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TAKINGS LAW AND THE REGULATORY STATE: A RESPONSE TO R.S. RADFORD*

*by William Michael Treanor***

Introduction

In the Winter 1994 issue of the *Fordham Urban Law Journal*, R.S. Radford provided an illuminating review of Dennis Coyle's book *Property Rights and the Constitution*.[1] Radford observes that, in addition to studying post-New Deal land use cases, Coyle "provides an ideological framework that illuminates several key strands in the constitutional jurisprudence of property law . . . [and] sets forth his own theories of the vital role of private property in creating and maintaining the American constitutional system."[2] Radford's review is a generally enthusiastic one. He sees Coyle's book as providing a much-needed corrective to "the existing pro-regulatory bias in the [scholarly] literature."[3] He applauds Coyle, as well, for enriching our understanding of the competing preference systems that lead to different views about the legitimacy of land use regulation.

Underlying Radford's review is the idea that property rights deserve greater constitutional protection than they have received in the almost sixty years since the Supreme Court accepted the fundamental legitimacy of the regulatory state. Radford's position in this regard is not novel, but reflects broader trends in the courts and in the academy. In particular, Professor Richard Epstein of the University of Chicago has argued that the Fifth Amendment's Takings Clause should be interpreted to bar government actions with redistributive consequences—to bar, in other words, the mod-

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* R.S. Radford, *Land Use Regulation and Legal Rhetoric: Broadening the Terms of Debate*, 21 FORDHAM URB. L.J. 413 (1994) (reviewing DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION (1993)).

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1. DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION (1993). For the review, see R.S. Radford, *Land Use Regulation and Legal Rhetoric: Broadening the Terms of Debate*, 21 FORDHAM URB. L.J. 413 (1994).

2. Radford, *supra* note 1.

3. *Id.* at 415.

ern regulatory state.[4] At the same time, in a series of recent cases involving land use and the Takings Clause, the Supreme Court has expanded the scope of the Takings Clause, although its holdings have been narrower in scope than Epstein's view would warrant.[5]

In this response, I will use Radford's review to talk about property rights and the Constitution. First, I will review Radford's interpretation and criticism of Coyle's theory. I will then discuss Radford's Culture X theory in the context of *Lucas v. South Carolina Coastal Council*.[6] Finally, I will discuss the constitutional implications of Radford's analysis.

Radford's Review of *Land Use Regulation and Legal Rhetoric*

In discussing Coyle's book, Radford writes that land use debates have typically been perceived as pitting "the private interests of property owners . . . [against] the public interests of the state."[7] In contrast, Coyle argues that these disputes should be understood "as a three-way opposition between competing preference systems embodying different fundamental values: liberty, equality and order."[8]

Radford finds Coyle's approach helpful in understanding judicial rhetoric. But he faults Coyle for failing to consider whether people view land use regulation differently depending on whether the burden of it falls on them. As Radford puts it:

> The relative cost to the evaluator of implementing these preference rankings inevitably alters the evaluation. Unfortunately, Coyle's grid-group preference model abstracts completely from the allocation and distribution of costs. Group identification and rule orientation are the only variables taken into account, and the model's output is taken to be uniform regardless of whether the resulting preferences are applied to oneself, to others, or to universal states.[9]

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4. Epstein's leading work on point is RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

5. *See* Dolan v. Tigard, 114 S. Ct. 2309 (1994); Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

6. 112 S. Ct. 2886.

7. COYLE, *supra* note 1, at 415.

8. *Id.*

9. *Id.* at 419. As Radford writes, according to Coyle, the values of liberty, equality and order arise:

> . . . from the interplay of two key dimensions of social orientation designated as group and grid. Group denotes the extent to which individuals define themselves as members of a collective such that personal interests are delib-

According to Radford, because Coyle has failed to consider economic cost, he has failed to see the impact on land use policy of a fourth worldview, which Radford calls "Culture X."[10] Those whose worldview is a Culture X worldview "would be motivated mainly by personal self-interest, yet would support extensive social regulation and control over others."[11]

Lucas and the Culture X Worldview

Radford contends that the aftermath of the Supreme Court's decision in *Lucas* v. *South Carolina Coastal Commission*[12] indicates the powerful way in which the Culture X worldview shapes land use policy. In that case, the South Carolina Coastal Commission barred David Lucas from developing two vacant beachfront lots he owned.[13] The United States Supreme Court held that, when a government regulation deprives property of all economic value, the government owes the owner compensation, unless the regulation was of a common law nuisance or was consistent with background principles of property law. The Court then remanded the case to determine whether one of the exceptions applied.[14] On remand, the exceptions were found not to apply, and South Carolina purchased Lucas's land.[15] At that point, rather than leave the lots vacant, South Carolina put them up for sale for residential development.

