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Regulatory Takings

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## I. TOPIC: Regulatory Takings

Among its many protections, the fifth amendment to the U.S. Constitution provides, "... nor shall private property be taken for public use, without just compensation." The courts recognize two types of "takings": "physical takings" when the government actually appropriates private property, and "regulatory takings" when government regulation significantly reduces property value. The issue of "regulatory takings" law has gained prominence during the Reagan/Bush Administrations, as officials and wealthy special interests schooled in the ideology of "property rights" have mounted a campaign to turn back the clock on health, safety, and environmental regulation by characterizing these public safety laws as attacks on sacred property rights.<sup>1</sup>

The "takings campaign" is, thus, a legal tactic in the political war against regulation. There are two distinct threads to the takings campaign: first, anti-environmentalists have sought to convince the new regime of conservative judges to broaden previous judicial interpretations of what constitutes a regulatory taking. Second, these anti-environmentalists have sought, through legislation or executive order, to enact "takings" laws that limit regulation far more severely than will the courts.

The court battles involve laws aimed at protecting wetlands, endangered species, sensitive coastal regions, and the like. The legislative battlefront is larger, encompassing the full range of this nation's environmental protections, including clean air, clean water, and solid waste regulations.

## II. History of Takings Jurisprudence

Historically, the only government activity denominated a taking under the fifth amendment was a "physical taking" in which the government physically appropriates private property under its right of eminent domain. In 1922, however, in a decision by Justice Oliver Wendell Holmes, the Supreme Court held that the fifth amendment also requires compensation for a "regulatory

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<sup>1</sup> The anti-regulatory campaign sometimes styles itself the "property rights movement" or, particularly in the West, the "wise use movement." Environmentalists view this movement as merely repackaged anti-environmentalism on the part of the extractive industries -- mining, oil and gas -- and development industries. (The extractive industries, especially mining companies, are the primary funding sources for the "property rights movement.")

A word of caution: many citizens may think they support a movement for protection of property rights, until they understand its true anti-environmental agenda, so it is important to denominate and unmask the "property rights" people as anti-environmentalists.

taking" if government regulation of private property "goes too far." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

Since the lion's share of government regulation affects property value, and in infinitely varying degree, the federal courts have been unable to come up with anything better than an essentially ad hoc approach to determining when individual regulations go too far. In the late 1970's and 1980's, the Supreme Court, with no great consistency, balanced the following three factors in making its ad hoc decisions: the character of the government action (e.g., does it prevent harm to others, rather than convey public benefit), the economic impact of the regulation (on property value), and the extent to which the government action interferes with "investment-backed" expectations (i.e., even if the property value is reduced, is the owner's use one that the owner might have expected the government to regulate).

The "takings" field heated up in the past few years, and arguably the spark for this combustion was the 1985 book by conservative University of Chicago Law Professor Richard Epstein, Takings, Private Property and the Power of Eminent Domain. As the academic guru behind the movement, Epstein provided a manifesto for the use of "takings" law as a legal tool in the war against all environmental, health, and safety regulation. The campaign's judicial and legislative offensives are described in the next section.

### III. Recent Developments in the Anti-Regulatory Takings Campaign

#### **A. The Courts**

During the past 5-7 years, anti-environmentalists have believed they were on the verge of a major change in takings law in the courts, though their actual gains have, to date, been quite limited. The belief that the judiciary was about to greatly broaden the definition of a compensation-requiring "regulatory taking" was fueled by the obvious change in the make-up of the federal judiciary (and, in particular, the Supreme Court) and by several modest "property rights" successes in the courts.

In a 1987 decision, the Supreme Court ruled that compensation is required even for any temporary period during which a regulation "takes" private property. First English Evangelical Church v. L.A. County, 482 U.S. 304 (1987). Also in 1987, the Supreme Court ruled that conditions placed on development permits may effect a taking if the conditions are not related to the underlying purpose of the permit. (The Court ruled that a condition requiring a developer to cede a public beach-access easement in return for construction on his property was a taking.) Nollan v. Calif. Coastal Commission, 483 U.S. 825 (1987).

These successes fueled anticipation that the Supreme Court, which had agreed to hear three takings case this year, was about to

attempted to enact legislation that would force federal agencies to comply with Executive Order 12630. His bill, S.50 would prevent any regulation from taking effect until the issuing agency has been certified by the Attorney General as being in compliance with the order. Ominously, judicial review would be limited to whether the A.G. has certified the agency, thus effectively giving the A.G. the power to effect a de facto regulatory moratorium by not certifying or by decertifying an agency.

