

WHAT FEDERALISM TELLS US ABOUT TAKINGS JURISPRUDENCE

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This Article discusses a niche within a niche: Federalism considerations in theories of governmental takings of property. Several property and land use theorists have argued that larger-scale and smaller-scale legislative bodies should be treated differently in takings jurisprudence, because these differently scaled legislatures are likely to behave differently in dealing with individuals' property and to respond differently to compensation requirements. I agree with this general proposition, but I sharply disagree with the centralist drift of most of this literature, which favors the national legislature while imposing strict takings requirements on local legislatures. I argue that these analyses overlook the existing constraints on smaller-scale governing bodies.

Meanwhile, the courts have paid very little overt attention to federalism concerns of any kind in takings jurisprudence, string citing cases about local, state, and national governments without differentiating them. Instead of responding to federalism (and other) takings theories, actual takings jurisprudence vacillates between leniency toward all legislatures and contempt for them. I argue, however, that federalism considerations might help courts to analyze the legislative process, and they might be incorporated into takings jurisprudence by a distinction between Fifth Amendment and Fourteenth Amendment takings.

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INTRODUCTION

Imagine for a moment the difference between your views on the Federal Bureau of Investigation (FBI) and your local police department. What do you think are the respective strengths and weaknesses of each? I bet you would say that the FBI is probably good at high-tech forensic investigations, complex financial crimes, and undercover work. Your local police department might not be as good at those things, but I expect you would say that it is likely good at cultivating local contacts, spotting street corner bad guys, and helping out with Christmas charity programs. Now, what failings would you expect at each level of policing? The FBI, you might well say, is probably bad at noticing the nuances of local characters, situations, and cultures, and its agents might behave imperiously and dismissively around state and local law officers—sometimes to their later chagrin, if you have watched cop shows like *NYPD Blue*. But the local cops might also have some systematic problematic areas. For example, they might get too close to some locals, or they might get into a routine of treating certain population groups as enemies, or they might put up a wall of silence about the misbehavior of fellow officers.

Here is another set of situations to imagine: the differences between local school board policies on, say, the school library, on the one hand, and the federal testing requirements in the No Child Left Behind Act (NCLB),¹ on the other. The local school board is likely to leave it to the school's teachers and librarians to decide what will work as reading material for the kids, but at the prodding of some especially outspoken local interest groups, they might start to intervene and do a lot of ad hoc tailoring on the sometimes contentious subject. That is to say, the local board might be overresponsive in an uninformed way. NCLB has the advantage of requiring each school to show its progress through nationally mandated testing. But it has a quite different problem, at least according to its critics: It has a blunderbuss, one-size-fits-all approach to education.²

Without pressing these hypothetical examples too far, it seems intuitive that there are differences in these opposite-end levels of government in how they operate and what we expect from them. Over a century ago,

1. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified in scattered sections of 20 U.S.C.).

2. See, e.g., Nicole Liguor, Note, *Leaving No Child Behind (Except in States That Don't Do as We Say): Connecticut's Challenge to the Federal Government's Power to Control State Education Policy Through the Spending Clause*, 47 B.C. L. REV. 1033, 1049–53 (2006) (describing the criticisms of NCLB's focus on testing, and Connecticut's disagreements with the federal government over the types of testing deemed appropriate).

Continental political theorists might have identified the divide between them respectively as rationalism versus traditionalism,³ or *Gesellschaft* (society) versus *Gemeinschaft* (community),⁴ or for the Russians, modernist Westernizers versus traditionalist Slavophiles.⁵ Governance on a larger scale has necessitated modernist institutional rationalization, but on a smaller scale, governmental institutions continue to hearken back to a more hands-on and intimate style, with smaller councils, individualized decisions, and more intense direct citizen involvement.⁶

One might expect, then, that differences like these might appear in the literature about the ways in which governmental action is constrained in American jurisprudence. Our jurisprudential constraints might have something to do with the different competences and problem areas of different levels of government. That is to say, we might expect judicial constraints on governmental action to take account of what one could roughly classify as federalism issues.

One category of those constraints is takings law, through which the courts require governments to compensate property owners for various kinds of losses occasioned by legislative action. And here indeed, a considerable body of the theoretical literature of property takings fairly drips with federalism—most of which, I should say, favors the modernist federal government and disfavors the traditionalist local government, reflecting a pattern that Robert Ellickson has described as the Beltway Syndrome.⁷

On the other hand, modern takings *jurisprudence*—court decisions as distinguished from academic theory—blithely ignores any concerns at all about the different competences of different kinds of legislatures. This is

3. 1 MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 215 (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1978) (differentiating “rational” authority as based on formal rules, from “traditional” authority based on “immemorial traditions,” and describing “charismatic” authority stemming from exceptional personality).

4. FERDINAND TONNIES, *COMMUNITY AND CIVIC SOCIETY* (Jose Harris ed., Jose Harris & Margaret Hollis trans., Cambridge Univ. Press 2001) (1887).

5. See Laura Engelstein, *Holy Russia in Modern Times: An Essay on Orthodoxy and Cultural Change, PAST & PRESENT*, Nov. 2001, at 129, 142 (describing cultural opposition between Westernizers and Slavophiles).

6. See Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1649–50 (2006) (describing how citizens participate with greater ease in local rather than larger governments); see also Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism From the Attack on “Monarchism” to Modern Localism*, 84 NW. U. L. REV. 74, 94–99 (1989) (describing echoes of antifederalist, traditionalist governmental concerns in modern local governmental structure).

7. Robert C. Ellickson, *Panel I: Liberty, Property, and Environmental Ethics*, 21 *ECOLOGY L.Q.* 397, 397 (1994) (describing the Beltway Syndrome as the “disease” that views only the national government as significant).

not to say that other kinds of federalism issues are absent from takings jurisprudence. Since the landmark case, *Lucas v. South Carolina Coastal Council*,⁸ the U.S. Supreme Court has noted that the “background principles” of state law determine the content of any given claim to property;⁹ and even though the federal courts are now much more active in takings cases than they once were, their decisions continue to leave the vast bulk of property and land use supervision to the state courts.¹⁰ But what is conspicuously absent from federal takings jurisprudence is any discussion of the different capabilities and problems of the different kinds of rulemaking bodies.