Thus, Radford contends, South Carolina was willing to impose on David Lucas the costs of a policy of preserving the beachfront, but was not willing to assume that burden itself.[16] According to Radford, the fact that South Carolina's decision to sell the land did

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erately subordinated to the welfare of all. Grid refers to the degree to which individual actions and decisions are seen to be constrained by a network of social rules. The resulting preference systems are plotted below:

	High Grid	Low Grid
High Group	Hierarchical	Egalitarian
Low Group	Culture X	Libertarian

Id. at 415-16 (citations omitted).

10. *Id.* at 416.

11. *Id.*

12. 112 S. Ct. 2886.

13. *Id.* at 420 (citing Lucas v. South Carolina Coastal Council, 404 S.E.2d 895 (1991)).

14. 112 S. Ct. at 2901.

15. *See id.* at 421.

16. *Id.* at 421-23.

not provoke a public outcry is attributable to the prevalence of the Culture X worldview. He writes:

> The pursuit of economic self-interest by seeking to impose regulatory burdens on others can plainly be attributed to a Culture X worldview. Since pro-regulatory rhetoric emanating from Culture X is not based on consistent principle or ideology, and there is little anticipated payoff in appealing to the state to regulate itself, these voices could be expected to fall mute when the State of South Carolina took over David Lucas's property.[17]

In his conclusion, Radford suggests that imposition of a compensation requirement would beneficially alter the debates about land use by stripping from the adherents of Culture X their incentive to support regulation. Thus, he observes, "[i]f effective procedures can be found to require the beneficiaries of restrictive property regulations to bear the cost of such measures, a major advocacy group . . . might disappear from the arena of land use disputes altogether." He adds that this is "a happy prospect."[18]

It would seem that Radford is suggesting that *courts* impose the requirement that beneficiaries pay for the benefits they receive. The alternative would be that majoritarian decisionmakers—Congress or state legislatures—impose such a requirement. Theoretically, majoritarian decisionmakers might enact such a requirement. For example, the Job Creation and Wage Enhancement Act, part of the Republican Contract with America, would mandate compensation whenever a government regulation diminishes the value of property by 10% or by $10,000, whichever is less.[19]

Given Radford's belief in the prevalence of the self-interested Culture X worldview, however, it is unlikely that he also believes that majoritarian decisionmakers are capable of such acts of self-abnegation. Moreover, he clearly salutes the rise of judicial activism in the area of property rights. It seems, therefore, that he desires judicial action to impose the burden of regulation on those who benefit from it.

Criticism of Radford's Culture X Worldview Theory

Possibly, I am attributing to Radford a conception of the judicial role that he would not in fact endorse. But the conception is none-

17. *Id.* at 422.

18. *Id.* at 423.

19. *See Environmentalists Detail Objections to GOP Proposed Contract with America*, BNA DAILY REPT. FOR EXECUTIVES at A1 (Jan. 3, 1995) (discussing proposed Job Creation and Wage Enhancement Act).

theless an interesting one and consistent with increasing demands by conservatives for judicial activism in the property area. In this regard, the remainder of this piece will discuss whether it is good constitutional law. I will not address the issue of whether it would be legitimate constitutionally to impose the burden on the beneficiaries. I will focus instead on the question of whether the property owners should have a judicially-enforced constitutional right to compensation when a Culture X worldview lies behind a regulation.

The relevant constitutional text, if courts are to impose a compensation requirement, is the Fifth Amendment's Takings Clause, which reads: "nor shall private property be taken for public use, without just compensation."[20]

There is a critical threshold problem with using this text to require compensation for regulations: the language of the Clause doesn't apply to regulations at all. If we interpret the words in the way in which they are normally used, what this clause means is simply that when the government physically takes property and uses it for its own purposes, then it has to pay the former owner. For example, when the government takes someone's land for a post office, it has to pay her. Compensation would be owed because the land would be "taken for a public use." But when a government regulation lowers the value of property—even when it dramatically lowers the value—nothing is "taken for public use."

