Regulatory Takings

*By William M. Treanor**

Note from the Editor:

The following article is Dean Treanor's portion of a debate with Professor Richard Epstein during an event on regulatory takings at the Fordham University School of Law moderated by Judge Loretta Preska of the U.S. District Court for the Southern District of New York. We carried Prof. Epstein's remarks in the last edition of *Engage*, available here: http://www.fed-soc.org/publications/detail/the-spurious-constitutional-distinction-between-takings-and-regulation.

I would like to start by talking about what the original understanding of the regulatory takings doctrine was, which I think was the first question that Judge Preska asked. The original understanding is, very simply, that there is no regulatory takings doctrine.

Under Professor Epstein's approach to constitutional law, the Takings Clause is really read to be about efficiency, and it becomes the basic principle of constitutional law. He's argued, beginning with his book *Takings*, that essentially the Court should closely supervise legislation affecting property interest and that statutes, municipal regulations, and government actions that are inefficient run afoul of the Takings Clause. Thus, under Professor Epstein's approach, many regulations run afoul of the Takings Clause.

But if you go back to the Framing, the Takings Clause is, first of all, very much literally an afterthought. If you go through the Bill of Rights, there are an enormous number of clauses. There's only one clause in the Bill of Rights that was not proposed by a state ratifying convention, and it's the Takings Clause. It's only in the Bill of Rights because Madison drafted it, and it's the only clause that he added. There are no debates in the Congress that proposed the Takings Clause and there are no debates in the states about what it meant.

Early sources reflect two justifications for the clause. One is that, during the Revolutionary War, there was a lot of impressment of goods by the military, and this clause was designed to address that, to say that if the government physically seized your property in time of war, it had to pay you for it. So, in the very first constitutional treatise that we have from 1803, St. George Tucker says the clause was "probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the Army and other public uses by impressment of goods, too frequently practiced during the Revolutionary war." So that seems to be the major reason why we have it in the Constitution. It's about seizure by the military of goods during wartime.

The other reason why it seems to be in the Constitution is that Madison was very concerned that Congress would in some way try to abolish slavery, and, if it did, he wanted to provide compensation for the slave owners. He has a couple of letters that he wrote after the Takings Clause that said that the clause would require compensation were there to be abolition of slavery by Congress.

In the pre-Civil War case law, the dominant view is that the clause only applies to physical seizures of property by the government. The leading treatise from the period used the formulation that there's no taking without a touching. So, if you look at the evidence we have of the original understanding and if you look at the early case law, you will find that the Takings Clause is not about regulations; it's just about physical seizure. When the government takes private property—such as when it takes a house for a road or a school—it's got to pay you for it. That's the original understanding. That's the early case law. Regulations are not implicated by the clause, and, similarly, taxes are not implicated by the clause. So, if you're an originalist, you would just reject the whole doctrine of regulatory takings.

If you're a textualist, if you look at the text—and Judge Preska started out with the words of the clause, "[N]or shall private property be taken for public use, without just compensation. . . "—the notion of taking private property is very much a physicalist notion. To use an example that I've often used in the past, if I were to say to my daughter, "Katherine, you can't play with your ball in house," unless she were deeply steeped in Professor Epstein's writings—which, as it happens, she's not—she would not say, "You have taken my ball." She still has the ball. I have regulated her use of the ball, but I have not taken it. So, for the textualist, as well as for the originalist or for someone who focuses on early case law, there are no regulatory takings.

Now, as Professor Epstein says, at this point, for about eighty years—and, actually, the relevant case law runs back a little more than one hundred years—the Supreme Court has recognized the doctrine of regulatory takings, and the lead case to establish that is the case that Judge Preska told us about, *Pennsylvania Coal Co. v. Mahon*, which is a 1922 case. So we have a doctrine of regulatory takings. Nonetheless, if you're a serious originalist or you're a serious textualist, you should just repudiate the whole doctrine.

But if you're going to have the doctrine of regulatory takings, you should read it narrowly. Why is that? Because it's essentially unmoored, if you don't read it narrowly. There's no text. There's no original understanding. The case law is deeply muddled. And so, unless you take a narrow, constrained view of the Takings Clause, it's really an invitation to judicial activism. It's an invitation to second-guessing a broad range of government decisions.

Again, that's really what Professor Epstein has argued for, and that is not good constitutional law. If you don't have a text or an original understanding or something to limit the courts, because they are reviewing decisions of "We the People," the courts shouldn't be intervening unless they have some limiting

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principles. And in Professor Epstein's approach, they don't. So that's basically what I would say as a constitutional law scholar.

Professor Epstein's point about the actual implications of the consequences of modern takings doctrine has a great deal of force: Because modern takings doctrine embodies only limited oversight of regulatory activity, government is permitted to act in ways that interfere with economic growth. But, if you go back to the Preamble to the Constitution, it says, "We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." You will see that there are a whole range of ends that the government serves to promote. The nation was not created simply to promote economic growth.

