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INTRODUCTION

The Taking Clause of the Fifth Amendment to the United States Constitution[1] is designed to deal with a moral problem inherent in democratic government, namely: How does a democratic society prevent majority factions from using their political power to redistribute wealth from a minority to the majority, or some part of the majority? Constitutional restrictions on direct national taxation, federalism, separation of powers, the Due Process Clause, and the procedural liberties and political structure in the Constitution and Bill of Rights were directed to preventing this danger. These protections, however, still leave gaps through which majorities can despoil minorities of their wealth. The Taking Clause, like the recognition of the ancient writ of habeas corpus, functions as a plug to some of these gaps. Thus, even when government has passed through all the procedural hoops in depriving persons of liberty or property, there is still a substantive final defense.

Constitutional or limited government has, at its core, the moral norm that government power is limited in the degree to which, and the manner in which, it may restrict the lives, liberties or property of its citizens. Thus, whenever government promulgates any regulation affecting citizens, a legitimate question exists as to whether that regulation improperly intrudes on the rights of the regulated.

This is a deeply moral question, because it goes to the autonomy of the human person. A person's body, the governmental restrictions on the activity of that body, and the property owned and utilized by that body are all integral parts of the individual's personhood. Only if one believes that human beings are not moral entities can one say that regulation that affects persons is not a moral issue. Human rights questions are always moral questions. Regulation that affects persons always poses moral questions. By regulation that affects persons, I mean any regulation that restricts a person's rights to life, to the exercise of liberty or to the use of property.

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[1] U.S. CONST. amend. V, "nor shall private property be taken for public use, without just compensation."

For much of this century, this view has been neither popular nor much argued in the public forum. Far more often, the case for property rights and economic liberty has been made on expediential and empirical grounds, juxtaposed against moral and emotional arguments for the restriction and limitation of property rights and economic liberties. In part this can be explained by the collectivist intellectual currents of the first half of the 20th century, with the rise of the "ugly siblings" of fascism and socialism. The idea must be understood in terms of the intellectual failure of classical liberalism in the later 19th century, however, to appreciate Adam Smith as a moral philosopher.

There is a significant rhetorical advantage to showing that the regulations one opposes do the exact opposite of what their proponents claim. This form of argument avoids deep philosophical conflicts that, in the short run, most often can not be resolved rationally. Of course, for most purposes there is no harm in using this "law and economics" approach in analyzing regulatory activity. Additionally, social cohesion and political stability in a society are furthered by having as few moral and philosophical conflicts as possible, because these types of conflict make democratic accommodation and compromise difficult. If the history of the twentieth century has taught us anything, this should be axiomatic.

There are, however, two principal dangers produced by couching the entire case for economic liberty and property rights on a foundation of efficiency, empirical success, and pragmatic utility. The first danger is that the public will lose an understanding of the real basis for the free society: the morality of human dignity. It is not because property rights and economic liberty produce the most prosperous and egalitarian society, which of course they do, that they are justified. The real justification for property rights and economic liberty is that it is impossible to have a moral society without them, and the justification's corollary is that every action which restricts liberty or property raises a moral question. Of course, such restrictions may be morally justified in a number of circumstances. The inquiry into this justification, however, remains an inherently moral one. It also should be noted that this inquiry is generally not a judicial one. It is an inquiry committed to the political branches in our constitutional system.

The second danger of the pragmatic defense of freedom is that it creates an asymmetry which concedes to the opponents of economic liberty and property rights not only the moral high ground, but the whole moral case. This ultimately destroys the case for liberty, since the human being is ultimately a moral animal. While positions acknowledged by the

public at the time to be the moral position are not always so,[2] they generally have prevailed until they lost their moral credibility. Pragmatic or empirical arguments tend to be effective at the margins, not in the central battles.

