No. 97-42

In The
Supreme Court of the United States
October Term, 1997

Eastern Enterprises,
Petitioner,
v.
Kenneth S. Apfel,
Commissioner of Social Security, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF CALIFORNIA CITIES AND COUNTIES: CITIES OF LONG BEACH, LOS ANGELES, MONTEREY, OAKLAND, SACRAMENTO, SAN DIEGO, SAN JOSE, SAN RAFAEL, SUNNYVALE; COUNTY OF SANTA BARBARA; AND CITY AND COUNTY OF SAN FRANCISCO IN SUPPORT OF RESPONDENTS

John R. Calhoun
City Attorney
Heather A. Mahood
Principal Deputy
City Attorney
City of Long Beach
City Hall
333 West Ocean Boulevard
Long Beach, CA 90802
(562) 570-2200

John D. Echeverria
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9850

Counsel of Record for Amici Curiae

Additional Counsel Listed Below:

James K. Hahn
City Attorney
Pedro Echeverria
Chief Assistant City Attorney
Anthony Saul Alperin
Assistant City Attorney
City of Los Angeles

1700 City Hall East
200 North Main Street
Los Angeles, CA 90012-4130
(213) 485-4510

William B. Conners
City Attorney
City of Monterey
City Hall
Monterey, CA 93940
(408) 646-3915

Jayne W. Williams
City Attorney
City of Oakland
1 City Hall Plaza
Oakland, CA 94612
(510) 238-3601

Samuel L. Jackson
City Attorney
City of Sacramento
980 Ninth Street, 10th Floor
Sacramento, CA 95814
(916) 264-5346

Casey Gwinn
City Attorney
City of San Diego
1200 3rd Avenue, Suite 1100
San Diego, CA 92101
(619) 533-5800

Joan R. Gallo
City Attorney
George Rios
Assistant City Attorney
City of San Jose
151 West Mission Street
San Jose, CA 95110
(408) 277-4454

Louise H. Renne
City Attorney
Andrew W. Schwartz
Deputy City Attorney
City and County of San Francisco
1390 Market Street, 6th Floor
San Francisco, CA 94102
(415) 554-3906

Gary T. Ragghianti
City Attorney
City of San Rafael

1400 Fifth Avenue
San Rafael, CA 94915
(415) 485-3080

S. Shane Stark
County Counsel
Virginia R. Pesola
Deputy County Counsel
County of Santa Barbara
Office of County Counsel
105 E. Anapamu Street, #201
Santa Barbara, CA 93101
(805) 568-2950

Valerie J. Armento
City Attorney
City of Sunnyvale
456 W. Olive Ave.
Sunnyvale, CA 94088
(408) 730-7464

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980)
Armstrong v. United States, 364 U.S. 40 (1960)
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985)
Bay View, Inc. v. Ahtna, 105 F.3d 1281 (9th Cir. 1997)
Bowers v. Hardwick, 478 U.S. 186 (1986)
Clajon Production Corp. v. Petera, 70 F.3d 1566 (10th Cir. 1995)
Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), cert. denied, 504 U.S. 931 (1992)
Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602 (1993)
Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1987)
Dolan v. City of Tigard, 512 U.S. 374 (1994)
Ehrlich v. City of Culver City, 911 P.2d 429 (Cal.), cert. denied, 117 S.Ct. 299 (1996)
Ferguson v. Skrupa, 372 U.S. 726 (1963)
First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)
Florida Rock Industries, Inc. v. United States, 791 F.2d 893 (Fed.Cir. 1986), cert. denied, 479 U.S. 1053 (1987)
Goldblatt v. Hempstead, 369 U.S. 590 (1962)
Gregory v. Ashcroft, 501 U.S. 452 (1991)
Harmelin v. Michigan, 501 U.S. 957 (1991)
Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984)
Home Builders Assn. v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997)
In re Chateaugay, 53 F.3d 478 (2nd Cir. N.Y.), cert. denied, 116 S.Ct. 298 (1995)
International News Service v. Associated Press, 248 U.S. 215 (1918)
Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419 (1982)
Loveladies Harbor v. United States, 15 Cl.Ct. 381 (1988), aff'd, 28 F.3d. 1171 (Fed Cir. 1994)
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)
Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479 (N.Y. 1994), cert. denied, 514 U.S. 1109 (1995)
McCarthy v. City of Lakewood, 894 P.2d 836 (Kan. 1995)
Missouri Pacific Ry. Co. v. Nebraska, 164 U.S. 403 (1896)
Nectow v. City of Cambridge, 277 U.S. 183 (1928)
New Port Largo, Inc v. Monroe County, 95 F.3d 1084 (11th Cir. 1996)
New State Ice, Co. v. Liebmann, 285 U.S. 262 (1932)
Nollan v. California Coastal Commission, 483 U.S. 825 (1987)
Northern Illinois Home Builders Assn. v. County of DuPage, 649 N.E.2d 384 (Ill. 1995)
Parking Assn. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), cert. denied, 515 U.S. 1116 (1995)
Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)
Richardson v. City of Honolulu, 124 F.3rd 1150 (9th Cir. 1997)
Richardson v. Ramirez, 418 U.S. 24 (1974)
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)
San Diego Gas & Electric v. City of San Diego, 450 U.S. 621 (1981)
Student Loan Marketing Assoc. v. Riley, 104 F.3d 397 (D.C. Cir.), cert. denied, 118 S.Ct. 295 (1997)
Suitum v. Tahoe Regional Planning Agency, 117 S.Ct. 1659 (1997)
Sylvia Development Corp. v. Calvert County, 48 F.3d 810 (4th Cir. 1995)
Tabb Lakes, Ltd v. United States, 10 F.3d. 796 (Fed. Cir. 1993)
Texas v. White, 74 U.S. 700 (1869)
Thompson v. Consolidated Gas Corp., 300 U.S. 55 (1937)
Trimen Development Co. v. King County, 877 P.2d 187 (Wash. 1994)
West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)
United States v. Gaudin, 515 U.S. 506 (1995)
United States v. Sperry Corp., 493 U.S. 52 (1989)
>**Walters v. National Association of Radiation Survivors**, 473 U.S. 305 (1985)
Waters Landing Limited Partnership v. Montgomery County, 650 A.2d 712 (Md. 1994)

