninth Circuit ordered the complaints dismissed as premature because the state court had not yet issued a final order that limited or "interfered in any way with the parties' use or diversions" of their water. 887 F.2d 215 (9th Cir. 1989).


In *Chino Valley*, the Arizona Supreme Court rejected a takings challenge by groundwater users to the Arizona Groundwater Management Act of 1980, partly on the basis that groundwater users did not own groundwater until they pumped it up for use and that users were thus not deprived of any property.

In *Cherry v. Steiner*, 716 F.2d 687 (9th Cir. 1983), aff'g 543 F. Supp. 1270 (D. Ariz. 1982), groundwater users challenged *Chino Valley* as itself an unconstitutional taking, arguing that the decision effectively reversed older decisions holding that groundwater users did own the resource before extraction. The federal courts rejected the challenge on the ground that the Arizona Supreme Court had not changed the law; the language from the older decisions was discarded as mere dictum. In the process, however, the Ninth Circuit expressly recognized that a judicial change in water law could violate the takings protections.


Although the California Supreme Court in its *Mono Lake* deci-
ion unanimously held that the public trust doctrine applied to and limited appropriations affecting navigable waterways, many California water lawyers and water users believed that the decision was a sharp and unjustifiable change in the law. In its petition for certiorari, the City of Los Angeles tried to emphasize the extent of the change and argued that the Mono Lake decision was an unconstitutional judicial taking. The Supreme Court denied the petition without comment. 464 U.S. 977 (1983).


Various interests urged the Michigan Supreme Court in Bott to expand the public’s right to use Michigan waterways by rejecting the state’s traditional "log-flotation" test in favor of a "recreational-boating" test. The court refused, largely because such a change would deprive many riparians of "a property right without compensation." The court did not expressly hold that a change in the test would constitute a judicial taking, resting its refusal to change the law simply on the "unfairness of eliminating a property right without compensation."

Where other state courts have expanded the public’s right to use waterways, riparians have sometimes unsuccessfully sought certiorari from the U.S. Supreme Court on the ground that the expansion was a judicial taking. See, e.g., State v. McIlroy, 268 Ark. 227, 595 S.W.2d 659, cert. denied, 449 U.S. 843 (1980).
B. Arguments For and Against Subjecting Judicial Decisions to the Takings Protections

1. Arguments for restricting judicial takings.

Strong arguments can be made in favor of subjecting judicial decisions to the federal takings protections. The language of the Fifth Amendment does not distinguish among the various branches of government. And the Fourteenth Amendment, which extends the takings protections to the states, is applied to judicial decisions in numerous other contexts. See, e.g., Shelley v. Kraemer, 334 U.S. 1, 16-18 (1948) (racial discrimination); Cantwell v. Connecticut, 310 U.S. 296 (1940) (freedom of speech). The adverse consequences to the property owner of a change in her rights, moreover, is exactly the same whether the change is made by the legislature, an administrative agency, or a court.

The arguments in favor of subjecting judicial decisions to the same constitutional restrictions as legislative and executive regulations are laid out at greater length in my article on Judicial Takings, 76 Va. L. Rev. 1449 (1990).

2. Arguments against restricting judicial takings.

At least three policy arguments can be made against subjecting judicial decisions to the takings protections, although none is ultimately convincing.

a. "Courts are more trustworthy."

The first argument looks at the possible reasons why the Constitution requires legislatures to pay compensation and asks
whether the reasons apply equally to the courts. A number of judges and academics believe that we require legislatures to pay compensation because of imperfections in the legislative process: legislatures (1) reshuffle property rights often in response to naked majoritarian pressure (rather than for the "common good"), (2) frequently discriminate among property owners in condemning and regulating property, and (3) will treat property as "free" if they don’t have to pay for it. The takings protections help remedy some of these flaws and compensate property holders who are victims of the other flaws. Many of these same judges and academics believe that courts are not subject to the same flaws as legislatures are and that compensation is therefore unnecessary when courts reshuffle property rights.

