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When "Takings" Happen to Good People: The Fifth Amendment Takings Clause and the Issue of Distributive Justice

Although the "era of big government" may be over, we still live in a world in which people's ability to use their property is directly, and often substantially, limited by government regulation. Some of the more controversial examples arise from environmental statutes. Under the federal Clean Water Act, for example, landowners may be limited in their ability to develop land that consists of a very broadly defined class of "wetlands." Under the federal Endangered Species Act, landowners may be prevented from developing their land in ways that would harm endangered species. In both cases, a select group of landowners is being regulated in order to confer what most would agree are important benefits to the public at large.

This situation raises one of the central concerns of moral philosophy—an issue that has captured the attention of philosophers from Aristotle to "Star Trek"'s Mr. Spock—when do the needs of the many outweigh the needs of the few? In Aristotle's terms, this is the issue of "distributive justice," or the ethical analysis of situations in which it may be appropriate to impose disproportionate burdens on a small group to benefit a larger group.

Although an issue of philosophy to academics, the issue is seen by lawyers as a question of construction of the Fifth Amendment of the United States Constitution. The Fifth Amendment provides, in relevant part, that:

> No person shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

The first clause is the "due process" clause of the Fifth Amendment; the second clause is the "takings" clause. It is this Takings Clause that many view as the primary limitation on the government's ability to restrict the use of private property without providing compensation to the affected landowner.

It is not surprising that the Takings Clause is part of the Fifth Amendment. The Fifth Amendment is one of the Bill of Rights; these

are the first ten amendments to the Constitution that were added to place limits on the government's ability to restrict important individual liberties. Thus, the Takings Clause is seen by many, together with freedom of religion, freedom of speech, and protections from self-incrimination, as a statement of a basic liberty. Indeed, the Takings Clause can be seen as being of particular significance as the only part of the Bill of Rights that explicitly deals with the government's ability to affect citizens' use of their property.

Despite the potential political and ethical importance of the

of Rights that involved substantial government regulation of land use without compensation.

In short, there is no contemporaneous evidence that the people who drafted or adopted the Takings Clause cast the provision as a central protection of government regulation of private property. This, of course, does not mean that the Takings Clause cannot fill that role; it does, however, raise real questions as to whether the "original intent" of its drafters supports that view.

B. Holmes,

extraordinary assertion of a court's authority to invalidate otherwise validly adopted government regulation based on the court's view of whether the regulation goes "too far." Few opinions of the Supreme Court have resulted in so great a usurpation of authority by the judiciary with so little support.

II. Searching for the Current Meaning of the Takings Clause

There may be few contemporaneous clues to the original intent of its drafters, and *Pennsylvania Coal* may rest on an unsupported foundation, but the fact remains that some meaning must be applied to the Takings Clause. Libraries exist and forests have been destroyed to support the mountain of books and articles that commentators have produced in their search for this meaning. Still, the central core and purpose of the Takings Clause remains unsettled. I would like to suggest that there are four major themes that have been advanced to explain and apply the Takings Clause. None are totally satisfactory. One, a view of the Takings Clause as a principle of distributive justice, deserves far greater attention than it has received.

A. The Takings Clause as a Limitation on Physical Appropriation (or its Direct Equivalent) by Government

The primary view of the Takings Clause, at least until *Pennsylvania Coal*, was that it served as a limit on the exercise of the government's historic and inherent eminent domain authority. In other words, the Takings Clause was seen not as a limit on the government's ability to regulate a private party's use of land, but as a limitation on the government's ability actually to obtain ownership of private land without payment of just compensation. This view is supported by most contemporary practices of the states at the time of adoption of the Bill of Rights. Indeed, a view of the Takings Clause as a limitation on the direct exercise of eminent domain authority is the position best supported by historical practice and court precedent.

What this view ignores is the enormous political, economic, emotional, and moral concerns triggered by government regulation of land use. In this narrow view of the Takings Clause, the only significant constitutional constraint on government regulation is the Due Process Clause. For various reasons discussed below, the Due

Process Clause has been interpreted narrowly in the economic and regulatory context and, for most of our history, has not been a significant limitation of government power.

It is almost inconceivable that the Supreme Court would retreat to this view of the Takings Clause (even if it is the best and most logical reading of the language and history of the clause).

