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ANATOL WOOLF

The Original Intent Of the Takings Clause

Conservative Activists Distort History To Oppose Government Regulation

BY WILLIAM MICHAEL TREANOR

Advocates of the property rights agenda have gained attention and support for their cause by contending that they seek to defend and reaffirm the original understanding of the takings clause of the Bill of Rights. Unfortunately for these advocates, this contention is based on illusion, not reality. As most responsible scholars of different shades of political opinion recognize, the takings clause was originally intended to apply only to outright physical seizures of property, and not to regulation of property under any circumstances.

Thus, the takings clause—a favorite of "conservative" jurists and members of Congress—offers an ironic twist on the contemporary debate over judicial activism and fidelity to the original meaning of the Constitution. To find a provision that constitutional activists seek to push beyond the original understanding of the Constitution—and with some considerable recent success—one need look no further than one of conservatives' favorite causes, takings.

Rarely relied upon by the Supreme Court until a dozen years ago, the takings clause has recently provided the basis for a string of successful challenges to land use and environmental regulations, most notably *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (recognizing compensation as a remedy for regulatory taking), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (recognizing regulation effecting total loss of value as a presumptive taking). A number of recent events illustrate continuing interest in the takings issue:

• On March 30, the Supreme Court granted certiorari in *Del Monte Dunes Ltd. v. City of Monterey*, No. 97-1235, to review a $1.45 million "temporary takings" award based on the city's rejection of a proposal to build residential housing on an ecologically important piece of open space along the California coast. The Court is expected to address the right to a jury in takings claims and the question of how closely courts should scrutinize the regulatory decisions of a political body.

• The Supreme Court's new focus on the takings issue has been matched by an increasing volume of takings litigation in lower federal and state courts. The U.S. Court of Appeals for the Federal Circuit, in particular, which reviews all regulatory takings decisions involving the United States, has been active in expanding the contours of regulatory takings doctrine in recent years.

• A proposal to require compensation for takings in situations beyond those covered by existing Supreme Court precedent was a central, but ultimately unsuccessful, piece of the Contract with America. More recently, Congress has emphasized procedural changes that would make takings claims easier and faster. After passing the House last fall, these bills are encountering increasing resistance in the Senate, primarily as a result of strong opposition from state and local government officials.

A basic theme underlying all these efforts is the notion that they are designed to defend and restore the original understanding of the takings clause. A leading champion of a broad reading of the takings clause has argued that "the founders shared Locke's and Blackstone's affection for private property, which is why they inserted the eminent domain provision in the Bill of Rights." According to this view of the original understanding, rules and regulations limiting uses of property to protect wetlands, threatened species, or historic districts, for example, should be viewed as takings requiring payment of compensation. But this claim has no actual support in the language or original understanding of the takings clause. Claiming to rely on history, takings advocates embrace, instead, a myth.

Remarkably, given the public prominence of the takings issue, there is nothing particularly novel about this conclusion. Legal experts representing diverse political opin-

William Michael Treanor is Deputy Assistant Attorney General in the Office of Legal Counsel at the U.S. Department of Justice. This article is adapted from a paper, "The Original Understanding of the Takings Clause," published by the Environmental Policy Project at Georgetown University Law Center, that he wrote while an associate professor of law at Fordham University. The views expressed are not necessarily those of the Justice Department.

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ions—including conservatives such as former Judge Robert Bork and former Solicitor General Charles Fried—have recognized that the modern property rights argument has no plausible foundation in the text or original understanding of the takings clause. What is remarkable is how little attention is paid to this historical reality in the current political and legal debate over property rights.

A LOOK AT HISTORY

Constitutional interpretation must start, of course, with the language of the provision at issue. 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 when property is "taken." The most plausible interpretation of the clause is that the only time when government must compensate 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.

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 she cannot play with her ball in the house, she has lost something of value (to her)—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

ature of the property rights movement would argue otherwise.

The evidence of the founding fathers' original understanding of the takings clause supports the same conclusion: the takings clause applied only to physical seizures.

AN AFTERTHOUGHT

Property advocates sometimes argue as if the founders believed that the takings clause was the central feature of the Bill of Rights, but the historical reality is almost the exact opposite. The state conventions assembled to ratify the Constitution called for the adoption of almost two hundred constitutional amendments establishing different individual rights. Not one proposed a takings clause. The clause is part

> While claiming to rely on history, takings advocates embrace a myth.