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985)
Yee v. City of Escondido, 503 U.S. 519 (1992)

Miscellaneous

Bork, Robert, The Tempting of America: The Political Seduction of the Law (1990)
Curtis, Larry, Testimony before the Senate Judiciary Committee, Oct. 7, 1997
Diamond, Henry & Patrick Noonan, Land Use in America, (1996)
Hart, John F., "Colonial Land Use Law and its Significance for Modern Takings Doctrine," 109 Harvard Law Review 1252 (1996)
Laitos, Jan G., "Takings and Causation," 5 William & Mary Bill of Rights Journal 359 (1997)
Rehnquist, William, Chief Justice of the U.S. Supreme Court, "1997 Year-End Report of the Federal Judiciary," January 1, 1998
Sax, Joseph L., "Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council," 45 Stanford Law Review 1433 (1993)
Treanor, William Michael, "The Original Understanding of the Takings Clause and the Political Process," 95 Columbia Law Review 782 (1995)

STATEMENT OF INTEREST[1]

The amici curiae (the Cities of Long Beach, Los Angeles, Monterey, Oakland, Sacramento, San Diego, San Jose, San Rafael, Sunnyvale; County of Santa Barbara; and City and County of San Francisco) are local governments established under the laws of the State of California. In California, as in most states, local governments have primary responsibility to plan and regulate land uses. The amici communities have a substantial interest in this case because petitioner and its amici urge the Court to adopt a broad, unprecedented reading of the taking clause. This interpretation, if adopted, would result in the filing of significantly greater numbers of claims under the taking clause for financial compensation based on local land use regulation. Increased constitutional litigation over local land use regulation would tend to undermine the fiscal health of amici communities; restrict amici's ability to establish and maintain safe, healthy, attractive and economically efficient patterns of development; and reduce the ability of democratically elected local officials to govern these communities.

While this case arises from a relatively unique federal program relating to one industry, the sweeping proposal advanced by petitioner and its amici to change established takings doctrine could have ramifications far beyond the context of this case. The taking clause probably is the most frequently cited constitutional provision relied upon in constitutional challenges to local land use regulations. The Court's reading of the taking clause in this narrow case therefore could profoundly affect amici communities and other American cities and towns.[2] Amici have a strong stake in ensuring that this relatively narrow case does not result in a decision that has unintended and unwarranted adverse consequences for amici and other communities. In line with amici's interest in this case, this brief focuses solely on the taking issue in this case.

SUMMARY OF ARGUMENT

The Court's decisions in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), and Dolan v. City of Tigard, 512 U.S. 374 (1994), cannot, consistent with the actual holdings and reasoning in those decisions, govern the resolution of the taking claim in this case. The unique, exacting standard of review adopted in Nollan and Dolan is explained and justified by two factors not present in this case C an adjudicative decision imposing a condition on land development, and a direct appropriation of private property for public use. The Court should resolve this case using the traditional three-part test the Court employed to evaluate a similar taking claim only a

few years ago in Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602 (1993).

The Court should reject petitioner's proposal to include means-ends analysis as a general component of the inquiry into whether a regulation effects a taking requiring the payment of compensation under the taking clause. Judicial inquiry into the reasonableness of the means selected to advance governmental ends, and the legitimacy of those ends, is a traditional part of the Court's analysis of government action under the due process clause. By contrast, taking analysis does not generally focus on the validity of government action, but instead focuses on whether the public must pay Ajust compensation" as a condition of proceeding with the action. Contrary to the implicit assumption of petitioner and its amici, there is nothing in the language or history of the taking clause to suggest it means the same thing as the due process clause.

Finally, the Court should reject petitioner's proposal to expand the taking clause because it conflicts with other important constitutional values and interests. In particular, petitioner's proposal would violate the principle that a constitutional provision must be read in accordance with the text and original understanding of the provision; conflict with the limited role of the judiciary under our system of separation of powers; undermine our federal structure of government; and result in new burdens on the federal courts which would dilute the federal courts' traditional character as a distinctive forum of limited jurisdiction.