B. The Takings Clause as an Expression of Political Liberty in the Political Compact between Citizens and Government

For many, the Takings Clause is an expansive statement of the liberty of individuals to use property as they see fit. Although there is an occasional hint of this view in some statements by the Supreme Court, this view has been most forcefully advanced by some scholars and many politicians. One of the more recent expressions of this view can be found in Professor Richard Epstein's writings, particularly his 1985 book *Takings: Private Property and Eminent Domain*. In that book, Epstein makes the "strong" assertion that the Takings Clause prohibits, except in rather limited circumstances, any government regulation that restricts the value of a person's property and increases the value of others. In Epstein's view, the basis for the political compact that underlies democratic government is a transfer of a certain amount of individual autonomy to the government in order to

extent values incident to property could not be diminished without paying for every such change in the general law."[8] This position has resulted in what is perhaps the Court's most consistent view of the

interests. Second, there is no clear limitation on the range of factors that are relevant to a balancing of public and private interests. Although the Court has produced a list of sorts, nothing restricts the scope of issues that may be relevant in such a balance. Third, as noted, even within a finite list of factors, the Court's approach provides no coherence in deciding how to weigh the balance. Finally, I think it is fair to say that this approach has led to a public distrust of the Court's takings jurisprudence because it seems based on such an ad hoc set of judgments.

D. The Takings Clause as a Principle of Distributive Justice

In the early 1960s, the Supreme Court announced what was a new and distinctive statement of the purpose of the Takings Clause. In the otherwise unremarkable case of *Armstrong v. United States*,[10] Justice Black made the following dogmatic assertion about "the" purpose of the Takings Clause. According to Black:

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[11]

In other cases the Court has stated that a takings analysis involves a determination of whether "justice and fairness" require government compensation when the costs of a public action "remain disproportionately concentrated on a few persons."[12]

Implicit in these ringing statements is the view that the Takings

same source as Justice Holmes in *Pennsylvania Coal*—nothing. Although this view of the Fifth Amendment has been repeated many times by the Court,[13] it is generally supported by a citation to Black's statement in *Armstrong*. Nothing in the history of the adoption of the Takings Clause, of course, directly supports this position, and the Supreme Court has done nothing since *Armstrong* to justify its legitimacy.

Nor has the Court provided any great insights into determining when principles of "justice and fairness" will invalidate a regulation. Indeed, the Court has provided less analysis than it has in explaining the application of its "pragmatic balancing" approach. Apart from references to Black's statement of the Takings Clause, the Supreme Court has never seriously explored the implications of viewing the Takings Clause in terms of distributive justice.

III. Justifying the Takings Clause as a Principle of Distributive Justice

Perhaps the only view of the Takings Clause that finds direct support in its history and the contemporaneous practice of state government is the view that it acts as a limitation on the direct appropriation of title by the government. This view, although coherent, is so narrow as essentially to eliminate a constitutional role in protecting private property interests. Repudiated by the Supreme Court, at least since *Pennsylvania Coal*, this narrow interpretation of the Takings Clause is unlikely to be applied by the Court or accepted by the public.

Left without an adequate grounding in history or text, how can a more expansive view of the Takings Clause be justified? One might think that "strict constructionists" or "originalists" would repudiate the Supreme Court inserting its views of a necessary political limitation and call instead for a constitutional amendment to supplement the Takings Clause. One is reminded of another phrase used by Justice Holmes in *Pennsylvania Coal*:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way . . ."[14]

No one, however, is rushing to adopt such an amendment.[15]

process muster) can still violate the Takings Clause if "in all justice and fairness" it imposes an unfair burden on a limited group of people.

Thus, a view of the Takings Clause as a principle of distributive justice tells a coherent story. It provides a view of the distinct purposes of the Due Process and Takings Clauses and establishes the twin limitations of rationality and fairness as constraints on government power.

IV. Taking Fairness Seriously: Implications of the Takings Clause as a Principle of Distributive Justice

statements universally made by courts, become irrelevant. The first casualty is the phrase, employed by far too many courts, that a taking is *either* a rational exercise of government authority (in the case of the states, a valid exercise of their police power) *or* a taking. As a principle of distributive justice, the Takings Clause only comes into play as a restriction on an otherwise valid regulation. It involves the issue of whether such a regulation unfairly distributes its burden. It is no more rational to say that a regulation is either a valid exercise of government authority or it is a taking, than to say that a regulation is a valid exercise of government authority or it violates the First Amendment. The Bill of Rights acts, in most cases, to place distinct constraints on action that the government is otherwise authorized to take.[17] It seems self-evident that a state regulation, for example, could be within its police power but still violate the federal constitutional takings prohibition. This is far from clear in the manner in which courts have applied this test.

The implication of this "either/or" analysis is that a regulation that fails this test will be found to be a taking. The Fifth Amendment, however, does not prohibit takings; the Constitution requires only that takings result in just compensation. It is a strange approach to say that the government can adopt an irrational regulation beyond the scope of its legitimate authority if it is willing to pay compensation.

