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A Brief History of the Takings Clause

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The "Takings Clause" of the U.S. Constitution fairly simply provides "nor shall private property be taken for public use." However, in the last quarter century, that clause has taken on a prominent role in constitutional jurisprudence, particularly with respect to the limits of state and local regulatory power. Any discussion of the Takings Clause should begin with the history that led to its enactment and the way the law has developed in the courts.

The Takings Clause found its genesis in Section 38 of the Magna Charta, which declared that land would not be taken without some form of due process. King John I, who signed that document, almost immediately denounced this undertaking to his barons. However, that promise eventually made its way into the coronation oaths taken by kings and, in England at least, became a protection against confiscation of lands without some form of a hearing.

That was not to say there were not battles between the kings and queens on the one hand and, on the other hand, the barons and Church and, after the Renaissance, a rising middle class. Those who opposed the powers of the monarchy to seize land found three formidable legal, and political, writers who provided theories based on common or natural law to support their position. Each of those writers was influential in the development of American law in general, and constitutional law in particular.

Sir Edward Coke (1552-1634), Lord Chief Justice of England, wrote decisions in cases coming before him and treatises on the development of the common law. Coke also published works opposing the powers of the King. Although his work was not historically accurate, it was put forth with passion and rhetorical brilliance. The common strand of his work was that the common law was a long-recognized tradition of rights against which even the powers of the King must bow. He authored the "*Petition of Right*," which set up specific rights, of alleged ancient provenance, against the powers of the King. He compiled the law in the form of reports on cases that he had heard and those he read and prepared a full volume series called the "*Institutes of the Laws of Engl*and," which set out his views on the role of the common law as protecting ancient rights against royal power.

Sir William Blackstone (1723-1780) wrote a four-volume series entitled the "*Commentaries on the Laws of England*," which was used as a foundation for legal education in England and the American colonies. The Commentaries sought to provide an introduction to English law in an easily understandable way. Like Coke, Blackstone stressed the continuity of the common law, as well as its position as a bulwark against royal powers.

The third writer of this trio is John Locke (1632-1704), who was a philosopher and political thinker. He is famous for the *Two Treatises on Government*, which was written, in part, to justify the "Glorious Revolution" of 1688, in which a Catholic king was overthrown and the Protestant ascendancy returned to England with the support of the middle class. His view was that sovereignty did not reside in the state, but rather in the people, who had the right to overthrow government. Locke's view of natural law provided for natural rights, including property rights, which did not depend on royal authority.

The writings of Coke, Blackstone, and Locke were, in addition to the Bible, a standard reference for enlightened English colonialists, and these English authors influenced the Declaration of Independence, which asserted a natural right against royal absolutism. The Declaration of Independence, in particular, reflected Locke's view that the monarchy could be limited or overthrown if it violated ancient or natural rights.

After the American Constitution was adopted, there was fear, particularly by the anti-Federalists led by Jefferson, that the federal government would be too powerful. Jefferson agitated for the adoption of the Bill of Rights, the first ten amendments to the federal Constitution. One of these Amendments, the Fifth, provided that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Jefferson's views probably came from his reading of Coke, Blackstone, Locke, and enlightenment philosophers, and reflected similar provisions in certain earlier post-Revolutionary War state constitutions.

The Fifth Amendment, as originally written, was only a restriction against the federal government. As was held in the opinion of Chief Justice Marshall in *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243 (1833), the prohibitions of the Bill of Rights did not apply to the States. While there were some limits on the powers of the States before 1865, it was not until the Civil War that the federal Constitution limited the powers of the state (and thus local) governments against their own citizens through the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments.

The Fourteenth Amendment imposed restrictions on States through the broadly worded Equal Protection, Due Process, and Privileges and Immunities Clauses. The Privileges and Immunities Clause was quickly eviscerated in the *Slaughterhouse Cases*, 83 U.S. 36 (1873). The Equal Protection Clause developed its own jurisprudence as to similar treatment of similar situations and was especially useful in ending state-sponsored racial segregation in *Brown v. Board of Education*, 394 U.S. 294 (1955). The Due Process Clause, however, developed along at least three lines.

One of those lines was procedural and was developed to assure that hearings and other governmental decision-making processes were conducted fairly. This review of the processes of government is known as "procedural due process." A second line of cases extended the limits on the federal government in the Bill of Rights to state and local government action using

the Due Process Clause. For approximately 100 years after the passage of the post-Civil War amendments, Due Process Clause litigation resulted in "incorporation" of some of the limitations on the federal government in the Bill of Rights to state and local actions as well. The Supreme Court applied the Takings Clause of the Fifth Amendment to the States through the Fourteenth Amendment Due Process Clause in *Chicago Burlington and Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

