Private property and the Constitution

Taking the Fifth Seriously

by Alex Kozinski

America's celebration of the Bicentennial of the Constitution has been, however unexpectedly, quite profound. All of the historical hoopla and pageantry aside, the course of national events has forced Americans to examine the principles of their unique way of governing themselves. For all of the concern about individual rights in an age of broad governmental authority, however, surprisingly little attention had been paid to an aspect of liberty the framers thought a cornerstone of free and just self-government: the protection of private property rights. But most propitiously, if coincidentally, the Supreme Court in this bicentennial year has brought the interplay between individual economic rights and government regulation once again to the fore.

The problem judges face when confronted with a challenge to economic regulation is simple to explain but difficult to solve: Almost anything government does has an adverse effect on somebody. Even simple and straightforward health and safety regulations, such as prohibitions against pollution or requirements that buildings be fire-safe, impose costs on some individuals that may be far disproportionate to the benefits they receive. The matter becomes more difficult the more government does.

Nowhere, perhaps, has judicial discomfort with review of economic regulation been so pronounced as in cases dealing with the takings clause of the fifth amendment, which provides: "nor shall private property be taken for public use, without just compensation." The result has been a series of decisions that, until very recently, virtually abandoned the institution of private property to the mercy of the legislature. The reason for this phenomenon is easily understood. No one likes to engage in fine line drawing, especially with regard to complex economic matters. Judges in particular are reluctant to be branded as "vile Lochnerites," second-guessing the will of the legislature. Such reluctance may well be appropriate where the basis for judicial intervention is due process, a nebulous and flexible concept. When it comes to the takings clause, however, these concerns are exaggerated.

In a document that speaks with such generality on so many matters, the takings clause speaks with refreshing clarity and precision. The framers spoke plainly in proscribing the taking of private property for a public use unless just compensation is paid. They understood, as John Locke wrote in his *Second Treatise of Government*, that "[t]he great and *chief end*, therefore, of Mens uniting into Commonwealths, and putting themselves under Government, *is the preservation of their property*." They enshrined this fundamental principle of limited government in the fifth amendment and gave ultimate legal force to the basic right of free individuals to possess and enjoy their property as they desire.

To be sure, no phrase in the English language, the takings clause included, is free from all ambiguity. For example, what constitutes private property? Needless to say, our understanding of private property is conditioned by our times; the Supreme Court has declared, relatively recently, that an individual may possess a property interest in welfare benefits or a pending lawsuit. Also, when does the use of one's property infringe on another's rights, and how does one reconcile the conflict? Finally, what amount of compensation is just? The value of one's property is often difficult to measure, but the clause nevertheless specifically authorizes—indeed, *commands*—judges to make precisely these calculations.

James Madison stated in *Federalist No. 51* that "[i]f men were angels, no government would be necessary." Similarly, if legislators were angels, no judicial review would be necessary. But our elected representatives are not divine and, even though appellate judges are equally mortal, the Constitution charges us with the responsibility of grappling with these difficult issues. Unfortunately, the Supreme Court has too often avoided this debate, choosing instead to defer to the legislature's allocation of the benefits and burdens of economic society.

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Take, for example, the Court's handling of the takings clause's "public use" requirement. Judges, particularly conservative ones, quite properly are reluctant to second-guess the legislature's policy choices. But this "constraining" axiom seems inapposite where the Constitution clearly and specifically states that government may take private property only for a *public* use. Examining the purpose of the taking seems to be part and parcel of the constitutional standard. But this simple fact failed to convince the Supreme Court, which held in *Hawaii Housing Authority v. Midkiff* (1984) that the public use requirement is coterminous with the police power. This is tantamount to saying that if the legislature acts, it acts for a public purpose, which simply reads "public use" right out of the Constitution.

When should a property owner be compensated for his "contribution" to the public? Up until this past Term the situation was fairly simple: You could make a claim for compensation only where the government had physically invaded your property or through regulation had taken away *all* of its value. Early in its most recent Term, the Supreme Court essentially reaffirmed this analysis. *Keystone Bituminous Coal Association v. DeBenedictis* (1987) involved a state statute requiring that 50 percent of subsurface coal be kept in place in order to provide support for property on the surface. In denying compensation for the lost coal, Justice Stevens, writing for the majority, spoke generally about the scope of the takings clause. He wrote:

> Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.

> Justice Stevens's analysis turns the takings clause on its head.