Thus, courts should avoid using, in a takings analysis, a consideration of whether a regulation rationally advances legitimate state interests. This is a due process concern. If a regulation fails this test, it is invalid regardless of the issue of distributive justice.

A second (and far more subtle) casualty of a distributive justice approach is a utilitarian assessment of a regulatory action. Utilitarianism at its greatest level of abstraction recognizes the moral appropriateness of an action that maximizes the overall amount of "goodness" in society. In the takings context, there is an indication from the Supreme Court and the academic literature that a regulatory action is to be judged as a "taking" based on whether it increases overall welfare (read wealth). In this view, a regulation is not a taking if the benefit of the regulation exceeds its burden.

The role of distributive justice in utilitarianism is complex, but one line of criticism of utilitarianism is that it ignores issues of

distribution. An action can satisfy some views of utilitarianism (by maximizing the overall quantum of good) but unfairly single out some group to bear the costs of the act. The country, for example, might get tremendous value from preserving wetlands, and the value of this wetlands preservation may far exceed its costs. In a utilitarian view, this may justify regulatory protection, notwithstanding a selective and limited imposition of the costs on some landowners. Utilitarianism in this limited view would ignore the distributive consequences of achieving an otherwise valid goal.

of benefits among affected landowners. Is distributive justice satisfied if my neighbor and I receive reciprocal benefits from a regulation although the regulation imposes a greater burden on me? Is fairness satisfied if the rich and poor alike are equally prohibited from stealing bread and sleeping under bridges? The factor of reciprocity should, for purposes of distributive justice, focus not only on the magnitude and reciprocity of benefit but also on whether affected parties are all treated with some rough equality in terms of both benefits and burdens. Phrased in that way, the concept does reflect a more appropriate concern with distributive justice.

Application of the factor in this way is also of practical utility. It implies that the more widely both the benefits and burdens are distributed, the more likely that a regulation will not be considered a taking. Perhaps the paradigm examples are zoning regulations that subject all property within a given "use" zone to a common restriction. In these cases, each landowner shares in the reciprocal benefits and burdens of the restriction. The availability of variances based on "undue hardship" recognizes that it would be unfair to impose the restriction on a landowner who suffered losses that were different in magnitude from others within the zone.

A focus on reciprocity of benefits and burdens raises still other significant issues. Must the reciprocity be satisfied at one point in time, or can reciprocity be assessed over a longer period? In other words, can a burden today be reciprocally offset by a benefit tomorrow? (Voilà!—the Mr. Wimpy defense to a taking.) This issue is crucial to the application of the factor of reciprocity and the Takings Clause as a whole. To the extent that the government acts rationally and without "undue" influence of special interests, one may assume that over time all members of society are made better off by the aggregate of government regulations. Viewing reciprocity as played out in time (and not just in space, as is the case with the zoning restrictions), most regulations would be presumed to satisfy any test based on reciprocity of benefits and burdens. This expansive view of reciprocity might be seen as potentially eliminating most applications of the Takings Clause. Actually, the issue of reciprocity, rather than eliminating the Takings Clause, may properly focus the takings

assessment on two other factors—the process for selection of the burdened parties and the magnitude of the short-term burden borne by an affected landowner.

2. Magnitude of Loss

One of the more puzzling factors used by the Court in assessing takings is the magnitude of the loss suffered by a landowner. The clear implication of the Court's pragmatic balancing approach is that some substantial level of loss must be accepted, but that too great a loss results in a taking. Thus, at least since the crucial zoning case of *Euclid v. Ambler Realty*,[19] losses of property value of up to 75 percent may not constitute a taking. In contrast, the Court in *Lucas v. South Carolina Coastal Commission*[20] held that a 100 percent loss of value is a "per se" taking. Forgetting, for the moment, the difficulty of drawing the line where a loss of value becomes "too great," the Court has never clearly articulated why some substantial loss does not require compensation while somewhat more loss does.

The answer may lie in terms of distributive justice. If, based on temporal reciprocity of advantage, we view most regulations as resulting in a roughly fair distribution of benefits and burdens over time, significant short-term burdens (although ultimately compensated through general social regulation) may still be viewed as unfair. Thus, in fairness terms, the issue of the magnitude of loss is relevant to determining whether a landowner has suffered a burden that is not only disproportionate over the short term but also of such a magnitude that it is unfair to require a landowner to bear at any time.

