

PROPERTY II QUIZ: TAKINGS

Prof. Bell

NOTE: Choose the one best answer to each question, applying the majority rule of property law. As on the MBE, you have 1.8 minutes/answer.

Question 1

Developer purchased a vacant plot of land in downtown Orange, well situated for use as a store or apartment building. The California Department of Environmental Protection thereafter discovered that the land harbored an hitherto unknown to science, the plush-toy mole. The Department declared the mole rare and endangered and forbade Developer from building on the property, explaining that to do so would wipe out habitat crucial to preservation of the species. Developer brought suit to enjoin the prohibition, arguing that it amounted to an uncompensated taking. What result?

- (a) Developer wins because the state's prohibition effectively transfers title to the property to the state.
- (b) Developer wins because the prohibition prevents all economically beneficial uses of the property and does not embody a background principle of state nuisance law.
- (c) Developer loses because the prohibition prevents a use of the property that would, like a nuisance, harm the environment.
- (d) Developer loses because the prohibition secures an average reciprocal advantage to property owners by protecting the environment.

Question 2

Suppose the same facts as those in the prior question, plus these: Immediately after buying the property, Developer granted to Trapper a *profit à prendre* ("profit") to enter the land and remove from it plush-toy moles, the pelts of which were valuable for use in coats, stoles, and the like. When the Department of Environmental Protection declared the plush-toy mole rare and endangered, it forbade Trapper from further exercising his profit. Trapper brought suit to enjoin the prohibition, arguing that it amounted to an uncompensated taking. What result?

- (a) Trapper wins because the prohibition prevents all economically beneficial uses of the moles and does not embody a background principle of state nuisance law.
- (b) Trapper wins because the prohibition prevents all economically beneficial uses of the profit and does not embody a background principle of state nuisance law.
- (c) Trapper loses because the prohibition limits personal property—not real property.
- (d) Trapper loses because the profit is but one small percentage of the overall value of the property.

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Answer Key

Question 1

- (a) Is not the best answer because the state has not, in fact, taken title to the property via condemnation. Adding "effectively" does not suffice to change the result; the analysis requires more than simply that proclamation.
- (b) Is the best answer because the facts of this case mirror those of *Lucas*. Indeed, this might be an easier case, given that the presence of the moles probably prevents any use of the property.**
- (c) Is not the best answer because, while in some sense developing the property would harm the environment, it would not do so in a manner akin to a common law nuisance.
- (d) Is not the best answer because the supposed average reciprocal advantage does not inure to the benefit of Developer or even similarly situated property owners.

Question 2

- (a) Is not the best answer because, as indicated by cases like *Lucas* and *Andrus v. Allard* (a case upholding a ban on the sale of eagle feathers, discussed in *Lucas*), the Supreme Court does not afford personal property the same protections against takings that it affords to real property.
- (b) Is the best answer, though it takes a two-step analysis to see why. First, you have to establish that a real property interest is at stake. Here, it is Trapper's profit that is affected by the restriction. Second, if you can establish that all the economic value of that property interest was destroyed, you can apply *Lucas*. In effect, this case is akin to *Pennsylvania Coal v. Mahon*, a case we did**

not read but that we've seen discussed, where the property interest is not the right to remove coal but rather to remove plush-toy moles.

- (c) Is tempting, given that *Andrus v. Allard* (a case discussed in *Lucas*), indicates that the Supreme Court would probably not treat a mere ban on the trapping of plush-toy moles as a taking. Here, though, we have more than just a ban on trapping the animals. Trapper has a property interest—the profit—that is affected by the ban.
- (d) Is tempting, given that we here face a conceptual severance problem (a.k.a. “the denominator problem”). If this were, indeed, merely an instance of reducing some of the *value* of the overall property, Trapper would indeed lose. Here, though, Trapper can justly claim that the state has effectively taken all of the *title* to his real property right—the profit he had to take the moles. That gives Trapper standing to sue for an uncompensated taking.