In an interesting footnote to this general statement, he elaborated:

> Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between taxes paid and the dollar value of benefits received.

Justice Stevens is correct in stating that the government does not guarantee that the benefits a person enjoys as a member of the national society are commensurate with the amount of taxes he pays. The assumption we share, however, is that the costs and benefits *are* roughly equivalent. It may be a fiction, but it is an important fiction: If we become convinced that what we contribute to the common weal is far out of proportion to what we get back, the legitimacy of taxation is seriously undermined.

In any event, this analysis turns the takings clause on its head. The clause, by its terms, directs the government to return to the individual benefits, in the form of compensation, roughly equivalent to the costs he has incurred in surrendering his property. This reflects the fundamental principle that the costs of government, like the costs of any other economic enterprise, must be internalized. Of course, the discordance between this principle and the Court's traditional approach to this issue should not surprise us. Then-Judge Scalia was surely correct when he observed, referring to the courts, that "[i]f economic sophistication is the touchstone, it suffices to observe that these are the folks who developed three-quarters of a century of counterproductive law under the Sherman Act."

More recent attempts to put some sense back into the takings clause owe a debt to an unexpected hero. In his dissent in *San Diego Gas & Electric Co. v. City of San Diego* (1981), Justice Brennan stressed that "the just compensation requirement in the Fifth Amendment is not precatory: once there is a 'taking,' compensation *must* be awarded." Justice Brennan stated a very important point that was too easily ignored—at least until this year, that is. In *First English Evangelical Lutheran Church v. County of Los Angeles* (1987), the Supreme Court held that a property owner was entitled to compensation as a remedy, not merely to invalidation of the unconstitutional statute. Simply stated, the Supreme Court held that individuals are entitled to be paid for damages suffered while awaiting the invalidation of the government regulation.

First Lutheran is encouraging. By providing damages for temporary depriv-

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ations, the Court finally began to acknowledge that the takings clause is more than merely advice to legislatures to try to balance individual and social interests equitably: It is a source of remedies for aggrieved property owners. The costs of temporary deprivations may be quite substantial and, as a result of *First Lutheran*, the government must take these costs into account in adopting its land-use policies.

Will this discourage state and local governments from promulgating land-use regulations that restrict owners' rights under the Constitution? Perhaps, perhaps not. At the very least, government officials will now be held more clearly accountable for their actions. This is entirely reasonable for, as Justice Brennan explained in what turned out to be a most prophetic dissent in *San Diego Gas & Electric*, "if a policeman must know the Constitution, then why not a planner?"

First Lutheran provides a framework for remedies when a taking has been established. But if the Court continues to be reluctant to find anything a taking, the remedies would be irrelevant. In the last case of its takings trilogy, *Nollan v. California Coastal Commission* (1987), the Supreme Court held—for the first time in years—that a government regulation amounted to a taking of private property. In *Nollan*, a state agency conditioned the issuance of a building permit on the owner's agreement to provide a permanent easement across his beachfront property so the public could get to the beach. The Court held this was a taking, based on the Constitution's clear command that individuals not be required to surrender their property in the interest of some general public good. It did not matter to the Court, as indeed it shouldn't have, that the regulation was a condition attached to the grant of a privilege. As Justice Scalia explained, "[It is] as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury."

The combined force of *First Lutheran* and *Nollan* frustrated Justice Stevens, who declared in his brief *Nollan* dissent that Justice Brennan had created an analytical monster with *San Diego Gas & Electric*. On the contrary, *First Lutheran* and *Nollan* are just what the doctor ordered. Indeed, one might consider them the Supreme Court's own celebration of the Bicentennial. The Court has finally begun to appreciate, along with Professor Richard Epstein, that the takings clause is not a mere "curlicue[] on the margin[] of the document . . . without force or consequence."

The Supreme Court will be faced with more difficult questions in the coming years. Rent control, height restrictions, noise controls, zoning—virtually all regulations have some impact on private property. Whether regulations must be borne as a cost of living in modern society, or whether they are impermissible unless just compensation is provided, are the difficult questions that the judiciary will have to face and resolve. It is clear that *First Lutheran* and *Nollan*, as one prominent land-use theorist recently observed, provide "real ammunition" for owners challenging such government restrictions. It is not at all clear what the answers will be, but at long last, in this two-hundredth year, we seem to be asking the right questions.

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