A third line of cases, commencing with *Mugler v. Kansas*, 123 U.S. 623 (1887), in which the U.S. Supreme Court, through Justice John Marshall Harlan, indicated that that Court could review, through the Due Process Clause, the substance of legislation. The ability to review both the substance, as well as the procedure, involving legislation, came to be known as "substantive due process." This third strand of the Due Process Clause allowed judges to "second-guess" state and local legislative decisions and reigned supreme for the period 1887 through approximately 1940. Under substantive due process, a court could determine whether the ends and means of legislation were appropriate and whether or not the legislation were “unduly oppressive” to regulated parties. To many critics, substantive due process allowed judges to substitute their own views on political and social matters in the guise of constitutional interpretation. Substantive due process generally became unimportant after the clash between the U.S. Supreme Court and the Franklin Delano Roosevelt administration when various New Deal measures were declared unconstitutional and the President threatened to "pack" the Supreme Court. The packing effort was unsuccessful; however, President Roosevelt was able to appoint seven justices to the Supreme Court in approximately two years. With some notable exceptions, particularly in the privacy and abortion areas, substantive due process is not a major factor in constitutional adjudication today, but some critics assert that the ability to second-guess legislatures has shifted from this third strand of substantive due process to the Takings Clause.

It was to be a quarter century after incorporation of the Takings Clause of the Fifth Amendment that the U.S. Supreme Court began working out its application to state and local government actions. In 1922, the U.S. Supreme Court decided *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). This case involved a regulation enacted by the Pennsylvania legislature to prohibit mining of coal under streets, houses, and places of public assembly. The coal company held mineral rights to many properties in northeast Pennsylvania and had sold the surface rights to others. The coal company argued that a taking had occurred under these regulations because it was unable to mine the coal. The U.S. Supreme Court agreed and said that, while property may be regulated, if the regulation goes "too far," it constitutes a taking. No compensation was ordered in that case, and the law was deemed invalid. The analysis of the court in *Pennsylvania Coal* was along the lines of substantive due process. No later cases discussed this case, or its reasoning, for many years after the decision.

At about the same time as the *Pennsylvania Coal* case, the U.S. Supreme Court took four cases involving the new land use regulatory technique called "zoning." Two of these cases were important. In *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926), the Court upheld

a general zoning ordinance against various substantive due process challenges. However, the Court found a zoning ordinance invalid as applied in a particular situation in *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). Both of these cases were substantive due process cases and used a substantive due process analysis. For almost 50 years, the U.S. Supreme Court did not take a land use regulatory case, but, in the meantime, abandoned its substantive due process analysis. The irony was that all four land use cases that were decided between 1926 and 1928 undertook a substantive due process, rather than a takings clause, analysis.

In 1978, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), the U.S. Supreme Court applied the *Pennsylvania Coal* takings analysis to determine whether a local government had gone "too far" and announced a three-factor rule to determine whether a taking had occurred. The Court said it would look at the "economic impact" of the regulation, how the regulation would affect "investment-backed expectations," and the "character of the governmental action." Three years later in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court established a two-part alternative test to determine whether a regulation amounted to a taking. The first part was whether or not the regulation "substantially advanced a legitimate state interest," and the second was whether the regulation "denied an owner economically viable use of land." Both the three-factor *Penn Central* test and the two-prong alternative test of Agins are part of current U.S. Supreme Court jurisprudence.

With regard to conditions involving dedication or transfer of property interests, the U.S. Supreme Court used the "substantially advanced a legitimate state interest" prong of *Agins* in *Nollan v. California Coastal Commission*, 43 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to require that there be a "nexus" between the anticipated effects of a land use and the real property exaction. The Court required that there be an individualized determination, with the burden being on the government, to show that there was a "rough proportionality" between the impacts of the land use proposal and the real property exaction.

The Court has also distinguished “facial” takings claims, which are rarely found, and involve the invalidity of a general ordinance or regulation in which its every application would be invalid, from “as applied” takings claims in which a taking may be found in the application of an ordinance or regulation to a single property. However, in an “as applied” situation, the property owner must demonstrate a final decision showing that level of use to which a parcel of land may be put. That may mean that property owners must seek zoning variances or other forms of relief before the court will find that property has been “taken” by regulation. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473, U.S. 172 (1985).

Further, the U.S. Supreme Court has determined that either a physical occupation of land either by government itself or by a private person authorized by government, as in *Loretto v. Telepromptor Manhattan CATV Corp.,* 458 U.S. 419 (1982), or the deprivation by regulation of all viable economic use, as in *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992), would constitute a "per se" taking (i.e., a taking by itself).

Aside from these "categorical" takings cases, the Court has yet to settle on an analysis for the application of the Takings Clause between the "three-factor" analysis of Penn Central and the alternative tests of *Agins*.

Takings law is confusing and perhaps has developed in a sporadic and contradictory way. Historically, politically, and socially, the arbitrary deprivation of title to property has always touched a raw nerve. However, the reduction of property value by regulation through general government action has not been as much a subject of concern, except in the "per se" situations described above. Law, particularly constitutional law, develops incrementally. Interpretation of the Takings Clause, as it applies to regulation of the use of land, is slow to develop and sometimes changes course. The twists and turns of its development over the next quarter century of the Takings Clause can be expected to replicate the erratic course of the last 25 years.