THE YALE LAW JOURNAL

COMMENT

Rethinking the Facial Takings Claim

In 1979, Santa Barbara County, California enacted a rent-control ordinance to regulate the fees levied by owners of mobile home parks on their tenants. Housing prices later climbed dramatically throughout the state, but due to the ordinance "the rents charged by the Park Owners did not keep pace with this increase."[1] Three co-owners of a mobile home park filed a lawsuit in federal court that included a facial takings claim under the Fifth Amendment.[2] In *Guggenheim v. City of Goleta*, decided last year, the U.S. Court of Appeals for the Ninth Circuit accepted the facial takings claim and, reaching the merits, ruled in favor of the plaintiffs.[3]

The opinion endorsed the shaky proposition that there is a meaningful difference between facial and as-applied regulatory takings claims. A facial challenge alleges that the disputed law is "inherently unconstitutional, regardless of factual circumstances of a particular case."[4] In theory, the factual situation of the specific plaintiff is irrelevant in a facial claim. In practice, almost every takings challenge requires a fact-driven inquiry: to decide if a government has "taken" private property, a court must ask whether the challenged ordinance "denies an owner economically viable use of his land."[5] This question is hard to answer without inquiring into particularized facts. Indeed, the *Guggenheim* court used the fact-intensive framework established in

1. Guggenheim v. City of Goleta, 582 F.3d 996, 1002 (9th Cir. 2009).
2. *Id.* at 999.
3. *Id.* at 1030.
4. Timothy Sandefur, *The Timing of Facial Challenges*, 43 AKRON L. REV. 51, 53 (2010) (citing United States v. Salerno, 481 U.S. 739, 745 (1987)).
5. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978)).

Penn Central Transportation Co. v. New York City[6] to assess the supposedly facial takings claim.[7]

The blurry distinction between facial and as-applied takings challenges is problematic. Federal courts are more inclined to hear facial regulatory takings claims thanks to more lenient ripeness rules.[8] Using the "facial" label, an unhappy landowner can bring a federal lawsuit without waiting for the local government to reach a final decision on how the regulation will actually affect the plaintiff's property.[9] And in one circuit the plaintiff does not even need to exhaust all his state law claims before going to federal court.[10]

Most troubling, the *Guggenheim* decision is evidence that some federal courts are willing to rule on the merits in these routine land disputes. Unfortunately, federal courts are ill suited to adjudicate takings cases. With most constitutional claims, if a court finds that a law violates the Constitution, the court invalidates the offending portion of the statute. Takings claims, however, have two steps: once the court determines that the government effected a taking, the court then must decide the amount of money that constitutes "just compensation" to the landowner.[11] On the compensation question, federal courts are at a clear comparative disadvantage relative to local governments and state courts. Federal courts are often geographically distant from the land at issue, and federal judges are not electorally accountable to landowners.[12] Not surprisingly, the federal courts historically have refused to interfere with the land-use decisions of local governments or to second-guess the rulings of state courts. This long-standing division of labor will be upended if disgruntled landowners can skip local processes and move quickly to federal courts with facial takings claims.

To avoid this result, this Comment urges the elimination of the facial regulatory takings claim, with two narrow caveats.[13] The federal courts should only recognize as-applied regulatory takings challenges, a decision that would

6. 438 U.S. 104.

7. *See infra* Section I.B.

8. *See infra* Section I.C.

9. *See, e.g.*, Hacienda Valley Mobile Estates v. City of Morgan Hill, 353 F.3d 651, 655 (9th Cir. 2003).

10. *See* Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1, 16-17 (1st Cir. 2007).

11. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

12. *See* U.S. CONST. art. III, § 1.

13. *See infra* Section II.C.

force landowners to wait for the final decisions of local governments before going to the courts. Because regulatory takings determinations are grounded in facts, Part I argues that the as-applied label is more appropriate than a facial designation. Part II explains how the just-compensation question distinguishes facial takings claims from other facial challenges and why the answer is best supplied by local governments and courts.

