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The notion that property ownership is essential for the enjoyment of political liberty has long been a fundamental tenet of Anglo-American constitutional thought. Reflecting this sentiment, many provisions of the Constitution and Bill of Rights pertain to the protection of the rights of property owners. Among the most important of these provisions is the Fifth Amendment, which provides in part: “nor shall private property be taken for public use, without just compensation.”

The origins of the takings clause can be traced to the English common law tradition. Magna Carta (1215) contained a prohibition on the king taking personal property without payment. Parliament also early recognized the compensation principle when property was taken for public use. William Blackstone (<http://uscivilliberties.org/historical-overview/3207-blackstone-and-common-law-prohibition-on-prior-restraints.html>), in his influential Commentaries on the Laws of England (1765–1769) stressed that private property could not be acquired for public use without the payment of full compensation.

Colonial Americans were strongly influenced by the English common law experience. Although their record was somewhat checkered, most colonies acknowledged the right of landowners to receive compensation when government took property. During the Revolutionary era several states, notably Massachusetts, elevated the common law compensation principle to a constitutional norm in their state constitutions. The takings clause of the Fifth Amendment was also foreshadowed by legislation at the national level. The Northwest Ordinance of 1787 required that full compensation should be made when property was taken for public use. Thus, the takings clause did not break new ground, but gave constitutional status to a long-settled common law principle. Its place in the Fifth Amendment, coupled with guarantees of criminal procedure, underscores the close association of property rights with personal liberty in the minds of the framers.

Significantly, the Fifth Amendment takings clause became a model for later state constitutions. Similar language is contained in nearly every state constitution, and some require compensation when property is “damaged” as well as “taken” by governmental action. The takings clause and its state counterparts clearly reject the uncompensated confiscation of property as a legitimate exercise of

governmental authority. Indeed, in *Gardner v. Village of Newburgh* (12 Johns, Ch. 162, N.Y. 1816) the distinguished jurist James Kent declared that the payment of compensation when private property was taken for public use was an indispensable principle derived from natural equity.

Eminent Domain

Eminent domain is the power of government to compel the owners of real or personal property to transfer such property to the government. It is among the most intrusive governmental powers because it entails taking property from persons against their will. Parliament in England long exercised the power of eminent domain for public projects. Following suit, governments in colonial America utilized eminent domain to facilitate the construction of roadways and public buildings through the acquisition of real and personal property. Moreover, colonial governments delegated eminent domain to private parties, such as gristmill operators, whose activities were viewed as encouraging economic growth.

The Constitution does not expressly grant the power of eminent domain to Congress. As early as *Vanhorne's Lessee v. Dorrance* (2 U.S. 304, 1795), however, a federal circuit court insisted that eminent domain was an inherent power of government as an aspect of sovereignty. The Supreme Court expressly acknowledged in *Kohl v. United States* (91 U.S. 367, 1875) that state and federal governments could exercise the power of eminent domain in order to perform governmental functions. The takings clause of the Fifth Amendment implicitly recognized the existence of eminent domain by placing limits on its exercise. It mandates that government must acquire property for "public use" and then only upon the payment of "just compensation."

Public Use

A vexing issue concerning the exercise of eminent domain is the requirement of the Fifth Amendment that private property must be taken for "public use." Courts have repeatedly held that eminent domain does not empower government simply to take the property of one person and transfer it to a private party, even with the payment of compensation. Nonetheless, the public use limitation steadily eroded during the twentieth century by judicial deference to legislative determinations that a particular acquisition of property served the public interest. In *Berman v. Parker* (348 U.S. 26, 1954), for example, the Supreme Court sustained the taking of land for redevelopment by a private agency as part of the urban renewal project and equated the public use requirement with the police power.

The justices were also highly deferential to legislative assessments in *Hawaii Housing Authority v. Midkiff* (467 U.S. 229, 1984), which ruled that a state could authorize the transfer of land titles from landlords to tenants to alleviate the perceived evil of concentrated land ownership. As this indicates, the federal courts have largely treated the reasons for the exercise of eminent domain as a matter for legislative judgment. Such a permissive judicial attitude has virtually eliminated "public use" as a meaningful constraint on eminent domain at the federal level. Some state courts, however, have been

more inclined to scrutinize the exercise of eminent domain. They occasionally strike down reliance on eminent domain on grounds that the planned acquisition is primarily for private gain not public benefit. The use of eminent domain to transfer property to private parties remains a highly contentious issue.

Emergence of Takings Jurisprudence

In Barron v. Baltimore (<http://uscivilliberties.org/cases/3169-barron-v-baltimore.html>) (32 U.S. 243, 1833), the Supreme Court ruled that the Bill of Rights, including the takings clause, applied only to the national government and did not bind the states. Before the Civil War, therefore, state courts, governed by state constitutional guarantees, took the lead in fashioning takings jurisprudence. During the antebellum era, the states regularly utilized eminent domain to foster economic development through improved internal transportation. Courts repeatedly sustained the delegation of eminent domain power to canal and railroad companies. Judges reasoned that such privately owned corporations were carrying out the public purpose of bettering transportation, thereby encouraging an open-ended definition of “public use.”