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 he intended by the clause, and no debate in Congress about its meaning—if there was any debate—has been preserved.

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 pre-eminent constitutional law 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. Most significantly, 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,

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> 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.

Madison's essay defends property interests, but it starts from the premise that the prohibition in the takings clause is limited, and does not reach the economic policies he is opposing. The takings clause, with its compensation requirement, applies only to physical takings: no property "shall be taken *directly*, even for public use without indemnification to the owner" (emphasis added). He argues against "indirect[ ]" violations and "arbitrary restrictions, exemptions and violations" on the basis of principle, not constitutional edict.

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 $20 million—one tenth the value of real property in the country—was confiscated. In addition, as a Virginian and a slave owner, 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 Magna Carta, the bedrock of English legal tradition, contained no provision requiring compensation for the taking of land. And the same is true for the charters of the original 13 colonies.

As a matter of practice, property owners in colonial America commonly were paid when their land was seized. But 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 across undeveloped property.

Colonial governments adopted many different kinds of land use regulations without any suggestion that they gave rise to a claim for financial compensation. Land use statutes throughout the colonies limited where certain businesses—such as bakeries, slaughter-houses, and stills—could be located and what crops farmers could grow. Colonial laws regulated the permitted density of development; for example, a Connecticut building law limited the dispersion of development within the community, while a New Jersey law prohibited the subdivision of home lots to prevent overcrowding. Ordinances in New Amsterdam and Virginia explicitly regulated the aesthetic features of development.

Until late in the 19th century, courts and commentators consistently followed the

original understanding of the takings clause. In 1871, for example, the Supreme Court stated that the clause "has always been understood as referring only to direct appropriation." *Legal Tender Cases,* 79 U.S. 457. Subsequently, the Court broke from precedent and reinterpreted the takings clause as applying to some regulations (although the Court's reading of the clause was much narrower than the interpretation offered by modern property advocates). Thus, the idea that the takings clause can reach at least some regulations has a historical pedigree. But it is not a pedigree that can be traced to the language in the Bill of Rights or the original understanding of the takings clause.

The narrow scope of the takings clause demonstrates no lack of respect for private property rights. To the contrary, the founding fathers treasured private property. They believed private property gave individuals the independence they needed to perform effectively and responsibly in political life. Because property was primarily valued as a means, however, rather than as an end of the state, the founding fathers believed that legislation could restrict property interests to advance the common good.

More fundamentally, the limited scope of the takings clause reflects the founding fathers' faith in representative democracy. The takings clause did not encompass regulations because the founders believed it was the appropriate responsibility of democratic decision-makers to balance individual interests against community interests. Both in its wording and its theory of governance, the Constitution begins with the words "We the People." The historical significance of the takings clause can only be understood in that larger context.

History, of course, is not destiny. Just because the founders intended the takings clause to apply only to physical seizures does not necessarily mean that the courts, much less the Congress, must adopt an identical view of property today. However, an understanding of history certainly rebuts the notion that the modern property rights movement seeks to restore some long lost constitutional tradition. An understanding of history also confirms that opponents of the takings agenda have a far better claim than property proponents to being the true defenders of the founders' Constitution. ■

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Taking Liberties With Property Rights

Liberal Environmentalists Distort History to Promote Government Regulation

BY ROGER PILON

IN REBUTTAL

Fortunately, Deputy Assistant Attorney General William Michael Treanor's crabbed reading of the Fifth Amendment's takings clause is "not necessarily" that of the Justice Department ["The Original Intent of the Takings Clause," May 11, 1998, Page 27]. I take such comfort as I can from learning that an administration driven to oppose property rights at every turn may not be entirely beyond redemption.

As for Treanor, there may be no hope, so committed is he to his contention that "the takings clause was originally intended to apply only to outright physical seizures of property, and not to regulation of property under any circumstances." To support his thesis, he offers up a history so tendentious as to be all but unrecognizable, but not before taking a shot, partly deserved, at those conservative "activists" who set their anchor in "original understanding," only to set sail when ideology calls.

I quite agree that fidelity to original understanding is often fleeting, even among conservatives. But original understanding may not be the most reliable touchstone of "activism," especially when it is unclear, or when contemporaneous practice, as here, sometimes runs counter to the meaning of a text. In general, one wants to begin interpretation with the text, then move to original intent insofar as doing so may be necessary or helpful. Always, however, one wants to keep the larger theory of the matter in mind. And that, precisely, is Treanor's undoing.

