INTRODUCTION TO VOLUME NINETEEN

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According to a popular myth, conservatism died a whimpering death a few years before the first issue of the Harvard Journal of Law and Public Policy appeared in the Summer of 1978. Critics would tell you how the country's right wing had been plagued by setback after setback in the preceding decade and a half. It began in the Sixties, when every value and belief dear to conservatives was openly and sometimes violently challenged. The architects of the Great Society had sought to reshape, at a fundamental level, people's ideas about merit and desert. And what was not torn apart at home was rent by a war thousands of miles away. When it was all over, Vietnam left Americans with a deep sense of uncertainty about the capabilities of their country and of themselves. This was followed by Richard Nixon's humiliating resignation, Gerald Ford's dignified but unsuccessful effort to bring the country back together and Jimmy Carter's victory and revelation that lust springs eternal even in the White House.

However, this myth was just that: a fiction or half-truth that formed part of a group's ideology. Despite all the obstacles set in its path, conservatism didn't die. Rather, it proved once again that what doesn't kill you makes you stronger. Conservatives discarded arguments and ideas that were outmoded; they had to if they wanted to survive. What remained was a core that was analytically sound, had been tested by experience and whose merit was transparent to the mainstream: self-reliance, individualism, an emphasis on family—yes, the much disdained nuclear family—and minimal government interference with all of the above.

This journal was both a catalyst for and a component of this new wave. Conservatism needed supporting voices in legal circles. Many of the gains made by liberals during the 1960s and 1970s had come in the courts. It was apparent that conservatives could not achieve their objectives by appealing to voters alone; they would have to persuade judges as well. Serious legal research and scholarship would be required to explain the important role conservative philosophies serve in sound jurisprudence. Just as important, a medium of communication was required to

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disseminate these arguments to the legal community. The HJLPP filled this crucial role.

Perhaps concrete examples will best illustrate how things have changed since the founding of this journal. We can compare the differences between 1978 and today in two important areas of jurisprudence to which the HJLPP has made substantial contributions,[1] the Takings Clause[2] and the Commerce Clause.[3]

At about the same time this journal first appeared, the Supreme Court decided *Penn Central Transportation Co. v. New York City*,[4] known among Takings Clause aficionados as the Alfred E. Neuman (or "What, me worry?") case. Penn Central Transportation Company, which not coincidentally owned Grand Central Terminal in New York, wanted to make some money by constructing an office building on top of the terminal.[5] Because Grand Central Terminal had been given the dubious honor of being chosen as a historic landmark, its owner had to receive permission from the Landmarks Preservation Commission before it could make any modifications to the structure. Penn Central dutifully submitted not just one, but two proposals. The commission bounced them on the ground that neither adequately preserved the unique aesthetic features of the terminal.[6]

The Supreme Court ruled that this was not a taking. It did so even though it was largely undisputed that Penn Central had been prohibited from developing its property, that this prohibition would cost Penn Central millions of dollars in lost income and that the city's action was taken for the benefit of the public—so that passers-by could feast their eyes on the terminal. The Court reasoned that the New York City historic preservation statute was just another run-of-the-mill zoning law, which, as we all know, could never be a taking. The effect on the owner was no big deal; after all, it got to keep its terminal, for which it should

1. For example, this issue includes an insightful Takings Clause article: Douglas W. Kmiec's *At Last, The Supreme Court Solves the Takings Puzzle*. Other thoughtful works that have appeared in this journal include Roger Pilon, *Property Rights, Takings, and a Free Society*, 6 HARV. J.L. & PUB. POL'Y 165 (1983) and Greer L. Phillips, *Commerce Clause Immunity for State Proprietary Activities: Reeves, Inc. v. Stake*, 4 HARV. J.L. & PUB. POL'Y 365 (1981).

2. U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation").

3. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

4. 438 U.S. 104 (1978).

5. I could have said that it wanted to help relieve the chronic shortage of office space in order to help make New York City a better place to live, but we're among friends.

6. *See Penn Central*, 438 U.S. at 116-18.

have been grateful. The diminution in value was offset by the reciprocal benefit of a more beautiful city and transferable rights to overdevelop other properties. Finally, Penn Central's investment-backed expectations were dismissed because the prohibition didn't change the current uses of the terminal, didn't forbid other uses of the airspace above the terminal (what these were, one could only imagine) and still gave Penn Central a reasonable return.[7]

The Supreme Court admitted in *Penn Central* that its judgment was basically a fact-intensive, ad hoc exercise of judicial discretion. Although the courts have always insisted that the impact of some regulatory actions are so severe they constitute a taking, the required level of severity has never been delineated with any clarity. In *Penn Central*, the Court visibly threw up its collective hands and said, "Don't go looking for any guidance from us."[8] These were the same Justices who were willing to make all sorts of judgments in areas as difficult and complex as race relations,[9] criminal procedure[10] and official immunity.[11] In that same Term, the Court even tackled and definitively answered the pressing question whether a lawyer has a constitutionally-protected property interest in representing Larry Flynt and *Hustler* magazine.[12] The simple truth was that a majority of the Court just couldn't get its dander up when it came to a violation of the Takings Clause.

