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The Environmental Policy Project conducts research and education on legal policy issues relating to protection of the environment and conservation of natural resources.

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The champions of the property rights movement claim that they are fighting to restore the original understanding of the Takings Clause of the Fifth Amendment. They invoke James Madison and other founding fathers as support for proposed statutes that require the federal government to pay property owners when it prevents them from harming the environment or jeopardizing the survival of endangered species. Wetlands regulation, it is often said, "takes" property by diminishing its value, and the founders adopted the Takings Clause to ensure that, when government regulations diminished the value of property, the owner would receive compensation. Increasing numbers of lawsuits are being filed on the same theory. Established Supreme Court standards for resolving takings claims, litigants contend, are at odds with the founders' belief that property ownership was a natural right that the government could never limit. These suits urge courts to return to the founders' vision, and claim that, once that vision is revived, the judiciary will routinely invalidate local land use and environmental protection standards.

Widely shared and forcefully repeated, this conception of the original understanding has come to play a central role in the debate about the Takings Clause. But it is demonstrably and dramatically wrong. The original understanding of the Takings Clause was, very simply, that the federal government had to compensate the property owner when it physically took property -- such as when it took land to build a fort. The clause did not require compensation for regulations under any circumstances. Property rights advocates ignore the plain language of the clause, the evidence about what the founders and other Americans in the early republic thought the clause actually meant, and the founders' views about property and democratic government. Claiming to rely on history, property rights advocates embrace, instead, a myth.

Despite the public prominence of the property rights argument, there is actually nothing novel or particularly controversial about the conclusion that the Takings Clause was limited to physical seizures. With some notable exceptions, prominent legal scholars of all shades of political opinion--including such leading conservatives as former judge Robert Bork and former Solicitor General Charles Fried--support the conclusion that the property rights argument has no plausible foundation in the original understanding of the Takings Clause. Justice Scalia, the Supreme Court Justice who most consistently argues for a broad reading of the Takings Clause, has acknowledged that until well into the twentieth century "it was generally understood that the Takings Clause reached only a ‘direct appropriation' of property or [its] functional equivalent...." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1114 (1992). The only remarkable aspect of the original understanding of the Takings Clause is how rarely the original

understanding of this clause is taken into account in political and legal debates over property rights.

Plain Language

Despite all the controversy about its meaning, the language of the Takings Clause--"nor shall private property be taken for public use, without just compensation"--is perfectly straightforward. Compensation is necessary only when property is "taken." In other words, the only time when government must compensate the property owner is when it physically seizes property. The text does not require compensation when regulations diminish the value of property. Indeed, the clause does not even mention regulations.

Proponents of a broad reading of the Takings Clause counter that, at the time of the ratification of the Takings Clause, "property" sometimes meant "anything of value." Thus, according to this view, whenever government diminishes the value of property through regulation, the Takings Clause can properly be read to require payment of compensation.

The problem with this view is that it ignores a critical part of the clause, the word "taken." "Take" means, and meant at the time the Fifth Amendment was ratified, "physically seize," not "diminish in value." All the debate among judges, scholars, policy-makers, and politicians about precisely what the Takings Clause means tends to obscure this obvious point, but it can be illustrated with a simple example. If I tell my daughter that she cannot play with her ball in the house, she has lost something of value--the right to play with the ball in the house. I have regulated what she can do with the ball, but I haven't "taken" it. She is still free to play with it outside. I only "take" her ball when I physically seize it. Only a child immersed in the literature of the property rights movement would argue otherwise. The plain language of the Takings Clause is to the same effect. Even if the word "property" is read to cover anything of value, compensation is owed only when property is "taken." Regulations, by their nature, are not "takings."

Original Understanding

The evidence of how the clause was originally understood leads to the same conclusion as analysis of its language: the Takings Clause applied only to physical takings.

While property rights advocates sometimes argue as if the founders believed that the Takings Clause was the central feature of the Constitution (or at least the Bill of Rights), the historical reality is almost the exact opposite. The state ratifying conventions that considered the Constitution proposed almost two hundred constitutional amendments. Not one, however, proposed a takings clause. The clause is part of the Constitution, not because there was a national demand for it, but because James Madison, the author of the Bill of Rights, unilaterally included it among the amendments he proposed in 1789. Madison did not explain what the clause meant when he presented it to Congress, and no debate in Congress about its meaning -- if there was any debate -- has been preserved. The language of Madison's proposal shows that he was concerned only with physical seizures: "No person shall be...obliged to relinquish his property, where it may be necessary for public use, without just compensation." This wording was altered in Congress to the current constitutional text. In the absence of recorded debates, we don't know why the change was made, but it is clear that the language eventually adopted was, like the language of Madison's initial proposal, the language of physical seizure. Indeed, the principal change was to highlight the physical action by the government. The focus is no longer on the individual's "relinquish[ing]"; it is on the government's "tak[ing]."