That lacuna is the subject of this Article—that is, what this aspect of federalism tells us about takings jurisprudence. In brief, what federalism tells us is that takings jurisprudence is not really about any of those fancy theories of the ways that different kinds of legislative bodies behave. The current trend in takings jurisprudence is just flat antilegislativ, no matter what the level, a sentiment that appears to be tempered only by the federal courts’ fear that if they become too activist, they will have to become grand boards of appeal for every piece of legislation, no matter what its origin.

With that, let me review some of the major categories of modern takings theories, to show how steeped they are—explicitly or implicitly—in federalism concerns about legislative competence. Then I will briefly survey some of the major modern takings cases, including those that especially affect the federal government in the Court of Federal Claims and the Federal Circuit, where one would suppose important federalism distinctions might arise but in fact receive no attention whatever. In my view, this is a jurisprudence that operates on no real theory of legislative or administrative capabilities, and instead vacillates between letting legislatures do what they like on the one hand, and disdainfully dismissing legislative action on the other. At the moment, disdain has the momentum, but presumably that too could shift in the future.

8. 505 U.S. 1003 (1992).

9. *Id.* at 1029 (rooting takings claims and defenses in “background principles” of state property law); see also Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203 (2004) (elaborating on the importance of state law background). Stewart Sterk thinks legal scholars have ignored this state law background, *id.* at 211, although there are certainly some who have discussed it, particularly since *Lucas v. South Carolina Coastal Council*, see, e.g., Louise A. Halper, *Why the Nuisance Knot Can’t Undo the Takings Muddle*, 28 IND. L. REV. 329, 347–51 (1995) (describing the actual South Carolina background property principles at stake in *Lucas*); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 310–11 (1993) (commenting that one has to know existing state law to know when property is “taken”).

10. Sterk, *supra* note 9, at 238–44.

I. MODERN TAKINGS THEORIES: THE FEDERALISM DIMENSION OF LEGISLATIVE COMPETENCE

When does a regulation “take” property? That is one of the most overwritten questions in American legal literature. I do not try to survey all that literature here, but instead, I divide takings theories into two major categories—fairness and efficiency—and discuss the work of just a few leading proponents, especially the more recent ones. This is not to discount all the other theories and the important nuances that their authors have uncovered, but rather to yield to the fact that life is short. Fairness and efficiency are broad terms, and I hope that many writers would agree that these are the big categories for thinking about property takings.

Federalism is a major component in both categories, though not all writers in either camp address federalism explicitly. But many do, and with significant implications for the intensity of supervision that at least theoretically should be exercised by the federal judiciary over different kinds of legislatures. I should mention that I have been a severe critic of the federalism aspects of some of these theories, but I do think they perform a service in at least raising questions about the role of different kinds of legislative competence in property jurisprudence. After all, as many writers have noted, takings issues arise at points of transition,¹¹ and particularly at points of legislative change in light of such matters as new property uses (such as skyscrapers), demographic shifts (such as beachfront congestion) and new knowledge and technology (such as the invention of the automobile and learning about air pollution damage). Takings jurisprudence is one way to police the interactions between legislative change and the security of individual ownership, and it should reflect some understanding of the ways that different kinds of legislatures are likely to treat property issues.

Where, then, do these federalism concerns play out in the big categories of takings scholarship? Let us begin with fairness. The touchstone for this scholarship is a remark in *Armstrong v. United States*¹²: that no person alone should be burdened with paying for benefits to the public, “which, in all fairness and justice, should be borne by the public as a whole.”¹³

11. See, e.g., Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 511 (1986) (citing regulatory transitions, including takings, as imposing losses); see also Carol M. Rose, *Property Rights and Responsibilities*, in THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY 49, 53–57 (Marian R. Chertow & Daniel C. Esty eds., 1997) (discussing takings jurisprudence as one of several means for smoothing regulatory transitions).

12. 364 U.S. 40 (1960).

13. *Id.* at 49.

Fair enough, so to speak. But then, why would governments behave unfairly to individuals? Why would legislatures gang up on some particular owner? The answer to that question can quickly turn to the character of legislatures, and from there the question can easily morph into an issue of federalism. When this occurs, the usual answer lands particularly heavily on local governments. Why? Because local legislative bodies are just not *federal* enough; instead, they are too small, too un-Madisonian, too premodern, too much based on cozy schmoozing instead of large-scale legislative give and take.

Some version of this argument has undoubtedly been around a long time, given a strain of mistrust of local governments in the later nineteenth century,¹⁴ but one can track it in more recent scholarship back to the mid-1960s. The local government scholar Terrence Sandalow sketched out the argument in an article in 1964,¹⁵ and the following year a Harvard Law Review note developed it at much greater length.¹⁶ As we shall see, the argument continues to bob up, most recently in scholarship on regulatory takings. The argument derives from Madison's famous analysis in *The Federalist* No. 10: Legislatures drawn from small constituencies all too often divide into a small number of factions, and of these, one or another is likely to dominate, to the great disadvantage of its rival or rivals.¹⁷ Legislatures drawn from large constituencies, on the other hand, have the advantage of incorporating many different factions, so that all must horse-trade or logroll with the others in order to arrive at a majority on any given issue. In this shifting, large-scale legislative scene, no one faction can become the permanent ruler, dominating the others over any length of time. Hence, according to this classic argument, unlike the small-scale legislature, the large-scale legislature has fewer occasions—not to speak of motivations—to fall into the pit of factional oppression.¹⁸

14. See, e.g., Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 WIS. L. REV. 83, 88–89 (describing later nineteenth century “Dillon’s Rule,” defining local governmental powers narrowly). But see Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 12–15 (1990) (cautioning against overstating state-level hostility to local government).