Responses: More traditional arguments for the takings protections, however, do not depend on the existence of political or governmental imperfections. All that matters is that the government has involuntarily expropriated a person’s property or, by taking property without compensation, forced the owner to bear an unjustifiably large portion of societal costs. As I have argued elsewhere, moreover, state courts suffer from many of the same political imperfections as legislatures (albeit to a lesser degree in some cases). 76 VA. L. REV. at 1482-98.

b. "Courts need to change the law."

Some have also objected that, if the takings protections are applied to judicial decisions, courts will not be able to change
property law in response to evolving societal needs. Legislatures
have a choice under the takings protections: they can take property
and compensate, or not take the property. Because courts do not
have treasuries of their own, however, most judges and lawyers have
assumed that courts would not have a similar option. If a judicial
change would take property, the courts could not make the change.

Responses: To begin, the takings protections apply only to a
narrow set of actions; most changes in property law would not be
considered "takings." As discussed later in this outline, moreover,
state courts might well be able to find a way to provide
compensation if they wished to make a change that would be consid­
ered a taking. Even if they could not, the legislature would still
be free to institute the change. Administrative agencies also
don’t have their own treasury. And although legislatures theoreti­
cally can pay compensation, they often do not have the wherewithal
to pursue a change if ordered to compensate injured property
holders. (For a more extensive treatment of these issues, see my
article at 76 VA. L. REV. 1499-1509.)

c. Concerns over federalism.

Some judges and lawyers have also argued that the development
of property law is a matter for the states, and that federal courts
should not interfere with this local function by applying the
takings protections to state property decisions.

Responses: Federalism arguments, however, apply equally to
all the branches of state government. Yet the courts have never
held state legislatures and administrative bodies to a lower standard under the takings protections than they have held the federal government. See 76 Va. L. Rev. at 1509-11.

C. Case Law

1. Supreme Court precedent.

The Supreme Court’s view of judicial takings has fluctuated widely over time and never been entirely clear.

a. Do the takings protections apply?

In the first case to hold that states were subject to the federal takings protections, the Court also held that the takings protections applied to the courts. Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 233-35 (1897). But the issue in the case was only whether a state court violated the takings protections by awarding one dollar for a legislative taking of property worth far more; the Court did not address the question whether a change in judicial law could constitute a taking.

In Muhlker v. New York & Harlem Railroad, 197 U.S. 544, 570-71 (1905), however, a 4-justice plurality held that the New York Court of Appeal had unconstitutionally taken someone’s property by abandoning prior precedents.

In the 1930s, the Court seemed to reject this position and, although not directly addressing a judicial takings claim, held that courts could "ordinarily overrule their own decisions without offending constitutional guaranties." See Great Northern Ry. v.

Justice Potter Stewart revived the idea of judicial takings in Hughes v. Washington, 389 U.S. 290 (1967), where he argued in a concurring opinion that the fourteenth amendment forbids a state from taking property without compensation "no less through its courts than through its legislature." According to Stewart, a state decision does not contravene the Constitution if the decision "arguably conforms to reasonable expectations." But a decision is unconstitutional "to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents."

The Court as a whole has not addressed the judicial takings issue in the last several decades, although the Court quoted Stewart's concurrence with apparent agreement in Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 331 (1973). (Bonelli, however, was itself overruled on other grounds in Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977).)

b. When is a judicial decision a "taking"?

Assuming courts are subject to the takings protections, the appropriate test for determining whether there has been a judicial taking is unclear. A judicial decision presumably would not constitute a taking if an identical legislative or administrative action would not be a taking. Justice Stewart's concurring opinion in Hughes, however, suggests that courts should have somewhat
greater constitutional leeway to change property rights than legislatures and administrative agencies are given: only "sudden" and "unpredictable" shifts in the law would be unconstitutional. Related Supreme Court opinions similarly suggest that state court decisions are valid if there is "fair support" or a "fair and substantial basis" for the decisions. See, e.g., Demorest v. City Bank Farmers Trust, 321 U.S. 36, 42-43 (1944).