St. George Tucker, a Virginia judge, politician and legal educator, provided the first clear statement of the clause's meaning in 1803 when he wrote what became the early republic's preeminent constitutional law treatise. In that treatise, he observed that the Takings Clause "was

probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war." Thus, according to Tucker, the purpose of the clause was to require compensation when the military seized civilian goods.

The other important early statements concerning the clause's scope are Madison's. In a 1792 newspaper essay criticizing Secretary of the Treasury Alexander Hamilton's economic policies, Madison attacked "arbitrary restrictions, exemptions, and monopolies [that] deny to part of [the nation's] citizens . . . free use of their faculties." Madison continued:

"If there be a government then which prides itself in maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet...which *indirectly* violates their property, in their actual possessions, in the labor that acquires their very subsistence, and in the hallow remnant of time which ought to relieve their fatigues and sooth their cares, ...such a government is not a pattern for the United States." Significantly, even as Madison in his essay is defending property interests, he demonstrates that the Takings Clause's prohibition is limited. In Madison's words, the clause provides that property "shall [not] be taken *directly*." It does not reach "*indirect*[ ]" violations - the "arbitrary restrictions, exemptions and violations" that Madison warns against, not as a matter of constitutional law, but as a matter of public policy.

Madison's other most significant writing about the Takings Clause reflects the same view of the clause's meaning. In a letter to an antislavery advocate, Madison proposed that the federal government purchase all slaves in order to free them. He observed, "Whatever may be the intrinsic character of that property [slavery], it is one known to the constitution and, as such, could not be constitutionally taken away without compensation." Again, compensation is necessary for Madison because the Government has physically "taken away" "property."

In drafting the clause, it appears that Madison sought to address very particular concerns. One type of government action during the revolutionary era that troubled him was the seizure of loyalist land. Such seizure had occurred on a scale of epic proportions: Loyalist property worth more than twenty million dollars--one tenth the value of real property in the country--was confiscated. In addition, as a Virginian and a slaveowner, he was worried that in the new republic the free states would band together in Congress and enact legislation that emancipated slaves without compensation. The Takings Clause, with its narrow ban on "direct" takings of physical property, precisely remedied these two problems.

In historical context, the narrow scope of the Takings Clause is hardly surprising. The clause provided greater protection for the property owner than the property owner had traditionally received. England's Magna Carta did not require compensation for government seizure of land. It only required compensation when the government took personal property. Thus, crown officials were barred from "tak[ing] anyone's grain or other chattels, without immediately paying the money." Magna Carta, Art. 28. In contrast, the sole limitation on government seizure of land was one of procedural regularity: "No free man shall be dispossessed...except by the legal judgement of his peers or by the law of the land." Magna Carta, Art. 39. Early colonial charters were similarly limited in scope. Only the Massachusetts Body of Liberty, adopted in 1641, required compensation when personal property was taken. No colonial charter required compensation for the seizure of land. While property owners, in practice, commonly were paid when their land was seized, no colony had a constitutional obligation to do so, and, in fact, compensation was not always paid. Strikingly, except for Massachusetts, no colony paid compensation when it built roads on undeveloped land.

No colonial charter barred regulation that diminished the value of property, and colonial governments adopted innumerable regulations that constrained the use of property. In some respects colonial regulations, particularly pertaining to the permitted use and intensity of

development, appear relatively rudimentary compared to modern regulations; other colonial regulations appear relatively stringent from a modern perspective. Land use statutes throughout the colonies limited where certain businesses--such as bakeries, slaughterhouses, and stills--could be located and what crops farmers could grow. Colonial laws regulated the permitted density of development; for example, a Connecticut building requirement limited the dispersion of development within the community, while a New Jersey law prohibited the subdivision of home lots to prevent overcrowding. Other colonial ordinances, such as in the colonies of New Amsterdam and Virginia, explicitly regulated the aesthetic features of development. An early Massachusetts Bay ordinance prohibited the construction of a dwelling unit more than half a mile from the meeting house.

Many colonial laws imposed affirmative obligations on residents to use their property for some specific purpose to advance the overall interests of the community. A Plymouth colony ordinance required those with rights in valuable minerals to exploit their rights or forfeit them. A Maryland law required owners of good mill sites to develop the sites or run the risk of losing their property to someone else who would develop the site. Similarly, when land was not developed or bridges fell into disuse, colonial governments took these properties from their owners and transferred them to someone else. Such forced transfers often occurred when the owner's initial grant contained provisions requiring use, but not always. New York's Governor Bellomont, for example, seized undeveloped land and, when confronted with the argument that he was not empowered to do so because the land grants had not explicitly required settlement, responded that the argument was inconsistent with royal authority and was "very presumptuous and unnatural."