Professor Epstein is right that takings law now sacrifices growth for other ends, but other ends, like equality, like justice, are valuable and constitutionally significant. The court should not simply second-guess majorities in order to promote efficiency. That isn't to say that every government regulation is correct or that every action of every municipality is right. They're not. Clearly, there are times in which legislature and cities slow down growth too much. I think there's no question about that.

But the question is really, should courts intervene to stop that? And they don't have a metric to do it that doesn't provide an "open sesame" for them to second-guess the legitimate decisions of majorities. Let me offer two examples. Professor Epstein highlights the *Penn Station* case, which involved Grand Central Station. Grand Central Station would look dramatically different if the City had not been able to landmark it. It would have been encased by a modernist facade with a skyscraper on top. Yes, the City did sacrifice economic growth as it landmarked Grand Central Station, but it served another end. It served the well-being of the City.

My second example is that Professor Epstein's approach would have invalidated the use of eminent domain that allowed Fordham to acquire this property. This was a classic use of eminent domain for a private property owner. I think under Professor Epstein's approach, it would have been invalidated. It clearly did not involve a nuisance activity, but it was the key to the revitalization of the Upper West Side, as well as to the education of everyone in this room.

So, what this shows is that there are compelling reasons why the courts should defer to majoritarian decision makers. Majorities don't always get it right, but given basic principles of constitutional law and given our commitment to decision-making by we the people, the courts should defer.

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REBUTTAL: Actually, it's very interesting, when Professor Epstein starts by discussing how you interpret the Takings Clause, he begins with a canon of construction from the Latin world. And that's very much the way in which he generally interprets the Takings Clause. Actually, I'm going to sound a little bit like Justice Scalia in this. When you read Professor Epstein's book *Takings*, or when you read his most recent book, *Supreme Neglect*, what you find is he has an account of original understanding that is essentially devoid of Americans. In the book *Takings*, he talks about Hume and Smith and Locke. There's one passing reference to Hamilton. In *Supreme Neglect*, it's all about Locke; there's one passing reference to Madison.

The way in which an originalist should look at the original understanding is: What did Americans who were confronting this text understand it to mean? But that's not Professor Epstein's approach. He brings a whole series of canons of construction to bear, without any indication that Americans would have applied them in these cases. They didn't. And, as I said, the idea of regulatory takings does not win acceptance until well after the Civil War. So the original understanding is pretty clear: The Takings Clause doesn't cover regulatory takings. So that's my first point.

Second, I did not mean that Professor Epstein's approach is standardless. It's not standardless. It's created out of whole cloth, but it's not standardless. In other words, what he is doing is equating efficiency and fairness, and his approach essentially would bar any government action that has redistributive consequences. So, it bars, for example, progressive taxation. It would bar minimum wage laws. It would bar maximum hours laws. It would basically bar most of the statutes written after 1920.

So, again, the basic point that I want to make is that, as a matter of constitutional law, courts should be deferential in reviewing economic legislation. That doesn't mean that everything can get a pass, but regulatory legislation should be subject to rational basis scrutiny. *Penn Central* stands for that proposition. So does *Kelo*. Majorities should be free to pursue ends other than efficiency and fairness, which are, in Epstein's approach, the same.

Will majorities get it right every time? They won't, but that's the cost of democracy.

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SECOND REPLY: So, Madison is very concerned about government interference with private property. It's one of the things that drives him. But how does he think such interference should be combated? That is the critical question. The key lies in structural protections, such as those Professor Epstein identified. Madison has, for example, a very limited conception of the power of judicial review. The critical agent for the protection for private property is not the courts. The key to protecting private property lies in a whole series of super-majoritarian constraints that are the basis of the constitutional system.

The essay "On Property" is actually directly on point for me because he is making a political argument there, and he says any government that would prevent direct seizures of property will also want to bar indirect interferences with property. And then he defines property in that way as including a broad series of rights. But what he's doing is, he's taking the principle of the Takings Clause and reading it more broadly. But his argument here rests on the idea that the Takings Clause itself has a narrow reach, and it just goes to physical seizures.

So, I think Madison's view of the meaning of the Takings Clause is absolutely clear.

I'm not reading Locke out of the founding generation,

but his approach is just a part of the founding generation's worldview.

Benjamin Franklin wrote: "Private property is a creature of society and is subject to the calls of that society whenever its necessities shall require even to its last farthing." At the Constitutional Convention, John Dickinson observed that he doubted that the policy of interweaving into a Republican constitution a veneration for wealth was sensible, and he had always understood that a veneration for property and virtue with the objects of Republican encouragement. Franklin's and Dickinson's statements evidence the fact that there's a range of different views about private property at the Founding, and to make it all about Locke without any reference to what they actually said is totally unconvincing.