He begins, to be sure, with text: "nor shall private property be taken for public use without just compensation." But he then claims that "the most plausible interpretation of the clause is that the only time when government must compensate is when it physically seizes property." Just why is that the most plausible interpretation? Because "the text does not require compensation when regulations diminish the value of property. Indeed, the clause does not even mention regulations."

One can hardly gainsay that final point. Nor can one claim that the text of the takings clause requires "compensation when[ever] regulations diminish the value of property"—a claim no serious critic of the Supreme Court's takings jurisprudence ever makes—for many a regulation affects the value of property, but only some take property.

What then is the problem with Treanor's contention that government must compensate only "when it physically seizes property"? Quite simply, it begs the basic question. It assumes, for the purpose of interpreting the takings clause, that "property" should be defined more narrowly than it is in every other area of the law—indeed, so narrowly as to make a mockery of the very clause in which the term sits. The whole point of writing and ratifying the takings clause, after all, was to protect property rights. Yet, on Treanor's interpretation, the only property right that is protected is the right to possess. Every other property right is subject to extinction—to being taken—by the very government that the framers tell us was created to protect such rights.

What we have here, in short, is a monumental sleight of hand—perpetuated by the

JO RIVERS

Roger Pilon is the director of the Cato Institute's Center for Constitutional Studies. The views expressed are necessarily those of the Cato Institute.

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modern Court, to be sure—as a single example should make obvious. When David Lucas paid nearly $1 million for two parcels of land on the Outer Banks near Charleston, S.C., in 1986, he acquired all the rights of possession, use, and exclusion that ran with the land—rights not unlike those his neighbors enjoyed. His "property," that is, was not simply the underlying estate but every estate that constituted it—the whole "bundle of sticks." On Day 1, he owned those rights, any one of which he might have sold, leased, bequeathed, what have you.

On Day 2, however, the South Carolina legislature, to promote tourism and provide its citizens with various amenities, effectively stripped Lucas of all such rights save one—the right to go on merely possessing "the property." That made the property worthless, of course. But no compensable "taking" had occurred, according to Treanor, because "the property" had not been "physically seized." Only if the state had taken that final step, as it might have done on Day 3, would it have owed Lucas compensation. By then, however, the issue would have been moot, practically, for as of Day 2 the property was worthless!

Treanor would doubtless object that a court would see right through such a three-day ruse by the state. But that's not the point, is it? Rather, the point is that under Treanor's theory of the takings clause the state can accomplish all it wants and get out from under the clause's compensation requirement simply by leaving a worthless title with the owner. The state's aim, after all, was to provide the public with various goods—from wildlife habitat to lovely views—but to do so in a tax-free way. The public presumably wanted those goods; it just didn't want to pay for them. Fortunately for the legislature, there was Lucas, who had only one vote come election time, as against the many votes of the public. How convenient!

As we all know, Lucas did what every red-blooded American would do under those circumstances—he sued. The U.S. Supreme Court ultimately ruled in his favor, 5-4, with an opinion that alarmed and outraged every regulator in the country. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). Yet in ruling, the Court only perpetuated the 70-odd years of ad hoc regulatory takings jurisprudence it had given us till then. Rather than articulate the principle of the matter—*all* regulations that take common law rights and cause losses not offset by equivalent benefits require compensation—the Court began at the other end: Only if such regulations result in a complete wipeout is compensation required. To Justice John Paul Stevens' query about why such an owner should recover in full while "[the] landowner whose property is diminished in value 95 percent recovers nothing," Justice Antonin Scalia could offer little more than the limp: "Takings law is full of these 'all or nothing' situations."

Treanor's misreading of the text—his crabbed, circular reading of "property"—is only compounded by the homely example he offers of his telling his daughter that she can play with her ball outside, but not in the house. "[S]he has lost something of value (to her)—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. . . . I only "take" her ball when I physically seize it." Now really, no one is saying that the "it" Treanor's "regulation" took was his daughter's ball. What he took was her "*right*" (to play with the ball in the house). That was the "something" she "lost"—not the ball. (It should hardly need adding that her "right" was probably never held to begin with since Treanor sets the rules in his house: that's one of his property rights, which one imagines him loath to see taken.)