2. **Lower court precedent.**
   a. **Lower federal court precedent**

   Since Stewart's concurring opinion in Hughes, two federal courts have held state decisions to be unconstitutional takings. See Robinson v. Ariyoshi, supra; Sotomura v. County of Hawaii, 460 F. Supp. 473 (D. Haw. 1978) (involving a change in the dividing line between public and private beach).

   Several other courts have recognized that a judicial decision might violate the takings protections, but have either held there was no taking on the facts presented or declined to hear the dispute on jurisdictional grounds. See, e.g., Cherry v. Steiner, 716 F.2d 687, 692 (9th Cir. 1983) (no change in the law); Reynolds v. Georgia, 640 F.2d 702, 705 (5th Cir. 1981) (no jurisdiction); Hay v. Bruno, 344 F. Supp. 286, 289 (D. Or. 1972) (no unpredictable change).

   b. **State court precedent**

   A number of state courts have also declined to overrule prior
precedents on the ground that to do so might be unconstitutional. See, e.g., *Dolphin Lane Assocs. v. Town of Southampton*, 72 Misc. 2d 868, 339 N.Y.S.2d 966, 975 (1971); *State v. Corvallis Sand & Gravel Co.*, 283 Or. 147, 582 P.2d 1352, 1363 (1977).

Several state courts have also held that judicial changes to property rights can violate the takings clause, but concluded that their holdings did not constitute changes in the established property regime. See, e.g., *County of Los Angeles v. Berk*, 26 Cal. 3d 201, 212-15, 161 Cal. Rptr. 742, 749-51, 605 P.2d 381, 388-90 (1980); *Village of Wilsonville v. SCA Servs.*, 86 Ill. 2d 1, 36-37, 426 N.E.2d 824, 841 (1981).

D. Practical and Jurisdictional Issues

Although there are strong arguments, and some precedent, in favor of applying the takings protections to judicial decisions, both practical and jurisdictional problems are likely to limit the degree to which federal courts actively police judicial changes in state property or water law. The most valuable use of the judicial takings doctrine may be in influencing the actions of state courts.

1. United States Supreme Court Review.

Where a state court abandons its prior precedents and narrows or eliminates the property or water right of a party before it, the party can petition the United States Supreme Court for certiorari. The Court, however, has shown no interest in granting petitions that raise judicial takings claims. The Court's disinterest is
unlikely to change for several reasons.

a. **Worries about becoming enmeshed in state law**

First, most state courts generally distinguish (or ignore) prior precedents in changing property or water rights; far from expressly abandoning the prior precedents, state courts will generally claim that the law has not changed. To hold that the state court has "taken" property, the Supreme Court would therefore need to immerse itself in the local law and conclude that the state court misinterpreted its own prior cases. For obvious reasons, the Supreme Court would prefer not to invest time becoming expert on local issues nor to cast aspersions on local courts.

b. **Desire to maintain own flexibility**

Second, the Court is almost certainly wary of the potential consequences of a judicial takings doctrine for its own flexibility. The Court itself has changed property and water rights in the past. *Oregon v. Corvallis Sand & Gravel*, 429 U.S. 363 (1977), for example, explicitly overruled *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) and thus reallocated to the State of Oregon property that under *Bonelli* would have belonged to a private party. The Court will want to continue to keep its options open in the future.

c. **Worries about the potential flood of petitions**

Finally, the Court may be concerned about an increase in
certiorari petitions if it were to reverse a state court decision as a judicial taking. Anyone who loses a property case in state court would then be tempted to argue that the court "changed" the law (i.e., ignored the litigant's arguments based on prior case law and precedents) and thus violated the takings protections. Given the indeterminacy in many areas of property law, most of these claims will be at least superficially plausible and difficult to reject out of hand.