15. Terrence Sandalow, *The Limits of Municipal Power Under Home Rule: A Role for the Courts*, 48 MINN. L. REV. 643, 709–11 (1964).

16. Note, *City Government in the State Courts*, 78 HARV. L. REV. 1596 (1965) [hereinafter *City Government*]. A somewhat later version was Michael J. Waggoner, *Log-Rolling and Judicial Review*, 52 U. COLO. L. REV. 33, 43 (1980).

17. *City Government*, *supra* note 16, at 1597–99.

18. See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 853–57 (1983) (reviewing the Madisonian discussion of large-scale legislature, implicit critique of local government).

In turn, these two different scenarios have implications for fairness and hence takings jurisprudence. As Frank Michelman pointed out in an important and underappreciated article (not his extremely well-known 1967 Harvard article¹⁹ but rather his Indiana piece written several years later²⁰), according to theories of this kind, the large Madisonian legislature, with all its vote trading and logrolling, may result in some individual instances of unequal treatment, but these disappear into a larger stack of legislative decisions of which some take but others give. In local decisionmaking, on the other hand, opportunities for logrolling and evening out may never arise at all.²¹ According to these antilocalists (of whom, I should say, Michelman is not one), it is the smaller-scale legislative body—read, local legislature—that can sink into the unfairness that comes from a single dominating interest. As the Harvard note argued back in the mid-1960s, at the local level, the dominating faction can become a permanent majority, lording its power over opposing factions without bothering to trade votes and stack goodies at all.²² That is why, in this literature, courts should take particular note of unfairness at the local level.

There are more recent variants on this theme too, though their federalism connotations are subtle. Dan Farber, for example, suggests that takings jurisprudence should aim at providing compensation for those who cannot easily make themselves heard, thus equalizing their situation with those who can be heard and who can demand compensation (or who can prevent programs *ex ante*).²³ But this too may be an implicit critique of local legislatures, insofar as all viewpoints can get heard in the larger Madisonian legislature.

I have been a steady critic of this theory, because I think it very much underestimates the endogenous fairness constraints on the local version of government, constraints that I put under the rubric of “exit” and “voice.”²⁴

19. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165 (1967).

20. Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 172–73 (1977).

21. See *id.*

22. City Government, *supra* note 16, at 1597–99.

23. Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 306–08 (1992).

24. Rose, *supra* note 18, at 882–87; Rose, *supra* note 6, at 98–102; Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1131–33 (1996) (book review); see also Vicki Been, “Exit” as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473 (1991); cf. Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831, 833–34 (1992) (criticizing Vicki Been’s thesis). For a recent discussion of the exit constraint, see Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 767–68 (2007) (describing exit as a brake on local land use exactions).

However much Madisonian logrolling might establish what one might call “legislative due process” in large-scale governments, smaller-scale governments have a legislative due process of their own, deriving from other sources. For example, one can talk directly to local decisionmakers, show up at the meetings, and in the worst-case scenarios, take one’s marbles and leave for a more accommodating town, in the standard model explicated in Charles Tiebout’s theory of local governmental competition.²⁵ This is not to say that exit and voice are perfect protections against local unfairness, but only that at the local level, exit and voice circumscribe local governmental unfairness more often than critics acknowledge. Nor is it to say that small-scale legislatures have no weaknesses. They do, sometimes including chumminess and lack of technical capacity. But large-scale legislatures have their problems too, not the least of which is their tendency to enact rigid or hypertechnical rules. In short, the strengths and weaknesses of these different kinds of legislatures simply fall along different dimensions, and require different kinds of monitoring, in takings jurisprudence as elsewhere.

I have obviously not been persuasive enough, however, because the strikingly promodernist critique of local government has proved itself a persistent weed. A notable example in the more recent past comes in William Fischel’s *Regulatory Takings*,²⁶ in which the Madisonian critique forms the foundation for the author’s argument: Takings jurisprudence should come down particularly hard on local governments, because these cozy little *Gemeinschafts* need discipline in a way that the big modernist *Gesellschaft* government does not.²⁷

Fischel’s concern was nominally not with fairness, however, but rather with the other big branch of modern takings theory: efficiency. But then, as Frank Michelman’s famous Harvard article²⁸ pointed out, fairness and efficiency can overlap, and so I turn now to efficiency.

25. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418–20 (1956).

26. WILLIAM A. FISCHEL, *REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS* (1995). William Fischel’s discussion of the Madisonian thesis first appeared in William A. Fischel & Perry Shapiro, *A Constitutional Choice Model of Compensation for Takings*, 9 INT’L REV. L. & ECON. 115, 112–23 (1989).

27. FISCHEL, *supra* note 26, at 105–07.

28. Michelman, *supra* note 19.

II. FROM FAIRNESS TO EFFICIENCY: A PARENTHESIS ON THE MICHELMAN THESIS

Frank Michelman's much-cited 1967 article on takings jurisprudence developed an efficiency thesis based on Jeremy Bentham's comments about property, and on what one might call Bentham's economic psychology of ownership.²⁹ According to Bentham, property is no more than an expectation of security, but that expectation generates the willingness to work hard and invest. The cumulative hard work and investment of many persons in turn enriches a society as a whole. For that reason, when a government violates an owner's expectations and takes away property, the owner suffers a number of losses, but so does the society. The owner suffers the specific loss of the property, of course, but she suffers more, too: She can also get discouraged about making future efforts. What is more, the owner's neighbors see what has happened to the particular owner, and they in turn come to feel insecure, and they too curtail their efforts accordingly. The result is what Bentham called the "deadening of industry,"³⁰ and the real loser is the whole society.

