

## **16. Property Rights and the Constitution**

### ***Congress should***

- enact legislation for guiding federal agencies and influencing 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 acquire, use, and dispose of property freely. 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 the federal government's own violations and to set out a standard that courts might notice as they adjudicate complaints about state violations.

The Constitution protects property rights through the Fifth and Fourteenth Amendments' Due Process Clauses and, more directly, through the Fifth Amendment's Takings 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 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 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 three decades, the Supreme Court has chipped away at the problem of uncompensated regulatory takings, requiring compensation in some cases; but its decisions were largely ad hoc, leaving most owners to bear the losses themselves. Thus, owners today can get compensation when the title is actually taken, as just noted; when the 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 October 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*, in which the city condemned Ms. 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 varied substantially, and nearly all leave unaddressed the far more common problem of regulatory takings.

At bottom, then, the Court has yet to develop a principled and 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. We need to begin, then, not with the public law of the Constitution as presently interpreted, 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 right claim, after all, is a claim to some thing—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, “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 and legal 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 for ourselves. It was the genius of the old common law, grounded in reason and custom, that it grasped that point. And the common law judges understood a pair of corollaries as well: property, broadly conceived, separates one individual from another; and 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. Thus, common law judges, charged with settling disputes between neighbors, drew on principles of reason, efficiency, and custom to craft a law of property that by and large respected the equal rights of all.

In a nutshell, the basic rights they recognized, beyond acquisition and disposal, were 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 will vary with the facts, of course, and that is the business of courts to determine, although legislatures can draw the broad outlines. Given our modern permitting regime, however, the point to be noticed here is that the presumption of the common law was ordinarily on the side of free use. People were not required to obtain a permit before using their property, that is, just as people today are not required to obtain a permit before

speaking. Rather, the burden was on those who objected to a given use to show how it violated a right of theirs. That amounts to having to show that their neighbor's use takes something they own free and clear. If they failed in that, the use could 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 and risk. The implications of that limit should not go unnoticed, however, especially in the context of modern environmental protection. Indeed, the belief, common today, that property rights are opposed to environmental protection is so far from the case 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 of Independence; and those 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 through natural law. Thus, to be morally legitimate, the powers of government must be derived from and consistent with those rights.

The two public powers most often at issue in the property rights context are the police power—the power of government mainly 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 general 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 our rights. Thus, *as such*, this

legal power is legitimate since it is nothing more than the public law version of a moral power we already have, by right, which we gave to government to exercise on our behalf when we constituted ourselves as a nation. But its *exercise* is legitimate only insofar as it is used to secure rights and to provide certain “public goods” like national defense and clean air—narrowly defined as economists do, citing free-rider problems, nonexcludability, and nonrivalrous consumption—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 mainly to secure rights through restraints or sanctions, not some general power to provide the public with goods and services more broadly defined.

A complication arises in the case of the federal government, however, because there is no general federal police power. Rather, the Constitution establishes a government of delegated, enumerated, and thus limited powers, leaving most powers, including the general police power, with the states or the people, as the Tenth Amendment makes clear. Consistent with constitutional principle, then, whatever power the federal government has to secure rights is limited to federal territory, is incidental to one of its enumerated powers, or is entailed mainly through the amendments. (See Chapter 15 for greater detail on this point.)

But if the police power is thus limited, then any effort to provide the public with goods and services more broadly must be accomplished under some other power, such as those, in the case of the federal government, that are enumerated in Article I, Section 8 of the Constitution. Yet that effort will be constrained by the Takings Clause, which requires that private property taken in pursuit of such ends—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 theft. Indeed, it was to prohibit that kind of thing that the Framers 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 affords a means that enables government, acting under some other power, to pursue 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 arises 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 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 receives just compensation.

### ***When Is Compensation Required?***

We come then to the basic question: When do owners have to be compensated as a result of government actions? In general, there are four scenarios to consider.