There have been at least five historic lines of attack directed at regulations that citizens believe to infringe on their rights. These lines of attack may be characterized as the procedural remedy, the substantive due process remedy, the statutory remedy, the political remedy, and the constitutional remedy. I propose to analyze each of these avenues or approaches with the goal of placing the regulatory taking avenue into the context of the general moral dilemma of regulation in a free society. The regulation of land has some particular characteristics that raise certain additional questions not raised by the regulation of other kinds of property. These will be explored in the context of the general problem.

I. THE PROCEDURAL REMEDY

The Administrative Procedure Act (APA)[3] and pre- and post-APA judicial doctrine have long held that, with a few exceptions, certain procedural steps must be met by the regulators before regulations can be imposed on individuals. Two rationales underlie this requirement. The primary rationale is that fairness or due process, combined with our democratic ideal, demand that before something is done to persons they have a chance to have their say about that action. At its most basic, it involves the time-honored concept of "getting one's day in court." Democracy has expanded that time-honored common law notion to political as well as judicial decisions. Another way to characterize this rationale is that each person is surrounded by a sphere of privacy or rights characterized by the phrase "life, liberty, and property." This sphere may not be entered but with the person's permission or by appropriate legal process.

The second theory behind both procedural due process and its structural embodiments in the APA and other statutes states that decisions made with full consideration of all interests involved will be better decisions than those made without such input. The idea that judges and juries should hear both the plaintiff and the defendant before reaching a

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[2] As demonstrated by prohibition and the progressive income tax, for example.

[3] 5 U.S.C.A. § 551 (West 1996).

decision is axiomatic in today's law. Fairness requires it, and most believe that a better decision will generally result.

With respect to regulatory and administrative decision making, as well as legislating, the proposition that good decisions require input from all affected interests is not axiomatic. In legislating, the proposition is generally not accepted because the Constitution, the courts and the democratic process are thought to provide the safeguards externally to the law-making process that are internalized in judicial proceedings by due process. We judge the quality of a statute not by the quality of the process, but by its merits or demerits. However, even in the legislative process the growth of staff, support agencies, and the use of fact-finding hearings has grown in order to provide more comprehensive information for supposedly better decision-making.

In the areas of regulation and administrative decision-making, the law has, over the five decades since the passage of the APA, been struggling with the proper model for making regulatory and administrative decisions. While the theoretical framework has by no means crystallized into either the pure judicial or the pure political model of citizen participation, it has moved strongly in the direction of the judicial model.[4] The movement has been most pronounced in the area of regulations. But even in the area of administrative decisions made by political appointees, process restraints, analogous to due process, have become ever more common. While I have criticized the trend toward over-judicialization of the administrative process,[5] candor requires me to note that the trend has gone on unabated, and apparently, unaffected by my critique.

Thus, it has been recognized to a fairly great extent in the area of regulatory, and many kinds of administrative decisions that affected persons have a right to some type of process or hearing before imposition of the regulation or the decision. This right, however, is of a more limited type than that provided in the judicial model. This lower level of formal process is typified by the fact that regulatory and administrative decision-makers, unlike judges, are not supposed to be disinterested.

The procedural challenge is the most important current method of challenging regulations. It keeps the United States Court of Appeals for the District of Columbia Circuit quite busy, and is a fairly significant item on other courts' dockets. In land use regulation it is the main route to

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[4] *See generally* Loren A. Smith, *Judicialization: The Twilight of Administrative Law*, 1985 DUKE L.J. 427 (1985).

[5] *See id.*

judicial scrutiny for the land owner opposing the regulation. In the case of wetlands regulations, for example, a permit denial can be appealed as arbitrary and capricious under the APA. Many regulatory taking cases against the federal government start in the district courts through this route.

A citizen-plaintiff must pass a high threshold to show that a federal regulation is arbitrary and capricious. Great deference is given to the regulatory agency under *Chevron*[6] and by the judiciary generally. The presumption of regularity, the presumption that government officials act properly, and the acknowledged expertise of many agencies, all make an APA challenge of a regulation daunting. To the extent that the arbitrary and capricious standard embodies both procedural and substantive elements, absent a showing of significant procedural mistakes by the regulators, it is very hard to bring a successful challenge based upon the substance of the regulation.

