

## 34. Property Rights and the Constitution

### Congress should

- enact legislation, to guide federal agencies and to provide notice by the courts, that outlines the constitutional rights of property owners under the Fifth Amendment's Takings Clause;
- follow the traditional common law in defining "private property," "public use," and "just compensation";
- treat property taken through regulation the same as property taken through physical seizure; and
- provide a single forum in which property owners may seek injunctive relief and just compensation promptly.

America's Founders understood clearly that private property is the foundation not only of prosperity but of freedom itself. Thus, through the common law, state law, and the Constitution they protected property rights—the rights of people to freely acquire, use, and dispose of property. With the growth of modern government, however, those rights have been seriously compromised. Unfortunately, the Supreme Court has yet to develop a principled, much less comprehensive, theory for remedying those violations. That failure has led to the birth of the property rights movement in state after state. It is time now for Congress to step in—to correct its own violations and to set out a standard that courts might notice as they adjudicate complaints about state violations.

The Constitution protects property rights mainly through the Fifth Amendment's Takings or Just Compensation Clause: "nor shall private property be taken for public use without just compensation." There are two basic ways government can take property: (1) outright, by condemning the property and taking the title; and (2) through regulations that take uses, leaving the title with the owner—so-called regulatory takings. In the first case, the title is all-too-often taken not for a public use but for a

private use; and rarely is the compensation received by the owner just. In the second case, the owner is often not compensated at all for his losses, and when he is the compensation is again inadequate.

Over the past two decades, the Supreme Court started chipping away at the problem of uncompensated regulatory takings, requiring compensation in some cases—even if its decisions were largely ad hoc, leaving most owners to bear the losses themselves. Thus, owners today can get compensation when title is actually taken, as just noted; when their property is physically invaded by government order, either permanently or temporarily; when regulation for other than health or safety reasons takes all or nearly all of the value of the property; and when government attaches conditions to permits that are unreasonable, disproportionate, or unrelated to the purpose behind the permit requirement. But despite those modest advances, toward the end of its 2004 term the Court decided three property rights cases in which the owners had legitimate complaints, and in all three the owners lost. One of those cases was *Kelo v. City of New London*, where the city condemned Susette Kelo's property only to transfer it to another private party that the city believed could make better use of it. In so doing, the Court simply brushed aside the “public use” restraint on the power of government to take private property. The upshot, however, was a public outcry across the nation and the introduction of reforms in over 40 states. But those reforms vary substantially. And nearly all leave unaddressed the far more common problem of regulatory takings.

At bottom, then, the Court has yet to develop a comprehensive theory of property rights, much less a comprehensive solution to the problem of government takings. For that, Congress (or the Court) is going to have to turn to first principles, much as the old common-law judges did. The place to begin, then, is not with the public law of the Constitution but with the private law of property.

## **Property: The Foundation of All Rights**

It is no accident that a nation conceived in liberty and dedicated to justice for all protects property rights. Property is the foundation of every right we have, including the right to be free. Every legal claim, after all, is a claim to something—either a defensive claim to keep what one is holding or an offensive claim to something someone else is holding. John Locke, the philosophical father of the American Revolution and the inspiration for Thomas Jefferson when he drafted the Declaration of Independence, stated the issue simply: “Lives, Liberties, and Estates,

which I call by the general Name, *Property*.” And James Madison, the principal author of the Constitution, echoed those thoughts when he wrote that “as a man is said to have a right to his property, he may be equally said to have a property in his rights.”

Much moral confusion would be avoided if we understood that all of our rights—all of the things to which we are “entitled”—can be reduced to property. That would enable us to separate genuine rights—things to which we hold title—from specious “rights”—things to which other people hold title, which we may want. It was the genius of the old common law, grounded in reason, that it grasped that point. And the common-law judges understood a pair of corollaries as well: that property, broadly conceived, separates one individual from another, and that individuals are independent or free to the extent that they have sole or exclusive dominion over what they hold. Indeed, Americans go to work every day to acquire property just so they can be independent.