I. FACT-BASED INQUIRIES MASQUERADING AS "FACIAL" TAKINGS CLAIMS

The distinction between facial and as-applied challenges is familiar to students of constitutional law. The plaintiff who brings a facial challenge to the validity of a law argues that the law cannot be enforced against anyone in a constitutional manner.[14] The as-applied plaintiff makes the narrower assertion that the enforcement against him in particular violates the Constitution.[15] Unlike a facial challenge, an as-applied case requires a factual inquiry into the plaintiff's specific situation.[16]

This distinction has collapsed with regard to takings claims. Facial takings claims now appear to be as fact-reliant as the as-applied takings challenges. This Part will discuss two recent developments that have, in effect, folded the claims together: the Supreme Court's elimination of the "substantially advances" test for takings and the Ninth Circuit's decision to apply *Penn Central* to a facial taking claim. The logical extension of these rulings is to consider all regulatory takings claims to be as-applied.

A. The Elimination of "Substantially Advances" as a Takings Test

For twenty-five years, plaintiffs had two independent ways to prove a facial taking. In *Agins v. City of Tiburon*, the Supreme Court announced that a land regulation "effects a taking if the ordinance does not substantially advance legitimate state interests, *or* denies an owner economically viable use of his

14. *See* Sandefur, *supra* note 4, at 53.

15. *See id.*

16. For two illustrative examples of the difference between facial and as-applied challenges, see David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333, 1335-36 (2005).

land."[17] The lower courts interpreted *Agins* to mean that proof of *either* element is sufficient to support a takings finding.[18]

In 2005's *Lingle v. Chevron U.S.A. Inc.*, however, a unanimous Court eliminated the "substantially advances" test announced in *Agins*.[19] The Court explained that the question of whether a regulation "substantially advances" a government interest too closely resembled a due process inquiry[20] that asked whether the government acted arbitrarily or irrationally in enacting a law.[21] The Court decided that the "substantially advances" portion of *Agins* is "not a takings[] test, and . . . it has no proper place in our takings jurisprudence."[22]

The demise of the "substantially advances" test should have doomed the facial takings claim.[23] To prove a taking under the truncated *Agins* test, the plaintiff must show that the regulation prevents him from using his property in an economically viable fashion. While some commentators still assume that *Agins* applies to facial claims,[24] they fail to recognize that the *Agins* land-use test requires the presentation of plaintiff-specific facts at trial. The "owner" must demonstrate the regulation's effect on "his land."[25] Evaluating whether a regulation "substantially advances" a legitimate state interest is a relatively easy

17. 447 U.S. 255, 260 (1980) (emphasis added) (citation omitted).

18. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540 (2005) ("*Agins*' 'substantially advances' language has been read to announce a stand-alone regulatory takings test that is wholly independent of *Penn Central* or any other test."); *see also* Recreational Devs. of Phx., Inc. v. City of Phx., 83 F. Supp. 2d 1072, 1099 (D. Ariz. 1999) ("As noted above, a facial takings challenge can proceed on *two* theories: that the ordinance fails to substantially advance legitimate state interests, or that it deprives the landowner of the economically viable use of the land." (emphasis added)); Richardson v. City & Cnty. of Honolulu, 759 F. Supp. 1477, 1493 (D. Haw. 1991) ("An ordinance which does not substantially advance legitimate state interests violates the takings clause.").

19. *See Lingle*, 544 U.S. at 540.

20. *See id.*

21. *See id.* at 542 (noting that the "substantially advances" test "has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause").

22. *Id.* at 540.

23. *See* Daniel A. Jacobs, *Indigestion from Eating Crow: The Impact of* Lingle v. Chevron U.S.A., Inc. *on the Future of Regulatory Takings Doctrine*, 38 URB. LAW. 451, 485 (2006) (footnote omitted from title) (suggesting that *Lingle* "seems to indicate the death of facial challenges under regulatory takings doctrine outside of per se takings").