ANALYTICAL ABSURDITY

By plumbing the theory of the matter so little, then, Treanor has failed to grasp the analytical absurdity of his position, an absurdity the Court eliminated in *Lucas,* in only the most absurd of cases—complete wipeouts resulting from regulatory takings of otherwise legitimate uses. But the historical account on which his contention primarily rests is hardly better. He seeks comfort, for example, in the Magna Carta's containing "no provision requiring compensation for the taking of land." And he adds that "the same is true for the charters of the original 13 colonies." One imagines 13th and 17th century zoning boards triumphant!

The truth, of course, understood by virtually everyone, is that the Magna Carta was the first great statement *protecting* property rights—declaring, "No freeman shall be . . . disseised of his freehold, or liberties . . . [but] . . . by the law of the land." What is more, the charter in fact did give partial recognition to the compensation principle by requiring the king to pay for any provisions he seized. That principle evolved as

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the common law grew in England and later in America, even if its applications were not always sure. With the Northwest Ordinance, however, and the constitutions of Vermont (1777), Massachusetts (1780), and other states, the principle came into its own. By the time it made its way into the Bill of Rights, it was already in state constitutions, state legislation, and of course the common law.

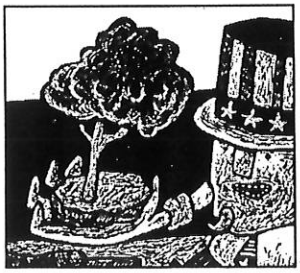
To be sure, one can always find misapplications and nonapplications of a principle, but several of the examples Treanor cites suggest less a failure to apply the compensation principle than a failure by him to understand its proper application. He notes, for example, that no colony except Massachusetts "paid compensation when it built roads across undeveloped property." Forgotten, there, is that roads often enhance the value of property; thus, while a technical taking may occur, no loss can be shown. Other examples Treanor cites are similarly explained, falling squarely under the nuisance exception to the compensation requirement, for instance.

TENDENTIOUS HISTORY

In all of this, however, what is striking is how many of Treanor's supposedly contrary examples are taken from the colonial era. Has he forgotten that we fought a revolution to overthrow such tyranny? Perhaps not, but he certainly diminishes—and misstates—the point of that revolution, as with his contention that the takings clause was probably intended to restrain supplying the army through impressement.

But it is Treanor's reading of Madison's famous essay on "Property" in the 1792 *National Gazette* that wins the prize for tendentious history. Writing there, not of the federal government but of any government, Madison argues, in essence, that a government that prides itself on compensating owners when it directly takes their property, but then indirectly violates their rights in property, labor, and the like "is not a pattern for the United States." Incredibly, Treanor reads Madison as saying that "the prohibition in the [actual] takings clause is limited"; that the clause "applies only to physical takings: no property 'shall be taken *directly*' " without compensation; and that *indirect* violations should be resisted "on the basis of principle, not constitutional edict."

> Treanor defines 'property' so narrowly that it makes a mockery of the takings clause.



One simply despairs. As Professor James W. Ely Jr. of Vanderbilt Law School wrote in a 1992 volume on the subject, "Madison's reference to indirect infringements indicates a generous understanding of the takings clause to encompass more than just the physical takings of property." Indeed, the very point of the passage is to condemn the artificial distinction between property and property rights, not to draw some narrow—and mistaken—legal distinction. Yet Treanor, with his final point, would have us conclude that it may be all right to commit "indirect" violations because they are a matter merely of principle, not constitutional edict. Is that the Justice Department's version of "no controlling legal authority"?

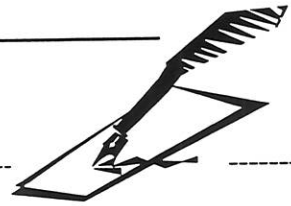
In the end, Treanor's views may "not necessarily" be those of the Justice Department that employs him or the administration he serves, but that disclaimer will be cold comfort to the countless Americans whose rights are trampled every day by an administration bent on providing various interests with goods they can obtain without cost only by taking them from their rightful owners.

Treanor would leave it all to the political process: "Because property was primarily valued as a means . . . rather than as an end, the founding fathers believed that legislation could restrict property interests to advance the common good." Compare that with Madison:

"Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his own."