Now fast forward to 1992. We find the Court once again wrestling with the takings problem, this time in *Lucas v. South Carolina Coastal Council*.[13] The opinion there actually tries to do what *Penn Central* said could not be done—set rules for Takings Clause cases. Up to that point, the courts, using fact-specific analyses, had almost always concluded that a taking occurred only when government action left private property totally valueless or when

7. *See id.* at 133-37.

8. *See id.* at 124 ("[T]his Court, quite simply has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government . . .") (quoting Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962)).

9. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (striking down a medical school admissions quota, but noting that admissions policies giving a preference to women and minorities are constitutional).

10. *See, e.g.*, Ballew v. Georgia, 435 U.S. 223 (1978) (holding that the Constitution requires state juries to have at least six members).

11. *See, e.g.*, Butz v. Economou, 438 U.S. 478 (1978) (holding that federal officials are not absolutely immune from damage suits for unconstitutional actions taken in the performance of their official duties).

12. *See* Leis v. Flynt, 439 U.S. 438 (1979) (per curiam).

13. 112 S. Ct. 2886 (1992).

the government physically encroached upon private property. In *Lucas*, the Court laid down the rule that these two categories of government action always constituted a taking.[14] Furthermore, the Court did away with the nonsensical rule that government actions that bestowed a benefit could be takings while those that prohibited a harm could not. Because prohibiting a harm was by definition bestowing a benefit, the test had no real bite, leaving courts to decide takings challenges by whatever mysterious rites judges engage in when they exercise unfettered discretion. *Lucas* laid down a less malleable standard: An owner need not be compensated when the lost use of the property could have been enjoined (for example, for nuisance).[15] Much work still needs to be done in this area, but the conservative ideal of maintaining private property inviolate from government intrusion resonated in the legal environment of the Nineties where it had fallen flat in the Seventies.

Recent developments in Commerce Clause jurisprudence also reveal a promising trend. In 1978, the Clause presented no real barriers to congressional power. The Supreme Court had not invalidated a statute on Commerce Clause grounds since the New Deal. One case, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,[16] decided early in the life of this journal, illustrates the state of the law at that time. In upholding a federal statute that sought to regulate surface mining within the States, the *Hodel* Court began its analysis by reminding the reader that "court[s] must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding."[17] The Court went on to explain that the Commerce Clause is a grant of power which is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution."[18] Not exactly a promising start. The Court then listed the seemingly endless number of things Congress could regulate under the Commerce

14. *See id.* at 2893-95, 2900. Not everyone agreed that it was a good idea to adopt a standard in lieu of no standard at all. *See id.* at 2910 (Blackmun, J., dissenting) ("I first question the Court's rationale in creating a category that obviates a 'case-specific inquiry into the public interest advanced' if all economic value has been lost") (citations omitted).

15. *See Lucas*, 112 S. Ct. at 2897.

16. 452 U.S. 264 (1981).

17. *Id.* at 276.

18. *Id.* (internal quotation marks omitted) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196 (1824)).

Clause: the channels of commerce, the instrumentalities of commerce, any activity affecting commerce and anyone sitting on his porch watching commerce pass by.[19] Most importantly, the Court made clear that even an activity conducted entirely within a State is not removed from Congress's clammy reach.[20] After reading that, you wonder why anyone would make the mistake of calling it the Commerce Clause instead of the "Hey, you-can-do-whatever-you-feel-like Clause."

Contrast this with the approach taken in *United States v. Lopez*,[21] in which the Court recently held unconstitutional a federal law prohibiting the possession of a gun on or near school grounds. *Hodel* emphasized what Congress *could do*. *Lopez*, on the other hand, focused on what Congress *could not do*, which strikes me as a fine start if we are construing what purports to be a *limited* grant of congressional authority. The *Lopez* Court began by stating that "[t]he Constitution creates a Federal Government of enumerated powers.... '[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.'"[22] Statements concerning the need to restrain Congress and the importance of interpreting the Commerce Clause so as not to make Congress's power limitless can be found throughout *Lopez*. Over and over, the *Lopez* Court declared that there must be limits to what Congress can do under the auspices of the Commerce Clause and that there must be some meaning given to the text of the clause: "Under the theories that the Government presents in support of § 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."[23] Several pages later, the Court chastised the govern-

19. *See id.* at 276-77. All right, so the bit about the porch is not exactly in the opinion but I have it on good authority the Justices would have added it had they thought of it.

20. *See id.* at 277.

21. 115 S. Ct. 1624 (1995). For a commentary on *Lopez*, see John P. Frantz, Recent Development, *The Reemergence of the Commerce Clause as a Limit on Federal Power*: United States v. Lopez, 19 HARV. J.L. & PUB. POL'Y 161 (1995). For a poignant look at the recent Cambodian elections, see Nhan T. Vu, *The Holding of Free and Fair Elections in Cambodia*, 16 MICH. J. INT'L L. — (1995). For a commentary on Rosenberger v. Rector of the Univ. of Va., 115 S. Ct. 2510 (1995), see A. Louise Oliver, Recent Development, *Tearing Down the Wall*: Rosenberger v. Rector of the Univ. of Va., 19 HARV. J.L. & PUB. POL'Y — (forthcoming 1996).