S.50 has 41 co-sponsors and has inspired three related House bills, H.R. 1572 (Olin)(with 122 cosponsors), H.R. 905 (McEwen), and H.R. 1650 (Solomon). There are also at least five states -- Maryland, Idaho, N. Dakota, N. Mexico, and Nevada -- currently considering Symms-type takings bills. Delaware and Washington have already passed significantly watered-down versions of the Symms bill. Arizona has passed a very stringent, anti-environmental bill, though it is the subject of a referendum drive to overturn it.

There are two bills in Congress that would require compensation even without a fifth amendment taking. H.R. 1330 (J.Hayes) would establish the automatic right of owners of high quality wetlands to sell these lands to the federal government. While this bill might provide windfall profits to some owners, it would also expand federal ownership of important wetlands. The most radical takings bill is H.R. 2185 (R.Smith), which would require agencies to compensate owners -- whether or not any takings has occurred --for any diminution in property value caused by the Endangered Species Act, Clean Water Act wetlands provisions, Surface Mining Control and Reclamation Act, or the National Trail System Act. At least eight states are considering similar "required compensation" bills (Nebraska, New Hampshire, New York, Oklahoma, Tennessee, Utah, Vermont, and Wyoming).

#### IV. Major predictable events in next few months

There should be no further action in the Supreme Court, which is on recess. While there are a number of lower level takings cases, none will likely emerge as a high profile issue before the election. None of the federal bills are close to passage this year, and state election cycles make those bills also unlikely to move. Arizonans may face a controversial referendum on the state's new legislation.

#### V. Key Issues and analysis

The key issue in the takings field is the question when a regulation effects a taking. As discussed above, the courts have identified three factors for use in analyzing this question (character of the government action, economic impact on property,

usher in a new anti-regulatory legal regime. In the final tally, however, the anti-environmentalists gained little, achieving partial legal success in only one case, Lucas v. South Carolina, 92 Daily Journal DAR 9030 (1992).

The Lucas case concerned whether South Carolina's strong coastal protection ordinance, by preventing developer David Lucas from building a home on his beachfront property, had effected a taking. The decision was sufficiently equivocal that both development interests and environmentalists claimed victory. The Supreme Court modestly broadened takings law by articulating a categorical rule that regulations that take 100% of property value constitute a taking; the Court then immediately created an exception for regulations that comport with traditional property and nuisance law. Moreover, the Court merely remanded the case back to the South Carolina courts for their determination in light of the new categorical rule and exception. Lucas v. South Carolina, . Most important, the Lucas decision is particularly limited because it only applies in the rare circumstances in which a regulation takes 100% of the value from the property owner.

The three much-watched 1992 Supreme Court cases, then, left the state of "regulatory takings" law much the same. Their true importance derives from the fact that the Court agreed to accept them all for consideration this year, indicating that the more conservative Justices would indeed like to be judicially active in the area of regulatory takings law.

## **B. "Takings" Legislation and Executive Order 12630**

Proponents of the anti-regulatory takings campaign hope to achieve in state and federal legislatures what they have not been able to achieve in the courts: a definition of "takings" that would require compensation for any losses in property value caused by regulation.

This effort received a boost from Ronald Reagan's signing in 1988 of Executive Order 12630. The order requires federal agencies to prepare "takings impact assessments" of proposed actions, ostensibly to avoid drains on the federal treasury from successful takings claims. The executive order purports to be merely procedural and to merely codify the changes in takings law caused by the 1987 Supreme Court decisions (discussed above). In fact, the order becomes substantive by exaggerating the limited scope of the 1987 decisions and overstating the risks of government actions being held to be takings. Environmentalists view the order as nothing more than a Reagan Administration anti-regulatory tactic, intended to intimidate the agencies, such as the EPA, most dedicated to public health and safety.

For the past two years, Senator Steve Symms (R-ID) has

and investment-backed expectations) that generally balance the public benefits of the government action against its effect on private property.

The genius of the anti-regulatory takings campaign is its attempt to focus the debate solely on the economic effects of regulation on private property, leaving out any consideration of the public needs behind the regulation. (This narrow focus leads naturally to the radical legislative initiatives that would compensate for all economic losses caused by regulation, no matter what the harmful conduct being regulated.) The justification for this narrow focus is that the lost property value to the owner is the same no matter what the purpose of the regulation. The unstated motive is to overturn the modern regulatory regime, since there is little chance federal, state, and local governments could afford to compensate for all reductions in value caused by regulation.