24. *See, e.g.*, Rebecca Lubens, *The Social Obligation of Property Ownership: A Comparison of German and U.S. Law*, 24 ARIZ. J. INT'L & COMP. L. 389, 395 (2007); Michelle DaRosa, Comment, *When Are Affordable Housing Exactions an Unconstitutional Taking?*, 43 WILLAMETTE L. REV. 453, 474 (2007).

25. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

exercise to conduct in the abstract. For instance, in 1996, the Fifth Circuit reasoned that an ordinance confining mobile homes to trailer parks substantially advanced the legitimate interest of preventing a decline in property values.[26] The inquiry into the economic viability of the land, on the other hand, demands factual evidence of the regulation's impact on the aggrieved plaintiff.

B. The Ninth Circuit's Application of Penn Central

The demise of the facial takings claim has continued with *Guggenheim*, in which the Ninth Circuit concluded that "a facial challenge under *Penn Central* must exist as a viable legal claim."[27] In *Penn Central*, the Supreme Court crafted a balancing test for regulatory takings claims that included three nonexhaustive factors: "The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action."[28] The Court observed that in previous takings cases it had engaged in "essentially ad hoc, factual inquiries."[29]

Despite the Court's emphasis on the factual nature of the *Penn Central* framework, the Ninth Circuit concluded that the test could be applied to a facial takings challenge. The court noted the importance of being "careful not to simply look at 'the effect of the application of the regulation in specific circumstances'"[30] but instead to consider the rent-control ordinance's "general scope and dominant features."[31] Nevertheless, in conducting the *Penn Central* analysis, the Ninth Circuit relied upon "the core findings of the Quigley

26. *See* Tex. Manufactured Hous. Ass'n v. City of Nederland, 101 F.3d 1095, 1105 (5th Cir. 1996).

27. Guggenheim v. City of Goleta, 582 F.3d 996, 1015 (9th Cir. 2009). *But see* Nissa Laughner & Justin Brown, *Cable Operators' Fifth Amendment Claims Applied to Digital Must-Carry*, 58 FED. COMM. L.J. 281, 304 n.155 (2006) (noting that *Penn Central* "may not be applicable to facial challenges").

28. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (citation omitted).

29. *Id.*; *see also Guggenheim*, 582 F.3d at 1013 (describing "*Penn Central*'s ad-hoc factual inquiry"); Gregory M. Stein, *Takings in the 21st Century: Reasonable Investment-Backed Expectations After* Palazzolo *and* Tahoe-Sierra, 69 TENN. L. REV. 891, 928 (noting that the Court has emphasized that "fact-specific land-use claims resist falling into patterns and therefore must be treated on a case-by-case basis").

30. *Guggenheim*, 582 F.3d at 1014 (quoting Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 773 (9th Cir. 2000)).

31. *Id.* at 1017.

Report," which contained "evidence of the effect that the mere enactment of the [ordinance] had on [the plaintiffs'] property."[32] In short, the court's *Penn Central* discussion focused on how the ordinance impacted the plaintiffs specifically.[33]

The *Penn Central* framework does not fit neatly with a facial takings challenge that, in theory, should not focus on a law's effect in "specific circumstances."[34] The investment-backed-expectations prong is particularly difficult to assess at a general level because each owner brings a unique set of expectations to his property purchase. In applying *Penn Central* anyway, the *Guggenheim* court treated a facial challenge like an as-applied challenge.

