The Spurious Constitutional Distinction Between Takings and Regulation

*By Richard A. Epstein**

Note from the Editor: The following article is an expanded version of a speech Professor Epstein gave during a debate on regulatory takings with Dean William M. Treanor at the Fordham University School of Law. We will carry Dean Treanor's remarks in a future edition of *Engage*. (He was recently named Dean at the Georgetown University Law Center.)

Toward a Unitary Theory of Takings

The major question that I shall address in this short talk concerns a fundamental fault line that is widely embraced in modern American constitutional law. My task is to figure out whether the American constitutional law of takings has a uniform architecture that applies with equal force to cases of government occupation in so-called "physical takings" cases and government regulation in so-called "regulatory takings" cases. For these purposes, I shall confine my attention to real property, and thereby ignore such critical issues as financial rate regulation of public utilities on the one hand or the regulation of intellectual property on the other. In the land context, the difference between these two scenarios is usually not that hard to observe in most settings. A physical taking is said to occur when the government occupies land that was once in the possession of some private party. Or, in the alternative, the government issues an order that allows some private party to enter the land under its authorization. The pivot point is found whenever an owner is allowed to remain in possession, but is forced to share that possession with either the government, or again, private parties who enter under government authorization.[1]

On the other side of the line fall those cases of regulatory takings in which the government leaves an individual in undisturbed exclusive possession of his or her own property, but nonetheless imposes restrictions on land use or land disposition above and beyond those imposed under the common law. This last qualification about the common law has two functions. The first is to make clear that restrictions on nuisance-like behavior do not require compensation. The second is to insure that certain common law restraints on alienation like the rule against perpetuities are not swept into the analysis.

To challenge the present divide between occupation and regulation is to ask whether the rules of private law must be carried over into the constitutional analysis of the Takings Clause that makes explicit reference to it: "Nor shall private property be taken for public use, without just compensation." As a matter of private law, an owner of property can enter into two kinds of transactions. The first might be called "clean" deals in which there is an outright transfer of ownership from one person to another, such that at the end of the day the original owner stands in no better position against his transferee than does a total stranger. That is just the position that all people would be in if they tried to reenter a house that they have just sold. On the other side are complex details in which voluntary transactions created divided interests in property. Private property can be divided at any given point in time by creating joint tenancies and tenancies in common. It can be divided spatially to include mineral rights, surface rights, and air rights. It can be divided on the plane of time, so that different persons hold a variety of present and future interests. Private property can be divided between an owner who keeps the equity of redemption and a lender that has a lien on property. Moving outward, private property can be divided between neighbors through the law of servitudes, which includes restrictive covenants on the one side and easements on the other. The great flexibility within this system allows any given owner or group of owners to enter into, simultaneously or sequentially, multiple types of transactions on the same underlying asset. Nothing is more common than joint owners taking out a mortgage on property over which a neighbor has a right of way.

The central analytical challenge is to determine the status of these divided interests under the Takings Clause. Does each component of the original property retain the full measure of protection, an equal dignity of right, with the original whole of which it was a part? Or does the fragmentation of property interests carry with it the implicit price that the holders of the separate pieces receive less protection from government action than the individual who retains possession of the entirety?

To give a concrete example, what happens when the government decides to impose a height restriction by public fiat? Should that regulation be analogized to the identical restrictive covenant that a group of neighbors want to impose upon the land? Privately, of course, the neighbors would be able to obtain that height restriction only voluntarily. Typically they would be required to pay for what they received. Normally these transactions are not made for cash. Rather, they are imposed as part of a common unit development by a common landlord, in which the reciprocal nature of the obligations coupled with appropriate adjustments in the sales price ensure that each person gets to share in the gains from the cooperative venture. The government of course does not act like the owner of a common development anxious to maximize his gain from sale. Rather, it enjoys the unique right to force the exchange on its own initiative over the active opposition of the party on whom the restriction is imposed.

