

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 Takings Clause, it historically has been of limited significance in controlling regulatory limits on the use of private property. Few such government regulations have been held to be "takings," and the Supreme Court has been unable to develop any test that will satisfactorily distinguish between a legitimate exercise of government regulatory power and an illegitimate "taking." The Supreme Court's takings jurisprudence is recognized by all to be (as it is most politely phrased) a "muddle."

Perhaps the most important reason for this "muddle" is the failure of the Court to articulate a coherent conceptual basis for the Takings Clause. The Court's opinions reflect a variety of themes that have been advanced to describe the basis of the Takings Clause. One such theme is that the Takings Clause, in fact, embodies a principle of distributive justice. In other words, the Takings Clause limits the government's ability to impose a regulation that places too great a burden on an individual in order to benefit the public at large.

Although the Supreme Court has itself described the Takings Clause as reflecting a concern for distributive justice, it has never explained the historical or legal basis for this view. If, however, we are to take this view seriously, it is important to be able to articulate a legitimate basis for construing the Takings Clause in terms of distributive justice. Furthermore, the Court has never directly addressed the implications of this view. First, are there principles of distributive justice that can actually provide better guides to decision-making than are currently employed by the Supreme Court? Second, how do we view the "legitimacy" of accepting or rejecting a government regulation based on views of its "fairness?" In other words, can the public be expected to accept (or should they accept) a

government regulatory burden because they are told it is fair? Third, if fairness is the appropriate criterion, should unelected judges be substituting their views of fairness for those of an elected legislature? These are some of the difficult questions that arise from taking the conception of distributive justice seriously.

I. Searching for the Meaning of the Takings Clause: The Historic Vacuum and the Supreme Court's Power Grab

Although, as discussed above, many see the Takings Clause as a central statement of fundamental liberty, the Takings Clause has two dirty little secrets. First, there is virtually no historical evidence that the Takings Clause was intended to be an important limit on the government's power to regulate land use. Second, it was not until 1922 that the Supreme Court, in what was an extraordinary act of judicial activism, claimed that the Takings Clause acted to limit government regulatory authority.

A. The Historical Basis of the Takings Clause

Although there were ideas current in the seventeenth and eighteenth centuries (and contemporaneous land use regulation by states) that might inform an interpretation of the Takings Clause, there is almost no direct evidence of the intent of those who actually proposed and adopted the Takings Clause. The Bill of Rights was adopted by Congress in 1789 and subsequently ratified by the states.¹ Many of the provisions in the Bill of Rights arose from petitions submitted by the states, but this was not the case with the Takings Clause. The Takings Clause stands alone as the only part of the Bill of Rights that was not requested by a single state.

Madison's first draft of what became the Takings Clause stated that a person could not "be obligated to relinquish his property, where it may be necessary for public use, without just compensation." This draft was later revised, without explanation, into its current version by a committee of the House of Representatives. In the reported debate on the proposed Bill of Rights in the House and Senate, there is no reference to the Takings Clause. Certainly, the Takings Clause did not reflect an eighteenth century view that the government could not regulate land without providing compensation; scholars have pointed to numerous practices of the states at the time of adoption of the Bill

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, *Pennsylvania Coal*, and a Judicial Power Grab

The Takings Clause was the subject of very little attention until the pivotal Supreme Court case of *Pennsylvania Coal v. Mahon* in 1922.² *Pennsylvania Coal* involved a challenge by coal companies to a Pennsylvania statute that required coal companies engaged in subsurface mining to leave pillars of coal in place to support the surface from subsidence. Justice Holmes, in a short but seminal opinion, held that the statute violated the Takings Clause. The Supreme Court, for the first time, announced the crucial proposition that a regulation may violate the Takings Clause even if it does not effect a physical appropriation of property. As Holmes stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."³

Holmes sketched out a variety of factors that he viewed as relevant to determining "how far" is "too far" for purposes of determining whether a regulation constitutes a taking of private property. I will discuss some of those below, but the crucial first step was the equation of regulation with a taking.