ARGUMENT

I. Nollan and Dolan Establish a Special Test Uniquely Applicable to Adjudicative Decisions Which Affect the "Essential Right" of an Individual Property Owner to Exclude the General Public from Private Land.

The petitioner and petitioner's amici contend that the Court's decisions in Nollan v. California Coastal Commission, 483 U.S. 825 (1987), and Dolan v. City of Tigard, 512 U.S. 374 (1994), should govern resolution of petitioner's taking claim. This contention is based on a fundamental misreading of those decisions. The Court in Dolan went out of its way to emphasize that ordinary land use regulations, which generally are not affected by the taking clause, Adiffer in two relevant particulars from the present case." 512 U.S. at 385. First, the Court stated that most land use regulations establish general rules for different areas of the community, 'whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." Ibid. Second, the Court emphasized that Athe conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city." Ibid. The same distinguishing features were present in the Nollan case.

Nollan and Dolan establish the following narrow rule: To defeat a taking claim based on an adjudicative order requiring an owner, as a condition of obtaining a development permit, to dedicate private property to the public, there must exist an "essential nexus" between a legitimate state interest and the required exaction, as well as a "rough proportionality" between the degree of the exaction and the projected impact of the development. In addition, the Court placed the burden on the local government to justify the exaction under this two-part test. 512 U.S. at 391. See also id. at 405 (Stevens, J., dissenting); id. at 413-414 (Souter, J., dissenting).

The two critical elements the Court identified - an adjudicative decision imposing a condition on development, and a direct appropriation of private property for public use - explain the outcome in Dolan and Nollan, justify the special test the Court adopted, and define the universe of cases to which this standard can appropriately be applied in the future. Because neither of these two critical elements is present in this case, there is no basis for applying the Nollan/Dolan test in this

case. The scope and rationale for the distinguishing elements in Nollan and Dolan are discussed in greater detail below.

A. Legislative/Not Adjudicative.

First, the Nollan/Dolan test only applies to "adjudicative decisions" affecting one "individual parcel" of land, not to "legislative determinations" establishing broad rules for a general category of property owners. 512 U.S. at 385. Nollan and Dolan arose from similar facts, and each involved a challenge to a development exaction imposed on one particular development through adjudicative decision-making. Dolan involved a challenge to a permit order by the City of Tigard planning commission. Nollan involved a permit order issued by the California Coastal Commission. In discussing the appropriate standard to apply in these cases, the Court distinguished a taking claim based on case-by-case, adjudicative decision-making from a claim challenging an "essentially legislative determination," which the Court believed was entitled to more latitude than case-by-case adjudication. The Court apparently based this distinction on its perception that the imposition of conditions on development through adjudicative decision-making created a unique risk of unfair burdens on the landowner. Dolan, 512 U.S. at 385-386; see also Nollan, 483 U.S. at 837 ("unless the permit condition serves the same governmental purpose as the development bar, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion"). Thus, Nollan and Dolan establish a special, exacting rule for a narrow category of cases.

In accord with this understanding of the critical importance of the adjudicative/legislative distinction to the Court's analysis in Dolan and Nollan, the majority of lower federal and state appellate court decisions have read Dolan and Nollan as being limited to the adjudicative context. See Home Builders Assn. v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997) (rejecting taking claim based on development exaction addressing water shortages, because it "involve[d] a generally applicable legislative decision by the city"); Parking Assn. v. City of Atlanta, 450 S.E.2d 200 (Ga. 1994), cert. denied, 515 U.S. 1116 (1995) (Nollan/Dolan standard not applicable to taking claim based on conditions imposed, pursuant to municipal ordinance, on construction of urban parking garages); Ehrlich v. City of Culver City, 911 P.2d 429 (Cal.), cert. denied, 117 S.Ct. 299 (1996) (following Dolan, and concluding that a condition attached to a permit order effected a taking, but rejecting a taking challenge to a condition imposed by municipal ordinance); Waters Landing Limited Partnership v. Montgomery County, 650 A.2d 712 (Md. 1994) (Dolan not applicable to county ordinance imposing development tax assessments). But see Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479 (N.Y. 1994), cert. denied, 514 U.S. 1109 (1995) (applying Dolan heightened scrutiny, over strong dissent, to city rent control legislation); Trimen Development Co. v. King County, 877 P.2d 187 (Wash. 1994) (concluding that subdivision ordinance meets Dolan "rough proportionality" standard, without discussing whether Dolan standard actually applies to legislation).

The financial responsibilities Eastern Enterprises challenges in this case were not set through any type of adjudicative process. The Coal Act defines these responsibilities. Because the Nollan "essential nexus" and Dolan "rough proportionality" standards do not apply to legislative rules, the Nollan/Dolan standard does not apply in this case.

B. No Limitation on Right to Exclude.

Furthermore, both Nollan and Dolan involved challenges to permit "exactions" which required landowners to convey a recognized interest in real property and eliminated the owners' right to exclude members of the general public from private property. This second element was another underpinning of the Court's conclusion that these requirements were subject to a special type of review.