The position that I've always defended is that any coherent account of the Takings Clause insists that the government can only force the exchange insofar as it is prepared to pay just compensation to the owner for the loss of the property interest in land. Partial interests in land can be taken in the same manner as the entire land itself. The government's unquestioned right to take a partial interest in land for public use does not

** Laurence A. Tisch Professor of Law, New York University School of Law, The Peter and Kirsten Bedford Senior Fellow, The Hoover Institution, Senior Lecturer, the University of Chicago.*

excuse it from the duty to compensate, in cash or in kind, all the individuals whose property is taken. Where it engages in a scheme with reciprocal burdens and benefits, it can credit the benefit that it supplies to any owner in that transaction against the costs that it otherwise imposes. This use of implicit in-kind compensation meets the requirements of the Takings Clause.

The Penn Central Fiasco: Does Competition Equal Restraint?

Unfortunately, this effort to link public to private law has been decisively rebuffed by the Supreme Court in its 1978 decision in *Penn Central Transportation Co. v. City of New York*,[2] where Justice Brennan, at his ingenious worst, took a different approach. *Penn Central* asked whether New York City's landmark preservation commission could, pursuant to city ordinance, prevent the construction of a proposed new Marcel Breuer tower over Grand Central Station without paying compensation to Penn Central for its loss of air rights under New York law. The first point about this case is that it shows the fragile nature of the divide between the physical and the regulatory takings. It is, for example, easy to think of this as a physical taking in which New York City took the air rights from the Penn Central, by denying Penn Central all use of them, even though it made no use of them itself, except to keep them open. The government engages in a physical taking if it decides to leave vacant land that it takes from a private owner. Air rights are no different. On the other hand, in both cases someone could argue that so long as the government does not use the air rights to build it is a mere restriction on use, similar to other forms of restrictive covenants. The same could be said of land which the government does not enter, but from it forbids its former owner all rights of access or use. It seems odd that the question of whether or not compensation is owing should depend on any of these fine distinctions.

Within this framework it is easy to see what a legal rule that told a given owner of land or chattels that the government would not let him make any use of his property even though he could not use it himself would count as a taking, followed by a retirement of the land from active use. If the mere fact of ownership still had value, it would reduce the level of compensation owing by some miniscule amount, but the literalism that says all regulations are out from under the Takings Clause produces results that no one can credit as a proper use of the English language.

The same point applies to chattels. William Treanor has often used the example of a ball which belongs to his daughter. He tells her that he will not take the ball, but that she nonetheless cannot make any use of it for some definite period of this time. Does his disavowal of the taking carry any weight? I think that everyone would regard this set of regulations as tantamount to a taking. If there were some residual value to the child from the use of the ball, that could be an offset against the level of compensation otherwise owing, but no one in dealing with either land or chattels would ever think that a total restriction on land use by either private or state action does not amount to a taking of the subject property.

That same analysis applies to the air rights in the *Penn Central* case, even though the overall situation is complicated further because of voluntary division of rights in the Penn Central parcel. Once the air rights were sold by the ground owner, its new holder of the air rights lost all value, for the case became a total taking of a divided interest. Yet if the air rights had been merged with the surface rights, the transaction would have only been a partial taking of the entire fee simple interest. Should the taking of all of a part be different from the taking of a part of the whole? Again this supposed fine line makes no sense. As a matter of basic theory, these subtle characterizations of the underlying rights should matter little for the overall analysis. It does not matter whether we think of this as a total or a partial taking. It does not matter whether we think of it as an occupation of the air rights or a restriction on their use. In all permutations, the loss in value to the owner is the measure of compensation that is required, no matter which description of the underlying facts is accepted. Rejecting all these fine lines puts the government in the proper position for asking whether the set of diffuse social benefits that it seeks to create through the landmark preservation law was greater or less than the concrete economic losses (and possible amenity losses from the construction of the new tower) that the regulation imposed on the owner of the air rights.

Unfortunately, Justice Brennan paid no attention to any of these doctrinal or functional issues. Instead he made the inexcusable intellectual blunder of analogizing the losses from these government restrictions on air rights to the economic loss that any property owner suffers from market competition. By way of example, on his view the loss of air rights is no different from the losses that Penn Central would have suffered if the shops inside its building suffered competitive losses when its former customers patronized a new shopping center that opened up across the street. In those cases, the owner of the existing establishment has no right to compensation for those losses. Brennan thought air rights should receive the same treatment.