## **Legal Protection for Property Rights**

It would be to no avail, however, if property, once acquired, could not be used and enjoyed—if rights of acquisition, enjoyment, and disposal were not legally protected. Recognizing that, common-law judges, charged over the years with settling disputes between neighbors, have drawn upon principles of reason and efficiency, and upon custom as well, to craft a law of property that respects, by and large, the equal rights of all.

In a nutshell, the basic rights they have recognized, beyond the rights of acquisition and disposal, are the right of sole dominion—variously described as a right to exclude others, a right against trespass, or a right of quiet enjoyment, which all can exercise equally, at the same time and in the same respect; and the right of active use—at least to the point where such use violates the rights of others to quiet enjoyment. Just where that point is, of course, is often fact dependent—and is the business of courts to decide. But the point to notice, in the modern context, is that the presumption of the common law is on the side of free use. At common law, that is, people are not required to obtain a permit before they can use their property—no more than people today are required to obtain a permit before they can speak freely. Rather, the burden is upon those who object to a given use to show how it violates a right of theirs. That amounts to having to show that their neighbor’s use takes something they own free and clear. If they fail, the use may continue.

Thus, the common law limits the right of free use only when a use encroaches on the property rights of others, as in the classic law of nuisance or risk. The implications of that limit, however, should not go unnoticed, especially in the context of such modern concerns as environmental protection. Indeed, it is so far from the case that property rights are opposed to environmental protection—a common belief today—as to be just the opposite: the right against environmental degradation is a *property* right. Under common law, properly applied, people cannot use their property in ways that damage their neighbors' property—defined, again, as taking things those neighbors hold free and clear. Properly conceived and applied, then, property rights are self-limiting: they constitute a judicially crafted and enforced regulatory scheme in which rights of active use end when they encroach on the property rights of others.

## The Police Power and the Power of Eminent Domain

But if the common law of property defines and protects private rights—the rights of owners with respect to each other—it also serves as a guide for the proper scope and limits of public law—defining the rights of owners and the public with respect to each other. For public law, at least at the federal level, flows from the Constitution; and the Constitution flows from the principles articulated in the Declaration—which reflect, largely, the common law. The justification of public law begins, then, with our rights, as the Declaration makes clear. Government then follows, not to give us rights through positive law, but to recognize and secure the rights we already have. Thus, to be legitimate, government's powers must be derived from and consistent with those rights.

The two public powers that are at issue in the property rights debate are the police power—the power of government to secure rights—and the power of eminent domain—the power to take property for public use upon payment of just compensation, as set forth, by implication, in the Fifth Amendment's Takings Clause.

The police power—the fundamental power of government—is derived from what Locke called the Executive Power, the power each of us has in the state of nature to secure his rights. Thus, as such, it is legitimate, since it is nothing more than a power we already have, by right, which we gave to government, when we constituted ourselves as a nation, to exercise on our behalf. Its exercise is legitimate, however, only insofar as it is used to secure rights, and only insofar as its use respects the rights of others. Thus, while our rights give rise to the police power, they also

limit it. We cannot use the police power for non-police-power purposes. It is a power to secure rights, through restraints or sanctions, not some general power to provide public goods.

A complication arises with respect to the federal government, however, for it is not a government of general powers. Thus, there is no general federal police power, despite modern developments to the contrary (which essentially ignore the principle). Rather, the Constitution establishes a government of delegated, enumerated, and thus limited powers, leaving most powers, including the police power, with the states or the people, as the Tenth Amendment makes clear. (See Chapter 3 for greater detail on this point.) If we are to abide by constitutional principle, then we have to recognize that whatever power the federal government has to secure rights is limited to federal territory, by implication, or is incidental to the exercise of one of the federal government's enumerated powers.

But if the police power is thus limited to securing rights, and the federal government's police power is far more restricted, then any effort to provide public goods must be accomplished under some other power—under some enumerated power, in the case of the federal government. Yet any such effort will be constrained by the Takings Clause, which requires that any provision of public goods that entails taking private property—whether in whole or in part is irrelevant—must be accompanied by just compensation for the owner of the property. Otherwise, the costs of the benefit to the public would fall entirely on the owner. Not to put too fine a point on it, that would amount to plain theft. Indeed, it was to prohibit that kind of thing that the Founders wrote the Takings Clause in the first place.