Michelman borrowed the Benthamite analysis to point out that property takings entail losses beyond those of the mere property itself, and he dubbed those additional losses "demoralization costs."³¹ Then, in a much-cited tour de force, Michelman created a "felicific calculus" of his own, where he concluded that for efficiency purposes, property takings jurisprudence should take demoralization costs into account, and more specifically, that owners should be compensated when demoralization costs exceed "settlement costs" (settlement costs being the expenditures that would be necessary to overcome demoralization costs).³²

III. FURTHER DEVELOPMENT OF THE MICHELMAN ANALYSIS: INSURANCE AND INTERNALIZATION

One might wonder about several points in the Michelman analysis. One question relates to owners: If owners might suffer so much from takings of their property, why don't they get insurance? A second question relates to governments: Given the long-term prospect of the "deadening

29. *Id.* at 1211–15; JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 109–14 (C.K. Ogden ed., Harcourt, Brace & Co. 1931) (1789).

30. BENTHAM, *supra* note 29, at 116.

31. Michelman, *supra* note 19, at 1214.

32. *Id.* at 1214–18.

of industry” that results from demoralization costs, why do governments themselves not tote up the costs of property takings, especially demoralization costs?

The first question, about insurance, came up in quite a lot of takings theory in the 1980s, beginning with Lawrence Blume and Daniel Rubinfeld’s assertion that the takings jurisprudence itself is the insurance: Takings compensation acts as a kind of surrogate insurance in an area in which insurance markets do not work well.³³ Their thesis in turn generated more academic back and forth about whether or not insurance would encourage landowners to make overly risky investments.³⁴

In still another turn, the insurance analysis led to the second question, the one about governmental motivations. If owners need insurance against legislative takings, then legislatures must not be taking owners’ costs into account. But why not? The answer is, because legislatures do not internalize off-budget costs—not the elementary property-value losses that they should be weighing against the benefits of the regulation itself (because owners’ losses are not in the governmental budget), and not those future demoralization costs (because the legislatures that cause property takings do not last long enough to take the long-term harms into account). This set of inefficiencies leads to the next subject among takings theorists: how to get governments to internalize externalities—a subject that once again leads back to federalism questions about legislative competence, albeit through the back door.

IV. EFFICIENCY REDUX: FORCING GOVERNMENTS TO INTERNALIZE EXTERNALITIES

In some newer versions of efficiency analyses, scholars have called for takings compensation as a way of requiring governments to take into account the costs and benefits of their property-related decisions, thus avoiding the “fiscal illusion” that comes when regulators are not confronted directly with the costs of regulation.³⁵ According to this line of thinking, as

33. Lawrence Blume & Daniel L. Rubinfeld, *Compensation for Takings: An Economic Analysis*, 72 CAL. L. REV. 569, 571–73 (1984). One reason is that governments control regulatory decisions, creating a moral hazard problem. *Id.* at 593.

34. See Farber, *supra* note 23, at 283–88 (summarizing the insurance thesis and scholarly critiques).

35. Blume & Rubinfeld, *supra* note 33, at 620–22 (using the term “fiscal illusion” to describe the situation in which regulators underweigh off-budget costs to others); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 420 (1977) (describing the compensation requirement as leading to the weighing of costs and

long as governments can make regulatory decisions that only affect other people's property values, without an ostensible impact on the government's budget, regulators are effectively spending other people's money. And that means that they are likely to overestimate benefits, while they quite insouciantly disregard regulatory costs. Moreover, they do not care about future costs, including demoralization costs, because by the time those come around to bite community productivity, the relevant political decisionmakers will be out of office.

This looks like an argument that applies to legislatures at all levels, but it does not take long to see that there is an important federalism issue lurking here. Indeed, federalism issues have moved into the foreground again, particularly in response to some of the criticisms generated by these newer efficiency theories themselves. As some critics have noted, takings compensation will hardly internalize externalities unless it actually does catch the attention of the regulatory decisionmakers and induce them to act more efficiently.³⁶ But do compensation cases have this effect on decisionmakers? No, at least not at the federal level.³⁷ Federal agencies are huge and complex, and bureaucratic decisionmakers may translate compensation requirements in ways that have little relationship to efficiency.³⁸ If compensation has quieted political opposition to, say, a boondoggle canal, then federal agencies might spend even more on the ill-conceived project. Legislators are even further removed from compensation costs, given their ability to allocate and spread costs in such a way as to defuse any significant constituent backlash.³⁹ But local governments are different, or so it is said. Fischel again is a central player here. In his 2001 book *Homevoter Hypothesis* (which he says he wrote in response to my criticism that his earlier book, *Regulatory Takings*, consisted of a familiar

benefits); see also Farber, *supra* note 23, at 287–94 (summarizing the fiscal illusion argument for compensation); Serkin, *supra* note 6, at 1634–37 (same); cf. Blume & Rubinfeld, *supra* note 33, at 622–23 (partially rejecting the fiscal illusion argument for takings compensation). The phrase “fiscal illusion” appears to come originally from public choice theory about taxation. See JAMES M. BUCHANAN, PUBLIC FINANCE IN DEMOCRATIC PROCESS 126–43 (1967) (using this phrase).

36. For a chief criticism of the cost-internalization thesis on takings compensation, see Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 375–77 (2000) (arguing that compensation may have noninternalizing effects on legislatures). See also Vicki Been, *Lucas v. The Green Machine: Using the Takings Clause to Promote More Efficient Regulation?*, in PROPERTY STORIES 221, 248–57 (Gerald Korngold & Andrew P. Morris eds., 2004) (sharply criticizing the cost-internalization thesis).

37. Serkin, *supra* note 6, at 1661–65.

38. Levinson, *supra* note 36, at 380–84.

39. *Id.* at 375–77; Serkin, *supra* note 6, at 1661–65.

form of “localism bashing”⁴⁰), he points out that he actually likes local government. Not the least of his reasons is that, as he argues, the bulk of local governments can indeed respond efficiently to issues pitting regulation against property. Why? Because these governments are dominated by “homevoters”—homeowners who take a very strong interest in property and tax matters at the local level. These homevoters directly feel the impact of local taxes that would be required for compensating property takings.