This supposed analogy between competition and land use restriction is, however, deeply flawed. The differences between these two supposed equivalents becomes clear when the two different types transactions are analyzed within a single comprehensive conceptual framework. The question of what counts as an "actionable" harm—that is an economic loss that the legal system should recognize—cannot be resolved simply by looking at what private or government actions make someone better off and someone else worse off. That conception of an externality is too broad for legal work. All actions that help one person will hurt in this broad sense another person. The necessary task is to seal off those subclasses of externalities that should be regarded as actionable within the system, and dismiss all others.

The modern English expression for this distinction puts "pecuniary externalities" on one side of the line and "real externalities" on the other. But the terms have to ordinary understanding no verbal traction. Slightly better is the Roman law view that certain harms are damnum absque iniuria, harms without legal injury, but that definition also mainly points to the distinction without grounding it more rigorously. What is needed is a systematic approach that bolsters the intuitive awareness that competition and the use of force lie at opposite

ends of the spectrum. Looking at only the two parties to a particular dispute does not supply that answer. The dispute has to be put in a large social context, which operates as follows. Competition generates a *positive-sum* game when the impact on all persons, including potential customers and suppliers, are taken into account. When customers move from one store to the other, they get lower prices, a benefit which more than offsets any loss by the existing firm, which can of course lower its prices or improve its products to meet the competitive threat. In the end competition generates a set of transactions whose quantities and prices squeeze the most out of scarce resources. Any private right of action that is allowed to frustrate that movement of resources to more productive uses thus creates social inefficiencies. It is an ironic corollary to Justice Brennan's opinion that the worst of the New Deal legislative excesses were routinely justified on the ground that they were needed to protect established firms against "ruinous competition." In short order that inflammatory rhetoric led to the cartelization of the airline industry under the Civil Aeronautics Board, and of the agricultural sector under the Agricultural Adjustment Acts, both passed in 1938—a very bad year indeed.

The Political Dynamics of Land Use Regulation

Penn Central of course is not objecting to competitive harm when it wants to use its air rights. Rather, it opposes a very different kind of political dynamic in which government-inflicted losses on private property owners are devastating for the property owner, without promoting any general community well-being. Here is how the game plays out. Once everyone knows that government has the ability to restrict land use and land development without having to pay compensation, the demand for these restrictions from neighbors (who have a clear view of their own self interest) will rise steeply. That is what always happens when people are able to obtain valuable rights from others for free. Indeed, for a zero price they will insist on all sorts of elaborate protections for which they would never pay. We know this because in crowded urban areas few people are willing to pay for the right to keep the plot of land next door vacant. The combined value of two urban homes is greater than the value of one home with a fancy side yard owned by someone else who has no particular use of the barren land. To be sure, restrictive covenants may be used to impose some adjustments on light and air and the boundary line, but, as noted earlier, these will typically be reciprocal, and naturally constrained to the point where each party at the margin thinks that what it loses in land use it gains in increased light and air made possible by the less intensive use of neighboring land. But once the reciprocal element is gone, that natural restraint which operates market settings will disappear. Instead, overclaiming the virtues of public amenities becomes the order of the day, as private losses are ignored in the relentless pursuit of, well, other private interests.

These maneuvers to impose these restrictive covenants on land use necessarily impose real losses on owners, who would in a private transaction demand real dollars or in kind benefits to accept those covenants. But with politics it is always possible to bypass the market and to use political means to obtain what one wants at a lower price, namely, what it costs to assemble a winning political coalition. The social cost calculations are thus clear. The political costs of acquiring the interests of others are low, but the externalities they inflict upon the users are great. Real resources are used to move land from a higher to a lower use so that the public loses both ways from these successful efforts at market circumvention. Resistance through politics is possible as well, and may prevail but only at a cost. What the eminent domain clause, with its just compensation requirement does, is prevent the circumvention of voluntary markets for private advantage. It eliminates the deadweight social losses that arise through political efforts to gain, or resist the coercive transfer of rights for no price, or indeed any price below their fair market value.