Thus, the power of eminent domain—which is not enumerated in the Constitution but is implicit in the Takings Clause—is an instrumental power: it is a means through which government, acting under some other power, pursues other ends—building roads, for example, or saving wildlife. Moreover, unlike the police power, the eminent domain power is not inherently legitimate: indeed, in a state of nature, prior to the creation of government, none of us would have a right to condemn a neighbor's property, however worthy our purpose, however much we compensated him. Thus, it is not for nothing that eminent domain was known in the 17th and 18th centuries as “the despotic power.” It exists from practical considerations alone—to enable public projects to go forward without being held hostage to holdouts seeking to exploit the situation by extracting far more than just compensation. As for its justification, the best that can be said for eminent domain is this: the power was ratified by those who

were in the original position; and it is “Pareto superior,” as economists say, meaning that at least one party, the public, is made better off by its use, as evidenced by its willingness to pay, while no one is made worse off, assuming the owner does indeed receive just compensation.

## When Compensation Is Required

We come then to the basic question: When does government have to compensate owners for the losses they suffer when regulations reduce the value of their property? The answers are as follows.

First, when government acts to secure rights—when it stops someone from polluting, for example, or from excessively endangering others—it is acting under its police power and no compensation is due the owner, whatever his financial losses, because the use prohibited or “taken” was wrong to begin with. Since there is no right to pollute, we do not have to pay polluters not to pollute. Thus, the question is not whether value was taken by a regulation but whether a *right* was taken. Proper uses of the police power take no rights. To the contrary, they protect rights.

Second, when government acts not to secure rights but to provide the public with some good—wildlife habitat, for example, or a viewshed, or historic preservation—and in doing so prohibits or “takes” some otherwise *legitimate* use, then it is acting, in part, under the eminent domain power and it does have to compensate the owner for any financial losses he may suffer. The principle here is quite simple: the public has to pay for the goods it wants, just like any private person would have to. Bad enough that the public can take what it wants by condemnation; at least it should pay rather than ask the owner to bear the full cost of its appetite. It is here, of course, that modern regulatory takings abuses are most common as governments at all levels try to provide the public with all manner of amenities, especially environmental amenities, “off budget.” As noted earlier, there is an old-fashioned word for that practice: it is “theft,” and no amount of rationalization about “good reasons” will change that. Even thieves, after all, have “good reasons” for what they do.

Finally, when government acts to provide the public with some good and that act results in financial loss to an owner but takes no right of the owner, no compensation is due because nothing the owner holds free and clear is taken. If the government closes a military base, for example, and neighboring property values decline as a result, no compensation is due those owners because the government’s action took nothing they owned. They own their property and all the uses that go with it that are consistent

with their neighbors' equal rights. They do not own the value in their property.

## **Some Implications of a Principled Approach**

Starting from first principles, then, we can derive principled answers to the regulatory takings question. And we can see in the process, there is no difference in principle between an "ordinary" taking and a regulatory taking, between taking full title and taking only uses—a distinction that government supporters repeatedly urge, claiming that the Takings Clause requires compensation only for "full" takings. If we take the text seriously, as we should, the clause speaks simply of "private property." As the quote earlier from Madison suggests, "property" denotes not just some "underlying estate" but all the estates—all the uses—that can rightly be made of a holding. In fact, in every area of property law except regulatory takings we recognize that property is a "bundle of sticks," any one of which can be bought, sold, rented, bequeathed, what have you. Yet takings law has clung to the idea that only if the entire bundle is taken does government have to pay compensation.

That view enables government to extinguish nearly all uses through regulation—and hence to regulate nearly all value out of property—yet escape the compensation requirement because the all-but-empty title remains with the owner. And it would allow a government to take 90 percent of the value in year one, then come back a year later and take title for a dime on the dollar. Not only is that wrong, it is unconstitutional. It cannot be what the Takings Clause stands for. The principle, rather, is that property is indeed a bundle of sticks: take one of those sticks and you take something that belongs to the owner. The only question then is how much his loss is worth.