22. *Lopez*, 115 S. Ct. at 1626 (quoting THE FEDERALIST No. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

23. *Id.* at 1632.

ment again: "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[24] In the end the Court declined to uphold the statute at issue because "[t]o do so would require us to conclude . . . that there never will be a distinction between what is truly national and what is truly local."[25] Good point.

The *Lopez* Court also clarified Commerce Clause doctrine in one important way. There was no dispute that regulated activity had to have some effect on interstate commerce for Congress to control it.[26] Unclear was the magnitude of effect that would be sufficient.[27] The *Hodel* Court had only required that the regulated activity "affect" interstate commerce.[28] In *Lopez*, after reviewing the history of Commerce Clause jurisprudence since *Gibbons v. Ogden*,[29] the Court concluded that the regulated activity had to have a *substantial* effect on interstate commerce before Congress could regulate it.[30]

The differences between the cases then and now are not especially dramatic. The Court has not reached contrary conclusions from the same set of facts. Nor has it substantially changed the doctrine in these two areas of the law; to the contrary, it has remained faithful to precedent, at least formally. The change is much more subtle: the cases reveal a different judicial philosophy at work. The Court has steered a course that follows the Constitution more closely, ensures that rulings are more consistent and refrains from making parts of the Constitution superfluous. The recent cases reveal an understanding that the Takings Clause does not allow a cramped interpretation. It is unequivocal: "[N]or shall private property be taken for public use without just compensation."[31] The Commerce Clause is equally clear and cannot be interpreted as a grant of authority without limits: "The

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24. *Id.* at 1634.

25. *Id.*

26. To my knowledge, supporters of Big Government have not mustered the ingenuity necessary to read the "Commerce" part out of the "Commerce Clause." At least, not yet.

27. *See Lopez*, 115 S. Ct. at 1630 ("[A]dmittedly, our case law has not been clear whether an activity must 'affect' or 'substantially affect' interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause").

28. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 277 (1981).

29. 22 U.S. (9 Wheat.) 1 (1824).

30. *See Lopez*, 115 S. Ct. at 1630.

31. U.S. CONST. amend. V.

Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[32] In addition, the Court has attempted to announce standards and rules, increasing the consistency of results and decreasing the opportunities for judges to decide important issues by caprice. Although Takings Clause analysis remains vague, at least we know that there are some government actions, short of physical expropriation, that definitely amount to takings. Just as important, the Court made clear what was muddied by *Hodel*: any activity has to have a *substantial* effect on interstate commerce before it can be regulated by the federal government. Finally, the Court, by insisting that the text be read faithfully and that real standards be applied, has put teeth into these clauses.[33] In other words, it has kept them from being read out of the Constitution, which strikes me as not only a conservative, but also a sensible thing to do.

Can any of this tell us what the future holds? I'll refrain from making any predictions, perhaps to save myself some embarrassment ten or twenty years from now should I be off the mark. I do, however, want to emphasize an important point: how we get there is just as important as where we are going. The most remarkable thing about the Court's interpretative philosophy, as revealed by our comparison, is that it underlies the Court's jurisprudence rather than drives it. That is its strength. Jurisprudence driven by a particular result leads to case law that is erratic or vague, or both. A particular policy today may not meet tomorrow's tastes. On the other hand, a set of interpretative principles that requires faithful adherence to the text and internal logic of the Constitution will be equally applicable at all times and in all contexts. This interpretive philosophy—known variously as textualism or originalism—is an important part of conservatism and is a source of immense strength. I am heartened that this volume's symposium issue will delve deeply into this subject.[34]

The issues discussed here have a broader application. Underlying originalism is an implicit assumption that means are just as

32. U.S. CONST. art. I, § 8, cl. 3.

33. In *Lopez*, for example, the Court admitted although "some of our prior cases have taken long steps down that road, giving great deference to congressional action. . . . we decline here to proceed any further." *Lopez*, 115 S. Ct. at 1634 (citations omitted).

34. *See* Symposium, *Originalism, Democracy, and the Constitution*, 19 HARV. J.L. & PUB. POL'Y — (forthcoming 1996).

important as ends. We must examine critically not only our goals, but our methods as well. If we are to make progress, it must be by a continuation of the strategy that has worked so far: reasoned and intelligent analysis and argument. If we don't, we're doomed to fail as liberals failed in the aftermath of the 1960s. It will not be enough to belittle liberals or their arguments. Liberals as a group are just as smart, just as motivated, and just as convinced of their beliefs as conservatives—and they're often a good bit more slippery. Nor is it enough mindlessly to declare that one's ideology is correct because a majority has voted for it. This is false logic that leads only to a loss of public confidence. Rather, we must push ourselves to think hard and to debate even harder. This is no time to give anything less than our best. We are still in the midst of a great intellectual battle and I have no doubt that this journal will continue to play a pivotal role in waging it.