One corollary of this unfortunate dynamic is that market processes cannot survive when the law of regulatory takes allows any stubborn group of neighbors a veto right over anybody who wants to build on his own property. Just that tragic outcome happens in cities like New York all the time. It is quickly perceived that no total veto right is acceptable. So the compromise that emerges is an elaborate administrative process that creates a forum in which everybody may express his or her views about what Jones can do with his land. There is no unique decisionmaker, but a motley array of administrative boards that gets to decide who is in a position to build subject to what constraints. What are going to be the architectural specifications? What about the densities? The amount of affordable housing? Access for wheelchairs? At zero price every interest group will make its grand entrance into the political process.

The combined operation of these various restrictions will retard development of any use project by as much as three to five years (in many cases more), assuming they get approval in the first place. There are many private agendas that converge on the proposed project, each demanding its pound of flesh. There need be, of course, little coordination among the various parties seeking particular benefits. Once the separate exactions are combined, therefore, it could easily turn out that the deal no longer contains enough profit for the developer to want to move forward. Ironically, marginal projects are shelved. The attractive projects that remain are then denounced as proof of the greed of real estate developers in a classic Catch-22 situation.

In this fevered environment, community boards, some better than others, occupy a pivotal role. Sometimes they lead the opposition that dooms the project. Sometimes they take on the thankless task of capping aggregate demand for exactions so that the project can move hesitantly forward with its backing. Yet their job is made more complicated because every large project will spawn a rejectionist wing whose main agenda is to make sure that the cumulative exactions sink the project. The outcome is never certain, but in some real fraction of cases viable projects may be abandoned, after both public and private resources are squandered. Failure in the first generation makes the next generation of developers more gun-shy than predecessors. Over time, the tax base is reduced, and the neighbors who like the status quo are emboldened to use the same disruptive tactics time and time again. The developer and its supporters cannot respond with similar inflammatory tactics, because they have to continue to work in the community when and if the project

goes forward, and thus cannot afford to alienate the key players with whom they will have to cooperate on both this and other projects. The opponents of development thus have a strident freedom of action that developers cannot match.

From this political turmoil economic stagnation can follow, for the dilapidated warehouses sitting on the property remain in their faded squalor because nobody can agree on the ideal configuration of townhouses or condominiums. The result of these heavy costs is a chronic underproduction of housing for new arrivals who might do much to revitalize commerce or trade. Faced with these roadblocks, the major tactic to expand supply in a place like New York is to subdivide small apartments into still smaller units in order to lower the price to the point where ordinary people can afford to buy them. The 800-square-foot apartment that once had two tenants now has three. Perpetual gridlock in the new housing even hurts the incumbents in the long run even if they happen to benefit from the outcome of a particular dispute. They could well favor a project located a mile away, but are powerless to steer it through the local opposition, which gives pride of place to a powerful breed of NIMBYism. The new way of business is so entrenched that freedom to build in real estate markets is never thought of as a viable option. The permit culture becomes a way of life.

This system produces other inequities which magnify the advantage of initial entrant into a community. The common law rules on first possession gave a person exclusive rights of use and disposition of the land so possessed. But those rules never prevented neighbors who arrived later from exercising the same rights over their own land. The newer political economy gives the early arrivals who develop their property an unwholesome political advantage in the form of a near-veto right over later developers that was no part of the traditional bundle of common law property rights. But since rights are always scarce like other resources, that veto advantage in the first-to-build hurts the newcomers. The result is that local politics, say in the form of rent stabilization (which should also be attacked under the Takings Clause), creates a group of privileged incumbents who can raise the value of their own homes at the expense of others who are forced to find very marginal accommodations at extremely high rents. The idea that these peculiar distributional consequences from regulation are intrinsically desirable is a first-order intellectual mistake that drives Justice Brennan's faulty analogy between competition and legal restriction. The system of land-use restraint has worse distributional consequences than any open market for real estate that obeys the simple and sensible constraints on private real estate development. The dominant paradigm thus imposes major allocative losses in order to solidify perverse distributional outcomes.

A Path For Reform

The present situation is ripe for change. The key question is what would happen if New York City and other cities around the country were to reverse course, such that the loss of a right to build, which is a loss of a use right, is treated as a fully protected species of private property instead of a nondescript interest that the government can always toy with at its free will and pleasure? At this particular point, the entire dynamic of the political process will change and change for the better. In this universe the opponents of new development will have only two legitimate options. The first is that they remain able to enjoin those activities that, if allowed to take place, would result in harms for which the new developer could rightly be required to compensate his aggrieved neighbors under the traditional law of nuisance. No property owner can construct a building that is likely to topple over only to smash on the pedestrians below. I dare say there's not a single builder anywhere in New York State or New York City that proposes to engage in construction that poses serious risk to life, limb, or property. Narrowly tailored building codes that addressed these external risks could withstand any constitutional challenge, without reintroducing the set of destructive veto gates under current law.