Thus, when the Court in 1992 crafted what is in effect a 100 percent rule, whereby owners are entitled to compensation only if regulations restrict uses to a point where all value is lost, it went about the matter backwards. It measured the loss to determine whether there was a taking. As a matter of first principle, the Court should first have determined whether there was a taking, then measured the loss. It should first have asked whether otherwise legitimate uses were prohibited by the regulation. That addresses the principle of the matter. It then remains simply to measure the loss in value and hence the compensation that is due. The place to start, in short, is with the first stick, not the last dollar.

The principled approach requires, of course, that the Court have a basic understanding of the theory of the matter and a basic grasp of how to resolve conflicting claims about use in a way that respects the equal rights of all. That is hardly a daunting task, as the old common-law judges demonstrated. In general, the presumption is on the side of active use, as noted earlier, until some plaintiff demonstrates that such use takes the quiet enjoyment that is his by right—and the defendant’s right as well. At that point the burden shifts to the defendant to justify his use: absent some defense like the prior consent of the plaintiff, the defendant may have to cease his use—or, if his activity is worth it, offer to buy an easement or buy out the plaintiff. Thus, a principled approach respects equal rights of quiet enjoyment—and hence environmental integrity. But it also enables active uses to go forward—though not at the expense of private or public rights. Users can be as active as they wish, provided they handle the “externalities” they create in a way that respects the rights of others.

## What Congress Should Do

The application of such principles is often fact dependent, as noted earlier, and so is best done by courts. But until the courts develop a more principled and systematic approach to takings, it should fall to Congress to draw at least the broad outlines of the matter, both as a guide for the courts and as a start toward getting its own house in order.

In this last connection, however, the first thing Congress should do is recognize candidly that the problem of regulatory takings begins with regulation. Doubtless the Founders did not think to specify that regulatory takings are takings too, and thus are subject to the Just Compensation Clause, because they did not imagine the modern regulatory state: they did not envision our obsession with regulating every conceivable human activity and our insistence that such activity—residential, business, what have you—take place only after a grant of official permission. In some areas of business today, we have almost reached the point at which it can truly be said that everything that is not permitted is prohibited. That is the opposite, of course, of our founding principle: everything that is not prohibited is permitted—where “permitted” means “freely allowed,” not allowed “by permit.”

Homeowners; developers; farmers and ranchers; mining and timber companies; and businesses large and small, profit making and not for profit, all have horror stories about regulatory hurdles they confront when

they want to do something, particularly with real property. Many of those regulations are legitimate, of course, especially if they are aimed, preemptively, at securing genuine rights. But many more are aimed at providing some citizens with benefits at the expense of other citizens. They take rights from some to benefit others. At the federal level, such transfers are not likely to find authorization under any enumerated power. But even if constitutionally authorized, they need to be undertaken in conformity with the Takings Clause. Some endangered species, to take a prominent modern example, may indeed be worth saving, even if the authority for doing so belongs to states, and even if the impetus comes from a relatively small group of people. We should not expect a few property owners to bear all the costs of that undertaking, however. If the public truly wants the habitat for such species left undisturbed, let it buy that habitat or, failing that, pay the costs to the relevant owners of their leaving their property unused.

In general, then, Congress should review the government's many regulations to determine which are and are not authorized by the Constitution. If not authorized, they should be rescinded, which would end quickly a large body of regulatory takings now in place. But if authorized under some constitutionally enumerated power of Congress, the costs now imposed on owners, for benefits conferred on the public generally, should be placed "on budget." Critics of doing that are often heard to say that if we did go on budget, we couldn't afford all the regulations we want. What they are really saying, of course, is that taxpayers would be unwilling to pay for all the regulations the critics want. Indeed, the great fear of those who oppose taking a principled approach to regulatory takings is that once the public has to pay for the benefits it now receives "free," it will demand fewer of them. It should hardly surprise that when people have to pay for something they demand less of it.