The Nollan/Dolan decisions rest in part on the critical fact that the exactions in those cases, if imposed directly rather than as a condition of a permit, would unquestionably have effected a taking. See Nollan, 483 U.S. at 831 ("Had California simply required the Nollans to make an easement across the beachfront available to the public on a permanent basis in order to increase public access to the beach. . . we have no doubt there would have been a taking."); see Dolan 512 U.S. at 284 ("Without question, had the city simply required petitioner to dedicate a strip of land along Fanno Creek for public use. . . a taking would have occurred.") These conclusions followed from the Court's prior decisions recognizing that the right to physically exclude the public from private property is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." Nollan, 483 U.S. at 831; see also Loretto v. Teleprompter Manhattan CATV Corp, 458 U.S. 419, 433 (1982) (government-mandated permanent physical occupation of private property constitutes a per se taking); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978) ("A taking may more readily be found when the interference with property can be characterized as a physical invasion by government."); International News Service v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J.) ("[a]n essential element of individual property is the legal right to exclude others from enjoying it"). This central premise of the Nollan and Dolan decisions is, of course, dramatically different from the Court's recognition, outside of the context of physical occupations, that "in the course of regulating commercial and other human affairs, [legislatures] routinely create burdens for some that directly benefit others" without violating the taking clause. Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211, 223 (1987).

The issue the Court faced in Nollan and Dolan was how to approach review of the exactions, given that these uncompensated infringements on the right to exclude the public from private property - rather than being imposed directly - had instead been imposed through conditions attached to development permits. On the one hand, the Court had to weigh the per se rule prohibiting permanent, uncompensated elimination by government of the right to exclude; on the other hand, the Court had to weigh the traditional rule that government decisions regulating the use (as opposed to occupation) of private property generally are not takings. See Dolan 512 U.S. at 385 & n. 6; id. at 391 n.8 The Court resolved the issue by formulating a new, unique test to deal with the special issues presented by the intersection of the per se rule against uncompensated permanent occupations and the broad latitude afforded regulatory permitting authority. Cf. Nollan, 483 U.S. at 841 ("We are inclined to be particularly careful. . . where the actual conveyancing of property is made a condition of lifting a land-use restriction.")

Consistent with this reading of Nollan and Dolan, the majority of lower federal and state appellate court decisions have read Nollan and Dolan as being limited to the physical exactions context. See Home Builders Assn. v. City of Scottsdale, supra (municipal requirement that owner cede land to the public is "a particularly invasive form of land regulation," in contrast to imposition of a fee, which is a "more benign form of regulation"); New Port Largo, Inc v. Monroe County, 95 F.3d 1084, 1088 (11th Cir. 1996) (Dolan and Nollan irrelevant to taking challenge to zoning ordinance where the ordinance "told [the owner] how it could use the property..., but did nothing to require [the owner] to open its property to the public for use just as the public wished"); Clajon Production Corp. v. Petera, 70 F.3d 1566, 1578-79 (10th Cir. 1995) ("Nollan and Dolan are best understood as extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., the possession of one's physical property) through a conditional permitting procedure"); McCarthy v. City of Lakewood, 894 P.2d 836 (Kan. 1995) (Dolan applies to actual dedications of land only); Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), cert. denied, 504 U.S. 931 (1992) (no decisions "have interpreted [Nollan] as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land").[3]

This case does not involve government action which impinges on the right to physically exclude the general public from private property. See U.S. v. Sperry Corp., 493 U.S. 52, 62 n.9 (1989) (rejecting argument that a financial assessment is a type of "physical occupation" of private

property, because money is fungible). Indeed, this case does not involve land at all, but rather ordinary business assets, and therefore is arguably outside the scope of "regulatory takings." See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027-1028 (1992) ("in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [the owner] ought to be aware of the possibility that new regulation might even render his property worthless"). Accordingly, the analysis in Nollan and Dolan cannot be applied in this case consistent with the holdings and reasoning in those cases.

II. Means-Ends Scrutiny Is Not a General Component of the Inquiry Into Whether a Government Action Effects a Taking Requiring the Payment of Compensation Under the Taking Clause.

Apart from the fact that Nollan and Dolan do not apply in this decisively different context, there also is no basis for petitioner's more general argument that some type of means-ends scrutiny, whether deferential or otherwise, represents a general component of the inquiry into whether a government action effects a taking requiring the payment of just compensation. The Court has never relied on means-ends scrutiny to support the conclusion that ordinary government regulation effects a taking requiring the payment of just compensation. While means-ends analysis represents a traditional component of due process analysis, it simply has no logical place in the ordinary just compensation inquiry. Contrary to the assumption of petitioner and its amici, it is far more logical to read the different language in the taking and due process clauses to mean different things, not the same thing. See Harmelin v. Michigan, 501 U.S. 957, 978 n.9 (1991) (Scalia, J.) ("When two parts of a [constitutional amendment] use different language to address the same or similar subject matter, a difference in meaning is assumed.") Rather than embarking under the taking clause on a broad-ranging assessment of the reasonableness of the means Congress selected in adopting the Coal Act, the Court should resolve the taking claim in this case, if it reaches the issue at all, using the traditional three-factor analysis the Court applied only a few years ago in Concrete Pipe & Products v. Construction Laborers Pension Trust, 508 U.S. 602 (1993).[4]