Second, local governments should have the power to coordinate new construction with existing and future infrastructure. The question of how much off-site parking is required for a large development, what kind of curb cuts are needed to secure vehicular access without endangering pedestrians calls for some measured degree of public regulation. Yet these issues in virtually all cases turn out to be low-level technical disputes that today rarely form the stumbling blocks for new development. It is typically possible to relocate a garage entry so that it does not open right next-door to an elementary school.

Apart from nuisance and infrastructure, the correct legal rule requires all local governments to buy for those extras that existing landowners demand for themselves. Ideally local governments should also have to pay for any extra delay from stringing out the administrative process to interminable lengths.

What changes in local government behavior should we expect under this new legal regime. There are some glimpses. Occasionally, some states like Oregon have flirted with legal regimes that say that any increase in regulation that reduces land values above a certain level must be paid for by the government that imposes it. Demand for these regulations typically disappears once the price tag is attached, which should come as no surprise. The basic dynamic in all these development settings is that the internal gain of the developer sets only the lower bound on the amount of social gain that a particular project will generate. Even if the developer is compensated for his loss, the government restrictions could still prove too severe. But the issue is usually academic. Even the prospect of partial payment for direct developer losses is enough to sink the political opposition.

Indeed, these observations reveal one common danger of speaking about the interests of the "community" in land-use disputes. This rhetorical trope consciously excludes the interests of those outsiders who would like to move into the community if only they could find a place to live. Those outsiders, of course, would profit from the deals they make with the developer. Any comprehensive social calculus has to include those gains, which can be quite large once modest local adaptations are made when the outsiders come in. The new apartment building that is ferociously fought one year becomes part of the fabric of the community the next year. Once these issues are put on the balance, blocking the project looks like a negative sum outcome, which turns hugely negative when the additional

costs of administration, error, delay, and uncertainty are factored into the equation. It is the modern tragedy of incurring heavy administrative costs in order to secure allocative losses.

Matters need not always remain that way. Once the price tag is added to the mix, the negatives and the positives are now brought into alignment. Given that the opponents of the project will have to pony up more money to stop the project than they could gain from it, they won't do it, even if the costs of coordinating their venture are zero. It never makes sense to expend $100 to secure a $50 gain. So understood, much of local opposition should be understood as a form of strategic "cheap talk." In case after case, once a compensation requirement is put into place, the opposition slinks way. Passionate indignation is in abundant supply. Dollars are not. The moral of this story should be clear. Neither in New York City or anywhere else should reflective citizens be prepared to tolerate a situation where endless delays take their toll in time, money, and uncertainty on those entrepreneurs who are trying to expand the homes, offices, and shops where ordinary people live and work, in order to let a few citizens objectors preserve their own short-term serenity, leaving everyone else to gather the scraps.

Unfortunately, the Supreme Court's flaccid approach to regulatory takings in *Penn Central* has created a huge void in which property rights have become indefinite. It is that indefiniteness of rights that in turn allows political intrigue to flourish. My alternative approach cuts down on opportunities for these illicit transactions without interfering with sensible state functions like controlling nuisances, ensuring safety, controlling infrastructure, and directing traffic. Yet, by the same token, this alternative approach does signal an end to all sorts of other exotic restrictions, which in effect can sap all the gain out of real estate projects that could to be to the benefit of the community at large if only allowed to go forward.

Originalism, Judicial Restraint, and Takings Law

One standard rebuttal to my position is that it may represent sound policy, but not sound constitutional law. The argument against constitutional protection of private property as an originalism matter never did extend to the area of regulatory takings. At this point, there is a familiar tension between the historical instances that are said to have sparked the inclusion of a particular guarantee into the Constitution and the scope of the guarantee that is included into the constitution. It could be said, for example, that the immediate instance of government practices that sparked the Takings Clause was a fear of outright seizure of land, or taking slaves from their owners without compensation. But the constitutional text, which speaks about private property in its widest signification, addresses a systematic protection of a bedrock social institution.