The dramatic growth of regulatory litigation since the passage of the APA has had a number of collateral effects. It has placed some substantive constraints on many areas of regulation. It has also made regulating slower and more costly. It has, in addition, judicialized the procedure for regulating. The result of this has been both to allow broader input into the regulatory process and to make that process more rigid, and therefore less responsive to real world changes. Correspondingly, the procedural quality of agency action improved but became more rigid, more formalized and less responsive.

However, while the procedural challenges to regulatory impositions available to the citizen under the APA and other statutes provide some protection from regulation that is either wildly imprudent, based on demonstrably false information, or done without adequate consideration, they do not protect the citizen very well against the kind of factional despoilment feared by the Framers of the Constitution. The APA does give minorities time and tools to make their case, and this is an important protection against temporary passions and fads of the regulatory majority.

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[6] *See* Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (applying the doctrine that the judiciary must uphold agency action based on any permissible construction of the statute unless the agency action contradicts the specific intent of Congress).

II. THE SUBSTANTIVE DUE PROCESS REMEDY

Prior to the late 1930s, courts used the concept of substantive due process to scrutinize the validity of governmental actions affecting the fundamental rights of individuals. It has often been claimed that this era came to an end in 1937,[7] in favor of a much more limited standard of judicial review. This new standard purportedly gave much greater deference to legislative determinations. This characterization appears to me to obscure what really happened in the late 1930s. Per the now famous footnote in *Carolene Products*,[8] the courts really limited substantive due process review to non-economic challenges. This reflected, as I have expressed elsewhere,[9] the judicial Zeitgeist of that era.

The period between the 1920s and the 1970s was marked by the intellectual ascendancy of collectivism around the world. In America we suffered only a mild form of the illness. In our version of the collectivist illusion we lost our historic understanding of the role of property rights and economic liberties as an integral part of the fundamental rights and integrity of the human person. Faced with an increasingly collectivist conception of social organization, courts increasingly deferred to the political branches when property rights were an issue.

Recognition that freedom and property rights are merely different aspects of the same thing, and that the denial of one necessarily produces the denial of the other, has grown dramatically in the last decade. The courts, however, are still searching for a proper conceptual framework for reviewing challenges to regulations based upon property rights. Substantive due process—one method often promoted as a solution—is not likely to provide such a conceptual framework. Its essential theory provides no reasonably objective criteria for distinguishing between what governmental actions affecting fundamental rights are permissible and which ones are not. The core theory of substantive due process is that certain things cannot be done, even with due process. This theory is subject to a destructive subjectivity that leads to the rule of judges rather than the rule of law.

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[7] *See* West Coast Hotel v. Parrish, 300 U.S. 379 (1937).

[8] *See* United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) (noting the need for a higher level of judicial scrutiny for due process challenges that were not economically-based, i.e., race).

[9] *See generally* Loren A. Smith, *Life, Liberty, and Whose Property?: An Essay on Property Rights*, 30 U. RICH. L. REV. 1055, 1064 (1996).

Substantive due process is, in reality, a simplistic version of natural law theory, but without most of the historic elements of that discipline, and without natural law's strong emphasis on duty and the human being's moral obligations. The philosophical foundations of natural law theory can be found in the Judaeo-Christian understanding of human nature, which gives the theory its coherence. Substantive due process analysis has none of this rigor. At another place I have written on the doctrine's history,[10] and attempted to explain the limited future utility of that doctrine.

An analysis of natural law theory far exceeds the scope of this article; however, it is important not to tar natural law theory with the very real failings of substantive due process. It should also be remembered that while substantive due process is a doctrine crafted for a limited judicial purpose, natural law is a comprehensive theory of the state, more relevant as a decisional guide to the executive and to the legislature than to the judiciary.

Thus, while the protection of liberty and property is the prime objective of our legal system, the use of substantive due process is unlikely to provide a useful tool to the judiciary for this purpose. To complement the new understanding of the importance of economic liberty and property rights to human freedom, a new, or at least different, set of conceptual tools is needed.

