CHAPTER 1

THE PROPER INTERPRETATION OF THE TAKINGS CLAUSE

I. Narrow Text and Original Meaning
II. Respect for Our Federal System
III. Judicial Deference to the Policymaking Branches
IV. Fiscal Impact
V. The Government as Guardian of Property Rights

The states ratified the Takings Clause of the Fifth Amendment in 1791, along with the other provisions of the Bill of Rights. Just twelve words long, the Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." As its text makes clear, the Takings Clause presupposes the government's authority to acquire private property for public use. It does not prohibit takings, but merely conditions a taking on the payment of just compensation. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987). The Takings Clause applies to state and local action through the Due Process Clause of the Fourteenth Amendment. *See Dolan v. City of Tigard*, 512 U.S. 374, 384 n.5 (1994). Most state constitutions have comparable takings provisions, and state court interpretation of these state provisions sometimes influences the interpretation of the federal Takings Clause. *See id.* at 389-91.

Below are five overarching principles that should shape a proper interpretation of the Takings Clause. It is unlikely that any of these principles, standing alone, will be dispositive in a specific case, but they should inform your understanding of the Takings Clause and your arguments in takings litigation. *See* J. Peter Byrne, *Basic Themes for Regulatory Takings Litigation*, 29 Envtl. L. 811 (1999).

I. Narrow Text and Original Meaning

The text of the Takings Clause is quite narrow. By its terms, the Clause applies only when property is "taken" by the government. Although the Constitution does not define the term "taken," it most naturally refers to a physical appropriation (or expropriation) of property. In other words, the text of the Takings Clause does not readily suggest application to mere restrictions on the *use* of property.[1] If you tell a child not to play with a ball in the house, you have regulated the use of the ball, but you have not taken the ball away.[2]

The Framers' original understanding of the Takings Clause was consistent with its narrow plain meaning.[3] Even Justice Scalia, generally regarded as sympathetic to takings claims, recognizes that the ratifying generation and several succeeding generations read the Clause as applying only to actual dispossessions of property. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1014 (1992) ("Prior to Justice Holmes's exposition in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), it was generally thought that the Takings Clause reached only a 'direct appropriation' of property . . . or the functional equivalent of a 'practical ouster of [the owner's] possession.'") (citations omitted); *id.* at 1028 n.15 ("early constitutional theorists did not believe that the Takings Clause embraced regulations of property at all").

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[1]*See* FRED BOSSELMAN, ET AL., THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL 51 (1973) ("The word 'take' ordinarily refers to the act of obtaining possession or control of property, and although there are many other usages of the word none of them seems descriptive of governmental regulation of the use of land.").

[2]*See* William Michael Treanor, *The Original Understanding of the Takings Clause* 3-4 (1998 Georgetown University Law Center).

[3]*See* BOSSELMAN, footnote 1, at 51-123; John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process,* 95 COLUM. L. REV. 782 (1995).

Supreme Court interpretations of the Takings Clause for the first 130 years bear this out. For example, in 1870 the Supreme Court stated:

> [The Takings Clause] has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. . . . [I]t is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.

Legal Tender Cases, 79 U.S. (12 Wall.) 457, 551-52 (1870); *see also Transportation Co. v. Chicago*, 99 U.S. 635, 642 (1879) ("[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision.").

Few commentators argue for the abolition of the doctrine of regulatory takings. *But see* J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89 (1995). Government lawyers should remind the courts, however, that the Clause is limited to *takings*, and that the physical appropriation of property remains an important point of reference in deciding whether a regulatory taking has occurred. Indeed, in the landmark case of *Pennsylvania Coal*, 260 U.S. at 393, 414, the Court held that the law at issue was unconstitutional because it had "very nearly the same effect for constitutional purposes as appropriating" private property.

This theme is a mainstay of takings jurisprudence. For example, the Court held that a taking might occur where regulation denies all economically viable use of land because such regulation is, "from the landowner's point of view, the equivalent of a physical appropriation."

Lucas, 505 U.S. at 1017. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Court held that physical occupations are takings where they "constitute an actual, permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property." *Id.* at 428 (quoting *Sanguinetti v. United States*, 264 U.S. 146, 149 (1924)). In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), the Court stated that in regulatory takings cases, its task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Id.* at 199.