Judicial inquiry into the reasonableness of the means selected to advance governmental ends, as well as the legitimacy of those ends, relates to whether a government action is valid and can proceed. But the validity of a governmental action - as opposed to whether the public must pay "just compensation" as a condition of proceeding with the action - does not fit comfortably with traditional just compensation analysis under the taking clause. At the distinctive core of takings analysis is the presumption that the means and ends government has selected are valid; the relevant question is whether the taking clause compels the payment of just compensation as a condition of government carrying out presumptively valid action. As the Chief Justice stated in First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314 (1987), the taking clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." The goal of the taking clause, rather than to prohibit particular governmental actions, is simply "to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40 (1960). See also Bay View, Inc. v. Ahtna, 105 F.3d 1281, 1284-1285 (9th Cir. 1997) ("the government is not prohibited from taking private property; indeed the eminent domain clause contemplates that government will take private property as needed for public purposes, so long as it pays compensation"); Tabb Lakes, Ltd v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993) (viability of taking claim "depend[s] upon the validity of the governmental action"); Florida Rock Industries, Inc. v. United States, 791 F.2d 893, 898-99 (Fed.Cir. 1986), cert. denied, 479 U.S. 1053 (1987) (in taking suits, the validity of government action must be established, or at least presumed for the sake of argument, before proceeding to question of whether compensation is due).[5]

While a number of the Court's taking decisions contain language suggesting that some type of means-ends inquiry might be relevant to the just compensation inquiry, the Court has never squarely addressed the issue. More importantly, outside of the narrow, unique context of

development exactions, the Court has never found a taking requiring the payment of just compensation on the ground that government action failed some type of means-ends test. See Loveladies Harbor v. United States, 15 Cl.Ct. 381, 390 (1988), aff'd, 28 F.3d. 1171 (Fed Cir. 1994) (Smith, C.J.) (stating that "no court has ever found a taking has occurred solely because a legitimate state interest was not substantially advanced") (Emphasis added). Compare Laitos, Jan G., "Takings and Causation," 5 William & Mary Bill of Rights Journal 359, 371 (1997) (Supreme Court has never adopted view that taking clause requires that regulated property owners must have "caused" social problem being addressed by regulation).

The opinion of the Court most frequently cited to support some type of means-ends inquiry under the taking clause is Agins v. City of Tiburon, 447 U.S. 255, 260 (1980), a brief, unanimous decision upholding a zoning ordinance against a takings challenge. The opinion does indeed state that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests." Id. at 260. But the only support cited for this proposition was Nectow v. City of Cambridge, 277 U.S. 183 (1928), a constitutional challenge to a zoning regulation, but one based on the due process clause, not the taking clause. Moreover, even as a statement of a due process means-ends analysis, the language in Nectow reflects the kind of exacting scrutiny of regulatory action superseded by more recent Supreme Court decisions interpreting the due process clause. See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). There is no indication in the brief Agins decision that the Court recognized that Nectow did not support the proposition for which it was cited, much less any discussion of the pros and cons of potentially taking the radical step of incorporating means-ends analysis into takings doctrine. Nothing in the circumstances or text of Agins suggests that the Court intended to take such a step.

Reliance on the Court's decision in Penn Central, 438 U.S. at 127, to support an ostensible means-ends component of takings doctrine is similarly misplaced. The Penn Central Court did state that "[i]t is implicit in Goldblatt v. Hempstead, 369 U.S. 590 (1962),] that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose," again citing Nectow. However, Penn Central, a decision rejecting a taking claim, contains no indication of any intent to establish an entirely new branch of analysis under the taking clause. Goldblatt does not in fact "implicitly" support any such conclusion; the case involved a due process challenge to a land use regulation, as well as a separate taking claim, and the Court discussed legislative means and ends exclusively in relation to the due process claim. And, as discussed above, Nectow was not a taking case at all, but instead reflected an outmoded method of due process analysis.[6]

Finally, the Court's decision in Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984), supports the conclusion that means-ends analysis is not an appropriate general component of the inquiry into whether a government action effects a taking requiring the payment of just compensation. The Court in Midkiff recognized the relevance of means-ends analysis in determining whether a government action must be invalidated because it fails to meet the "public use" requirement of the taking clause. See 467 U.S. at 241. However, the Court emphasized the distinction between the "just compensation" and "public use" requirements. The taking clause requires payment of "just compensation" when a government action serving a valid public purpose results in a taking. On the other hand, when a government action does not serve a valid public purpose, whether compensation is provided or not, the action is invalid and must be proscribed. Ibid. Midkiff does not suggest that an invalid government action which violates the "public use" requirement necessarily creates a claim for just compensation; indeed, the fact that the court indicated that a taking not for "public use", whether or not compensated, must be proscribed, suggests just the opposite. Thus, the decision supports the conclusion that means-ends analysis is not a general component of the just compensation inquiry.[7]

III. The Proposal to Expand the Takings Inquiry By Adding a General Means-Ends Test Threatens Other Important Constitutional Interests.

The Court also should reject petitioner's proposal to expand the scope of the taking clause because adoption of this proposal would sacrifice other values and interests which are central to our system of constitutional government. Four major constitutional concerns raised by this expansive reading of the taking clause are discussed below.