The proper response to the narrow anti-regulatory focus is to reject it and to restore consideration of the character of government action to its proper place as the most important factor in determining whether property rights -- not property values -- have been compromised by regulation. The government should not have to pay property owners to prevent them from harming their neighbors. While the courts understandably have trouble deciding where to draw the line, the public understands well the distinction between regulations that take private property merely for public benefits (such as a beach-access easement across private property) and regulations that protect us all from the harms caused by those who would foul our air and waters and destroy our coasts. The economic loss to the private owner may be the same, but only the former is a taking, for one's property rights do not include the right to harm one's neighbors.

There are those in the anti-regulatory camp who will concede this argument generally but seek to narrow the sweep of permissible regulation only to preventing "traditional" harms, such as those encompassed under nuisance law. (This is, for example, the position of the Supreme Court majority in the Lucas decision.) The response is that the modern, interconnected world requires a modern legal framework to function properly, not one locked in to the 19th century. The modern world will require new protections against newly-discovered harms. Thus, because of advances in scientific knowledge, we as a society have only recently come to understand the importance of protecting wetlands (previously thought of as useless swamps), the damage we are doing to the stratospheric ozone layer, the imminent threat of massive species extinction, and the extent of our toxic waste problem. Property rights do not include the right to do harm, even a newly-discovered harm.

## VI. Administration policy

The Bush Administration has inherited and supported the Reagan Executive Order 12630. Citing the executive order, the Justice Department argued for a decision generally in favor of the property owner in the Lucas Supreme Court case and supported a broad, inclusive interpretation of "regulatory takings." Dan Quayle (and his Council on Competitiveness) and Interior Secretary Manuel Lujan have repeatedly voiced sympathy for the aims of the "property rights movement." Probably the Administration's greatest influence on the takings issue has been appointing extremely conservative judges who have proven to be generally unsympathetic to modern environmental and safety regulation.

## VII. Likely Questions & Draft Answers

1. Aren't regulations to protect wetlands, coastal regions, endangered species really "takings" of private property, in violation of the Fifth Amendment?

Response: The Supreme Court has defined takings narrowly, ruling that the Fifth Amendment does not require compensation except when property is totally confiscated, either physically or by regulation. Moreover, even when the property is entirely lost, it is still not a taking, if the regulation is needed to prevent harm, so most public safety regulations are not takings. The courts seem to define takings much more narrowly than those arguing that public safety laws are takings.

2. Isn't it only fair to compensate someone who buys property, like Lucas in South Carolina, but then is told by the government that he cannot build on his own beachfront land or fill in a wetland on his property?

Response: The taxpayers should not have to pay to prevent a property owner from harming his neighbors. We do not pay the factory owner not to spew pollution into the air or the river. Similarly, the taxpayers of South Carolina should be able to prevent construction on a sensitive coastline that will then erode and damage inland homes. The answer is the same in the wetlands area. Wetlands protect our water supplies and act as sponges to prevent floods, so taxpayers should not have to pay someone to prevent his filling in a wetland. You don't have the right to flood your neighbor's basement.

3. Takings law does not prevent the government from exercising its regulatory power. Doesn't it just require the public to pay for the benefits it gains from regulation?

Response: First, the public should compensate when it takes land for truly public benefit, like to include in a park or to widen the street or to build a freeway. But the taxpayers should not have to pay to prevent the owners from doing things that harm their neighbors, like polluting a river or dumping toxic wastes. The people asking to be compensated for these public safety regulations are really seeking a direct subsidy from the taxpayers to pay them for not harming us.

Second, the costs to the taxpayers would be astronomical to compensate every person who is economically affected by a regulation. Almost all zoning laws affect property values, so cities would be paying out to half their citizens. The compensation scheme these people want would break the bank.

4. Isn't the property rights movement just trying to restore traditional protections for property rights?

Response: The courts traditionally required compensation only when the government physically appropriated land, not for reduced value from protective regulations. The courts have always allowed government to regulate public nuisances that prevent owners from harming their neighbors. And as science teaches us about new dangers -- for example, the harm we are doing to the ozone layer -- we will require new legal protections, such as laws preventing the manufacture of ozone-eating CFC's.

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Secondary Congressional Research Service Issue Brief  
Sources: (Robert Meltz, 5/22/91)  
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