In the late nineteenth century, the Supreme Court began to address issues arising under the takings clause and, in the process, strengthened the constitutional protection afforded property owners. The justices held in Pumpelly v. Green Bay Company (80 U.S. 166, 1871) that the flooding of land as a result of governmental action constituted a taking even without a formal eminent domain proceeding to acquire title. This established the basis for the doctrine of inverse condemnation, which holds that a physical invasion of land by governmental action constitutes a compensable taking.

Drawing upon this concept, the Supreme Court in the twentieth century amplified the protection afforded owners against physical intrusion by government. In United States v. Causby (328 U.S. 256, 1946), the justices ruled that frequent military flights at low altitude over a farm destroyed its value and in effect appropriated the land. Furthermore, the justices declared in Loretto v. Teleprompter Manhattan CATV Corp. (458 U.S. 419, 1982) that any permanent physical occupation of private property authorized by government constituted a taking.

The Supreme Court gave a broad interpretation to the just compensation requirement in the leading case of Monongahela Navigation Company v. United States (148 U.S. 312, 1893), declaring that the compensation paid to owners must be a full and perfect equivalent for the property taken. In most situations this means that the measure of compensation is determined by the market value of the property. Of even greater significance was the seminal case of Chicago, Burlington and Quincy Railroad Company v. Chicago (166 U.S. 226, 1897), in which the justices unanimously held that the payment of just compensation when private property was taken for public use was an essential element of due process guaranteed by the Fourteenth Amendment. Accordingly, the just compensation norm became the first provision of the federal Bill of Rights to be applied against the states.

Regulatory Takings

By the late nineteenth century, property was increasingly understood to encompass not just title to a physical object but such beneficial characteristics as the right to possess, transfer, use, and derive profit. This understanding highlighted the question of the extent to which governmental actions, short of outright acquisition of title or physical invasion, might effectuate a taking for which compensation was constitutionally required. In particular, the spread of land use regulations posed the issue of whether a regulation could so diminish the value or usefulness of property as to be tantamount to a taking.

During the 1890s prominent commentators and jurists, such as David J. Brewer and Oliver Wendell Holmes, Jr., suggested that regulation of the use of property might so destroy its value as to constitute the practical equivalent of outright appropriation. These contentions anticipated the emergence of the regulatory takings doctrine, which achieved constitutional status in the famous case *Pennsylvania Coal Company v. Mahon* (260 U.S. 393, 1922). Speaking for the Supreme Court, Justice Holmes agreed that property could be regulated to some extent under the police power. But he cautioned that controls on land use that went “too far” would be treated as a taking of property.

It remained difficult to distinguish between appropriate restrictions on use and an unconstitutional taking. For decades after *Mahon* the Court was reluctant to apply the regulatory takings doctrine. For instance, the Court brushed aside takings objections and upheld the validity of comprehensive zoning ordinances in *Village of Euclid v. Ambler Realty Company* (272 U.S. 365, 1925). In the same vein, the justices in *Penn Central Transportation v. New York* (438 U.S. 104, 1978) validated the designation of Grand Central Terminal as a historic landmark by a six-to-three vote, despite the fact that this action caused a drastic drop in the value of the building. Establishing a framework for subsequent regulatory takings challenges, the Court in *Penn Central* engaged in an ad hoc inquiry, balancing the economic harm to the owner’s “investment-backed expectations” against the purpose served by the government’s action. This resulted in a muddled regulatory taking doctrine with no clear standards.

Starting in the 1980s, however, the Supreme Court took a fresh look at the question of regulatory takings and rendered a number of decisions that put some teeth into the doctrine. In the landmark case of *Nollan v. California Coastal Commission* (483 U.S. 825, 1987) the Supreme Court, for the first time since the 1920s, invalidated a land use regulation. It held that a state agency could not impose conditions on the grant of a building permit when such conditions were unrelated to any problem caused by the proposed development. In *Dolan v. City of Tigart* (512 U.S. 374, 1994) the Court went a step further, insisting that there must be a rough proportionality between imposed building conditions and the burdens anticipated from the development. Moreover, Chief Justice William Rehnquist, writing for the Court, pointedly remarked that the takings clause of the Fifth Amendment was as much a part of the Bill of Rights as the First or Fourth Amendments.

The Supreme Court has also shown heightened concern about land use restrictions that dramatically diminished the value of property. In *Lucas v. South Carolina Coastal Council* (1992) the Court held that regulations that denied an owner all economically productive use of land constituted a taking

notwithstanding the public interest advanced to justify the restraint. The Court treated a total deprivation of economic use as the practical equivalent of a physical appropriation of the land. The regulatory takings doctrine continues to evolve. For example, in *Eastern Enterprises v. Apfel* (524 U.S. 498, 1998) a plurality of the Court found that a congressional act that retroactively imposed financial liability on an employer effectuated a taking.

Purpose of Takings Clause

Like other provisions of the Bill of Rights, the takings clause serves as a vital guarantee of the rights of individuals against abuses of government power. As the Supreme Court explained in *Armstrong v. United States* (364 U.S. 40, 1960), the purpose behind the takings clause was “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” (p. 49). In other words, the takings clause prevents government from singling out individual owners to share a disproportionate burden of the cost of furnishing public goods. It reinforces the security of property ownership as a means to encourage economic growth as well as to provide a practical basis on which to safeguard other individual rights. It also attests to the important role of private property in the American constitutional order.

JAMES W. ELY, JR.

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