It is sheer pretense, of course, to suppose that such benefits are now free, that they are not already being paid for. Isolated owners are paying for them, not the public. As a matter of simple justice, then, Congress needs to shift the burden to the public that is demanding and enjoying the benefits. Among the virtues of doing so is this: once we have an honest, public accounting, we will be in a better position to determine whether the benefits thus produced are worth the costs. Today, we have no idea about that because all the costs are hidden. When regulatory benefits are thus "free," the demand for them, as we see, is all but infinite.

But in addition to eliminating, reducing, or correcting its own regulatory takings—in addition to getting its own house in order—Congress needs

to enact general legislation on the subject of takings that might help to restore respect for property rights and reorient the nation toward its own first principles. To that end, Congress should do the following.

### Congress Should Enact Legislation That Specifies the Constitutional Rights of Property Owners under the Fifth Amendment's Takings Clause

As already noted, legislation of the kind here recommended would be unnecessary if the courts were doing their job correctly and reading the Takings Clause properly. Because they are not, it falls to Congress to step in. Still, there is a certain anomaly in asking Congress to do the job. Under our system, after all, the political branches and the states represent and pursue the interests of the people within the constraints established by the Constitution, and it falls to the courts, and the Supreme Court in particular, to ensure that those constraints are respected. To do that, the Court interprets and applies the Constitution as it decides cases brought before it—cases often brought against the political branches or a state, as here, where an owner seeks either to enjoin a government action on the ground that it violates his rights or to obtain compensation under the Takings Clause, or both. Thus, it is somewhat anomalous to ask or expect Congress to right wrongs that Congress itself may be perpetrating. After all, is not Congress, in its effort to carry out the public's will, simply doing its job?

The answer, of course, is yes, Congress is doing its job, and thus this call for reform—against the “natural” inclination of Congress, if you will—is somewhat anomalous. But that is not the whole answer. For members of Congress take an oath to uphold the Constitution, which requires them to exercise independent judgment about the meaning of its terms. In doing that, they need to recognize that we do not live in anything like a pure democracy. The Constitution sets powerful and far-reaching restraints on the powers of all three branches of the federal government and, since ratification of the Civil War Amendments, on the states as well. Thus, the simple-minded majoritarian view of our system—whereby Congress simply enacts whatever some transient majority of the population wants enacted, leaving it to the Court to determine the constitutionality of the act—must be resisted as a matter of the oath of office. The oath is taken on behalf of the people, to be sure, but through and in conformity with the Constitution. When the Court fails to secure the liberties of the people, there is nothing in the Constitution to prevent Congress from exercising the responsibility entailed by the oath of office. In fact, that oath requires Congress to step into the breach.

There is no guarantee, of course, that Congress will do a better job of interpreting the Constitution than the Court. In fact, given that Congress is an “interested” party, it could very well do a worse job, which is why the Founders placed “the judicial Power”—entailing, presumably, the power ultimately to say what the law is—with the Court. But that is no reason for Congress to ignore its responsibility to make its judgment known, especially when the Court is clearly wrong, as it is here. Although nonpolitical in principle, the Court does not operate in a political vacuum—as it demonstrated in 1937, unfortunately, after Franklin Roosevelt’s notorious Court-packing threat. If the Court can be persuaded to undo the centerpiece of the Constitution, the doctrine of enumerated powers, one imagines it can be persuaded to restore property rights to their proper constitutional status.

Thus, in addition to rescinding or correcting legislation that now results in uncompensated regulatory takings, and enacting no such legislation in the future, Congress should also enact a more general statute that specifies the constitutional rights of property owners under the Fifth Amendment’s Takings Clause, drawing upon common-law principles to do so. That means that Congress should do the following.