A. The Original Understanding of the Taking Clause.

The petitioner's proposed reading of the taking clause contradicts the principles that a constitutional provision must be read in accord with the "express language" of the provision, Richardson v. Ramirez, 418 U.S. 24, 54 (1974), as well as relevant "historical practice," United States v. Gaudin, 515 U.S. 506, 516 (1995). See also Bowers v. Hardwick, 478 U.S. 186, 194 (1986) ("The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.")

These principles of constitutional interpretation point to a reading of the taking clause focusing on actual physical appropriations of property and regulatory actions which are the functional equivalent of physical appropriations. The Court's leading decisions interpreting the taking clause respect the limitations rooted in the language and history of the clause. By contrast, petitioner's proposal to incorporate means-ends analysis into the just compensation issue has no plausible basis in the language of the taking clause or the available evidence of the drafters' original understanding.

Read in accordance with natural and customary usage, the term "take" refers to a range of governmental actions which involve the actual appropriation of an owner's private property by the government. An individual "takes" his son's ball if he grabs the ball and places it on a closet shelf; there is no "taking" if he simply directs the child to stop bouncing the ball off the living room wall or tells him to play with the ball in the backyard. Likewise, a local government "takes" a person's land when it effects a transfer of title to the government and builds a public facility on the land. The local government does not "take" land in the ordinary sense by enforcing the local zoning code limiting the number of houses the owner can place on the land, or by restricting development in high hazard areas such as on steep slopes or flood plains. And the Court's decisions are basically consistent with this reading of the plain text, unless (in general) the government leaves the owner with no economic use of the land. Lucas v. South Carolina Coastal Council, supra.

Historical research on the original understanding of the taking clause supports the conclusion that the basic issue addressed by the taking clause is the physical appropriation of private property. See Lucas, 505 U.S. at 1028 n.15 ("early constitutional theorists did not believe the Takings Clause embraced regulations of property at all"). Professor John Hart, based on a comprehensive survey of land use regulatory practices in the colonial era, has concluded that the framers' consciously and purposefully drafted the taking clause to focus on direct appropriations of private property: "The Framers knew that land use regulation had served broad purposes in their time, and they evidently considered subjecting this sphere of government action to substantive constitutional review to be inappropriate." Hart, John F., "Colonial Land Use Law and its Significance for Modern Takings Doctrine," 109 Harvard Law Review 1252, 1292 (1996). See also Treanor, William Michael, "The Original Understanding of the Takings Clause and the Political Process," 95 Columbia Law Review 782 (1995) (available evidence "clearly indicates that the Takings Clause was intended to apply only to physical takings, and the early case law interpreted it and its state counterparts as not extending to government regulations"); cf. Robert Bork, The Tempting of America: The Political Seduction of the Law 230 (1990) ("My difficulty is not that [Richard] Epstein's constitution would repeal much of the New Deal and the modern regulatory-welfare state but rather that these conclusions are not plausibly related to the original understanding of the takings clause.")

The Court's decisions interpreting the taking clause have respected the original understanding of the clause, by effectively limiting so-called "regulatory takings" to instances in which regulatory actions are the functional equivalent of physical appropriations. In Lucas, in particular, the Supreme Court recognized that a regulation which deprives the owner of "all economically beneficial or productive use of land" is generally a taking because, among other things, a "total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation." 505 U.S. at 1017. See also San Diego Gas & Electric v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J.) (observing that certain land use regulations "can destroy the use and enjoyment of property. . . just as effectively as formal condemnation or physical invasion of property"). If the regulatory takings doctrine is to have any coherent limits which respect the text and original understanding of the taking clause, only regulations which are functionally equivalent to physical appropriations can properly be understood to be takings. See Hart, supra, 109 Harv.L.Rev. at 1293 ("The Takings Clause ought not to apply to any forms of land use regulation that do not approximate eminent domain by effectively depriving a landowner of possession.")

On the other hand, adding means-ends analysis to the just compensation inquiry would take the Court far afield from the actual text and original understanding of the taking clause. Means-ends inquiry would create potential financial liability for all sorts of regulations which have slight or even trivial economic impacts and which cannot be equated in any sense to the actual appropriation of private property.

B. Limited Judicial Role.

The proposed expansion of the taking clause would invite searching judicial second-guessing of legislative judgments, contradicting the bedrock principle that "courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." Ferguson v. Skrupa, 372 U.S. 726, 730 (1963). See also Walters v. National Association of Radiation Survivors, 473 U.S. 305, 319 (1985) ("Judging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform.").

Defining and redefining property interests over time is one of the single most important functions of democratically elected legislatures. In response to changing economic needs, cultural understandings and political arrangements, property law in this country has constantly undergone change. Among other changes in property law, Professor Joseph Sax noted recently:

In eighteenth century America, the states abolished feudal tenures, abrogated primogeniture and entails, ended imprisonment for debt, and significantly reduced rights of alienation, as well as dower and curtesy. . . . In the arid west, landowners' riparian rights were simply abolished because they were unsuited to the physical conditions of the area. As the status of women changed, laws abolished husbands' property rights in their wives' estates.
Joseph L. Sax, "Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council," 45 Stanford Law Review 1433, 1448 (1993).