Not surprisingly, it takes "extreme circumstances" for land use regulation to rise to this level. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985) ("land-use regulation may under extreme circumstances amount to a 'taking' of the affected property."). Land use controls that do not approximate the extreme situation of an outright appropriation, *i.e.*, that do not substantially destroy the value and use of the property, generally should be viewed as outside the scope of the Takings Clause. Government attorneys need not argue that courts should return to the original understanding of the Clause. Instead, they should place an appropriate emphasis on the text and original understanding to persuade courts to refrain from applying the Takings Clause in ways that contravene its proper scope.

II. Respect for Our Federal System

The Takings Clause should be read in a manner that respects the role of state and local governments in our federal system. An unduly expansive reading of the Clause would inappropriately federalize one of the most quintessentially local responsibilities in government, namely, local land use planning. Federalism concerns underlie the strong, bipartisan opposition to recent federal takings bills that would revise ripeness requirements to allow developers to sue

local officials in federal court far earlier in the land use planning process. *See* S. Rep. No. 242, 105th Cong., 2d Sess. 29-58 (1998) (minority views). Many judges, perhaps the very judges inclined to be sympathetic to the claims of property owners, might well share the countervailing concern that federal courts should tread lightly on local land use issues. *See, e.g., Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) ("The Courts of Appeals were not created to be 'the Grand Mufti of local zoning boards.'") (quoting *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989)), *cert. denied*, 119 S. Ct. 278 (1998); *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 828 (4th Cir. 1995) ("Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts."); *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir. 1985) ("[F]ederal courts do not sit as a super zoning board or a zoning board of appeals.").

III. Judicial Deference to the Policymaking Branches

The Takings Clause does not entitle the courts to make land use policy. The wisdom and efficacy of zoning and other forms of land use regulation have traditionally been, and remain, the province of the legislative and executive/administrative branches of government. While the courts need to ensure that land use controls comport with the Constitution, judicial review should not be used simply to second-guess legislative or administrative policy judgments. Under the checks and balances of our constitutional system, the courts should interfere with land use regulation by co-equal branches of government only in the most extreme circumstances.

Courts typically review challenges to the reasonableness of land use controls and other socio-economic regulation under the Due Process Clause. Since the New Deal, the Supreme Court consistently has applied the lowest level of scrutiny — the rational basis test — to determine whether such regulation advances a

legitimate government interest. *See United States v. Caroline Prods. Co.,* 304 U.S. 144, 152 (1938). Courts afford similar deference to land use regulation. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-89 (1926) (if the validity of the legislative classification for zoning purposes is "fairly debatable," the legislative judgment must be allowed to control).

Under the Takings Clause, the Supreme Court has adopted a similarly deferential posture regarding legislative or administrative policy decisions, stressing that "a broad range of governmental purposes and regulations" are constitutionally valid under the Takings Clause. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834-35 (1987). As discussed in Chapter 8, five Justices recently questioned whether a court should ever evaluate the wisdom of regulation under the Takings Clause.[4] Even where the Court has suggested that the Takings Clause might allow for an evaluation of the reasonableness of land use regulation, it has indicated that the Clause applies only to a truly *arbitrary* exercise of legislative and administrative authority. *See Dolan*, 512 U.S. at 391 n.8 ("the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights."); *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck*, No. 176, 1999 N.Y. LEXIS 3739, at *15-16 (N.Y. Ct. App. Nov. 23, 1999) (open space zoning ordinance "easily qualifies" as a valid regulatory action under the Taking Clause; "[s]o long as the method and solution the Board eventually chose substantially advances the public interest, it is not this Court's place to substitute its own judgment for that of the Zoning Board . . .").

These precedents reinforce the notion that when faced with a claim under the Takings Clause, a court generally should respect the

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[4]*See* Eastern Enterprises v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) ("normative considerations about the wisdom of government decisions . . . [are] in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the Government's power to act."); *id.* at 554 (Breyer, J., dissenting, joined by Stevens, Souter, and Ginsburg, JJ.) ("[A]t the heart of the Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good.").

policy judgments made by officials in the legislative and executive branches.