### Congress Should Follow the Traditional Common Law in Defining “Private Property,” “Public Use,” and “Just Compensation”

As we saw earlier, property rights in America are not simply a matter of the Fifth Amendment—of positive law. Indeed, during the more than two years between the time the Constitution was ratified and took effect and the time the Bill of Rights was ratified, property rights were protected not only against private but against public invasion as well. That protection stemmed, therefore, not from any explicit constitutional guarantee but from the common law. Thus, the Takings Clause was meant simply to make explicit, against the new federal government, the guarantees that were already recognized under the common law. (Those guarantees were implicit in the new Constitution, of course, through the doctrine of enumerated powers, for no uncompensated takings were therein authorized.) With the ratification of the Civil War Amendments—and the Fourteenth Amendment’s Privileges or Immunities Clause in particular—the common-law guarantees against the states were constitutionalized as well. Thus, because the Takings Clause takes its inspiration and meaning from the common law of property, it is there that we must look to understand its terms.

Those terms begin with “private property”: “nor shall private property be taken for public use without just compensation.” As every first-year law student learns, “private property” means far more than a piece of real estate. Were that not the case, property law would be an impoverished subject indeed. Instead, the common law reveals the many significations of the concept “property” and the rich variety of arrangements that human imagination and enterprise have made of the basic idea of private ownership. As outlined earlier, however, those arrangements all come down to three basic ideas—acquisition, exclusive use, and disposal—the three basic property rights, from which more specifically described rights may be derived.

With regard to regulatory takings, however, the crucial thing to notice is that, absent contractual arrangements to the contrary, the right to acquire and hold property entails the right to use and dispose of it as well. As Madison said, people have “a property” in their rights. If the right to property did not entail the right of use, it would be an empty promise. People acquire property, after all, only because doing so enables them to use it, which is what gives it its value. Indeed, the fundamental complaint about uncompensated regulatory takings is that, by thus eliminating the uses from property, government makes the title itself meaningless, which is why it is worthless. Who would buy “property” that cannot be used?

The very concept of “property,” therefore, entails all the legitimate uses that go with it, giving it value. And the uses that are legitimate are those that can be exercised consistent with the rights of others, private and public alike, as defined by the traditional common law. As outlined above, however, the rights of others that limit the rights of an owner are often fact dependent. Thus, legislation can state only the principle of the matter, not its application in particular contexts. Still, the broad outlines should be made clear in any congressional enactment: the term “private property” includes all the uses that can be made of property consistent with the common-law rights of others, and those uses can be restricted without compensating the owner only to secure such rights, not to secure public goods or benefits.

The “public use” requirement also needs to be tightened, not least because it is a source of private-public collusion against private rights. As noted earlier, eminent domain was known in the 17th and 18th centuries as “the despotic power” because no private person would have the power to condemn, even if he had a worthy reason and did pay just compensation. Yet we know that public agencies often do condemn private property for

such private uses as auto plant construction, casino parking lots, and tax-enhancing commercial development. Those are rank abuses of the public use principle: they amount to implicit grants of private eminent domain—and invitations to public graft and corruption. Every private use has spillover benefits for the public, of course. But if that were the standard for defining “public use,” then every time someone wanted to expand his business over his neighbor’s property, he could go to the relevant public agency and ask that the neighbor’s property be condemned since the expansion would arguably benefit the public through increased jobs, business, taxes, what have you. He would no longer need to bargain with his neighbor but could simply ask—even “pay,” as has happened—the agency to condemn the property “for the public good.”

Because it is a despotic power, even when the compensation paid actually is just, eminent domain should be used sparingly and only for a truly *public* use. That means for a use that is broadly enjoyed by the public, rather than by some narrow part of the public, and in the case of the federal government, it means for a constitutionally authorized use. In defining “public use,” however, there is no bright line. Nevertheless, certain general considerations can help. To begin, provided the compensation is just, no problem arises when title is transferred to the public—to build a military base, for example, or a public highway. Nor is there a genuine problem when, to avoid the holdout situation that might arise with, for example, laying cable or telephone lines, title is transferred to a *private* party—provided the subsequent use is open to all on a nondiscriminatory basis, often to be regulated in the public interest. Were eminent domain available only when the public kept title, the public would be deprived of the relative efficiencies of private ownership in cases like those.