First, when government actions incidentally reduce property values, but no rights are violated because nothing that belongs free and clear to the owner is taken, no compensation is due. If the government closes a military base or a neighborhood school, for example, or builds a new highway distant from the old one with its commercial enterprises, property values may decline as a result—but nothing was taken. We own our property and all the legitimate uses that go with it, not the value in our property, which is a function of many ever-changing factors.

Second, when government acts, under its police power, to secure rights—when it stops someone from polluting, for example, or from excessively endangering others—the restricted owner is not entitled to compensation, whatever his financial losses, because the uses prohibited or "taken" were wrong to begin with. Since there is no right to pollute, no right was taken. Thus, we do not have to pay polluters not to pollute. Here again the question is not whether *value* was taken but whether a *right* was taken. Proper uses of the police power take no rights. They *protect* rights.

Third, when government acts not to secure rights but to provide the public with goods like wildlife habitat, scenic views, or historic preservation, and in so doing prohibits or "takes" some otherwise *rightful* use, then it is acting, in part, under the eminent domain power and *does* have to compensate the owner for any 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 for what it takes 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 above, there is an old-fashioned word for that practice—“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, through full condemnation, takes for public use not simply some or all of the owner’s uses but the entire estate, including the title, compensation is clearly due.

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

Starting from first principles, then, we see that there is no difference in principle between the full use of eminent domain just described and a regulatory taking—between taking full title and taking only uses. Thus, the oft-heard claim that the Takings Clause requires compensation only for “full” takings will not withstand scrutiny. Giving the clause a natural reading, it speaks simply of “private property.” As Madison wrote (above), “property” denotes all the uses or rights that can rightly be made of a holding. It does not denote simply the underlying estate. In fact, in every area of property law except regulatory takings, we speak of property as being a “bundle of sticks,” any one of which can be bought, sold, rented, bequeathed, what have you. Yet, to enable government to provide the public with goods “off budget” and thus “on the cheap,” 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, a bundle of rights: 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 in *Lucas v. South Carolina Coastal Council* crafted what is effectively 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 backward. It measured the loss to determine whether there was a taking. As a matter of first principle, the Court should have determined first whether there was a taking—whether otherwise legitimate uses were prohibited by the regulation—and only then should it have measured the loss. That addresses the principle of the matter. It then remains simply to measure the loss in value and hence the compensation that is due. In *Lucas*, since all uses were effectively taken, full compensation was due. The place to start, in short, is with the first stick, not the last dollar. That is especially so since most regulatory takings take only some uses, thus reducing the value of the property by less than its full value.

More generally, the principled approach to takings requires 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, although the application of those principles in particular cases can be complicated, to be sure. But in general, as already noted, the presumption is on the side of active use 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 protection. 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**

As already noted, the application of these principles is often fact dependent and so is best done by courts. But until our courts, and the Supreme Court in particular, craft a more principled and systematic approach to takings, Congress can assist by drawing at least the broad outlines of such an approach as a guide both for the courts and, more directly, for federal agencies.



In this last connection, however, Congress should recognize that the regulatory takings problem begins with regulation. Doubtless the Founders did not anticipate the modern regulatory state, so they did not specify that regulatory takings are takings too and thus are subject to the Just Compensation Clause. They did not envision our obsession with regulating every human activity and our insistence that such activities—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 everything that is not permitted is prohibited. That reverses our Founding principle: everything that is not prohibited is permitted—that is, “freely allowed,” not allowed only after obtaining a government permit.

Homeowners, developers, farmers and ranchers, mining and timber companies, firms large and small, profit seeking 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 aim, 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. 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 leaving their property unused.

In general, then, Congress should review the many federal regulations affecting private property 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 particular owners, for benefits conferred on the public generally, should be placed “on budget.” Critics of doing that are often heard to say that if those goods did go on budget, we couldn’t afford them. What they are really saying, of course, is that taxpayers would be unwilling to pay for all the things 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, Congress needs to shift the burden to the public that is enjoying the benefits. 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.