A recent article by Christopher Serkin has elaborated extensively on the federalism implications of Fischel’s homevoter thesis. Serkin agrees with Fischel that local governments, the vast majority of which are small enough to be ruled by sharp-eyed homevoters, are particularly good candidates for compensation requirements.⁴¹ Why? Precisely because local governments, unlike the big federal government, respond to the homevoters, who both get the benefits of regulation and pay the taxes that pay for compensation. Hence local legislatures will internalize externalities, at least for the most part. But the other side of the coin is that the big fat U.S. Congress will not, because it is so large that, as the standard public choice analysis tells us, compensation payoffs to particular interests get spread around diffuse interest groups without anyone noticing very much.⁴² And federal bureaucracies will not internalize externalities either; their decisions are even further removed from taxpayer preferences.⁴³

Lee Fennell’s fine book review of Fischel’s *Homevoter Hypothesis* has pointed out that the participants in local governments are not actually so uniform as Fischel’s homevoter analysis suggests, and that as a result, homevoter decisions can have some serious distributional consequences. Tenants, for example, do not necessarily share the interests of homevoters.⁴⁴ And one might add, homevoters whose homes are on opposite sides of the railroad tracks might not share interests either.⁴⁵ No doubt more will come of all this in the future.

40. WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS*, at x (2001) (citing the “localism bashing” criticism); Rose, *supra* note 24, at 131 (using the phrase “localism bashing”).

41. Serkin, *supra* note 6, at 1644–47, 1659.

42. The locus classicus for this argument is JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962) (arguing that large-scale democratic decisionmaking diffuses the costs of logrolling groups’ benefits).

43. Serkin, *supra* note 6, 1637–39, 1661–64 (describing the perverse public choice consequences of compensation requirements in multiple-minority or “minoritarian” governments like the U.S. Congress, greater appropriateness of compensation requirements for local governments).

44. Lee Anne Fennell, *Homes Rule*, 112 *YALE L.J.* 617, 628–30 (2002) (book review).

45. See, e.g., *Hawkins v. Town of Shaw*, 437 F.2d 1286, 1292–93 (5th Cir. 1971) (requiring the extension of paved streets and sewers to the minority areas of town).

For now, this rather remarkable set of theories means that the focus of takings jurisprudence should be local land use decisions, whether you hate local government (because its self-serving, permanent dominating factions will otherwise unfairly disregard minority interests), or love it (because it responds to constituents who efficiently weigh regulatory compensation costs against regulatory benefits). By contrast to local governments, on the first, fairness-oriented theory, the federal government, with its big logrolling legislature, does not need compensation to police property takings; everything evens out in the vote trades that assure every interest a share in the goodies. And on the second, efficiency-oriented theory, that kind of policing would be pointless at the federal level anyway, because the federal government's big legislature and big bureaucracy would not pay any attention to compensation requirements.

V. THE COURTS' RESPONSE—NOT!

As I mentioned earlier, I am not a fan of these theories that would place local governmental actions squarely in the bull's-eye of takings jurisprudence, because I think it is inaccurate to suppose that local governments lack alternative fairness and efficiency constraints. Nevertheless, these theories do raise the very important issues of the ways that different kinds of legislatures behave, and the different ways they may respond to judicial supervision.

It would not be difficult for courts in takings cases to pay attention to differences in legislative characteristics at different levels of government. All that would be required doctrinally would be a pursuit of the differences between Fifth Amendment takings (applying the takings clause directly to the federal government) and Fourteenth Amendment takings (applying takings analysis to states and localities through the Due Process Clause of the Fourteenth Amendment⁴⁶). Undoubtedly, some fiddles would have to be made to account for the state legislatures, which seem rather closer in size and character to Congress than to the Hicksville Town Council, but the Fifth Amendment–Fourteenth Amendment divide seems to be an easy and very conventional starting point for the discussion.

How then have the courts reacted to these important federalism questions of legislative competence in their takings jurisprudence, particularly

46. *Chi., B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 235–42 (1897) (first assertion that a state or a local taking of property without compensation violated the Fourteenth Amendment's Due Process Clause).

in view of the relatively easy doctrinal entry point? They haven't. Oh, yes, in local government law, some state courts have pursued Madisonian doubts by effectively denying that local legislatures really are legislatures for some purposes, especially when they make small-scale land use decisions. These decisions then require local legislatures to jump through some extra decisionmaking hoops based on judicial process.⁴⁷ These requirements, in my view, fit only very awkwardly with the actual processes of fair local decisionmaking.⁴⁸ But in takings cases, the courts have not even bothered to give these federalism concerns the back of their hand.

Consider the defendants in the major takings cases that the Supreme Court has deemed worthy of consideration since the 1970s, when the Court started to take a serious interest in the subject after a fifty-year pause. *Penn Central Transportation Co. v. City of New York*⁴⁹ and *Loretto v. Teleprompter Manhattan CATV Corp.*⁵⁰ took up two different municipal regulations from New York City, upholding the first and overturning the second; *Nollan v. California Coastal Commission*⁵¹ held against a state body, the California Coastal Commission, and *Lucas v. South Carolina Coastal Council*⁵² against the equivalent council in South Carolina;⁵³ *Palazollo v. Rhode Island*⁵⁴ gave a mixed result to the state coastal board of Rhode Island; *Hodel v. Irving*⁵⁵ invalidated a federal statute concerning Indian lands as a taking of property; *Eastern Enterprises v. Apfel*⁵⁶ overturned another federal statute (though not entirely on takings grounds) that attempted to require firms to contribute retrospectively to an employee health fund; and *Yee v. City of Escondido*⁵⁷

47. See, e.g., *Fasano v. Bd. of County Comm'rs*, 507 P.2d 23, 26 (Or. 1973) (early and leading case treating small-scale land use decisions as "quasi-judicial" rather than legislative).

48. Rose, *supra* note 18, at 867–82 (critical appraisal of quasi-judicialization); Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1162–64 (1984) (noting some of the difficulties of applying quasi-judicial category).

49. 438 U.S. 104 (1978).

50. 458 U.S. 419 (1982).

51. 483 U.S. 825 (1987).

52. 505 U.S. 1003 (1992).

53. Justice White momentarily mistook South Carolina for California. See Richard J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 STAN. L. REV. 1411, 1417–18 (1993) (recounting the incident).