The first state constitutions enacted after independence was declared did not require compensation when the government seized property. Instead, they left the decision to compensate or not to legislative discretion. As a Pennsylvania court stated, citizens "were bound to contribute as much of it [land] as, by the laws of the country, were deemed necessary for the public convenience." M'Clenachan v. Curwin, 3 Yeates 362, 373 (Pa. 1802). Similarly, South Carolina's Attorney General, in prevailing over a claimant who sought compensation for the taking of unimproved land, argued that such taking without payment was "one of the inherent prerogatives of the majesty of the people."

A compensation requirement began to win constitutional recognition during the revolutionary era, but only in a very limited way. Vermont - not one of the original thirteen states - broke from precedent in 1777 when it adopted the first constitutional provision requiring compensation "whenever any particular man's property is taken for the use of the public." Massachusetts adopted a similar restriction in its 1780 constitution. The Northwest Ordinance of 1787 was the third and final revolutionary era document to contain a compensation requirement. These constitutional provisions, however, were understood narrowly. None was read as a limit on government regulation. Indeed, an early court case construed the Northwest Ordinance's provision as applying only to military seizures, Renthrop v. Bourg, 4 Mart. 97, 132-33 (La. 1816), thus adopting a view similar to Tucker's view of the Takings Clause.

Until late in the nineteenth century, judicial constructions of the Takings Clause and of similar state constitutional provisions were consistently narrow. As one treatise writer observed in 1857, "It seems to be settled that, to be entitled to protection under this clause [the Takings Clause], the property must be actually taken in the physical sense of the word." Similarly, the Supreme Court declared in 1871:

"[The Takings Clause] has always been understood as referring only to a direct appropriation. ...It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared?"

Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871). In short, the Fifth Amendment's Takings Clause did not prevent regulations and statutes from restricting how property could be used nor did it prevent them from diminishing the value of property. The clause applied only to "a direct appropriation."

Current Supreme Court jurisprudence has dramatically departed from the original understanding. Since the 1890's, the Court has applied the clause to regulations (although its reading of the clause has still been much narrower than the reading favored by property rights advocates). Thus, the idea that regulations can violate the Takings Clause has a historical pedigree. But it is a pedigree that can be traced back only to the late nineteenth century, not to the framers of the Constitution.

Political Values

Finally, the limited scope of the Takings Clause reflects the basic political values of the founding fathers. Most fundamentally, the founders believed in democratic self-governance. They believed that, given the proper institutional framework, the people of this country could govern themselves wisely and well. The structure of the government the founders created embodied such a framework, one designed to ensure that debate on proposals would be fair, that elected officials who considered legislation were responsible leaders, and that statutes enacted into law enjoyed strong support -- either from both houses of Congress and the President or two-thirds of both houses.

The Takings Clause was drafted narrowly, not because the founding fathers cared too little about property rights, but because they cared so much about representative democracy. The founders did not bring regulations within the ambit of the Takings Clause because they believed it was the appropriate responsibility of democratic decision-makers to balance individual property interests against other community interests. Both in its wording and its theory of governance, the Constitution starts with "We the People," and the original meaning of the Takings Clause can only be understood in that larger context.

Proponents of a broad reading of the Takings Clause offer an alternative account. They assert that the founders were followers of the philosopher John Locke and therefore committed to the principle that the state can never diminish an individual's property. Sophisticated adherents of this view sometimes acknowledge that the founders favored certain statutes that caused the value of some private property to diminish. But, these proponents argue, the founders simply failed to see the tension between, say, their acceptance of state regulation in some circumstances and their general commitment to a Lockean conception of property. If we are to honor the original understanding, these proponents continue, we should honor the founders' general commitments, not their occasional blind spots.

This account is bad history. To start with, it misreads Locke, who did not see property rights as absolute. Far more important, regardless of whether or not the proponents of a broad reading of the Takings Clause have misread Locke, they have certainly misread the founders and their views on property. The founders were profoundly influenced by republicanism, the school of thought that contends that the essential role of the state is to promote individual virtue and commitment to the common good. Republicans treasured the institution of private property. Property gave the individual the independence he needed to participate responsibly in politics without fear of economic retribution. Because property was valued as a means, rather than as the end of the state, however, republicans believed that legislators could limit property interests in order to advance the common good.