To be sure, there is an obvious logic to the proposition.⁴ Being precluded from making use of your property may have the same effect as having title actually taken by the government. But besides the "obvious," on what did Holmes rely for this groundbreaking proposition? The answer is—nothing. Holmes cites no support for this position other than the self-evident logic. Whatever its "obvious" logic and appeal, the expansion of the Takings Clause to cover regulatory acts by the government was a tremendous shift from the Court's past treatment of the Takings Clause.⁵ It was, and is, an

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 protect the value of property. The government in this view is authorized to act only in ways that protect or increase the wealth of citizens; redistributive acts are in most cases precluded. It is this principle that Epstein sees enshrined in the Takings Clause. In an apparent reflection of this view, Justice Scalia refers to the "historical compact recorded in the Takings Clause that has become part of our constitutional culture."⁶

What is the support for this "property as liberty" view of the Takings Clause? Epstein neither relies on (nor really cites) any statements by the Supreme Court or any history of the Takings Clause. Essentially the entire basis for this reading of the Takings Clause comes from Epstein's interpretation of the views of John Locke. Epstein states that the drafters of the Constitution were familiar with and acting to further the views of Locke.⁷ To be fair, Epstein briefly relies on some statements of Blackstone about the nature of private

property, but Epstein's view of the political role of the Takings Clause comes from his (not undisputed) interpretation of Locke.

There is a certain dogmatic clarity to this "property as liberty" view of the Takings Clause. Carried to its extreme, the Takings Clause becomes a significant check on government power. Regulations can be imposed without compensation only if they benefit the people being regulated. This, as will be discussed below, raises some difficult issues in judging the benefits of regulation. Does, for example, the prospect of benefits from future regulations tomorrow justify an uncompensated burden today? But, beyond this, this view of the Taking Clause implies that no person may be singled out to bear a regulatory burden without receiving compensation. The significant political consequence of this view is that a regulation will be adopted only when it is so valuable that the government is willing to take the political heat of imposing taxes to pay for it.

In addition to the minor problem that there is no precedent or historical basis for this reading of the Takings Clause, many would reject this approach as unduly limiting the power of government. Regulations that might, in a utilitarian sense, increase the overall wealth of society will not be adopted, because the costs of compensation (both the direct costs of compensation and the indirect transaction costs of petitioning for, calculating, and providing compensation) are too great. To the extent that compensation is a bar to regulation, it also thwarts objectives of government other than utilitarian wealth maximization. Social values of wealth redistribution or other issues of justice may be compromised by elevating the concerns of the Takings Clause.

Just as the Supreme Court is unlikely to retreat to a narrow view of the Takings Clause as a limitation on physical appropriation by government, it is unlikely that the Court will drastically alter the constitutional prohibitions on government regulation by adopting a strong "property as liberty" view of the Takings Clause.

C. The Takings Clause as a Pragmatic Balancing Act

Although the Court, in *Pennsylvania Coal*, recognized that a government regulation could constitute a taking, the Court also acknowledged that "[g]overnment hardly could go on if to some

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 Takings Clause: the Takings Clause requires the Court to engage in a balancing of the interests of the landowner against other interests. This “pragmatic balancing” approach recognizes the legitimacy of property owners’ interests and their expectations that the value of their property will not be damaged by government regulation, but it also recognizes the countervailing community interests that may justify government regulation for valid public purposes without compensation.

For good or ill, this balancing approach provides a role for the Takings Clause beyond the narrow limits of physical appropriation, but short of the conceptual straight jacket of “property as liberty.” What this approach has failed to produce is any coherent theory that helps to identify the proper balance of private to public interest.⁹

The Supreme Court, from *Pennsylvania Coal* on, has produced a laundry list of factors that it recognizes as relevant in determining whether a regulation is a taking. These include, among others:

- the legitimacy and strength of the governmental interest;
- the reasonableness of the “investment-backed expectations” of property owners that the value of their property will not be reduced;
- the extent of diminution of value in the landowners’ property;
- the extent to which the regulation constitutes a “physical invasion” of the landowners’ property by requiring that others be allowed to have physical access to the property;
- the extent to which the regulation can be said to prevent a public harm resulting from the actions of the landowner as opposed to compelling the landowner to confer a public benefit.