Here are some relevant comparisons. When those institutions are at issue in connection with speech under the First Amendment, no one thinks that the Amendment should be limited to government actions that shut down a newspaper, whether or not they leave the owners in possession of their plant. The legal rules quickly address permissible forms of taxation, permissible forms of regulation short of an outright prohibition on speech, and permissible rules of liability for defamation and invasion of privacy. It is those same three dimensions that a comprehensive theory of takings has to move as well. Similarly, the Fourth Amendment protection against searches and seizures has not been interpreted to tolerate all sorts of surveillance that was not possible at the time of the finding. Once again the fear of circumvention by wrongful government action leads to the quick conclusion that eavesdropping is covered by the Amendment even if it does not involve a trespassory invasion of private property. The history does not impose shackles on any interpretation of the other guarantees in the Bill of Rights which is consistent with the text and the larger purposes—the constraint of government abuses against which it was directed.

The more difficult question is whether a rigorous analysis that only looks to the original public meaning of the written words of the text can be a faithful guide to constitutional interpretation. No workable originalism could reject fidelity to text. But by the same token no workable originalism can limit itself to parsing the words of the text. Indeed, no one who has ever steeped in classical interpretive methods ever defended the view that a key governing text had to be complete and entire unto itself. In all cases, the text was read and understood against the backdrop of a strong interpretive tradition that dates back to Roman times, and which was followed consistently throughout the following centuries.

I know of no better way to understand this issue than to refer to one of my favorite Roman texts—the Lex Aquilia of 287 BCE, which was written in stone, and thus not subject to easy amendment. It showed how to make a flexible interpretation of doctrine that avoids a rigid narrowness on the one hand and the free-form discourse of Justice Brennan on the other.

The key feature of this approach is to start with a single prohibition that in the case of the Lex Aquilia condemned the unlawful killing of a slave or herd animal. That was it for the written text. But the law of these killings went far beyond these words, as the basic qualification prohibition was systematically qualified in two ways to meet the challenges of the discerning skeptic. The first involves issues of strategic behavior. X knows that he cannot kill Y without being punished. So he decides to place poison in the milk which he places in front of Y. Y then drinks the milk and dies. X defends himself by saying that he did not kill Y who in ignorance of the risk chose to drink the milk and thus in effect killed himself. It never works. To be sure there was the act of Y that intervened between the act of X and the death of Y, but the counterresponse is that anyone who tries to circumvent a powerful norm will, in fact, be found liable if the tactic he uses is sufficiently similar to the forbidden tactic. Dutifully, the Romans developed the principle *causam mortis praestare*, meaning "to furnish the cause of death," which did not literally fall within the Lex Aquilia, but was subject to the same treatment (some procedural details aside) as the direct killing.[3] The precise English analogy is the action on the case—placing a log on a road—which grew up to supplement the tort of trespass, which was confined to cases of the direct application of force by one party to another.

This principle of statutory interpretation was well-understood and accepted by the Framers. To treat it as though it is some foreign element that was to be expunged in the name

of originalism is to misunderstand the originalism. It is not that careful textual interpretation of the words in the text can be ignored. It is just that these words have to be read against an interpretive tradition which in this instance has a powerful social justification. Thus does anyone think that a decision by government officials to blow up a private home is not caught by the Takings Clause because the government does not enter the land or allows the owner to retain possession of the rubble? Just as private parties can be guilty of evasions of public law, so public officials can be guilty of evasion of their constitutional obligations.

The Lex Aquilia used a second nontextual move. Defenses to killing were allowed, to cover such matters as self-defense, assumption of risk and contributory negligence. Once again this move has its precise constitutional analogue, which covers the extensive development of the "police power" exception to the Takings Clause, and indeed to every other major constitutional protection of individual rights to cover regulations that deal with matters of health, safety, morals and the general welfare. Once again this critical element of the constitutional tradition has no textual warrant in the Constitution. Nor, ironically, was it seriously discussed during the founding period. But just as the anticircumvention rules expand the scope of the basic text, so the police power move limits its scope. The government can, for example, disarm somebody who's about to kill a stranger. The owner of the property cannot treat that as an unlawful deprivation of the property. The control of common law nuisances is a classic instance of a proper police power initiative that allows for state restrictions on the private use of land, without just compensation.