What we have in Treanor is neither theory nor history. It is politics parading as scholarship. ■

LETTERS



Framers Took Narrow View Of Scope of Takings Clause

To the editor:

The original understanding of many constitutional clauses is open to legitimate debate. Proponents of conflicting views can often point to different statements from the reports of the Constitutional Convention and state ratifying conventions, early case law, or early legal treatises that support their position. Notwithstanding Roger Pilon's heated response ["Taking Liberties With Property Rights," May 25, 1998, Page 21] to my earlier article here ["The Original Intent of the Takings Clause," May 11, 1998, Page 27], however, the takings clause is not one of these clauses. As a result, his lengthy article is tellingly, but not surprisingly, short of historical evidence to support his views.

As I wrote on May 11, "[T]he takings clause was originally intended to apply only to outright physical seizures of property, and not to regulation of property under any circumstances." That doesn't mean that the regulatory takings doctrine—which the Supreme Court has consistently recognized for more than a century—is illegitimate. Constitutional doctrine in a host of areas has evolved away from the original understanding, and evolution in the takings area, as in other areas, is appropriate. But the issue of the legitimacy of constitutional change here should not obscure the fact that the modern case law represents a complete break with the way in which the clause was originally read. While Pilon attempts to dismiss my analysis, scholars and jurists across the political spectrum have reached the same conclusion that I have reached.

We have no record of debates in Congress concerning the takings clause when Madison proposed it nor any records of ratification debates on the clause. Nonetheless, the evidence shows that the original understanding was that it applied to physical seizures, not government regulations. For example, as I pointed out in my earlier article, St. George Tucker wrote in his 1802 constitutional law treatise that the clause "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment." The early case law reflected the view that, to quote Theodore Sedgwick, the author of an 1857 treatise, "to entitle the opener to be protected under this clause, the property must be actually taken in the physical sense of the word." When the Supreme Court in 1871 was presented with the claim that a regulation could violate the takings clause, it dismissed the argument as inconsistent with the case law and the meaning of the clause, writing that it "*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." *Legal Tender Cases*, 79 U.S. 457, 551-52 (1871) (emphasis added).

Leading conservatives such as Judge Robert Bork, former Solicitor General Charles Fried, and Justice Antonin Scalia have recognized that there is no room for dispute about the way in which the clause was originally read. "[E]arly constitutional theorists," Justice Scalia observed in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), "did not believe that the Takings Clause embraced regulations of property at all." *Id.* at 1028 n.15. Justice Scalia found that the case law reflected the same view: "Prior to Justice Holmes' exposition in [the 1922 decision] *Pennsylvania Coal v. Mahon* . . . it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, . . . or the functional equivalent of a 'practical ouster of [the owner's] possession.' ") *Id.* at 1014 (citations omitted).

Pilon points to no statement from the ratification debates, no early treatise, and no case law to support his position. This failure is understandable because there is no such evidence. As a result, rather than actually looking to the original understanding, Pilon is forced to make an argument that is in part textualist and in part reflects his views of the framers' larger beliefs. He is, however, wrong here as well.

His textual argument is that, because the word "property" encompasses all common law rights, the clause means that "*all* regulations that take common law rights and cause losses not offset by equivalent benefit require compensation." This argument is without merit because it completely reads the word "take" out of the takings clause. "Take" meant (and means) "seize." As a result, the clause did not protect against government regulation of property. It prevented against seizure of property. This textual point is evidenced by the statement in the 1857 treatise quoted above: "to entitle the owner to be protected under this clause, the property must be actually taken in the physical sense of the word."

Pilon's appeal to the framers' fundamental beliefs seems to reflect the premise that the founders had an absolute commitment to primacy of property rights and, apparently, his belief that they favored activist judicial review to enforce those rights. He thus dismisses my reading of James Madison's essay "Property." In that essay, Madison is arguing against Alexander Hamilton's economic policy on the grounds that it was inconsistent with the principles represented in the takings clause, not on the grounds that it actually violated the takings clause. The distinction, while lightly dismissed by Pilon, is critical, since it bears directly on the original understanding of the mandate established by the takings clause.

Pilon invokes the founders as he calls for judicial enforcement of the rule identified above—that any government regulation that limits common law rights without conferring offsetting benefits requires compensation. In effect, he is suggesting that the founders wanted broad-ranging judicial review that would allow courts to strike down legislation with redistributive consequences because it was at odds with their fundamental commitment to property rights. Such a view of the founders as uncomplicated libertarians is flatly inconsistent with historical scholarship. His view of judicial review is, if anything, even more obviously unfounded. The framing generation struggled with whether the then novel idea of judicial review was ever appropriate. The idea that the takings clause might be read as empowering courts to overturn any government regulation that affected "common law rights" would have made them gasp.