#### *Enact Legislation That Specifies the Constitutional Rights of Property Owners under the Fifth Amendment’s Takings Clause*

As already noted, legislation of the kind recommended here would be unnecessary if the courts were reading and applying 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—often *against* the political branches or a state when 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. Is not Congress, in carrying out the public’s will, simply doing its job?

Yes, that is part of its job. But members of Congress swear to uphold the Constitution, which requires them to exercise *independent* judgment about the meaning of its terms. And in that connection, 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, especially since ratification of the Civil War Amendments, on the states as well. Thus, the idea that Congress simply enacts whatever some transient majority of the population wants enacted, leaving it to the courts to determine the constitutionality of its acts, must be resisted. The oath of office is taken on behalf of the people, to be sure, but through and in conformity with the Constitution. Even if the courts fail to secure the liberties of the people, therefore, nothing in the Constitution prevents *Congress* from exercising the duties 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 has done. In fact, given that Congress is one of the political branches and thus an “interested” party, it could very well do a worse job. That is why the Framers placed “the judicial Power”—entailing, presumably, the power ultimately to say what the law is—with the Court, the nonpolitical branch. 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, as it did after that extraordinary and unconscionable political interference, one imagines it can be persuaded *by Congress* to restore property rights to their proper constitutional status.

Thus, to start, Congress should revisit and rescind or correct legislation that results in uncompensated regulatory takings—and enact no such legislation in future. In addition, however, Congress should enact a more general statute that specifies the constitutional rights of property owners under the Fifth Amendment’s Takings Clause, drawing on common law principles to do so.

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

As we saw above, property rights are not protected by the Fifth Amendment’s Takings Clause alone—that is, by positive constitutional 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,

it was the common law that protected property rights against both private and public invasion. Thus, the Takings Clause simply made explicit, against the new federal government, the guarantees that were already recognized under the common law. (Constitutional protection was *implicit* during that time, of course, through the doctrine of enumerated powers, for no uncompensated takings were authorized under the new Constitution.) And with the ratification of the Civil War Amendments—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.

**“Private property.”** The first of those terms is “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 parcel of real estate. Were that not the case, property law would indeed be an impoverished subject. 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 above, however, those arrangements all come down to three basic ideas—acquisition, exclusive use, and disposal, the three basic rights we have in property, 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* it as well. As Madison wrote, people have “a property” in their rights, including in their rights of use. If the right to property did not entail rights 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 some or all of the uses owners may make of their property, government makes the title they retain that much less valuable—even worthless in extreme cases. Who would buy property that cannot be used?

The very concept of “property,” therefore, entails and denotes all the legitimate uses that can be made of the underlying estate, 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 an owner's uses depend often on the facts. Thus, legislation can state only the principle of the matter, not its application in specific contexts. Still, the broad outlines should be made clear in any congressional enactment. In particular, the term "private property" should be defined to include all the uses that can be made of property consistent with the common law rights of others. The only grounds that justify restricting uses without compensation are (1) to protect the rights of others; and (2) to provide narrowly defined "public goods," where owners receive public benefits equivalent to the losses incurred by regulation. By contrast, when a particular owner's uses are restricted to provide the general public with goods more broadly defined, the resulting loss in value should be compensated.

**"Public use."** Turning now from regulatory takings to the full use of eminent domain, here the government condemns the entire property and takes title in order to give the property a "public use"—a military base, for example, or a public school or highway. Unfortunately, governments today too often use eminent domain for much broader purposes, and courts have sanctioned such condemnations by reading "public use" as "public benefit." That has led to private-public collusion against private rights as governments condemn private property for the benefit of other private users, either directly or by delegating their condemnation power to a quasi-public or even a private entity. Those are rank abuses of the eminent domain power, amounting often to implicit grants of private eminent domain and to invitations to public graft and corruption. Typically, when a large private entity wants to expand, it goes to the relevant public agency and asks that a nearby property be condemned and title transferred to it, arguing that the expansion will benefit the public through increased jobs, business, taxes, what have you. No longer needing to bargain with the owners of the target properties in an effort to buy them, the entity simply asks or even pays the agency to condemn the properties "for the public good."