C. Ripeness Rules Distinguish Facial and As-Applied Claims

However, one critical difference remains between facial and as-applied claims: facial challenges are subject to less stringent ripeness rules, which means that plaintiffs will be able to smuggle as-applied challenges into federal courts under the guise of *Penn Central* facial claims. In *Williamson County Regional Planning Commission v. Hamilton Bank*,[35] the Supreme Court sought to keep as-applied takings claims out of federal court by imposing two strict ripeness requirements. A court should dismiss a claim as unripe if (1) the local government has not reached a "final decision" on how the regulation affects the plaintiff's property,[36] and (2) the plaintiff has not sought compensation through state procedures.[37]

The general consensus among the circuit courts, however, is that facial takings claims need not satisfy the final-decision prong of *Williamson County*.[38] The Ninth Circuit reasoned that this exemption is warranted because "a facial challenge by its nature does not involve a decision applying the statute or

32. *Id.*; *see also id.* at 1020 ("The Quigley Report estimated that the [ordinance] forced the Park Owners to rent the entire Park at close to an 80 percent discount below the market rate.").

33. *See, e.g.*, *id.* at 1023 ("The undisputed evidence shows that the mere enactment of the [ordinance] has caused a significant economic loss for the Park Owners."); *id.* at 1023-27 (discussing the investment-backed expectations of the plaintiff park owners).

34. *Tahoe-Sierra*, 216 F.3d at 773.

35. 473 U.S. 172 (1985).

36. *Id.* at 186.

37. *Id.* at 194.

38. *See, e.g.*, Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza, 484 F.3d 1, 14 (1st Cir. 2007); Brubaker Amusement Co. v. United States, 304 F.3d 1349, 1357 (Fed. Cir. 2002); Thomas E. Roberts, *Facial Takings Claims Under* Agins-Nectow*: A Procedural Loose End*, 24 U. HAW. L. REV. 623, 645 (2002).

regulation"[39]—a characterization of facial takings challenges that this Comment contests.[40] Two circuits have also loosened the state-procedures prong. The First Circuit has stated that a plaintiff need pursue his state remedies only if the state provides "a process that is *particularly aimed* at providing compensation when government action effects a taking," such as an inverse condemnation action.[41] The court stressed that "such procedures do not include litigation of a state takings claim or any general remedial cause of action under state law."[42] Meanwhile, the Ninth Circuit held that the *Guggenheim* plaintiffs could meet the state-remedies requirement without filing an inverse condemnation claim,[43] even though that cause of action was specifically created to provide compensation for takings.[44]

In practice, the relaxed ripeness rule means that federal courts will actually have to reach the merits of some takings claims characterized as "facial." The Ninth Circuit's finding for the plaintiffs in *Guggenheim* demonstrates that some federal courts are willing to adjudicate local land-use disputes.[45] However, the next Part will argue that federal intervention in this field is a mistake. It explains how takings claims, which include a just-compensation question, differ from other constitutional questions. It then argues that the compensation issue is best left to local governments and state courts, rather than to federal courts.

39. Hacienda Valley Mobile Estates v. City of Morgan Hill, 353 F.3d 651, 655 (9th Cir. 2003).

40. *See supra* Sections I.A-B.

41. *Flores Galarza*, 484 F.3d at 16 (emphasis added).

42. *Id.* at 17. A statement from three judges following the panel decision suggested that the decision "likely conflicts directly with binding Supreme Court authority and prior decisions in this court, as well as the law in other circuits." *Id.* at 40 (statement of Boudin, C.J., Lynch & Howard, JJ., respecting the denial of rehearing en banc) (footnotes omitted).

43. Guggenheim v. City of Goleta, 582 F.3d 996, 1012 (9th Cir. 2009).

44. The Supreme Court has stated that a facial challenge is ripe the moment the regulation is enacted—which would mean that neither prong applies—in cases such as *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 484-85 (1987), and *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). However, those cases cited the "substantially advances" test of *Agins* that the Court later abrogated. *See supra* Section I.A. It is unclear to what extent those cases remain good law.

45. *See Guggenheim*, 582 F.3d at 1030.