IV. Fiscal Impact

An unduly aggressive reading of the Takings Clause would have a severe fiscal impact on state and local governments. While this argument by itself will never be dispositive, it should be emphasized in appropriate cases. Some judges are sympathetic to these concerns. For example, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), Justice Kennedy criticized the plurality's broad reading of the Takings Clause due to the problems it would pose for state and local governments. He called regulatory takings "one of the most difficult and litigated areas" of the law, and he criticized the plurality for injecting further confusion that would subject "States and municipalities to the potential of new and unforeseen claims in vast amounts." *Id.* at 542 (Kennedy, J., concurring in the judgment and dissenting in part).

More than 95% of the 40,000 U.S. cities and towns have populations of less than 10,000 and miniscule budgets. *See Hearings on H.R. 2372, "The Private Property Rights Implementation Act of 1999" Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong., 1st Sess. (Sept. 15, 1999) (testimony of Diane Shea). In appropriate cases, government litigators should explain to the courts that extravagant theories of takings liability run the risk of bankrupting many local governments, or, at a minimum, diverting scarce financial resources from other important public projects.

V. The Government as Guardian of Property Rights

Notwithstanding the typical rhetoric of the takings debate, government officials are defenders of property rights. The

overwhelming majority of property owners in the United States are homeowners. Their property values are greatly enhanced by local zoning and other land use controls. An aggressive use of the Takings Clause to undermine land use controls does not promote property rights generally, but rather promotes the property rights of a select few at the expense of the majority of property owners. *See Property Rights and Environmental Laws: Hearings Before the Senate Comm. on Environment and Public Works*, 104th Cong., 1st Sess. 203, 204, 207-08 (1995) (statement of C. Ford Runge) (most landowners are homeowners, and land use regulations benefit most residential property values). The growing call for greater control of corporate hog farms dramatically illustrates how land use restrictions protect neighboring landowners and the community at large.

Owners of undeveloped land also greatly benefit from government action. For example, direct government support programs have increased the average value of farmland by an estimated 15% in recent years. *See id.* at 205-07. Most of the affected farmland owners are net winners from government regulation, even if they are disadvantaged by a particular regulation. *See id.*

Excessive focus on alleged takings causes some courts to lose sight of the "givings" that result from so many government programs. *Id.* Although developers respond that real estate taxes recapture part of these givings, this recapture necessarily constitutes only a small fraction of the overall benefit. Identifying and articulating these givings in a particular case may help convince a court that the government has treated the takings claimant fairly, all things considered. As stated in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987), although "each of us is burdened somewhat by [land use] restrictions, we, in turn, benefit greatly from the restrictions that are placed on others." For example, wetland protections designed to prevent flooding restrict development of certain property, but they might reduce flood risks to that parcel or other developable property owned by the same person. A zoning ordinance might restrict development of a parcel but also benefit the

same land by ensuring orderly development of the surrounding community. *See Agins v. City of Tiburon*, 447 U.S. 255, 262 (1979) ("In assessing the fairness of the zoning ordinances [under the Takings Clause], these benefits must be considered along with any diminution in market value . . . .").

Conclusion

When defending against takings challenges, government attorneys should stress these five overarching principles: the narrow text and original meaning of the Takings Clause, federalism, judicial deference to the policymaking branches, fiscal impact, and government protection of private property. No single principle is likely to be controlling, but collectively they might help persuade the court to reject an inappropriate expansion or unfair application of the Takings Clause.

Recommended Reading

FRED BOSSELMAN, ET AL., THE TAKING ISSUE: AN ANALYSIS OF THE CONSTITUTIONAL LIMITS OF LAND USE CONTROL (1973).

J. Peter Byrne, *Basic Themes for Regulatory Takings Litigation*, 29 ENVTL. L. 811 (1999).

J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89 (1995).

Douglas T. Kendall and Charles P. Lord, *The Takings Project: A Critical Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509 (1998).

John F. Hart, *Colonial Land Use Law and its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996).

William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process,* 95 COLUM. L. REV. 782 (1995).

William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L. J. 694 (1985).