The constitutionalization of a compensation requirement, first in several state constitutions, the Northwest Ordinance, and then in the Bill of Rights, reflected a break from this view, but only in a

very limited way. During the revolutionary era, a range of Americans concluded that - with respect to the seizure of physical property - additional protection of private property was needed, even as their specific concerns varied dramatically. The movement for a compensation requirement began in Vermont and reflected the peculiarities of that state's history. The area that became Vermont had originally been a part of New Hampshire and then, in 1764, the English government had shifted the area to New York. The New York legislature subsequently invalidated the New Hampshire land titles. The Vermonters who declared their independence from New York included a Takings Clause in their constitution, presumably because their central grievance was the New York government's attempt to seize their land. Tucker's statement about the Fifth Amendment, as well as the court's holding in Renthrop interpreting the Northwest Ordinance, suggest that others supported constitutionalizing a compensation requirement because of their opposition to military seizure of civilian property. Madison's various political writings suggest that he was motivated by still other concerns: he feared that, because a majority would own neither land nor slaves, the interests of landowners and slaveowners were property interests that the political process was particularly unlikely to consider fairly. Moreover, while no one seems to have voiced objection to the constitutionalization of a compensation requirement in the Takings Clause, there was not a strong movement in favor of it either. As noted, it is the one clause in the Bill of Rights that no state requested.

It is thus wrong to read the Takings Clause as embodying a fundamental rejection of majoritarian decision-making or republicanism. Its adoption reflected, instead, a congruence of concerns relating to the perceived need to protect particular forms of real property from state seizure. While it is true, as proponents of a broad reading of the Takings Clause often point out, that some of the actions of revolutionary era state governments - such as their confiscation of loyalist land - caused many of the founders to fear what unconstrained majorities, in the absence of appropriate checks and balances, might do, the founders were also worried about what wealthy property-owners might do if they were not controlled. Thus, even a staunch conservative such as Pennsylvania's John Dickinson could declare at the constitutional convention that he "doubted the policy of interweaving into a Republican constitution a veneration for wealth [and] had always understood that a veneration for poverty & virtue, were the objects of republican encouragement."

The scope of the Takings Clause was limited, then, to physical seizures because most of the founders fundamentally believed in republicanism and believed, as well, that in most contexts majoritarian decision-making could appropriately limit property claims to advance the common good. John Adams described laws that caused "frequent division of landed property" as one of the five principal sources of liberty in New England. Madison in Federalist Ten recognized that governmental decisions necessarily involved creating economic winners and losers among competing interests: "A landed interest, a manufacturing interest, a mercantile interest, a moneyed interest, with many lesser interests, grow up of necessity in civilized nations.... The regulation of these various and interfering interests forms the principal task of modern legislation...." Benjamin Franklin, however, offered perhaps the strongest statement of the relation between private property claims and the public good. He wrote, "Private Property...is a Creature of Society, and is subject to the Calls of that Society, whenever its Necessities shall require it, even to its last Farthing; its contribution to the public Exigencies are...to be considered...the Return of an obligation previously received, or the payment of a just debt." The limited scope of the Takings Clause was not, as proponents of a broad reading of the clause argue, the product of the founders' blindness. It was a product of their beliefs.

History, of course, is not destiny, and just because the founders intended the Takings Clause to have a narrow scope does not necessarily mean that it should be given an identical reading today.

Ultimately, what one makes of the founders' original understanding of the Takings Clause depends upon one's approach to constitutional interpretation in general. An advocate of strict adherence to the actual original meaning of a constitutional provision will be forced by the history outlined above to adopt a reading of the Takings Clause that excludes governmental regulation. Others, for example, could argue that the animating principle behind the Takings Clause should be sensitively applied in twentieth century America, taking account of changed social and economic circumstances. Others might pursue other routes of constitutional interpretation. All examinations of this important and controversial subject would benefit, however, by accurate recognition that the founders never intended the Takings Clause to reach government regulation at all. As its name indicates, the Takings Clause applied only to takings.

For further reading about the original understanding of the Takings Clause:

Robert Bork, The Tempting of America: The Political Seduction of the Law (1990).

Fred Bosselman et al., The Takings Issue, A Study of the Constitutional Limits of Government Authority to Regulate the Use of Privately-Owned Land Without Paying Compensation to the Owners (1973).

Richard Epstein, Private Property and the Power of Eminent Domain (1985).

Charles Fried, "Protecting Property--Law & Politics," 13 Harvard Journal of Law and Public Policy 44 (1990).

John F. Hart, "Colonial Land Use Law and its Significance for Modern Takings Doctrine," 109 Harvard Law Review 1252 (1996).

William Michael Treanor, "The Original Understanding of the Takings Clause and the Political Process," 95 Columbia Law Review 782 (1995).

William Michael Treanor, "The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment," 94 Yale Law Journal 694 (1985).