II. THE CONSEQUENCES OF AN EASY-ACCESS FACIAL TAKINGS CLAIM

A. The Compensation Question Distinguishes Facial Takings Claims

The remedy for a facial taking is very different from that for most other facial challenges. As noted earlier, if a court finds that a law is unconstitutional on its face, "[t]he proper remedy . . . is typically not compensation but an injunction against enforcement and a declaration that the law is invalid."[46] In sharp contrast, "a facial takings claim is not an argument for invalidity *per se*" because the Fifth Amendment allows takings as long as the government provides just compensation.[47] If a court does find that a regulation constitutes a taking on its face, the next step is not invalidation but rather determination of the appropriate compensation that should be given to the plaintiff. A federal court—removed from the disputed property, unaccountable to the local landowners, and inexperienced with takings cases[48]—is not in the ideal position to decide a land-value question. The Supreme Court has stated that "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations."[49]

B. Facial Takings Claims Undermine the Traditional Power of Local Governments

The remedy for a facial taking requires local knowledge, and the proper amount of compensation should be the decision of the local government in the first instance. As the Supreme Court has recognized, the "regulation of land use [is] a function traditionally performed by local governments."[50] Local governments have always had wide authority to set land-use policies and

46. Sandefur, *supra* note 4, at 61.

47. *Id.* at 63.

48. *See* San Remo Hotel, L.P. v. City & Cnty. of S. F., 545 U.S. 323, 347 (2005) ("[T]here is scant precedent for the litigation in federal district court of [takings] claims that a state agency has taken property in violation of the Fifth Amendment's Takings Clause.").

49. *Id.*; *see also* Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 243 (2004) (noting that Supreme Court precedent has "locate[d] primary authority for resolving takings claims in the state courts").

50. Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 44 (1994); *see also* FERC v. Mississippi, 456 U.S. 742, 768 n.30 (1982) (noting that "regulation of land use is perhaps the quintessential state activity").

regulations.[51] After the local government exercises its eminent domain power, it deserves the opportunity to offer fair payment without worrying about the credible threat of federal intervention.[52]

The facial takings claim is a cause for concern because it can be used to undercut the local government's land-use powers. The exemption of the facial claim from the *Williamson County* final-decision prong means that a disgruntled landowner can bring an action in federal court without first using the political channels. Even the threat of a federal lawsuit could alter the behavior of local officials, turning the traditional power balance on its head.

The availability of federal court as an option would also undermine the customary process of bargaining and horse trading that occurs between the government and the landowner.[53] The ripeness prong reinforced this tradition of haggling with the government. In fact, in *Williamson County*, the Supreme Court decided that the takings claim was not ripe because the plaintiff had not applied for a variance from the municipal officials.[54] However, with the facial takings claim, landowners no longer have to spend time negotiating with the local government.

As a result, the facial takings claim will likely give individual landowners too much control over land-use policy. This additional power is unnecessary because checks are already built into the system to restrain the local government from consistently making bad-faith compensation offers. For instance, the local government can be held accountable through elections. People care a great deal about property values in the community.[55] Politicians who consistently undervalue property taken by the government would face backlash. Moreover, one scholar argues that governments usually overcompensate the owners of taken property.[56] The political processes protect

51. *See* Rogin v. Bensalem Twp., 616 F.2d 680, 698 (3d Cir. 1980) ("[T]he Supreme Court affords state and local governments broad latitude in [land use]. Implicit in this deference is the recognition . . . that local political bodies are better able than federal courts to assess the benefits and burdens of such legislation.").

52. *See* Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 46 (1st Cir. 1992) (expressing the belief that federal courts should not "sit as a 'zoning board of appeals'" or "involve them[selves] in political disputes better left to local governments" (quoting Vill. of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting))).

53. *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 304 (3d ed. 2005).

54. *See* Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 188-89 (1985).

55. *See* ELLICKSON & BEEN, *supra* note 53, at 305.

56. *See, e.g.*, Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 121-31 (2006).

landowners from arbitrary seizures and unjust compensation; the federal courts should not intrude into this realm, especially in light of the expertise of state courts in local land disputes.