The petitioner's proposed means-ends test under the taking clause would authorize the courts to adopt fixed property norms as constitutional doctrine. This constitutionalization of property law would retard or block the fulfillment of new social and economic goals, as well as the adoption of innovative methods for addressing emerging social problems. While at first merely inconvenient to local communities, the freezing of property norms would, over time, significantly frustrate the ability of local communities to resolve important problems. The Court should decline the invitation offered in this case to venture into that dangerous territory.

C. Federalism.

The proposal to expand upon traditional understandings of the taking clause also conflicts the fundamental principle that the Constitution created a Federal Government of limited powers, leaving all remaining powers in the States. See U.S. Const., Amendment X. As the Court explained in Gregory v. Ashcroft, 501 U.S. 452 (1991), the principle of dual Federal-State sovereignty infuses every aspect of the Constitution:

"[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence, . . . [W]ithout the States in union, there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."
Id. at 457, quoting Texas v. White, 74 U.S. 700, 725 (1869).

Federalism affords American society numerous practical advantages. Among other things, "[i]t assures a decentralized government that will be more sensitive to the diverse needs of a heterogenous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." Gregory v. Ashcroft, 501 U.S. at 458. See also New State Ice, Co v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")

The advantages of Federalism are especially great in the context of managing land uses. Our nation is a land of enormous extremes: of climate, topography, ownership patterns, population density, rate of growth (or depopulation), and social values, to name but a few factors. Land use planning and regulation in America reflects this diversity. Some intensely developed and rapidly growing communities face serious environmental, social, and economic challenges related to the use of land, and have adopted sophisticated land use regulatory programs to address these problems. See Henry Diamond & Patrick Noonan, Land Use in America 13-42 (1996). Other, more rural communities have adopted relatively simple approaches more appropriate to their circumstances. A few States have developed state-level programs to address at least certain major land uses, while most other states have assigned basic responsibility for land use decisions to counties, cities, and/or towns. Id. at 26.

The taking clause has traditionally been read to respect the sovereign authority of the states and their subdivisions to manage local land uses. More specifically, the Court has recognized, in the context of the taking clause, that "[p]roperty interests. . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984). This recognition protects our federal system of government, by defining an aspect of property law assigned primarily if not exclusively to the States, and by limiting the preemptive reach of the Court's interpretations of the taking clause. Compare Sylvia Development Corp. v. Calvert County, 48 F.3d 810, 828 (4th Cir. 1995) ("Land use decisions are a core function of local government. Few other municipal functions have such an important and direct impact on the daily lives of those who live and work in the community.")

Petitioner's proposal to expand the scope of takings doctrine by including a means-ends component would tend to undermine our federal system by imposing a significant new constraint on state sovereign authority to define - and, as appropriate, over time, redefine - property norms to match modern circumstances. Just as the Court will not lightly infer that Congress intends to invade state sovereignty, see Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985) ("if

Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute"), the Court should be wary of proposed judicial innovations which would undermine federalism unless such innovations are mandated by some other provision of the Constitution. It cannot plausibly be argued that the language and history of the taking clause mandate expansion of takings doctrine at the expense of federalism.

D. Distinctive, Limited Jurisdiction of the Federal Courts.

Adoption of petitioner's reading of the taking clause would increase the volume of constitutional challenges to zoning and other local land use measures in federal court, creating a larger federal case load and undermining the distinctive role of the federal courts in our constitutional system. As the Chief Justice observed in his recently issued "1997 Year-End Report of the Federal Judiciary," one of the most significant problems facing the federal judiciary is the Alarge and expanding workload." The Chief Justice observed: "Unless steps are taken to stop or reverse this trend, either the demands placed on the federal Judiciary will eventually outstrip its resources, or the Judiciary will become so large that it will lose its traditional character as a distinctive judicial forum of limited jurisdiction." Expanding the just compensation inquiry by incorporating means-ends scrutiny would expand the volume of taking claims, in both federal and state courts. However, it would impose a particularly significant new burden on the federal courts.

In Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985), the Court established that a taking claim against a unit of local government is not "ripe" for federal court review unless and until (1) the local government "has arrived at a final, definitive position regarding how it will apply the regulations at issue," id. at 191 and (2) the claimant has sought "compensation through the procedures the States have provided for doing so," id. at 194. See also Suitum v. Tahoe Regional Planning Agency, 117 S.Ct. 1659, 1664 (1997). These ripeness rules ensure that a large volume of litigation arising from local land use regulation is addressed, at least in the first instance, in the state court systems rather than in federal courts. By contrast, incorporating a means-ends analysis into takings doctrine would invite claimants to circumvent these ripeness limitations, and encourage direct filing of essentially local property disputes in federal court, because a taking claim based on the theory that a government action is not logically related to a legitimate government interest apparently would be exempt from Williamson County. See Yee v. City of Escondido, 503 U.S. 519, 533-534 (1992) (claim that regulation effected a taking because it failed to substantially advance a legitimate government interest held ripe, but declining to rule on the merits of claim because issue was not fairly presented in the petition for certiorari); Richardson v. City of Honolulu, 124 F.3rd 1150, 1165 (9th Cir. 1997) (following Yee and declining to dismiss taking claim filed in federal court on ripeness grounds).