This list itself does not seem remarkable; all of these factors seem roughly relevant to a weighing of public and private interests. But the approach itself is remarkable for a number of reasons. First, it has no clear historical basis, but rather appears to be the Court’s response to concerns about the lack of constitutional protections for landowners’

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 Clause embodies a view of distributive justice. In other words, the Takings Clause can be seen as serving the role of ensuring that otherwise valid and rational government regulations do not single out a limited group of people to bear a disproportionate share of the burden. Thus, the scope of the Takings Clause is to be found in "justice and fairness," not in mere physical appropriations or in absolute assertions of private liberties.

As I will discuss below, there is much to be said for this view of the Takings Clause. But what cannot be said is that it is founded in history or precedent. What source does Justice Black rely on for his statement about the purpose of the Takings Clause? Black cites the

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

If, however, the Court is going to “make up” a meaning to the Takings Clause, it at least should go through some exercise (beyond the unsupported assertions in *Pennsylvania Coal* and *Armstrong*) of justifying a particular view. In fact, I think it is possible to make a case for interpreting the Takings Clause as a principle of distributive justice. This is not the place to make that case, but let me suggest at least one rationale grounded in the language and structure of the Fifth Amendment.

The Takings Clause is textually linked with the Due Process Clause. As noted, the full sentence in the Fifth Amendment reads:

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.

As written, the Takings Clause and the Due Process Clause express two distinct, but related, limitations on the government power, and a proper reading of the text of this sentence should find a unique role for each of these limitations. Under the “property as liberty” and “pragmatic balancing” approaches, however, the distinctions between the Due Process and Takings Clauses blur. Factors that the Court has found relevant in assessing due process—the legitimacy of the government’s purpose in adopting a regulation and the rationality of the relationship between the regulation and the achievement of that purpose—become part of an assessment of whether a regulation is a taking.

Viewing the Takings Clause as a principle of distributive justice accomplishes a reconciliation of the purposes of the Due Process and Takings Clauses. Consistent with many of the Supreme Court’s past statements, the Due Process Clause acts as a limitation on the rationality of a government economic regulation. If it does not serve a legitimate public purpose or if it is not a rational means of achieving that public purpose, the regulation violates due process. No matter how fairly the burden of such a regulation is spread, it fails under the Due Process Clause.

The Takings Clause acts as a distinctive limit on the otherwise valid exercises of government authority. A regulation that rationally advances a legitimate government interest (and thus passes due

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

If the Takings Clause is seen as embodying a principle of distributive justice, then it is time for the Supreme Court seriously to consider the implications that follow from this view. This is not an idle academic exercise; much is at stake in terms of the limits on government authority and the perception of legitimacy of the Court’s approach.

One thing certainly does *not* follow from this view. Application of the Takings Clause does not become simpler or clearer; no bright-line test emerges to replace the current muddle. The concept of distributive justice is elusive.¹⁶ Aristotle is said to have stated (roughly) that distributive justice involves treating “like things in a like manner.” This phrase is notable more for its verbal felicity than its clarity. Distributive justice does not require that people be treated equally, only that differences in treatment are justifiable on grounds relevant to the distinction. Thus, different golfers may have different handicaps, but the differing handicaps are based on the differences in their ability.

This issue, finding relevant and appropriate criteria to justify different treatment of people, is the heart of the search for distributive justice in the takings context. The Supreme Court’s goal, if distributive justice is to be taken seriously, should be to articulate the factors that justify the imposition of regulatory costs on a limited group of people.

A. Certain Factors Must be Excluded in Assessing Takings

If a takings assessment involves a review of distributive justice, then certain factors previously used by the Court, and certain

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.