Because eminent domain is a "despotic power," it should be used rarely and only for genuinely *public* uses. That means uses that are broadly enjoyed by the public, rather than by some narrow part of the public; and in the case of the federal government, it means a constitutionally authorized use. In defining "public use," however, facts matter, and sometimes there is no bright line. Nevertheless, certain general considerations

can be noted. To begin, if the compensation is just, then no problem arises when title is transferred to the public for a genuine public use such as those mentioned above. Nor is there a problem when title is transferred to a *private* party—for example, to avoid the holdout situation that might arise with laying cable or telephone lines—provided the subsequent use is open to all on a nondiscriminatory basis, often to be regulated in the public interest. In such cases, were eminent domain available only when the public kept the title, the public would be deprived of the relative efficiencies of private ownership.

Beyond such cases, however, the public use restriction on employing eminent domain looms ever larger. Thus, condemnation for “blight reduction,” often a ruse for transferring title to a private developer, sweeps too broadly. If the “blighted” property constitutes an actual nuisance, it can be condemned under the police power, after all, without transferring title to another owner. A close cousin to the blight reduction rationale is the “economic development” rationale used in the infamous *Kelo* case and often used for the erection of privately owned sports stadiums; this rationale should never be allowed, whatever the claimed public benefit. Private economic development nearly always generates spillover benefits for the public, but that is no justification for using eminent domain. Since private markets provide ample opportunities for obtaining the property needed for development the right way, by voluntary agreement. To avoid abuse and the potential for corruption, therefore, Congress needs to define “public use” rigorously, with reference to titles, use, and control.

**“Just compensation.”** Finally, Congress should define “just compensation” with an eye 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 discussed above, the rationale for this despotic power, even when properly used, is problematic. Given that, the least the public can do is make the victim of its use whole. That too will be a fact-dependent determination, but Congress should at least make it clear that for compensation to be “just” and hence to make the owner whole, he must receive more than the “market value” of his property, the normal standard today. After all, the simple fact that the owner does not have his property on the market indicates that its value to him is greater than the market price. Moreover, his compensation should reflect the fact that his loss arises not by mere accident, as with torts, but from a deliberate decision by the public to force him to give up his property.

In the case of regulatory takings, however, it should be noted that not every such 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—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. Thus, 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 partial and full takings. Nevertheless, Congress should be explicit about what it is doing.

### *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 but not all 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 “property” signifies not only the underlying estate but all legitimate uses that by right can be made of it, then any government action that takes any one of those uses or rights 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” and “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 regulatory takings doctrine: as one justice 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.

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

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 provide a single forum for owners to press their claims.

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 commission for permission to develop their land. After submitting numerous proposals over this period, each rejected, even though each satisfied the commission's previous recommendation, 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 confronts property owners across the nation today 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 have been relegated to a kind of second-class status.

The first problem 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 with property rights, which places enormous, often arbitrary, power in the hands of federal, state, and local "planners." Driven by political goals and considerations, 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 (1) he obtains a final, definitive agency decision regarding the application of the regulation in question, and (2) 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 jumping through those hoops and he gets into federal court at last, 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 go to a district court for an injunction and to the Court of Federal Claims for compensation, each waiting upon the other to act.

The 105th and 106th Congresses tried to address those procedural hurdles through several measures, none of which passed both houses. Those or similar measures must be revived and enacted if the unconscionable way we treat owners—who are simply trying to vindicate their constitutional rights—is to be brought to an end. This is not an “intrusion” 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 have done to property rights over the course of the 20th century. One would never know today 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, of course, at that point yet. But if regulations that provide the public with benefits continue to grow, unchecked by the need to compensate those who bear the costs, we will gradually slide to that point—and in the process we 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—both the common law and the law of the Constitution. Reduced 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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