Beyond such cases, however, the “public use” restriction on employing eminent domain looms ever larger. Condemnation for “blight reduction,” for example, sweeps too broadly: private uses that constitute nuisances can be enjoined under the police power, after all, without transferring title. And a close cousin, the “economic development” rationale for condemnation, as in the *Kelo* case, should never be allowed, whatever the “public *benefit*” of such transfers. Thus, condemnation for building a sports stadium may be authorized under some state’s constitution, but if the stadium is then owned and managed by and for the benefit of private parties, the “public use” standard has been abused, whatever the spillover “public” benefits may be. Here, title settles the matter. Yet even if the

public keeps the title, but the effect of the transfer is to benefit a small portion of the public rather than the public generally, the condemnation is also likely to be illegitimate because it is not truly for a “public” use. If some small group wants the benefits provided by the condemnation, private markets provide ample opportunities for obtaining them—the right way. To avoid abuse and the potential for corruption, then, Congress needs to define “public use” rigorously, with reference to titles, use, and control.

Finally, Congress should define “just compensation” with reference to its function: it is a remedy for the wrong of taking someone’s property. That the Constitution implicitly authorizes that wrong does not change the character of the act, of course. As noted earlier, eminent domain is “justified” for practical reasons, and because “we” authorized it originally, although none of us today, of course, was there to do so. Given the character of the act, then, the least the public can do is make the victim whole. That too will be a fact-dependent determination. But Congress should at least make it clear that “just” compensation means compensation for all losses that arise from the taking, plus an added measure to acknowledge the fact that the losses arise not by mere accident, as with a tort, but from a deliberate decision by the public to force the owner to give up his property.

It should be noted, however, that not every regulatory taking will require compensation for an owner. Minimal losses, for example, may be difficult to prove and not worth the effort. Moreover, some regulatory restrictions may actually enhance the value of property or of particular pieces of property—say, if an entire neighborhood is declared “historic.” Finally, that portion of “just compensation” that concerns market value should reflect value before, and with no anticipation of, regulatory restrictions. In determining compensation, government should not benefit from reductions in value its regulations bring about. Given the modern penchant for regulation, that may not always be easy. But in general, given the nature of condemnation as a forced taking, any doubt should be resolved to the benefit of the owner forced to give up his property.

If Congress enacts general legislation that outlines the constitutional rights of property owners by following the common law in defining the terms of the Takings Clause, it will abolish, in effect, any real distinction between full and partial takings. Nevertheless, Congress should be explicit about what it is doing. Any legislation it enacts should do the following.

## Congress Should Treat Property Taken through Regulation the Same As Property Taken through Physical Seizure

The importance of enacting a unified and uniform takings law cannot be overstated. Today, we have one law for “full takings,” “physical seizures,” “condemnations”—call them what you will—and another for “partial takings,” “regulatory seizures,” or “condemnations of uses.” Yet there is overlap, too: thus, as noted above, the Court has said that if regulations take all uses, compensation is due—perhaps because eliminating all uses comes to the same thing, in effect, as a “physical seizure,” whereas eliminating most uses seems not to come to the same thing.

That appearance is deceptive, of course. In fact, the truth is much simpler—but only if we go about discovering it from first principles. If we start with an owner and his property, then define “property,” as done earlier, as including all legitimate uses, it follows that any action by government that takes any property is, by definition, a taking—requiring compensation for any financial losses the owner may suffer as a result. The issue is really no more complicated than that. There is no need to distinguish “full” from “partial” takings: *every* condemnation, whether “full” or “partial,” is a taking. Indeed, the use taken is taken “in full.” Imagine that the property were converted to dollars—100 dollars, say. Would we say that if the government took all 100 dollars there was a taking, but if it took only 50 of the 100 dollars there was not a taking? Of course not. Yet that is what we say under the Court’s modern takings doctrine because, as one justice recently put it, “takings law is full of these ‘all-or-nothing’ situations.”

That confusion must end. Through legislation specifying the rights of property owners, Congress needs to make it clear that compensation is required whenever government eliminates common-law property rights and an owner suffers a financial loss as a result—whether the elimination results from regulation or from outright condemnation.