To be sure, utilitarianism can have a significant role in assessment of the legitimacy of a regulation. In some sense, due process involves an assessment of utility. A substantive due process demand that a regulation rationally advance a legitimate state interest can be seen as imposing a requirement that, at a minimum, a regulation must be designed to increase the overall wealth of society. Although it is possible to imagine a regulatory act that, in fact, diminishes overall wealth for the sake of other values, this is clearly not the normal case.

Utilitarianism and due process, it seems to me, establish a *sine qua non*, a minimum prerequisite, for the legitimacy of a regulatory act. Having satisfied that requirement, a regulation can be subject to an independent test of distributive justice. Therefore, a determination that the value of regulation exceeds the burdens it imposes is irrelevant to a takings assessment of its fairness.

This statement is made with at least two caveats. First, it would not be inconceivable to argue that the fact that the value of a regulation *far* exceeds its burden is relevant to determining the fairness of imposing the burden without compensation—not inconceivable, but not easy. The fact that the public receives an enormous benefit does not explain why they should not compensate the losers for that benefit. Indeed, the greater the balance of benefit to burden, the more appropriate compensation might be, because there are fewer concerns that the transaction costs of providing compensation might overwhelm the benefit. Second, at least some have argued that a regulation might be considered fair based on a utilitarian analysis if the cost of “unfairness” is included in the calculation. Thus, Professor Michelman, in “Property, Utility and Fairness,”¹⁸ his influential

article on the Takings Clause, argued that “demoralization costs,” the costs to public attitudes arising from noncompensation, were appropriately included in a utilitarian assessment.

B. Factors Relevant to an Assessment of Distributive Justice

Although the Court has failed expressly to evaluate its balancing factors in terms of distributive justice, most factors appear to have a rough relevance to a consideration of fairness. Much like Molière’s Monsieur Jourdain, the Supreme Court has been speaking “fairness and justice” for forty years without knowing it. A sharper focus on the implication of these factors to issues of distributive justice will, however, likely alter the way they are evaluated and suggest others that might be relevant.

1. Reciprocity of Advantage

At least since *Pennsylvania Coal*, the Supreme Court has recognized that “reciprocity of advantage” is relevant in determining whether a regulation is a taking. Although a regulation may burden me to benefit another, that same regulation may burden another to benefit me. The issue of reciprocity, in part, addresses the question of loss. It asks whether the benefits of the regulation *to the landowner* offset the burdens, and a regulation will not be a taking if the landowner receives sufficient benefit to require no additional compensation. In other words: no harm, no foul.

For persons such as Epstein, who view the Takings Clause as a largely absolute limit on government authority, the concept of “reciprocity of advantage” is essentially the only justification for government regulation. If a landowner has received sufficient benefits from the regulation, then the government has not improperly taken value for the sake of others. Presumably, in this view, a regulation would not be a taking as long as the landowner received a benefit at least as valuable as the burden.

The concept of “reciprocity of advantage” is also clearly relevant to an assessment of distributive justice. Without loss, it is hard to say that a person has been unfairly singled out to bear the cost of regulation. Reciprocity does, however, raise a number of questions that are particularly relevant to issues of distributive justice. First, “reciprocity of advantage” surely cannot focus simply on the equality

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.

Perhaps the Takings Clause can be seen, in part, as a form of social insurance that requires compensation for catastrophic loss through regulation. Through taxes we pay the premiums for protection against such catastrophic loss, but we bear the costs of routine regulatory loss ourselves. In this view "temporal reciprocity" justifies the fairness of routine regulation, and the "social insurance" aspect mitigates the unfairness of a loss beyond a certain magnitude.

3. Selection Process

If distributive justice is concerned with unfairly "singling out" a person to bear the costs of regulation, one would assume that the actual process of selection would be relevant in assessing fairness. The issue of fairness in selection is particularly important if "temporal reciprocity" plays a significant role in a takings analysis, because that analysis makes sense only if benefits and burdens are fairly distributed over time. Decision-making processes that may repeatedly single out certain groups to bear regulatory costs would raise distributive justice, and therefore takings, concerns.

