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Op-Ed: Defending Local Control of Land Use

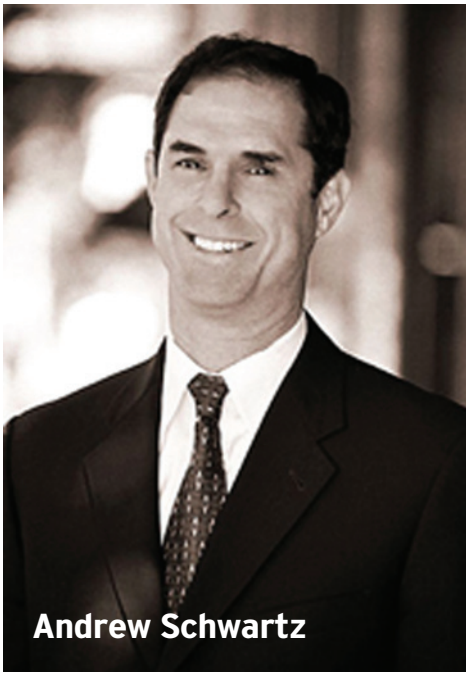
By Andrew Schwartz

Odds are that President Trump's Executive Order calling for "review" of President Obama's Clean Power Plan and designation of national monuments are just the start of his administration's efforts to eviscerate federal regulations that protect the environment. The potential dismantling of federal environmental protections presents an opportunity for states and local governments to back-fill holes in federal regulation. Legal precedent is on their side.

Aided by a pro-oil, -gas, and -coal Congress, the administration has made no secret of its intent to roll back and defund long-standing federal regulations such as the Clean Water and Clean Air Acts. Trump's appointments of Scott Pruitt to head the Environmental Protection Agency and Ryan Zinke as Secretary of the Interior underscore the point.

Undertaking more robust environmental stewardship at the state and local level will not be without challenges. In addition to obvious political hurdles, state and local legislatures and agencies will likely face new legal attacks on their authority to adopt tougher environmental regulations. Such challenges will likely fall under the federal preemption and dormant Commerce Clause doctrines, which are routinely asserted by proponents of a "New Federalism" to counter state regulations targeting polluters. The regulatory takings doctrine could also pose an obstacle to more robust state and local environmental regulation.

A regulatory taking is a judicial interpretation of the Just Compensation Clause of the Fifth Amendment. The Clause allows government to "take" private property for a public use, as long as the government pays compensation to the owner.


Andrew Schwartz

At the time the Clause was added to the Constitution in 1789, it was understood to apply only to eminent domain. In 1922, in *Pennsylvania Coal v. Mahon*,

the Supreme Court interpreted the Clause to require regulatory agencies to pay compensation where regulation has the same effect as an eminent domain taking. The doctrine rests on the logic that if the economic impact of a regulation is so extreme that it is the functional equivalent of eminent domain, the government has constructively "taken" the property and should compensate the owner.

Since the 1970s, a conservative Supreme Court has nudged the regulatory takings doctrine away from requiring the extreme economic impact tantamount to eminent domain. The High Court has left the door open to government takings liability for traditional police power regulation that falls well short of total destruction of property value. For example, in 2013 in *Koontz v. St. Johns River Water Management District*, the Supreme Court held that a fee the government allegedly tried to impose on a developer to replace sensitive wetlands to be filled by the project could effect a taking, even if the obligation did not wipe out the property's value.

If a regulation can be deemed a taking regardless of whether it resembles eminent domain, the regulatory takings doctrine loses its tether to constitutional text or original intent, and therefore its legitimacy. Although the majority of takings challenges to government regulation have failed up to this point, the confirmation of Neil Gorsuch to the Supreme Court makes heightened regulatory takings liability for regulation a real possibility. To protect their prerogatives to remedy their own environmental problems, state and local governments should oppose expansion of regulatory takings by fixing courts' attention on the narrow question of whether regulation is so onerous as to be equivalent to eminent domain.

Efforts to federalize local land use regulation could also undermine local government efforts to protect the environment. A conservative majority of the Supreme Court could try to diminish local governments' control over their own land use policies by abolishing a longstanding Supreme Court precedent that requires takings claimants to sue local government in state rather than federal court.

The rule requiring adjudication of takings challenges against local government in state court arises from the 1985 Supreme Court decision in *Williamson County Regional Planning Commission v. Hamilton Bank Of Johnson City*. In *Williamson County*, the Supreme Court required that a takings plaintiff challenging a local government land use decision first attempt to recover compensation in state court under the state constitution's counterpart to the federal Just Compensation Clause. Only after state court remedies were exhausted could plaintiffs sue in federal court.

Twenty years later, in *San Remo Hotel v. City and County of San Francisco*, the Supreme Court ruled that once a claimant litigates its takings claim in state court under *Williamson County*, and loses, it cannot have a second bite at the apple in federal court. The combination of *Williamson County* and *San Remo Hotel* has erected a high barrier for takings claimants suing local government to access the federal courts. That's as it should be.

The state compensation requirement promotes the bedrock constitutional principle of federalism. The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by

it to the States, are reserved to the States respectively, or to the people." Land use planning is a quintessential *local* government responsibility.

Federalism is vital to local land use regulatory agencies because state courts are more familiar with local conditions and values and experienced in interpreting their sovereign law than federal courts. In her dissenting opinion in *Koontz*, Justice Kagan noted that federalizing takings challenges to local land-use laws "deprives state and local governments of the flexibility they need to enhance their communities—to ensure environmentally sound and economically productive development. It places [federal] courts smack in the middle of the most everyday local government activity."

Similarly, the majority in *San Remo Hotel* observed that state courts have more experience than federal courts in resolving the "complex factual, technical, and legal questions related to zoning and land-use regulations." Given these realities, the court where the takings case is heard—state or federal—can greatly affect the survival of local regulation. Of even greater concern is the chilling effect on responsible land use planning if a local regulatory agency has to defend its regulations in a federal court that is often distant from the neighborhoods affected by the regulation.

While the Supreme Court and lower federal courts have endorsed federalism on questions of land use regulation in the past, the conservative majority of the Supreme Court has been anything but consistent on questions of federalism. This inconsistency is also manifest in regulatory takings. Since deciding *Williamson County*, the Supreme Court has expressed discomfort with the *Williamson County* rule. On multiple occasions, the Court has indicated that the state compensation requirement is not mandatory, but is merely a "prudential" hurdle to federal court jurisdiction, without explanation.

In his tenure on the 10th Circuit, Justice Gorsuch had no opportunity to weigh in on states' rights to control local land use. But if he is to remain faithful to the 10th Circuit opinions in which he participated, Justice Gorsuch should come down on the side of federal noninterference with state laws and procedures where they are not preempted by federal laws, as required in the arena of regulatory takings.

The Supreme Court has provided no principled basis for overturning *Williamson County*'s state compensation requirement or watering down the doctrine as "prudential." Local government agencies seeking to do right in the face of a federal retreat from protections of natural resources should do everything they can to defend their right to local control of land use, especially in this era of weakened federal environmental regulations. Our federal system of government guarantees it.

Andrew Schwartz *is a partner in the San Francisco environmental law firm Shute, Mihaly & Weinberger. His practice areas are regulatory takings, eminent domain, real estate transactions, redevelopment, rent control and land use and real estate litigation. He was a member of the firm's winning litigation team in 'San Remo Hotel v. City and County of San Francisco,' in which the U.S. Supreme Court unanimously held that unsuccessful state-court takings claimaints are not entitled to relitigate their claims in federal court.*