The promise of the common law and the Constitution will be realized, however, only through procedures that enable aggrieved parties to press their complaints. Some of the greatest abuses today are taking place because owners are frustrated at every turn in their efforts to reach the merits of their claims. Accordingly, Congress should do the following.

## Congress Should Provide a Single Forum in Which Property Owners May Seek Injunctive Relief and Just Compensation Promptly

In its 1998 term, the Supreme Court decided a takings case that began 17 years earlier, in 1981, when owners applied to a local planning commis-

sion for permission to develop their land. After having submitted numerous proposals, all rejected, yet each satisfying the commission's recommendations following a previously rejected proposal, the owners finally sued, at which point they faced the hurdles the courts put before them. Most owners, of course, cannot afford to go through such a long and expensive process, at the end of which the odds are still against them. But that process today confronts property owners across the nation as they seek to enjoy and then to vindicate their rights. If it were speech or voting or any number of other rights, the path to vindication would be smooth by comparison. But property rights today have been relegated to a kind of second-class status.

The first problem, as noted earlier, is the modern permitting regime. We would not stand for speech or religion or most other rights to be enjoyed only by permit. Yet that is what we do today with property rights, which places enormous, often arbitrary, power in the hands of federal, state, and local "planners." Driven by political goals and considerations—notwithstanding their pretense to "smart growth"—planning commissions open the application forum not only to those whose *rights* might be at stake but to those with *interests* in the matter. Thus is the common-law distinction between rights and interests blurred and eventually lost. Thus is the matter transformed from one of protecting rights to one of deciding whose "interests" should prevail. Thus are property rights effectively politicized. And that is the end of the matter for most owners because that is as far as they can afford to take it.

When an owner does take it further, however, he finds the courts are often no more inclined to hear his complaint than was the planning commission. Federal courts routinely abstain from hearing federal claims brought against state and local governments, requiring owners to litigate their claims in state courts before they can even set foot in a federal court on their federal claims. Moreover, the Supreme Court has held that an owner's claim is not ripe for adjudication unless (a) he obtains a final, definitive agency decision regarding the application of the regulation in question, and (b) he exhausts all available state compensation remedies. Needless to say, planners, disinclined to approve applications to begin with, treat those standards as invitations to stall until the "problem" goes away. Then, if an owner does spend years and extraordinary expense going through those hoops and is able to get into federal court, he faces the *res judicata* restriction of the federal Full Faith and Credit Act: the court will say that the case has already been adjudicated by the state

courts. Finally, if the claim is against the federal government, the owner faces the so-called Tucker Act Shuffle: he cannot get injunctive relief and compensation from the same court but must instead go to a federal district court for an injunction and to the Federal Court of Claims for compensation.

The 105th and 106th Congresses tried to address those procedural hurdles through several measures, none of which passed both houses. They must be revived and enacted if the unconscionable way we treat owners, trying simply to vindicate their constitutional rights, is to be brought to an end. This is not a matter of “intruding” on state and local governments. Under the Fourteenth Amendment, properly understood and applied, those governments have no more right to violate the constitutional rights of citizens than the federal government has to intrude on the legitimate powers of state and local governments. Federalism is not a shield for local tyranny. It is a brake on tyranny, whatever its source.

## **Conclusion**

The Founders would be appalled to see what we did to property rights over the course of the 20th century. One would never know that their status, in the Bill of Rights, was equal to that of any other right. The time has come to restore respect for these most basic of rights, the foundation of all of our rights. Indeed, despotic governments have long understood that if you control property, you control the media, the churches, the political process itself. We are not at that point yet. But if regulations that provide the public with benefits continue to grow, unchecked by the need to compensate those from whom they take, we will gradually slide to that point—and in the process will pay an increasingly heavy price for the uncertainty and inefficiency we create. The most important price, however, will be to our system of law and justice. Owners are asking simply that their government obey the law—the common law and the law of the Constitution. In reducing their request to its essence, they are saying simply this: Stop stealing our property; if you must take it, do it the right way—pay for it. That hardly seems too much to ask.

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