The Supreme Court, however, has indicated only obliquely that a takings analysis involves a focus on the decision-making process. There is an odd line of takings cases in which courts have not found a taking when the regulation was a result of some natural calamity. Thus, in the important but bizarre case of *Miller v. Schoene*,²¹ the Supreme Court found no taking when the owner of cedar trees was required, in order to prevent the spread of an infectious disease, to destroy his trees to protect economically more valuable apple trees. Conceding the legitimacy of the need to protect the more valuable apple trees, this hardly provides an explanation of why fairness does not require compensation of the owner of the cedar trees. Certainly, the Court failed to provide such an explanation.

Perhaps the answer lies in the issue of process. The owner of the cedar trees was singled out, not by the potentially manipulated political process, but rather by the vagaries of disease. In other words, God, not people, selected the victim. If you have questions about fairness, take it up with clergy, not the courts.

Whether this, in fact, underlies the courts' treatment of calamity cases, the issue of selection process seems relevant to an assessment

of fairness. In line with the calamity cases, a regulation should be less likely to be seen as a taking when the burden imposed by a regulation is assigned based on some objective criteria that do not lend themselves to political manipulation. In this view, Endangered Species Act or wetlands regulations would not raise heightened takings concerns if restrictions were imposed based on the qualities of the land (and its critters) rather than the qualities of the landowner.

4. Blameworthy Conduct

A factor that has dogged the Supreme Court's takings analysis has been the relevance of "blameworthiness" in assessing a taking. Is a regulation less likely to be a taking if it prohibits blameworthy conduct of the affected landowner? Is a regulation more likely to be a taking if it regulates otherwise benign conduct? It would be hard to dispute that the moral blameworthiness of the burdened landowner would be relevant in assessing the distributive justice of a regulation. No one complains that a landowner has lost value because he or she is prohibited from selling heroin or creating a "meth" lab on the property.

The problem arises in how to characterize "blameworthiness." One strange line of thinking suggested by the Court can be seen as the "two-sided coin" approach. In this view, forcing a landowner to confer a public benefit is equivalent (the flip side of the coin) to preventing the harm of losing the benefit. This was, in part, the logic employed by the Supreme Court in *Penn Central Transportation Co. v. New York City*.²² In *Penn Central*, the Court upheld a New York landmark preservation ordinance that limited the development of a historic building. Altering Penn Station may be an aesthetic disaster, but it is harder to make the case that the owner of a building considered important to the public is morally blameworthy for developing the building in the same manner available to the owners of less important buildings. Nonetheless, part of the Supreme Court's analysis was premised on the view that altering the building was, in some sense, equivalent to harm-inflicting acts that are the more traditional target of government regulation.

In contrast to this expansive view of moral blameworthiness, others have suggested a surprisingly limited view. Although the

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 did *not* constitute a common law nuisance.

There are hints of this approach in *Lucas v. South Carolina Coastal Commission*.²³ In *Lucas*, the Supreme Court held that a regulation that prohibits a common law nuisance can never be a taking (in part based on the logic that you can never be deprived of a property right that you never had). Although this seems clearly correct, it says nothing about whether a regulation could be a taking if it regulated other than nuisance-like behavior.²⁴

The issue of "blameworthiness" for purposes of distributive justice cannot be resolved either by sophistry or common law rules of land use. The issue should be whether the conduct of the affected landowner is such that it is appropriate to impose on the landowner the onus of uncompensated regulation. This takes us right back to the problem of the Endangered Species Act and wetlands regulation. Is it morally blameworthy to take action on your property that others could take on theirs if no endangered species or wetlands existed? Is there sufficient moral blameworthiness in the destruction of habitat necessary for an endangered species or the destruction of wetlands that serve important public purposes? In one sense, this raises the "two-sided coin" problem: creating a harm by failing to provide a public good.

But the issue of blameworthiness in these contexts is colored by an even more significant factor. Let's call it the problem of the "last 10 percent." The problem of endangered species habitat and wetland destruction arises largely because others have previously destroyed habitat and wetlands. The need to regulate at this point arises because we are metaphorically, if not mathematically, down to the last 10 percent of these resources. Is it proper to view the current owners of these resources as morally blameworthy for taking acts that others were free to take because they acted first?