Let's take *Lucas* as an example. The regulation may have made Lucas's land worthless, but it did not take the property for public use. The land still belonged to Lucas. Justice Scalia, it should be noted, disagrees with this argument about the plain meaning of the text. In *Lucas*, Scalia wrote that "the text of the Clause can be read to encompass regulatory as well as physical deprivations . . . ."[21] Any such reading departs from normal usage. A regulation of property does not, however, take property for a public use. The words "taken" and "for a public use" reflect the idea of physical seizure.

Moreover, to the extent that evidence exists, the original understanding of the Takings Clause and of its state counterparts was consistent with what I have argued is the clauses' plain meaning. The Takings Clause and similar state constitutional provisions were originally understood to apply only when the government physically took property. Regulations, no matter how drastically they

20. U.S. CONST. AMEND. V.
21. 112 S. Ct. at 2900 n.15.

affected the price of property, did not trigger a compensation requirement.[22] Even Justice Scalia acknowledges that "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all."[23] The larger point that should be made is that, as a general matter, the Framers did not believe that regulations that affected the value of property were impermissible.[24] Thus, a requirement that beneficiaries have to pay for regulations is not consistent with original understanding or constitutional text because the text and the original understanding tell us that regulations *never* give rise to a compensation requirement.

Of course, there is now precedent for reading the Takings Clause to require compensation for regulations, despite the text and original understanding. In 1922, the Supreme Court decided in *Pennsylvania Coal v. Mahon*[25] that "if regulation goes too far it will be recognized as a taking."[26] As it established this rule, however, the case also created a problem that has failed to yield a solution: how can courts tell when a regulation "goes too far"? Scholars and courts have long struggled with this problem and the inconsistencies in the case law have occasioned frequent comments.[27] At the same time, the precedent does not support the principle that courts should require compensation whenever they suspect that the majority would not impose a regulation if its beneficiaries had to pay for it. Although the principle that compensation is due when a regulation "goes too far" departs from the original understanding, it does not totally eliminate the concept that a certain degree of deference is owed to majoritarian decisionmakers. A regulation that diminishes the value of property and that serves public purposes does not give rise to a compensation requirement so long as it does not go "too far." Moreover, takings law requires that the polity as a whole pay compensation, not simply those who benefit from a particular regulation.

I have not discussed whether it would be wise from a public policy perspective to require beneficiaries to pay for their regulations.

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22. William Michael Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 701-06 (1985).

23. 112 S. Ct. at 2900 n.15.

24. This point is developed in William Michael Treanor, *The Takings Clause and the Political Process*, 95 COLUM. L. REV. — (forthcoming 1995).

25. 260 U.S. 393 (1922).

26. *Id.* at 415.

27. For an excellent discussion of the case law, see Andrea L. Petersen, *The Takings Clause: In Search of Underlying Principles* (pts. 1 & 2), 77 CAL. L. REV. 1299 (1989), 78 CAL. L. REV. 53 (1990).

But if we assume that it would be, there is still a fundamental problem with such a scheme. As suggested above, it lacks any constitutional basis. The language and original understanding do not support it. Nor does precedent. All we are left with is the possible argument that land use decisions would be improved if courts imposed such a requirement. Unless we are to have government by judiciary, more of a basis than that is necessary to justify judicial invalidation of decisions arrived at by majoritarian decisionmakers.

Conclusion

In his famous dissent in *Lochner v. New York*,[28] Justice Oliver Wendell Holmes wrote:

> The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics . . . . [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[29]

Critiques of economic regulation have gotten more sophisticated in the past ninety years, but Holmes's core insight remains accurate. A regulation can be economically unsound without being unconstitutional. In a constitutional system in which the power of courts to invalidate majoritarian decisionmaking is limited, the difference between economic regulations that are unsound and those that are unconstitutional is critical.

28. 198 U.S. 45 (1905).
29. *Id.* at 75-76 (Holmes, J., dissenting).