The careful originalist position also must be aware of the overuse of physicalist images in determining the scope of constitutional protections. For example, current property law gives strong protection to patents, copyrights, and trademarks, none of which can be seized physically by the government. But essentially they are treated as seized, if somebody else is allowed to use them in addition to the owner. There's nobody who thinks that that particular doctrine is not appropriate, notwithstanding the absence of some physical interest at stake. Various forms of electronic surveillance often are of dubious physicality, yet they do not fall outside the scope of the Fourth Amendment protections against searches and seizures.

Indeed, as I mentioned earlier, it is not clear *Penn Central* should be treated as a regulatory taking case at all when it is a confiscation of air rights under standard common law rules under which these rights were severable estates that were capable of being alienated, mortgaged, donated, or bequeathed. What happened in *Penn Central* was an intellectual travesty. Once the property owner complained that the government took its air rights, the Court replied "no, no, no; so long as you, Penn Central, retain the ground rights, the air rights don't count as protectable property rights, even when they are held by some separate owner." The line between the physical and the regulatory is vanishingly thin. *Penn Central* is probably incorrectly decided because it does not follow the central maxim of takings law which holds that state law determines the nature and scope of the property interests that the United States Constitution protects.

Fairness and Efficiency—Opponents or Allies?

In responding to originalist arguments, the opponents of a broad reading of the Takings Clause make a different claim. The Takings Clause should not be read in a crabbed sense so that its sole objective is to protect some undefined notion of economic "efficiency." The fairness element is a constant theme in the public discourse on this issue, and it too should be incorporated into the analysis so that due weight is also given to community interests. I believe that this position misunderstands the interrelationship between fairness and efficiency. Indeed, one reason why the clause is susceptible to a coherent and comprehensive interpretation is because of the close correlation between fairness and efficiency when both concepts are rightly understood.

First of all, on the efficiency side, the standard economic definitions of efficiency are necessarily implicated by the Takings Clause. The two standard definitions are closely related insofar as both seek to combine the subjective states of different individuals in order to create a composite measure of social welfare. The first of these two definitions in the Pareto standard which holds that a general kind of regulation will be Pareto efficient if when all is said and done each person is at least as well-off after the social program is implemented and at least one person is better-off. The reason that this formula implicates compensation is that various kinds of transfer programs can be used to offset any skewed distribution that regulation otherwise brings about. Thus suppose that a system of regulation moves one person from ten to twenty and another person from ten to eight. That system is not Pareto efficient because of the shortfall for the second person. But it can be made to be Pareto efficient if two units are paid over to the second party from the first to compensate the former for his loss. Indeed, it should be clear that in this simple example, in the absence of transaction costs, distribution of the ten units of surplus between the two parties is consistent with the definition of Pareto efficiency. From this example it is a very short stretch to note that if the state takes the role of the first party, it can take (or regulate) land so long as it meets the just compensation requirement by paying off two units to the individual owner whose property is taken. The Pareto test thus maps easily into the constitutional standard.

In contrast, the Kaldor-Hicks formula builds off the same basic insight that compensation between parties is one way to insure overall social efficiency. But it does not require that this compensation be paid with all the transaction costs that are thereby imposed. It only requires some demonstration that the winner from some government action be able to provide, *hypothetically*, compensation to the loser and still be better off himself. As a general intuition the higher the level of transaction costs, the greater the appeal of the Kaldor-Hicks formulation, which does not, however, meet the constitutional standard that calls for the provision of just compensation.

As a normative matter, however, it is equally clear that the higher level of perceived fairness comes with the Pareto test under which no person is required to make on net a sacrifice for the common good. Individual property may be taken against an owner's will but the offset will be supplied in some other form. Indeed that is the precise logic that dictated the outcome

in the important 1960 case of *Armstrong v. United States*,[4] which articulated the most common fairness justification of the Takings Clause when it wrote that "[t]he 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."