Thus, the issue of blameworthiness seems relevant but ambiguous in the context of most disputed regulation.

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 Court's implication that the expectation must be "investment-backed." This perhaps suggests a preference for development of property over more environmentally benign uses.

But surely the issue of a landowner's "expectations" is relevant to an assessment of the fairness of imposing regulatory burdens. The problem is in determining when, if ever, a landowner can "reasonably expect" that the government will not impose a regulation. We all purchase property with the understanding that laws may change. More than that, we undoubtedly pay a discounted price based on the possibility of change; people would presumably pay some additional premium if that would guarantee that no more stringent regulations ever could be applied to the use of the land.

A focus on the legitimacy of expectations harkens back to factors previously discussed. Can a landowner be said to have a legitimate expectation that a regulatory loss will not exceed some absolute magnitude? Can a landowner be said to have a reasonable expectation that morally blameless conduct will not be regulated?

The issue of legitimacy of a landowner's expectations also may raise another concern. Is a regulation more likely to be viewed as a taking if it represents a novel or unusual application of regulatory authority? In this view, it would be relevant whether the type of regulation was one that could have been reasonably foreseen by the landowner. In other words, the first application of a class of regulations (whether it be zoning or endangered species) may be more likely to be viewed as a taking than a later use of the same type of regulation.

C. Looking to Sources Beyond the Law

The Supreme Court's search for factors relevant to a takings analysis has been long on imagination but short on references. The academic literature is rich with political and economic analyses of the takings issue, but this generally has been of little utility to the Court.

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.

A focus on the Takings Clause as a principle of distributive justice has the potential to open a line of takings analysis based on the literature of moral philosophy. There is a substantial body of literature evaluating the concept and application of distributive justice that could be relevant to a court's analysis. It might be odd to cite Aristotle in support of a takings argument before the Supreme Court, but the extra-legal judgments inherent in distributive justice may point to reliance on extra-legal sources.

The application of philosophical analysis to law is not, of course, unknown. One immediately thinks of John Rawls, a philosopher whose insightful work on justice and fairness has become a staple of judicial discourse. Indeed, Rawls' classic *A Theory of Justice* suggests one possible line of analysis of fairness issues in the takings context. Perhaps the most influential (or at least cited) law review article on takings, Professor Michelman's *Property, Utility and Fairness*, provides an interesting analysis of fairness in the takings context through an application of Rawls.²⁵ Other philosophers, Robert Nozick, for example, also have provided analysis of distributive justice that is potentially relevant to a takings analysis.

Fortunately for the reader, an analysis of particular philosophers' views of distributive justice is beyond the scope of this brief paper. Rather, the point being made is that a focus on the Takings Clause in terms of distributive justice could open the door to a whole body of literature and analysis to inform the takings debate.

V. Legitimacy, Judges, and Distributive Justice

A focus on distributive justice may open the door to a judicial evaluation of philosophical concepts. The question remains, however, whether we want judges to walk through that door. How is one to judge the legitimacy of a position that requires judges to apply their conceptions of "fairness and justice" in establishing limits on government power?

This issue raises a number of questions (and one significant conclusion). The initial question to address is whether a proposed theory of the Takings Clause that requires courts to make such indeterminate and extra-legal judgments fails on that ground alone. In

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 of substantive due process. Although the Court has recognized the possibility of invalidating legislative acts on due process grounds, it largely has chosen not to exercise such power, except in defined areas. Concerns with the application of a more powerful due process constraint, in large part, stem from institutional concerns about the lack of historical and textual basis for defining "due process" and the institutional impropriety of judges overruling legislative judgments regarding means and ends of legislation.

In this view, the conjoined twins of "due process" and "takings," both contained within the same sentence of the Fifth Amendment, would serve as conceptual limits to government power, but limits that would be invoked sparingly by the courts. Although specialized cases of takings (particularly actions that approach exercise of eminent domain power) might be subject to a more searching takings analysis, courts would defer largely to legislative judgments of fairness in most cases of regulatory restrictions.