54. 533 U.S. 606 (2001).

55. 481 U.S. 704 (1987). The property in question was a set of fractional shares of individual Indian land allotments, which Congress hoped to consolidate and turn over to the reservations.

56. 524 U.S. 498 (1998). Justice Kennedy concurred with four other Justices in overturning the statute, but he did not agree that a taking was involved because he did not think that the firm had a property interest at stake. *Id.* at 539–47 (Kennedy, J., concurring). For a discussion of the case, see Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 900–07 (2000).

57. 503 U.S. 519 (1992).

and *Dolan v. City of Tigard*⁵⁸ respectively upheld and upended regulations from Escondido, California, and Tigard, Oregon, both suburban communities.

Of the governmental entities in these cases, only Escondido and Tigard were possibly homevoter communities, or conceivably the kinds of towns that might be dominated by permanent factions, though that too is somewhat doubtful. Did the Court make anything of the possible differences between federal, state, and local decisionmaking? Not really; all these opinions cited one another and included string cites of cases about legislatures at all different levels, without acknowledging the potential differences in legislative decisionmaking. Meanwhile, over in another federal courthouse, the Court of Federal Claims and the Federal Circuit have been busily applying the Supreme Court's takings categories to the federal government's wetlands and endangered species measures, as well as to a number of other federal entitlement and regulatory measures (such as housing subsidy programs and patents). Although the Court of Federal Claims and the Federal Circuit deny quite a number of claims for compensation, they occasionally apply the Supreme Court's ordinary takings criteria to these federal defendants, if anything more stringently than the Supreme Court does to state and local defendants.⁵⁹ But the Federal Circuit also string cites Fifth Amendment and Fourteenth Amendment cases without distinction, as if in takings cases, all kinds of legislatures were the same.⁶⁰

If at least some modern takings theories implicate federalism in the sense of legislative competence, and if the Supreme Court and other federal courts' actual takings cases ignore these kinds of federalism issues, what does it tell us about the our highest court's takings jurisprudence? Well, one thing is for sure: That jurisprudence is not concerned with modern takings theories, or at least not the legislative competence aspect of those theories.

The next question is, why not? After all, takings jurisprudence polices the boundaries between security of private property and legislative action,

58. 512 U.S. 374 (1994).

59. See, e.g., *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994) (upholding a takings claim for the denial of a wetlands permit on a portion of the original parcel); *Fla. Rock Indus. v. United States*, 18 F.3d 1560, 1568–69 (Fed. Cir. 1994) (holding that a partial diminution in value may be a taking). For a critical discussion of both cases, see Michael C. Blumm, *The End of Environmental Law? Libertarian Property, Natural Law, and the Just Compensation Clause in the Federal Circuit*, 25 ENVTL. L. 171 (1995). Michael Blumm also notes the conventional theoretical anomaly of holding federal legislation to a higher standard than state and local legislation. *Id.* at 173; see also David F. Coursen, *The Takings Jurisprudence of the Court of Federal Claims and the Federal Circuit*, 29 ENVTL. L. 821, 828–31 (1999) (noting government success in the great majority of claims even after *Lucas*, but with some controversial exceptions).

60. See, e.g., *Loveladies Harbor*, 28 F.3d at 1175–79; *Fla. Rock*, 18 F.3d at 1570–72.

and one would think that adjudicators would be interested in the characteristics of the legislative bodies in question. There are several possible answers, but one is this: It is just too damned much trouble to sort out takings issues by governmental levels. There is probably something to this answer. Christopher Serkin's extensive and thought-provoking recent foray into intergovernmental takings distinctions gives an idea of the complications.⁶¹ Roughly pursuing William Fischel's homevoter thesis, Serkin's approach would charge homevoter local governments with compensation for property takings in order to induce these governments to internalize externalities.⁶² But his plan would also entail some adjustments to counteract homevoters' risk aversion (because of their big investments in their houses), as well as intergovernmental externalities (because other town boundaries are likely to be close by).⁶³ One can easily imagine that courts might react adversely to all that tinkering. It is just too fancy.

But a more plausible answer is that the Court's takings jurisprudence is not based on any particular theory of the ways that legislatures might act unfairly or inefficiently. Instead, that jurisprudence is reacting to a rising distrust of governmental initiatives, no matter what the level of government or type of legislative body from which they emerge.⁶⁴ Legal scholarship has played some role in this development. Probably the single most influential academic work in the takings literature in the last generation is Richard Epstein's 1985 book *Takings*,⁶⁵ which has been an enormous source of encouragement to antigovernmental litigators and think tanks. This book mixed together a version of constitutional originalism with efficiency considerations and libertarian proclivities, and because of its somewhat undigested polymorphism, it took a beating in the legal academic reviews.⁶⁶ But it nevertheless has had a huge following, because it has

61. Serkin, *supra* note 6, at 1680–97. Serkin explores local land use procedures further in Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. (forthcoming 2007), available at <http://ssrn.com/abstract=949390> (elaborating on mechanisms to allow localities to precommit to varying levels of property protection).

62. See Serkin, *supra* note 6, at 1680–97.

63. *Id.*

64. For a similar conclusion with respect to the recent wave of legislative restraints on the use of eminent domain, see Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Sweet Home v. Babbitt, and Other Tales From the Supreme Court* 51, 60 (U. of Houston L. Ctr., Working Paper No. 2006-W-02, 2006), available at <http://ssrn.com/abstract=895008> (describing restraints as an example of the “Constitution in Exile” movement, or, more specifically, “minimalism”).

65. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

66. See, e.g., Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21 (1986) (book review) (sharply criticizing Epstein's book); Mark Kelman, *Taking Takings Seriously: An*

something for everyone who dislikes governmental regulation. One of the most thoughtful and sympathetic academic reviews at the time was Thomas Merrill's, which pointed out that the underlying thread holding Epstein's book together is disdain for the political branches of government, as opposed to the judiciary; Epstein thinks the former are particularly vulnerable to "rent seeking," the angling of small groups to get control of the property that justly belongs to others.⁶⁷

That same disdain for political decisionmaking runs through many recent proposals for takings compensation. It is quite in keeping with this strand of thinking that the author of the first major regulatory takings case, *Pennsylvania Coal Co. v. Mahon*,⁶⁸ was Oliver Wendell Holmes, a man who deferred to legislatures but with notorious contempt.⁶⁹ In more recent years, the Reagan Administration's Executive Order 12630⁷⁰ pounced on several then-recent Supreme Court takings cases and required federal agencies to analyze proposed regulations for their takings implications. But given that takings analyses since *Mahon* have had an ad hoc character, and given that the Supreme Court itself has said takings issues necessitate case-by-case analyses,⁷¹ and given, finally, that federal regulations reach such a wide range of properties, Executive Order 12630 gave agencies an impossible task. It is hard enough to figure out what a taking is after the fact, on a case-by-case basis. Before the fact, with a large but amorphous set of potentially affected properties, assessment is well-nigh impossible. Hence one could characterize the Executive Order as a measure to harass and impede regulation, rather than one that protects individuals' property or induces a weighing of costs and benefits.

Similarly, Howard Rich, the wealthy eminence grise behind several state-level takings initiatives, has stated flatly that his goal is to impede governmental regulation.⁷² If recent history is a guide, those initiatives may indeed succeed in stymying regulation. In Oregon, voters a few years ago

Essay for Centrists, 74 CAL. L. REV. 1829 (1986) (book review) (same); Joseph L. Sax, *Takings*, 53 U. CHI. L. REV. 279 (1986) (book review) (same).

67. Thomas W. Merrill, *Rent Seeking and the Compensation Principle*, 80 NW. U. L. REV. 1561, 1586-90 (1986) (book review).

68. *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922).

69. See ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 62-63 (2000) (arguing that Holmes deferred to legislatures out of social Darwinism and cynicism).

70. Exec. Order No. 12,630, 3 C.F.R. 554 (1989).

71. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-24 (1978).

72. Christopher Cooper, *How Mr. Rich Spreads the Republican Word*, WALL ST. J., Nov. 7, 2006, at A4.

passed Measure 37,⁷³ which required either compensation or repeal when new regulations simply diminish property values. Since then, however, property owners' challenges have virtually all led to repeal rather than compensation. Indeed, in one of the very few compensation proffers under Measure 37, the landowners have attempted to reject compensation; they did not want the regulation at all.⁷⁴ A backlash may be on the way, however, because many property owners do want regulation. They want it because regulation generally *protects* property, a point that, for the most part, is conveniently ignored by property rights proponents.⁷⁵ Citing a particularly notable instance in which some Oregon landowners claimed the right to start a quarry next to other people's property, some citizens in other states cite Oregon's experience as a warning, and apparently even Oregonians themselves would reject the measure if it were to arise today.⁷⁶

Visceral dislike of legislative actions may drive takings proposals and many takings cases, but there is at least one countervailing deterrent on courts generally, and on the Supreme Court in particular. One reason not to extend takings jurisprudence too far is that the regulatory takings doctrine is at bottom an unfathomable well of antilegislativism, at all levels. Every regulation has some winners and some losers, and to allow takings challenges to all of them in effect would turn the Takings Clause into an avenue for general taxpayer suits against governments, including the federal government. I keep a file that I call "weird takings claims," and the materials in that file suggest how ready lawyers are to let takings claims spill out from land-based matters, their historical locus, into every kind of regulation that governments pass—nowhere more so than in the courts dealing with federal claims.⁷⁷ And even sticking to the garden-variety takings claims about local land regulations, municipal officials have the

73. State Measure No. 37 (codified at OR. REV. STAT. § 197.352 (2005)).

74. Matthew Preusch, *Prineville Offers Measure 37 Pay*, PORTLAND OREGONIAN, Oct. 26, 2006, at A1 (describing only one payment offer to date, which was rejected by the owners).

75. See, e.g., Debate, *Taking "Takings Rights" Seriously: A Debate on Property Rights Legislation Before the 104th Congress*, 9 ADMIN. L.J. AM. U. 253, 259 (1995) (statement of Kenneth B. Mehlman) (calling for compensation for wetlands regulation); cf. *id.* at 263–64 (statement of Joseph L. Sax) (arguing that concern for community needs is inherent in property rights).

76. Editorial, *Oregon's Sad Tale a Warning for Voters*, SAN JOSE MERCURY NEWS, Nov. 3, 2006, at 18A.

77. See, e.g., *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206 (Fed. Cir. 2005) (rejecting the claim that FAA regulations preventing the use of a heliport pad after 9/11 was a taking); *Adams v. United States*, 391 F.3d 1212 (Fed. Cir. 2004) (rejecting the claim that pay at an allegedly erroneous overtime rate was a taking); *Am. Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1366 (Fed. Cir. 2004) (rejecting the claim that the revocation of permits to fish for herring and mackerel in the U.S. Exclusive Economic Zone was a taking).

perfect revenge for a know-it-all Supreme Court: They will let the Court turn itself into a Universal Board of Zoning Appeals. The Supreme Court has recoiled from this prospect, using the device of referring claims to state remedies,⁷⁸ and avoiding general cost-benefit review of regulations.⁷⁹ Disdain for legislative bodies has its limits too. If you show too much disdain, you will wind up doing their job, and so far, the Supreme Court does not want to become a Universal Board of Zoning Appeals.

Is there a way that courts might structure takings decisions to account more fully for intergovernmental differences, as well as for issues of owner security, in different legislative contexts? Possibly. As I mentioned earlier, one doctrinal route is available through a distinction between the Fifth and Fourteenth Amendments, though it would engage the courts in substantive due process considerations, and some members of the Supreme Court do not want to get into this.⁸⁰ One does not need to give in to localism bashing to acknowledge that local governments are very likely to deal with property issues differently from the way that the federal government does, in much the same way that local cops deal with issues differently from the FBI, or the local school board regulations differ from the No Child Left Behind Act.