It is easy to see where the fairness reference comes from. In that case Armstrong had a materialman's lien United States Navy vessel berthed in Maine waters. The United States decided to dissolve the lien by sailing the vessel into international waters. The construction of the boat was for the benefit of the public at large, not the materialman alone. So it is just not fair that he should pay the disproportionate cost of providing that indubitable public benefit. Since the lien cannot be restored, the government's unilateral action did not let it go scot free. Rather it transformed the government into a unsecured debtor that had to pay the debt out of general tax revenues. To be sure, this fairness standard might not apply in all cases. Indeed, historically, asking when the Pareto standard should be abandoned poses one of the great challenges of constitutional theory. The correct answer usually is to do so only with widespread social changes which we are confident generate huge social gains, so that we can prevent the situation where a complex set of legal transformations cannot go forward because some uncompensable loss of ten units to one person blocks an ambitious initiative that generates hundreds of units of gains to everyone else. But short of those extreme cases the fairness concern tends to point to the Pareto test, which is why the two standards are operationally so closely linked together.

There is, moreover, one critical common feature that exerts an immense influence in thinking about the proper role for government coercion. Although the Pareto and Kaldor-Hicks tests differ in how they divide gains from government projects, both of them unequivocally condemn the government initiation of those projects that generate *net losses*, such that providing compensation, hypothetical or real, becomes a definitional impossibility. But the importance of this point is easy to overlook. The common way of thinking about the Takings Clause is to assume that it only regulates the distribution of benefits or losses from those projects that do take place. But in fact one of its most vital functions is to afford a general all-purpose screen that blocks in practice those government initiatives that should not be undertaken in the first place. The price system in ordinary economics has, by way of comparison, one desirable function of making sure that goods and services do not get provided to the wrong people. The price mechanism adopted under the takings clause has exactly the same effect. In general every time that we can identify some public projects that do not take place, we have good reason to praise that result so long as the compensation measures are accurately set.

In practice therefore the Takings Clause in its multiple guises prevents both inefficiencies and inequities at the same time. Why then should any court want to back off its logical structure and subject private ownership to the vagaries of the political process? The usual argument in that regard comes from the supposed belief that the principle of judicial restraint demonstrates that it is not an appropriate function of courts to intervene in, for example, land-use disputes no matter how scandalous because courts do not have the expertise to so do. Fortunately, that logic has never dominated across the board, as many areas of law dealing with speech, religion, and searches and seizures show that it is possible to develop coherent rules under which judicial intervention is not an arbitrary expression of political will. That is surely the case with the Takings Clause once regulation and occupation are seen as part of a single continuum that are governed by a uniform set of rules.

The key question in many cases is how to work out the principles of compensation. In dealing with the occupation of a single parcel by the state, cash compensation is the norm, because there is no reason to think that the occupation in question supplies any in-kind compensation to the dispossessed landowner. The same is true of land-use regulation which is directed to a single parcel. That form of "spot zoning" subjects the landowner to immediate losses in uses for which there are no offsetting benefits. Yet the situation may change if the regulations in question cover a large number of parcels, each of which are benefitted and burdened in the same degree. As a matter of first principle, the burdens on each parcel count as the taking for which the benefits received from nearby parcels count as the return compensation. In some cases the entire scheme could leave each owner better off than before, at which point no further compensation is required. But in other cases, the compensation in question may amount to only a partial offset of the loss from the parallel restriction, at which point some cash compensation is needed to offset the difference.

In dealing with these cases, my rejection of the supposed principle of judicial restraint does not imply that courts should take over the world. There is, for example, no warrant for any court to decide whether or not the state should, or should not, condemn a particular parcel of land. That decision is a political function, subject to the limitations of the public use requirement. The proper role of the state is to be sure that the correct levels of compensation are supplied once the compensation of the property in question is determined. I do think, however, courts should decide that the compensation is needed. The rejection of the categorical distinction between occupation and regulation in no way undermines that distinction, nor does it offend any originalist position or force courts into any improper role. There is no need to fear the proper reading of the Takings Clause. There is much to fear in the current situations where its commands are systematically ignored.

Endnotes

1 United States v. Kaiser Aetna, 444 U.S. 164 (1979).

2 438 U.S. 104 (1978).

3 For discussion, see Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 Bost. U. L. Rev. 699 (1992).

4 364 U.S. 40, 49 (1960).