2. **Lower Federal Court Review.**

   a. **Direct review of state court decisions**

      Unable to obtain Supreme Court review, a property owner or water right holder who has been injured by a state decision might try filing a lawsuit in federal district court challenging the constitutionality of the decision. Such a lawsuit, however, is likely to run into serious jurisdictional problems.

      i. **Ripeness and prematurity**

         As the water users in *Robinson* discovered, judicial takings challenges can run into prematurity problems. As noted at pages 27-28, the Ninth Circuit on remand in *Robinson* held that the water users could not prosecute their judicial takings claim because the Hawaiian courts had not issued a final order that precluded the users from continuing to use their water rights as before. *Robinson v. Ariyoshi*, 887 F.2d 215 (9th Cir. 1989). Unless there is a court order expressly limiting use of one's property or water
rights, therefore, any challenge to a state decision is likely to be dismissed as premature.

ii. The Rooker-Feldman doctrine

A far more serious jurisdictional obstacle is presented by the Rooker-Feldman doctrine. In Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923), plaintiffs who lost in state court brought a separate action in federal district court arguing that the state decision had changed the law in violation of the due process clause. The Supreme Court held that district courts do not have jurisdiction to review alleged constitutional flaws in state decisions because appellate jurisdiction over state decisions lies exclusively in the Supreme Court. In District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), the Supreme Court reaffirmed Rooker and observed that district courts cannot entertain "horizontal" challenges to state court decisions even on constitutional claims that were not raised in the state court.

Although the Rooker-Feldman doctrine would seem to bar district court review of judicial takings claims, the Ninth Circuit has narrowly interpreted the doctrine. In Robinson v. Ariyoshi, supra, the Ninth Circuit held that Rooker-Feldman does not apply where a property holder raises a judicial takings claim in a petition for rehearing of the offending state decision and the state court then fails to consider and decide the issue. 753 F.2d at 1471-73. The Ninth Circuit would presumably also hold that the doctrine does not apply in any situation where the property holder
is not given an effective opportunity to raise a judicial takings claim in the state court.

The Fifth Circuit, by contrast, has expressly rejected the Ninth Circuit view and applies Rooker-Feldman broadly to bar all collateral attacks on alleged judicial takings. See, e.g., Reynolds v. Georgia, 640 F.2d 702 (5th Cir. 1981).

b. Incidental review of state court decisions.

A property holder who was not party to the offending state decision but who is affected by the decision may be able to obtain federal review if non-judicial state action is also involved. Where a property holder challenges legislative or administrative action as a taking and a defense is that the plaintiff did not have any property right to take, federal courts are free to decide the property question for themselves even though a state court has held that the claimed property right did not exist. See, e.g., Demorest v. City Bank Farmers Trust, 321 U.S. 36, 42-43 (1944).

As noted at page 28, for example, groundwater users were able to raise a federal challenge to the Arizona supreme court's decision in Chino Valley even though the state court had already considered and rejected the claim that its decision violated the takings protections. The groundwater users were able to bring the federal action because they were not technically challenging the Arizona Groundwater Management Act of 1980 and were not parties to the Chino Valley action.

40
3. Relevance to state court proceedings.

Because of the problems with federal review, judicial takings arguments might be most effectively used in urging state courts not to change the law to begin with. As previously noted, a number of courts have declined to modify their states' property or water law because of the argument that the modification would violate the takings protections.

In this regard, return for a moment to an earlier question: given that state courts don't have their own treasury, is there any way that they can make a change that would be a taking? Or must they leave any change to the legislature?

A reasonable argument can be made that courts have the power to change the law and order the state to compensate property holders for the change—although courts, for obvious reasons, are unlikely to exercise the power. Alternatively, a court could change the law contingent on the legislature authorizing compensation within a set period of time; if the legislature does not authorize compensation, the decision would not take effect. A court, for example, might order a water user to reduce its diversions in light of the public trust, but only if the state agrees to pay compensation to the user.

This latter approach is not as far fetched as it might seem at first glance. California courts, for example, have generally held that the state must pay compensation if, in asserting the public trust, it appropriates or destroys improvements built by a private owner on trust lands. See, e.g., State v. Superior Court, 29 Cal.
VI. CONCLUSION

Over the next decade, water law is likely to become a significant battlefield in the war over "taking." Unfortunately, water cases are also likely to add new complexities and puzzles to a jurisprudence which is already murky with uncertainty. This does not mean that courts should avoid tackling the issues. The constitutional protections against takings remain important for many reasons and call out for enforcement. The cases that confront the courts, however, will seldom be easy.