But again, the issue is "how much is too much?" I would tentatively suggest that the issue is best viewed as an issue of insurance. Insurance involves the sharing of risk among others to minimize loss, but, in most economic views, insurance is appropriately employed only to avoid catastrophic loss from unusual and unpredictable events. Insurance theory indicates that we should not buy insurance to cover relatively small losses that arise from the regular and expected events; it is economically more rational to bear such losses ourselves. I am reasonably sure that there are nice formulas developed by economists that indicate the economically rational situations in which risks should be spread through insurance.

Supreme Court has never gone this far, some have advocated a view that nuisance, the historic common law approach to regulating "unreasonable" uses of land, serves to define the limits of uncompensated government takings. In this view, the government would be free to regulate nuisance-like behavior, but the Takings Clause would require compensation when the government regulated conduct that does not constitute a common law nuisance.

There are hints of this approach in *Lucas v. South Ca1(onts)3(w (onts l)1((onts n (onts)2(o)1(onts w (onts)4(

5. Expectations

One other factor deserves mention. The Supreme Court has regularly stated that it is relevant for purposes of a takings analysis if a regulation affects reasonable "investment-backed expectations." The controversies over the use of this factor primarily relate to the

It is problematic to rely on political theory and economics when it is unclear how those relate to the core objectives of the Takings Clause.

other words, is it impermissible to interpret the Takings Clause in distributive justice terms *because* it requires judges to become involved in philosophical issues of fairness? There are several not-so-simple responses to this concern. First, it is the Supreme Court itself that has articulated this rationale for the Takings Clause. You can blame it if you do not like this claim of judicial authority. Second, alternative interpretations of the Takings Clause, ranging from "property as liberty" to "pragmatic balancing," involve the courts in applying their value judgments; an express reliance of distributive justice makes this process more open. Finally, other aspects of constitutional interpretation, particularly the development of "substantive due process," involve the courts in extra-textual, and arguably extra-judicial, limits on government power. Thus, the intrusion of judges' values into constitutional interpretation has some pedigree.

A second question is whether, as an institutional matter, it is proper to rely on the philosophical views of a narrow, unelected, and unaccountable group of judges. Because this approach to the Takings Clause largely eliminates any "neutral" anchoring of takings analysis in text or history, a concern that the biases and prejudices of judges will shape takings law is quite real. There is no response to this concern other than to say that "judges happen." Whole movements in legal analysis have been built on concerns with the effects of such institutional bias in the legal structure. Perhaps it would be better to be more, rather than less, explicit about this aspect of the law.

A third, and perhaps the most important, question is whether society would accept takings decisions premised on judicial views of distributive justice? Will I be content to accept restrictions on the use of my property based on assurances by a court that it is fair? Rawls' theory of justice, for example, involves an identification of those social practices and institutions that disinterested observers, operating behind a "veil of ignorance" as to their places in society, would agree are fair. This suggests that an individual could be expected to accept a decision based on the logic of "You would think it was fair if you were as smart as I am." This is perhaps not the most compelling argument for social acceptance of imposition of a regulatory burden.

These concerns with the institutional legitimacy of judicially derived judgments of distributive justice suggest perhaps the most

significant consequence of "takings as fairness." Because courts have limited institutional competence and few neutral criteria to apply in making distributive justice decisions, judges should be extremely chary of substituting their views of fairness for legislative judgments. In other words, the Takings Clause should have limited force, except in the most extreme cases. This is not an abandonment of the principle of distributive justice, but it is a recognition that such judgments are better left to elected and socially responsive legislatures rather than courts.

This is *exactly* the position taken by the Supreme Court in the area

VI. Conclusion

The takings "muddle" arises from the Supreme Court's failure to articulate a consistent and satisfactory statement about the purposes of the Takings Clause. There is a credible and coherent case to be made that the Takings Clause embodies a principle of distributive justice that, together with the Due Process Clause, act to limit both irrational and unfair applications of government authority. Viewed in this way, takings analysis gains a sharper focus on those factors that are relevant to assessing the "fairness" of imposing costs on the few to benefit the many. The logical implication of this view is a takings test, which is no more clear or certain in application than the current muddle; in addition, it expressly requires the courts to engage in

Endnotes

1 Actually, Congress adopted twelve amendments as part of the Bill of Rights; only ten were subsequently ratified by states.
2 260 U.S. 393 (1922).
3 Id.
4 That is, in fact, the basis for Holmes' opinion; he states that "obviously" government regulatory must have some limits.

16 Fairness, at least since Aristotle, has been seen as involving a number of distinct applications. Thus, distributive justice can be seen as analytically distinct from retributive and compensatory justice.

17 In fact, the original drafters of the Constitution, Madison among them, initially opposed adoption of a Bill of Rights because it was viewed as unnecessary. In this view, the inherent limitations on the exercise of power by

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