III. THE STATUTORY REMEDY

Inherent in the federal system of regulation is the theory of enumerated powers. Congress may only legislate under certain identified powers. Although an expansive reading of the commerce clause has *de facto* created a government of general rather than delegated powers, the theory has never been rejected and may yet have some vitality.[11] Agencies, however, are still limited by the grants of statutory authority they receive from the Congress. They may only promulgate regulations or issue administrative decisions as authorized by statute.

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[10] *See generally* Loren A. Smith, *Business, Buck$ & Bull: The Corporation, The First Amendment and The Corrupt Practices Law*, 4 DEL. J. CORP. L. 1 (1978).

[11] *See* United States v. Lopez, 514 U.S. 549 (1995) (holding that Congress exceeded its Commerce Clause authority in passing legislation that forbade possession of firearms within designated school areas).

IV. THE POLITICAL REMEDY

Publius put forward in the *Federalist Papers*[12] the notion that under the new constitution the political structure of the government would be the primary guarantee of liberty and property rights.[13] The judiciary and the provisions of the Constitution and Bill of Rights restricting government powers were important, but thought to be a secondary or backup protection. For several reasons, I do not intend in this essay to engage in the debate over whether the political structure was more important than the "paper barriers" supported by the judiciary in the protection of our liberties: first, because the question cannot really be answered; second, because the body of literature and the historic length of the debate make trivial any contribution this small article could make; finally, that debate is not our purpose in this article or symposium. However, the topic does have great relevance to the protection of rights against certain types of regulation, particularly the regulation of land.

The democratic process, as embodied in our Constitution and national government, was designed with the danger of factions, including majority factions, clearly in mind, as Madison noted in *Federalist No. 10*.[14] The differing political constituencies, combined with the federal system's emphasis on dual sovereignty, tend to limit radical departures from established regulatory norms of any period. This is because many group vetoes must be overcome in order to get regulation-authorizing legislation through the system from subcommittee through presidential signature. This inhibition on regulation generally protects those minorities capable of placing at least minimal pressure on one part of our complex law-making system.

There are four limitations of the political remedy's protection from improper regulations. First, it does not protect insular or very discrete minorities, or individuals who are either unpopular or so lacking in political clout that they cannot meet the minimal threshold for influencing the legislative or executive decision.

A second problem is that the political process, particularly at the national level, tends to discount individualized cases in favor of broad distinctions that can garner legislative majorities. Thus, small or particular regulatory abuses are not easy to remedy through the political process in a

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[12] *See generally* THE FEDERALIST.

[13] *See, e.g.*, THE FEDERALIST No. 45 (James Madison), No. 78 (Alexander Hamilton).

[14] *See* THE FEDERALIST No. 5, at 123 (John Jay) (Isaac Kramnick, ed., 1987).

large democracy. Even when these abuses do affect a broad constituency, the constituency might have little political significance if it is relatively incoherent, compared with well-organized groups with a high level of commitment to the particular regulation or regulatory scheme.

In a small democracy, like a town, regulatory abuses may be more easily remedied. In those contexts, however, other factors come into play. Personalities, social tensions, limited governmental budgets, and popular prejudices may make it difficult for the politically unpopular to get any fair hearing before a city council or town meeting. These factors often have a great impact on the regulation of land. Very few of us can resist the appeal of imposing a regulatory restriction on a neighbor's property if it will make our property more enjoyable or valuable. When we can do this in the name of health or the environment, so much the better. We then get a feeling of moral uplift in addition to an economic benefit, at our neighbor's expense! At the local level, this motivation can have a substantial effect.