CONCLUSION

The amici curiae respectfully urge the Court to affirm the judgment of the Court of Appeals for the First Circuit.

Respectfully submitted,

John D. Echeverria
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
(202) 662-9850
Counsel of Record for Amici Curiae

January 20, 1998

Notes

[1] Counsel for the parties have consented to the filing of this amicus brief, and the letters of consent are being filed with the Clerk simultaneously with the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than amici or their counsel, made a monetary contribution to this brief's preparation or submission. See Supreme Court Rule 37.

[2] The amici California cities and counties have relatively large populations and budgets, as well as full-time legal counsel, but it is useful to observe, according to figures compiled by the National League of Cities, that over 90% of America's 36,000 cities and towns have populations of less than 10,000, and, of these, almost all lack full-time legal counsel or the financial resources to withstand concerted constitutional litigation over local land use issues. See Testimony of Larry Curtis, Mayor of Ames, Iowa, on behalf of the National League of Cities, before the Senate Judiciary Committee, October 7, 1997 (citing example of Missouri community of several hundred residents sued for $8,000,000 for alleged regulatory taking).

[3] Of the handful of cases in which the Nollan/Dolan standard has been applied outside of the physical exactions context, most have involved monetary exactions in lieu of physical exactions. See, e.g., Ehrlich v. City of Culver City, 911 P.2nd 429 (Cal.), cert. denied, 117 S.Ct. 299 (1996); Northern Illinois Home Builders Assn. v. County of DuPage, 649 N.E.2d 384, 388-89 (Ill. 1995). However, even these aberrant decisions, which are inconsistent with the Court's reasoning in Nollan and Dolan, do not support applying the Nollan/Dolan standard in the present case. In Ehrlich, for example, the California Supreme Court concluded that the Nollan/Dolan test should be extended to fee exactions, but only if the exactions were imposed "on an individual and discretionary basis," 911 P.2d at 444; the assessments under the Coal Act challenged in this case were not, of course, arrived at through adjudicative decision-making.

[4] Without repeating in any detail the arguments likely to be presented by respondents, the amici support the conclusion that there was no taking in this case under the traditional three-part test, given that: the government action does not effect a direct appropriation of private property but rather "arises from a federal program that adjusts the benefits and burdens of economic life to promote the public good," 103 F.3rd at 161; the absence of any showing of a substantial adverse economic impact on petitioner's property as a whole, much less a total denial of all economic use; and the petitioner's long-time, profitable involvement in the coal industry, which has been heavily regulated for the last 50 years.

[5] This understanding of the taking clause is not contradicted by the fact that the Court has recognized an implicit exception to the general rule that a taking claim must be brought as a suit for just compensation in the case of a suit to enjoin alleged takings which involve direct transfers of money to the government. See, e.g., Connolly v. Pension Benefit Guaranty Corp., supra. In that circumstance, interpreting the taking clause as mandating that relief be sought in a suit for just compensation, rather than equitable relief, arguably "would entail an utterly pointless set of activities, as '[e]very dollar paid pursuant to a statute would be presumed to generate a dollar of... compensation.'" Student Loan Marketing Association v. Riley, 104 F.3rd 397, 401 (D.C. Cir.), cert. denied, 118 S.Ct. 295 (1997) quoting In re Chateaugay, 53 F.3rd 478, 493 (2nd Cir. N.Y.), cert. denied, 116 S.Ct. 298 (1995). Whatever the scope of this apparent exception, it is entirely consistent with the basic principle that the taking clause is not intended to prohibit government action per se, but rather to require payment of compensation in the event government action effects a taking.

[6] Because taking claims do not formally implicate the validity of government activity, see p. 12, supra, the Court's takings precedents (quite logically) do not suggest that the courts owe the legislative branch any particular deference in considering claims for just compensation under the taking clause -- in marked contrast to the very explicit deference the Court grants the legislative branch under the due process clause, See, e.g., Concrete Pipe & Products, supra, 508 U.S. at 637 ("It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court [under the due process clause] with a presumption of constitutionality.") The lack of formal judicial deference to legislative judgments in taking suits supports the conclusion that the taking clause must have a different, more limited scope than the due process clause. Compare Connolly v. Pension Benefit Guaranty Corp., supra, 475 U.S. at 223 (after concluding that a federal program does not violate the due process clause, "it would be surprising indeed to discover" that the program effected a taking requiring payment of compensation).

[7] It is debatable whether the standard for invalidating government action under the "public use" requirement is distinguishable from the requirements of due process. See, e.g.. Missouri Pacific Ry. Co. v. Nebraska, 164 U.S. 403 (1896) (invalidating under the due process clause a compensated "taking" of private property, when the "ordinance in question was not, and was not claimed to be... a taking of private property for public use under the right of eminent domain"); Thompson v. Consolidated Gas Corp., 300 U.S. 55, 80 (1937) (invalidating, apparently on due process grounds, an uncompensated taking which did not serve a legitimate public purpose). See generally Midkiff, 467 U.S. at 241 (discussing Missouri Pacific, Consolidated Gas, and other cases). It is clear that the Court's test for invalidation of government actions which fail the "public use" requirement is not intended to be any more exacting than the minimal rationality standard under the due process clause. See Id. at 239-40.