With federal regulation, the most serious fairness and efficiency issues are likely to stem from the cookie-cutter problem, the one-size-fits-all inflexibility about local circumstances that lead not only to outrage but also

78. See, e.g., *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (declining to consider the case on ripeness grounds); see also Stewart E. Sterk, *The Demise of Federal Takings Litigation*, 48 WM. & MARY L. REV. 251, 253-54 (2006) (arguing that a recent U.S. Supreme Court case combines ripeness and preclusion in such a way as to delegate takings cases to state courts).

79. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 532 (2005) (declining to consider an action a taking on the ground that it did not substantially advance a state purpose); see J. Peter Byrne, *Due Process Land Use Claims After Lingle*, 34 ECOL. L.Q. (forthcoming 2007), available at <http://ssrn.com/abstract=976404> (arguing that *Lingle* shows federal courts' distaste for open-ended due process review of land use regulations, but that state courts are better equipped to scrutinize these regulations for due process and are likely to continue to do so).

80. See Merrill, *supra* note 56, at 987 (noting Justice Scalia's rejection of substantive due process in any form); *id.* at 983-85 (discussing some potential differences between takings and due process analysis of property-related issues, though not linking them to differences between federal, state, and local regulation). Until its approach was rejected by the Supreme Court, the New York Court of Appeals treated regulatory impacts on property as issues of due process, except when the regulation actually took title or physical control of an owner's property. See *Fred French Investing Co. v. City of New York*, 350 N.E.2d 381, 384-86 (N.Y. 1976) (distinguishing a regulation taking title or transferring control to the government from an unreasonable use of police power); *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1274 (N.Y. 1977) (same); cf. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 122, n.25 (1978) (affirming the New York Court of Appeals decision but stating that property may be taken by acts other than transfer of control).

to evasion. But this kind of problem may be alleviated by opportunities for tradeoffs elsewhere in a whole array of Congressional legislation, or by a more hands-on administration of the legislation in question. These are issues that courts could ask about with respect to takings challenges to federal property-related legislation. On this approach, for example, one might well understand why the Court in *Hodel v. Irving*⁸¹ found that congressional legislation took property when it attempted to consolidate fractionated Indian allotments; however unwieldy the fractionated holdings, removing them without compensation looked high-handed and inattentive to highly personal and emotional stakes of relatively uninfluential people.⁸² On the other hand, with respect to the land-related wetlands and endangered species takings challenges that are bound to emerge on the Court's docket one of these days, one would want to know whether the legislation was implemented in a one-size-fits-all manner, or whether individual landowners had opportunities to come to reasonable accommodations, perhaps through wetlands trades or habitat protection plans.⁸³

When the regulatory body is local, however, one might want to ask about the more local version of what one might dub "legislative due process"—not the Madisonian tradeoffs but rather the possibilities for voice and exit that are more salient locally. One would want to know whether the property owner has a voice, in the sense that she gets or could get the ear of the local governing body. Alternatively, one would want to know whether she has been effectively shut out, as some minority groups have been in the past, and as nonresident owners might still be, when local governments try especially hard to protect insiders' property values and tax bills. One would also want to know whether the complaining landowner had an opportunity for exit or for what one might call "anticipatory exit," by staying out of a known local regulatory climate and by making some other Tieboutian choice that would bring home to the local legislature itself the costs of oppressive legislation.

One should also take into account that in the local context, the federal judiciary is not the only safeguard against arbitrariness. Stewart Sterk has stressed the importance of state court review on state and local measures,

81. 481 U.S. 704 (1987).

82. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition From Marx to Markets*, 111 HARV. L. REV. 621 (1998) (exploring the theme of property made unusable by the fractionation of interests).

83. These mitigation efforts may of course raise other issues. See James Salzman & J.B. Ruhl, *Currencies and the Commodification of Environmental Law*, 53 STAN. L. REV. 607, 611–12 (2000) (noting questions about the fungibility of habitat and wetlands trades).

but there are other constraints as well.⁸⁴ State planning legislation makes many demands on local governments to rationalize their procedures and to take their share of unwanted uses, and it may also require them to explain what they are doing in various ways.⁸⁵ State requirements for impact review, for example, may create a lot of opportunities for venting, delay, and excessive verbiage. But those state demands do require local regulators to explain their actions, and if one is concerned about clubbiness in local government, the demand for an explanation can be half the battle.⁸⁶

CONCLUSION

Federal takings supervision of local and state governments began as a due process matter. But as many modern takings theorists have noted, federal and local legislative processes differ. The usual modernist approach among legal academics is to deride local governments, because they do not replicate the federal legislative process. In my view, that is a mistake; local legislatures have a kind of legislative due process of their own, though it is not the same as the large legislature's horse-trade among interest groups. But as contemporary takings theorists regularly note, the property owner is not the only entity at stake. Governments are on the other side of the equation, and different levels of government are apt to have their own characteristic strengths, as well as their characteristic weaknesses. Those too are a part of the inquiry into a jurisprudence that should assure fairness, provide for the satisfaction of normal though regularly changing expectations about governmental action, and permit governments to do the work that citizens expect them to do. Do we see those federalism concerns in contemporary takings decisions? No, and that fact tells us that the courts are not paying much attention to competence-based takings theory. But if judicial takings decisions ever do develop a coherent theory, those issues should come to the fore. That is because a genuine takings theory is also a theory of governance, something sorely lacking in our current takings jurisprudence.

84. Sterk, *supra* note 9, at 261–70; *see also* Byrne, *supra* note 79 (noting state courts' due process review of land regulations).

85. *See, e.g.*, ARIZ. REV. STAT. § 9-461.05 (West 1996) (describing the required elements in municipal plans, including land use, water use, circulation, public services, conservation, and housing).

86. *See, e.g.*, New York Environmental Quality Review Act, N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0117 (McKinney 2005); *see also* Fenster, *supra* note 24, at 759–64 (describing further state legislative and judicial constraints on local land use exactions).