A third problem with the political remedy is that it has a bias towards the status quo. This may protect against regulatory excess when there is relatively little regulation. In systems of ongoing regulation, our political system's bias tends to immunize the regulators from legislative change or control. It creates a situation where the correction of regulatory abuse is politically difficult and slow. This, in part, was one of the concerns that motivated the Congress to pass many legislative veto statutes in the thirty years prior to *Chadha*.[15]

The fourth problem with the political remedy is that it treads a tricky line between policy and potential corruption. To the extent that political lobbying is used to change regulatory or legislative policy, the basic tenets of democracy are reinforced. It is both appropriate and respectable conduct. It is conduct, in fact, protected by the very core of the First Amendment. However, as the problems sought to be dealt with become ever more specific, the effect of an often-used political remedy is to turn the regulatory system into a tool for extortion and a place where unequal treatment of the law is the norm. The last fifty years have provided abundant evidence of the tricky nature of political attempts to deal with regulatory abuses.

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[15] *See* Immigration and Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (holding the legislative veto unconstitutional).

V. THE CONSTITUTIONAL REMEDY

In the United States, the ultimate remedy for any government action seen as an infringement on "God-given" liberties is a constitutional challenge before some court. As far back as the early part of the 19th century, Alexis de Tocqueville[16] noted this uniquely American trait, and deemed it a positive part of our culture. The perpetual struggle in this country between freedom and order has for the most part been fought in the courtroom rather than at the barricades.

With respect to regulation, the battle was fought beginning in the 1930s along a number of fronts: the Commerce Clause, the Tenth Amendment, the taxing power, the spending power, the nondelegation doctrine, the Contract Clause, the Equal Protection Clause, and the property protections of the Fifth Amendment. When the 1960s dawned, the federal judiciary had abandoned all protection of economic liberties and property rights, except for a limited scrutiny based upon the Taking Clause of the Fifth Amendment. The only exception to this was the degree to which state burdens on interstate commerce also affected the economic liberties of individuals or businesses. These burdens received some judicial scrutiny as well.

In the last two decades, the federal courts have heard and decided more taking cases, particularly regulatory taking cases, than in any of the previous decades since the dawn of the republic. This has occurred for two related reasons. First, the federal government has, in the last few decades, dramatically increased its level of regulatory control over the citizenry and the economy. This has been particularly true with respect to the environment and natural resources. While federal substantive land regulation was generally quite limited before the 1970s, and water regulation limited largely to navigational issues, that has also dramatically changed.

Second, the taking remedy seemingly has become the only judicially-recognized avenue open to those claiming that the federal government has infringed economic liberties or property rights. Thus, complainants who formerly may have found a conceptual framework in the limits imposed upon the federal government by the Commerce Clause or the Tenth Amendment or the nondelegation doctrine, now look to the

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[16] *See generally* ALEXIS DE TOCQUEVILLE, ON DEMOCRACY, REVOLUTION, AND SOCIETY, SELECTED WRITINGS (John Stone and Stephen Mennell, eds., University of Chicago Press 1980) (1835).

Taking Clause as the only viable way to challenge an infringement of their fundamental rights.

I have bemoaned this phenomenon in other places,[17] and bemoan it again here. I believe that economic liberty and political liberty are neither separable nor fundamentally distinguishable. Most human actions, such as the publishing of a newspaper, for example, manifest both economic and political liberty. Making the Taking Clause do the work of all of the constitutional provisions designed to protect liberty and property, however, does violence to the Framers' intent, as well as to the structure of the Constitution. To some extent, however, it explains the growth of taking litigation against the federal government, when combined with the growth of federal function and regulatory impact.

Thus, to return to my opening premises, I hope that the context in which taking litigation occurs can now be appreciated. The Constitution imposes several mandates on the governmental system: governmental authority must be limited; it must be used fairly; and it must be reviewable by an independent authority through a rational process. The Taking Clause of the Fifth Amendment increasingly has become a method of doing just these things, when the substantive effect of federal regulation on private rights is at issue. The vast majority of legal regulatory challenge is still procedural, or formally procedural. And most of the battle over regulation still occurs in the political forum, legislative halls and executive conference rooms. However, we hear more about regulatory taking claims because they are the only currently viable means of challenging governmental economic actions or policies that seriously impact property rights.

