
Less of this, please

I've never been particularly sympathetic to regulatory takings claims; like many on the left of center, I'm wary of expanding a constitutional doctrine with the potential to severely injure good land-use planning and reconstitute Lochnerism. That said, it's hard to look at the reports of many takings cases without getting a strong sense that a lot of property owners are, to use a technical term, getting screwed. One might find a good example in Landgate v. California Coastal Commission, a 1999 California Supreme Court case where the staff of the relevant municipality dragged a homeowner through more than 10 years of proceedings and made several mistakes of applying their own law, yet the state high court still said (4-3) that it wasn't a taking.

Why are these sorts of outcomes occurring? It certainly isn't because of lefty judges: 6 out of the 7 California Supremes were Republican appointees. Rather, I think it is because the very vagueness of regulatory takings law means that holding for the plaintiff opens up the possibility of generating very bad results down the road: as Justice Robert Jackson commented in his *Korematsu* dissent, a bad decision "sits like a loaded weapon" in the hands of a potential plaintiff. Attempts to do justice in individual cases will create doctrine that could, well, severely injure good land-use planning and reconstitute Lochnerism.

Is there a way to square the circle? Maybe: here is a proposal for Californians.

For many years, California courts have routinely "depublished" opinions that, for whatever reason, they have deemed inappropriate to constitute actual precedent. Depublished opinions cannot be cited, and have no precedential authority. It's almost the exact opposite of traditional common-law method, because with depublishing, hard cases do ***not*** make bad law; in fact, they don't make any law at all. The practice has received condemnation from academic commentators, although I think it is overstated: essentially, it is something like injecting a civil law practice into a common law system. Yes, there is a problem that like cases will not be treated alike, but it's far from clear that such problems have run rampant in civil law systems.

It should be clear where I'm going with this: *courts should be more inclined to rule for plaintiffs in takings cases but also be aggressive in depublishing them*. It won't drag the law in unforeseen and possibly destructive directions, but will be able to do

justice in the individual case.

I think that this is a particular issue with regulatory takings, because of the essentially "ad hoc, factual inquiry" (to use the Court's phrase) in Takings cases. The subject matter simply does not lend itself to broad rules: the most recent attempt to make it more rule-based was Justice Scalia's opnion in *Lucas v. South Carolina Coastal Council,* an opinion that quickly eroded because of its fundamental incoherence (i.e. what is an "inherent limitation on title"? How do you solve the denominator problem?). Published opinions, though, have a tendency to create a more rule-like structure because of the ability to analogize between cases. These sorts of analogies can pose particular problems in takings cases because no appellate opinion, no matter how comprehensive, cannot truly express the factual subtleties necessary to really come to a just judgment. Thus, the temptation is always for a judge to deny the claim: why open the can of worms?

I realize that this will hardly satisfy members of the private property rights bar. They detest the ad hoc inquiries of the *Penn Central* standard and I can see why: that standard, if it can be called that, gives them little information about their client's change of success. But it is better than what they have now, and more to the point, there is a reason why *Penn Central* has survived: there really is little better available if we want to protect private property *and* allow for coherent land-use planning.

I think that many environmentalists might view this proposal sympathetically: they have little interest in government arbitrariness, and many takings cases do not implicate environmental values. Moreover, to the extent that property owners will be frustrated in developed areas with byzantine land use regulations, the more they will tend to build in undeveloped areas with less NIMBY opposition. Allowing more takings claims could thus reduce sprawl.

This seems like a win-win. In this era, there seem to be few of those. We should take this one.