In fact, this sounds like what the Court is doing. What is different is that a focus on distributive justice provides a clearer basis than the Court's current reliance on an unexplained and unexplainable balancing act. Further, it does suggest a line of analysis for courts brave enough to take on concepts of distributive justice.

For good or ill, the concept of the Takings Clause as a principle of distributive justice arises from the Supreme Court's own statements. The Supreme Court has made and repeated the claim that the Takings Clause is "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." At a minimum, the Court should be aware of the consequences that follow from such a view.

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 social and philosophical judgments that many would say are beyond their competence (used both in the sense of judges’ institutional role and their intelligence). Perhaps, most significantly, it suggests a limited role for the judiciary in policing the social judgments of legislators and could confine the Takings Clause, along with the Due Process Clause, to a limited role.

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.
- 5 In an important recent takings case, *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), Justice Scalia acknowledged that prior to *Pennsylvania Coal*, the Takings Clause had been limited in application to situations of direct appropriation of private property.
- 6 In a dissenting opinion in the case in which Scalia makes this statement, Justice Brennan reviews the history of state practices that indicates that the Takings Clause did not apply to government regulations. When, in a footnote, Scalia dismisses the relevance of this history, Justice Brennan states that “I cannot imagine where the Court finds its ‘historical compact,’ if not in history.”
- 7 Curiously, in his response to criticisms that other sixteenth and seventeenth century scholars, such as Grotius, had different views on the role of government in protecting property interests, Epstein responds by stating that “inferences from a single writer to a constitutional text are at best troublesome.”
- 8 260 U.S. at 413.
- 9 It is the pornography of regulation, because the Court knows an invalid regulation only when it sees one.
- 10 364 U.S. 40 (1960).
- 11 *Id.* at 49.
- 12 *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978).
- 13 The statement, and its logic, was applied with perhaps the greatest force by now Chief Justice Rhenquist in his dissent in *Penn Central Transportation v. New York City*, 438 U.S. 104 (1978). In that case, the majority upheld a New York City historic preservation law that limited Penn Central’s plans for a major alteration of Penn Station. Rhenquist noted that the owners of Penn Central were being singled out because the building was built too well, and Rhenquist, relying in part on Black’s statement in *Armstrong*, would have held the requirement a taking since it unfairly singled out the property owner to bear the cost of a public benefit.
- 14 Which in *Pennsylvania Coal* was “. . . of paying for the change.” *Pennsylvania Coal*, 260 U.S. at 416.
- 15 There have, however, been efforts in the past ten years to adopt statutory “takings” provisions that require compensation in certain circumstances. Although not adopted by the federal government, several states, including Texas, have such takings laws. In large part, these statutes have been proposed by conservative interests that are frustrated by what they see as the Supreme Court’s narrow constitutional takings analysis.

- 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 the federal government would prevent it from taking actions that would violate those rights that a Bill of Rights was designed to protect. Obviously, federal power (and, of course, state power) has been found to be broad enough to violate fundamental rights, and the Bill of Rights has hardly proved to be irrelevant and unnecessary.
- 18 Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L.Rev. 1165 (1967).
- 19 272 U.S. 365 (1926).
- 20 505 U.S. 1003 (1992).
- 21 276 U.S. 272 (1928).
- 22 438 U.S. 104 (1978).
- 23 505 U.S. 1003 (1992).
- 24 In *Lucas*, the Court accepted as fact that the land in question had lost all of its value as a result of a government regulation. The Supreme Court adopted a *per se* takings rule that a 100 percent loss of value will be a taking *unless* the government was regulating a traditional common law nuisance. The Court did not resolve the issue of when a taking will be found where there is less than a 100 percent loss in value.
- 25 Michelman, *supra* note 18. Michelman's article relies on an early version of Rawls' work and hence fails to consider certain implications, particularly the "difference principle," of changes that Rawls made to his theories in a later version of *A Theory of Justice*.

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