Taking cases historically have come in two basic flavors. One involves governmental actions that physically appropriate, or take property. The other involves regulatory actions that have the effect of destroying the value of property. The trend in the courts is toward an increase in regulatory taking cases. These cases also have generated virtually all the current interest in taking law. The physical taking cases generally are not controversial, are heavily fact bound, and most often turn on complex issues of causation. They involve relatively few issues of law. They are very close to tort cases, with a few exceptions. Their biggest issue is whether the government produced the effect the plaintiffs say it did. Often, government-caused pollution or permanent flooding is the gravamen of the complaint.

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[17] *See generally* SMITH, *supra* note 4 at 429; note 9 at 1055.

Regulatory taking cases, on the other hand, often involve the most profound issues of the rights of property owners and the limits on legitimate government powers. While regulatory taking cases may also have complex fact questions, they are of interest beyond the litigants because they raise fundamental concerns about the nature of liberty and government. They are moral challenges dealing with the claimed rights of individuals or groups. Whether the individuals or groups actually have those rights, the challenge must be taken very seriously.

VI. THE REGULATION OF LAND

Land always has raised unique problems and issues for the law, not only because it was the basis of virtually all social wealth, but because it was the primary basis for political rights in the common law tradition. At common law, the ownership of land, and the kind of ownership, determined one's status, i.e., whether one was free or indentured. In early America, land ownership became almost synonymous with the meaning of liberty. The independent rural land owner was the model and ideal of Jeffersonian democracy. The landowner was seen as the ideal citizen, in contrast to an urban proletariat.

This heavy cultural baggage is supported by other functional characteristics that make land ownership and its regulation a unique problem. First, the law considers each parcel of land unique. Unlike money, or most personal property, it is not fungible. Its location can never be exactly duplicated, and each location has a unique value. Second, the owner of land rarely has the same degree of liquidity as the owner of personal property such as stocks, bonds, gold, or the like. If someone does something I object to near my land, I generally have to deal with that action, rather than shift my assets. Third, people have deep emotional attachments to land that they rarely have towards the other common types of wealth. Fourth, a piece of land is part of a community, always connected to other land, and existing in a matrix of roads, rivers, and the whole of civilized society.

These unique land characteristics lead, not surprisingly, to unique problems concerning the regulation of land. Most problems occur in the context of the local regulation of land by zoning and planning. Analysis of land regulation is beyond the scope of this essay. However, one general consideration raised by local land regulation also concerns our central issue: the moral problem of regulation by the federal government, or exaction.

Landowners, because they are dependent on a community, and because they cannot move their property, are particularly sensitive to regulatory burdens. They generally cannot pass on the cost of such regulation to others in the market, as business generally can with health and safety regulation. If we think drivers must have safety belts, and make the auto manufacturers install them, they can generally pass on the cost to the purchaser. If we think a land owner's property should remain undeveloped, then the landowner must absorb the full cost of that decision (absent a government payment). In fact, in the case of such a decision, the other property owners may actually derive a benefit from the regulation, while the regulated owner suffers the full loss.

This phenomenon is complicated further by the legal uniqueness of each parcel of land, which allows government to regulate each parcel differently. The potential for unequal treatment of very similar parcels removes much democratic protection. When the people vote a tax that applies to all, they are quite sensitive to its reasonableness. When they vote a tax that applies only to others, all those who are not saints apply a very different standard. Thus, the regulation of land has unique dangers for minorities, even in the most democratic of majoritarian systems.

VII. CONCLUSION

In this essay I have attempted to sketch the moral issue at the core of every exercise of regulatory authority over land ownership. I have attempted to show how that authority may be reviewed in the current American federal context, and the role the Taking Clause of the Fifth Amendment has in such review. I have also shared a few insights as to why land regulation presents some unique problems for our legal and constitutional system. My conclusion, implicit in this whole article, is that regulation and its review cannot be separated from the profoundly moral question of the fundamental rights of the person in a free society. This moral question requires as much sophistication and consideration when land is at issue as when speech or reproductive questions are at stake. For some decades, unfortunately, the legal system has not given such consideration to the regulation of property rights or economic liberty. I believe that era is ending.