C. What Role for the Federal Courts?

This Comment recognizes that elected local governments and courts once openly oppressed minorities and other vulnerable groups.[57] Some scholars view the federal courts as "providing a fair and unbiased forum—insulated from local majoritarian pressure and elected state court judges"[58] and have come out strongly in favor of a federal forum for takings claims.[59] As discussed above, federal courts are not designed to be the courts of first resort for takings issues. This observation does not, however, suggest that the federal courts should be completely divested of any role in land-use cases. Instead, those courts should be used as a backstop to guard against failure at the local level.

In fact, plaintiffs currently have several ways to access the federal courts. A landowner who satisfies the two ripeness requirements of *Williamson County* is free to bring his claim to federal court. A plaintiff can also challenge a regulation under the Due Process Clause of the Fourteenth Amendment rather than the Takings Clause. Judge Richard Posner has pointed out that the Takings Clause cannot possibly be the exclusive remedy for an infringement of property rights because, "pushed to its logical extreme, the argument would read 'property' out of the due process clause of the Fifth and Fourteenth

57. *See* Sterk, *supra* note 49, at 236.

58. J. David Breemer, *You Can Check Out but You Can Never Leave: The Story of* San Remo Hotel—*The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended To Ripen the Claims for Federal Review*, 33 B.C. ENVTL. AFF. L. REV. 247, 290 (2006).

59. *See* Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73, 74 (1988) (arguing for a federal forum for takings claims raised against actions taken under color of state law because of state courts' "'inherent potential for bias'" against claimants in such cases (quoting Paul Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 HARV. L. REV. 1352, 1358 (1970))); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91, 92-93 (1994) (arguing that "[i]t is extremely important that property owners have access to federal courts" because "[a]n almost certain prejudice is created by having an elected or appointed state judge, sitting in the same local area as the alleged taking, decide the case"). *But see* Sterk, *supra* note 49, at 236 ("[T]here would appear to be little institutional reason to conclude that state courts are poorly situated to police political process failures in the takings area.").

Amendments."[60] In the same vein, one legal commentator has noted that an unhappy landowner can file "an offensive action to enjoin the government from taking private property," including a § 1983 lawsuit and a Fourteenth Amendment due process claim.[61]

Finally, there are two situations in which a facial challenge is not only possible but potentially desirable: per se takings and one hundred percent diminutions of value. This Comment's argument against facial takings challenges does not apply to either situation. Per se takings result from regulations that produce physical invasion and occupation of private property; in these cases, the Court "has invariably found a taking."[62] And if a regulation results in a one hundred percent diminution in value, the categorical rule is that the landowner recovers the full land value.[63] The common thread here is that, in both situations, the disputed regulation has a uniform impact on all landowners and just compensation can be more easily calculated without resorting to the specifics of each piece of property.

CONCLUSION

The facial regulatory takings claim is a vestige of the pre-*Lingle* takings jurisprudence, which allowed a plaintiff to show that a land-use regulation did not "substantially advance" a legitimate government interest. Facial takings challenges are now heavily fact-driven, much like as-applied takings challenges. The *Guggenheim* court advanced the merger even further by using the fact-based *Penn Central* framework to assess a facial takings claim. However, courts continue to distinguish between facial and as-applied takings claims, and the consequences will be the sapping of local government power and the undercutting of state courts. To prevent these negative effects, courts should eliminate the facial takings claim.

DAVID ZHOU

60. Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 464 (7th Cir. 1988). In the same opinion, Judge Posner expressed skepticism about invalidating regulations based on the doctrine of substantive due process, which "invests judges with an uncanalized discretion to invalidate federal and state legislation." *Id.* at 465. However, violations of procedural due process rights—including notice and opportunity to be heard—might prove to be more successful grounds for lawsuits. *See* D. Zachary Hudson, Note, *Eminent Domain Due Process*, 119 YALE L.J. 1280 (2010).

61. Hudson, *supra* note 60, at 1297; *see id.* at 1298, 1303.

62. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982).

63. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).