Although my article is adapted from a report I wrote for the Environmental Policy Project at Georgetown University Law Center before I began working for the Justice Department and was identified as a statement of personal views rather than departmental views, Pilon used his rebuttal to attack the current administration as "driven to oppose property rights at every turn." He offers no specifics, so there is no need for detailed response. It is sufficient to observe that his description of administration policy is as inaccurate as his description of the original understanding of the takings clause.

William Michael Treanor
Washington, D.C.

LETTERS

Taking Liberties On Takings

To the editor:

Not wanting to belabor the obvious much longer, let me get right to the point: In his reply to my "heated response" to his takings article, William Michael Treanor still doesn't get it. ("Framers Took Narrow View of Scope of Takings Clause," June 8, 1998, Page 25; replying to my "Taking Liberties With Property Rights," May 25, 1998, Page 21; rebutting his "The Original Intent of the Takings Clause," May 11, 1998, Page 27.) While charging me with ignoring the historical evidence, Treanor himself ignores text and theory, relying instead on a selective and tendentious reading of "original intent" to conclude that "the most plausible interpretation of the [takings] clause is that the only time when government must compensate is when it physically seizes property."

As I tried to make clear from the outset—this is fairly standard, I believe—"one wants to begin interpretation with the text, then move to original intent insofar as doing so may be necessary or helpful." Reliance on original intent is especially perilous, I noted, when that intent is mixed or unclear "or when contemporaneous practice, as here, sometimes runs counter to the meaning of a text." For that admission, Treanor charges me with being "forced" to make an argument from the text! I plead guilty.

But it gets better. For he goes on to say that I have misread the text: In reading "property" in the ordinary common-law way—as denoting not simply the underlying estate but each of the rights that constitute "the property"—and concluding from that reading that compensation is required whenever regulations take one or more of those rights and cause losses not offset by equivalent benefits, my argument "reads the word 'take' out of the takings clause. 'Take' meant (and means) 'seize.' As a result, the clause did not protect against government regulation of property. It prevented against seizure of property."

As even the inattentive reader should have noticed, that argument is not simply circular but, as logicians would say, viciously so. "Take" means "seize," Treanor tells us. All right. Make the substitution, and it turns out that the clause "prevented against [taking] of property." Just so. It prevented "taking" or "seizing" the rights that constitute "property." So we're right back to the definition of "property." And with that, Treanor is unwilling to grapple.

That is no accident, of course. Nor is it any accident that he ignores my discussion of *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992); for on Treanor's reading of the clause, David Lucas would have been left with a useless title and a million-dollar mortgage.

Rather than work with the plain text, then, Treanor is forced to construct an "original intent" that serves his end. Thus, he again misreads Madison. And he relies on the opinion of the 5-4 majority in the *Legal Tender Cases*—hardly your typical regulatory takings cases—from which he then omits a crucial phrase. With the omitted phrase emphasized, the passage reads in full as follows: The takings clause "has always been understood as referring only to a direct appropriation, *and not to consequential injuries resulting from the exercise of lawful power.* It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals." *Legal Tender Cases,* 79 U.S. 457, 551 (1871).

Even fully stated, that passage is not unambiguous, to be sure, but the examples the Court then cites of laws that result in "consequential injuries" without giving rise to compensation—"a new tariff, an embargo, a draft, or a war"—go far toward resolving the ambiguity. Those are hardly the laws David Lucas faced. Nor are they the stuff of regulatory takings law, rightly understood. For as I made clear in my original rebuttal, those of us who call upon the Court to properly read the takings clause do not call upon it to require "compensation when[ever] regulations diminish the value of property."

There is all the difference in the world between regulations that take property and regulations that merely diminish value while taking none of the owner's rights. To appreciate that difference, however, one needs the theory of the matter, not a few quotes from treatises written when regulation was sparse, when property could be used freely, subject only to the constraints of the common law. The regional planning board, after all, was unknown, and would have been anathema, to the founders. Treanor chides me for offering no specifics when I attacked the planners in the administration he now serves as "driven to oppose property rights at every turn." Frankly, I thought it unnecessary to catalogue the obvious.

Roger Pilon
Director, Center for Constitutional Studies
Cato Institute
Washington, D.C.