SMART CITIES: THE TAKINGS CLAUSE

"The Supreme Court claims that its Takings Clause jurisprudence 'is not . . . quixotic,' that it is not 'illogical,' and that it 'is not standardless.' Commentators (although perhaps not all) disagree, 'call[ing] Takings Clause jurisprudence "famously incoherent" and a "mess,"' a 'muddle' (or 'muddled'), 'confused,' 'incomprehensible,' 'standardless,' and 'unprincipled.'" —Stephen Durden*, Unprincipled Principles: The Takings Clause Exemplar*.

Urban Planning

Hippodamian Plan

The process used to plan and develop cities is called urban planning. It is an interdisciplinary area, and could include anything from social science, architecture, human geography, politics, engineering, and design sciences. It goes back all the way to Greek architect Hippodamus of Miletus in the 400s BCE. Historians refer to him as the Father of Urban Planning. He was the creator of the Hippodamian plan, which is still used sometimes today by urban planners for constructing city layouts. The plan uses rectangular blocks, which represent land of equal area, which are then crossed by parallel lines representing streets in a grid-like pattern. The location of important city structures and landmarks were placed in the center of the grid, while homes were placed on the periphery.

City Beautiful Movement

The goal of the City Beautiful Movement was to use urban planning to create better cities, ones that were safer, easier to traverse, and were more visually appealing. It also focused on making cities more monumental in grandeur. The best example of the movement was the White City built for the 1893 World's Columbian Exposition in Chicago.

Helpful case law

***Euclid v. Ambler Realty Co.*, 272 U.S. 375 (1926).** This case held that zoning laws are a legal method of city planning. The restrictions had a rational relation to the health and safety of the community.

Other helpful sources

Hippodamian Plan, LIVIUS (2019), https://www.livius.org/articles/concept/hippodamian-plan/.

City Beautiful Movement, NYPAP, http://www.nypap.org/preservation-history/city-beautiful-movement/.

WILLIAM H. WILSON, THE CITY BEAUTIFUL MOVEMENT: CREATING THE NORTH AMERICAN LANDSCAPE (1989).

ERIK LARSON, THE DEVIL IN THE WHITE CITY: MURDER, MAGIC, AND MADNESS AT THE FAIR THAT CHANGED AMERICA (2004).

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The Takings Clause

The Fifth Amendment of the Constitution has several different clauses, most of which are about criminal law and procedure. The last part of the Amendment holds the Takings Clause, which basically reads: the government shall not take "private property [ ] for public use, without just compensation." The process of the government taking private property for public use is called "eminent domain."

A "taking" can come in two forms: it may be physical, which means that the government literally takes the private property from its owner, or it may be constructive, which means that the government restricts the owner's rights to do what he wants with the property so much that the governmental action becomes the functional equivalent of a physical seizure.

The word "use" in "public use" can be interpreted in two ways in this context. It could mean "employment" OR "advantage." If we read the phrase as "public employment," it may mean using eminent domain only for projects where the public may use the land acquired, like for a public park. But if we read "use" to mean "public advantage," then that means using eminent domain for any project serving the public good or welfare like taking beachfront property to stop erosion.

Helpful case law

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). The Supreme Court held that, by making Pennsylvania Coal Co's property worthless through the Kohler Act, the state had effectively taken the property. In this way, the Court ruled that the extent of diminution in the value of the property can make a regulatory act constitute a taking.

United States v. Causby, 328 U.S. 256, (1946). This case limits the *ad coelum* doctrine, which is a common law rule that a landowner owns everything below and above the land, up to the sky and below the earth to its core (up to Heaven and down to Hell). "The air is a public highway[.]"

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). This case held that a permanent physical occupation authorized by government is a taking, without regard to the public interests it may serve.

Kelo v. City of New London, 545 U.S. 469 (2005). The Court found that the development plan served a public *purpose* and therefore constituted a "public use" under the Takings Clause of the Fifth Amendment.

Brandt Trust v. United States, 572 U.S. 93 (2014). This case asks: what happens to a railroad's right of way granted under a particular statute—the General Railroad Right-of-Way Act of 1875—when the railroad abandons it? Does it go to the Government, or to the private party who acquired the land underlying the right of way? In an 8-1 decision, the Supreme Court held that the land belongs to the private party.

Other helpful sources

Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ALA. CIVIL RIGHTS & CIVIL LIBERTIES L. REV. 25, 27–28 (2013).

Andrew Parslow, *A Defense of the Regulatory Takings Doctrine: A Historical Analysis of This Conflict Between Property Rights and Public Good and A Prediction for Its Future*, 44 WM & MARY ENVIRONMENTAL L. & POL'Y REV. 799 (2020).

Takings, LEGAL INFO. INST., https://www.law.cornell.edu/wex/takings.