

November 9, 1998

Curve Ahead?

State Supreme Court Should Turn Takings in New Direction
San Francisco Daily Journal

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In *Santa Monica Beach Ltd. V. Superior Court of Los Angeles County*, S052824, the California Supreme Court has an opportunity to bring some order and reason to the muddled field of takings. To take advantage of the opportunity, however, the court will finally have to decide whether the U.S. Supreme Court really meant what it said nearly 30 years ago: A government action effects a taking if it “does not substantially advance legitimate state interests.” *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

The U.S. Supreme court has never actually relied on that standard to find that an ordinary land use regulation effects a taking, and recent signals indicate that a majority of the court is prepared to jettison this ostensible test. See *Eastern Enterprises v. Apfel*, 118 S.Ct. 2131 (June 25, 1998). The California Supreme Court itself, most notably in *Kavenau v. Santa Monica Rent Control Board*, 15 Cal. 4th 761 (1997), has already expressed its doubts about the validity of the *Agins* test.

The claim that government is pursuing an illegitimate goal, or using improper means to do so, raises an issue – as we have all known all along – under the Due Process Clause, not the Takings Clause.

The Santa Monica Beach case arises from a takings challenge to the Santa Monica rent control ordinance brought by the Pacific Legal Foundation. PLF contends that the law does not substantially advance a legitimate state interest because, even though the law has been in effect for several years, the quantity of affordable housing has continued to decline. Santa Monica responds, not surprisingly, that this evidence proves nothing, because the loss of affordable housing would have been greater in the absence of rent control. Setting aside this factual and policy dispute, the fundamental legal issue is whether, in this or any other challenge to local land use regulation, *Agins* provides a valid takings test.

Agins was a brief, unanimous decision rejecting a regulatory taking challenge to a zoning ordinance. Without elaboration, the Supreme Court asserted that a zoning law effects a taking if it “does not substantially advance legitimate state interests...or denies an owner economically viable use of his land.” The second part of the *Agins* test reflects the economic impact inquiry at the core of modern takings doctrine. However, the first prong of *Agins* was, from the first, more problematic.

The only authority the court cited to support its ostensible test was *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), a case decided under the Due Process Clause, not the Takings Clause. The court whispered not a word suggesting any awareness of the

momentous step of incorporating due process analysis into takings doctrine much less how such a step might be justified.

One might well inquire why it matters whether an allegation that a government action fails to satisfy means-ends analysis might be pursued under the rubric of takings rather than as a straightforward due process claim. There appear to be at least several explanations.

First, in transplanting means-ends analysis into takings doctrine, the Supreme Court supplied language supporting the argument that means-ends analysis under the Takings Clause, even if derived from due process doctrine might actually be more demanding than under the Due Process Clause itself. The *Agins* court said that a regulation would effect a taking if it does not “substantially” advance legitimate state interests.

By contrast, at least since the 1930s, when the U.S. Supreme Court repudiated the notion that the Due Process Clause provides a vehicle for searching judicial review of economic regulation, the court has applied the clause deferentially, asking only whether the action is “reasonably related” to some “conceivable” government purpose.

Second, the takings label is attractive because it offers plaintiffs the opportunity for rich financial rewards. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the court ruled that even if a municipality rescinds a regulation held to effect an unconstitutional taking, it still must pay compensation for the “temporary taking.”

In addition, the Takings Clause offers the possibility of “just compensation” based on fair rental value, a theory that might well yield a great deal more than the actual damages available in a due process action brought under 42 U.S.C. Section 1983.

What, then, should the California Supreme Court do about *Agins* in the *Santa Monica Beach* case? It should forthrightly acknowledge that the means-ends test is not a test for a taking at all.

The rationale for this conclusion starts with the plain language of the Takings Clause: “nor shall private property be taken for public use, without just compensation.” A government action must satisfy means-ends analysis to be a taking for a “public use” *within the meaning* of the clause. If that is the case, however, means-ends analysis cannot logically provide a test for whether there is taking *under* the clause as well.

Consistent with the language of the Taking Clause, *First English* held that the clause “is designed...to secure compensation in the event of otherwise proper interference amounting to a taking.” The requirement that a taking be “otherwise proper” (i.e. that it serve a public use) means that the validity of a government action is a precondition for a compensable taking. The *Agins* test turns the language of the clause and *First English* upside down by making the alleged invalidity of government action not a bar to a compensable taking, but an actual ground for finding a taking.

The original understanding of the Takings Clause also supports repudiating the test. It is well-recognized that the clause was originally intended to address direct appropriations of private property and was never intended to address regulations at all. See William Michael Treanor, "The Original Understanding of the Takings Clause" (1997). In deference to the original understanding, modern doctrine has basically confined regulatory takings claims to those "extreme circumstances" where regulation imposes severe economic burdens analogous to direct physical appropriations. *United States v. Bayview Homes Inc.*, 474 U.S. 121, 126 (1985).

The means-ends test, by contrast, would subject all types of regulatory actions, even those with very modest economic impacts, to potential takings claims, expanding takings doctrine far beyond any discernible link with the drafters' original understanding.

The final argument for repudiating *Agins* rests on an appeal to judicial frankness. In hindsight, it is apparent that *Agins* was a muddled, perhaps even careless opinion. A sensible takings doctrine cannot be erected based on an unexplained and apparently unintended mixture of due process thinking and takings doctrine. The credibility of the legal process would be served by declaring *Agins* what it was and is - a mistake.